Georgia Law Review

Volume 55 | Number 3 Article 9

2021

Diverse Holdings and Diversified Holdings: Uncertainty in Georgia's Procedure for Seeking Judicial Review of Rezoning Decisions

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DIVERSE HOLDINGS AND *DIVERSIFIED HOLDINGS*: UNCERTAINTY IN GEORGIA'S PROCEDURE FOR SEEKING JUDICIAL REVIEW OF REZONING DECISIONS

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To determine the proper procedure by which landowners may seek judicial review of adverse decisions on rezoning applications, Georgia courts must consider the nature of rezoning decisions. For decades, the courts have held—with little explanation—that rezoning decisions are legislative acts subject to de novo review. Then, in the 2017 case Diversified Holdings, LLP v. City of Suwanee*, the Georgia Supreme Court classified rezoning decisions as adjudicative acts that may only be reviewed by writ of certiorari. Because the court did not explicitly overturn the decades of precedent classifying rezoning decisions as legislative acts, however, the nature of rezoning decisions—and thus the proper procedure for seeking judicial review of those decisions—is uncertain. This Note argues that the* Diversified Holdings *court properly classified rezoning decisions as adjudicative acts subject to discretionary appeal and explores the implications of the court's decision.*

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I. INTRODUCTION

Zoning—the authority of a local government to divide property within its control into zones for various uses and to regulate the development of real estate within those zones[1]—is a powerful tool that governments can use to shape how individual landowners' properties and entire communities develop.[2] The Georgia Constitution empowers "[t]he governing authority of each county and of each municipality" in the state to "exercise the power of zoning."[3] Georgia's Zoning Procedures Law confirms this authority while establishing minimum procedures for the exercise of that power to ensure that individuals are afforded due process when the government limits the use of their land.[4]

A landowner who is dissatisfied with the zoning classification of their property may apply to have their property rezoned to a different use classification.[5] If the local zoning authority denies the landowner's application, the landowner may seek judicial review of the zoning authority's decision in superior court.[6] The proper procedure for seeking review of the rezoning decision turns on whether the decision is classified as a legislative or adjudicative act.[7] Traditionally, rezoning decisions have been considered legislative acts, which are subject to de novo review by a superior court.[8] In the 2017 case *Diversified Holdings, LLP v. City of*

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[1] *See, e.g.*, O.C.G.A. § 36-66-3(3) (West, Westlaw through Laws 2021, Act 6) (defining "[z]oning"); *Zoning*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw (defining "zoning" as "[t]he legislative division of a region, [especially] a municipality, into separate districts with different regulations within the districts for land use, building size, and the like").

[2] *See* Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 752 (2020) (describing zoning as "an important tool in municipal toolkits" that "maintain[s] community character, enhanc[es] property values, and allocat[es] the costs of development between insiders and outsiders").

[3] GA. CONST. art. IX, § 2, para. 4.

[4] *See* O.C.G.A. § 36-66-2(a) (West, Westlaw through Laws 2021, Act 6) (providing, "as state policy," certain "minimum procedures governing the exercise of [zoning] power" with the goal of "assur[ing] that due process is afforded to the general public").

[5] *See id.* § 36-66-4(b) (noting that a party other than a local government can initiate a rezoning).

[6] *See infra* notes 28–29 and accompanying text.

[7] *See infra* Part II.

[8] *See, e.g.*, Stendahl v. Cobb Cnty., 668 S.E.2d 723, 726 (Ga. 2008) ("Judicial review of the grant or denial of a re-zoning application is a de novo proceeding because the General

Suwanee, however, the Georgia Supreme Court stated that because a rezoning decision is an "individualized application of law to facts and circumstances," it is an adjudicative act, rather than a legislative act, and adjudicative acts may only be reviewed by discretionary appeal.[9] Because *Diversified Holdings* did not explicitly overturn the precedent stating that rezoning decisions are legislative acts, however, the nature of rezoning decisions—and thus the proper procedure for seeking judicial review of those decisions—remains uncertain.

This Note argues that, after *Diversified Holdings*, rezoning decisions must be treated as adjudicative acts, which may only be reviewed by discretionary appeal. Part II introduces the law and procedure underlying rezoning decisions and discusses the process for their judicial review. Part III discusses the traditional view that rezoning decisions are legislative acts subject to de novo review in superior court. Part IV explores the *Diversified Holdings* decision and its implications. Part V addresses opposing arguments to the treatment of rezoning decisions as adjudicative acts. Part VI discusses the practical effects of classifying rezoning decisions as adjudicative acts. Part VII concludes.

II. BACKGROUND: ZONING DECISIONS AND JUDICIAL REVIEW

A landowner may seek relief from their property's present zoning classification in several ways, including by applying for a variance or rezoning. A variance is an officially authorized exception to the terms of a zoning ordinance.[10] Variance applications are generally filed with an agent of the local governing authority, such as a zoning board, which votes on whether to grant the application.[11] Rezoning, on the other hand,

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Assembly has not provided a statutory mechanism for the direct appeal to superior court of the zoning decisions of local governing authorities." (citing Cobb Cnty. Bd. of Comm'rs v. Poss, 359 S.E.2d 900, 904 (Ga. 1987))).

[9] 807 S.E.2d 876, 883 (Ga. 2017).

[10] *See* 3 EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 38:20 (4th ed., database updated Nov. 2020), Westlaw RLZPN ("In the case of a use variance, the formal zoning of the property remains the same, but the owner is granted exemption from the use restriction . . . .").

[11] *See id.* ("An application for a use variance is usually made to a zoning board of appeals or adjustment, and the variance grant is considered an administrative act."); *see, e.g.*,

involves an amendment to the zoning map.[12] Rezoning applications are generally filed with a different agent of the governing authority, such as a planning commission.[13] The planning commission votes on whether to recommend approval of the application to the governing authority, which has the ultimate power to grant or deny the application.[14] If a variance or rezoning application is denied, the applicant may seek judicial review of the decision in superior court.[15]

The Georgia Constitution states that superior courts have appellate jurisdiction only "as may be provided by law."[16] Title 5 of the Georgia Code provides two general methods for appealing a decision to superior court: direct appeal and discretionary appeal.[17] A direct appeal is proper when a party seeks review of a decision over which the superior courts have been given appellate jurisdiction under O.C.G.A. Section 5-3-2(a) or a statute that incorporates provisions of Chapter 3 of Title 5 by reference.[18] A

ATHENS-CLARKE COUNTY, GA., CODE OF ORDINANCES § 9-4-6 (2019) (providing that a variance application must be submitted to the Athens-Clarke County Hearings Board, which will conduct an administrative hearing and make a decision on the application).

[12] *See* 3 ZIEGLER, *supra* note 10, § 38:2 (explaining that rezoning is "usually accomplished by alteration of the classification or designation of the land on the official zoning map"); *id.* § 38:20 (distinguishing rezoning from a use variance by noting that, "in a rezoning, the zoning classification is changed to one which formally allows the contemplated use").

[13] *See id.* § 38:20 ("[A]n application for a rezoning is made to the local government's legislative body and the grant thereof is usually considered a legislative act."); *see, e.g.*, ATHENS-CLARKE COUNTY, GA., CODE OF ORDINANCES § 9-4-4 (2019) (providing that a rezoning application must be submitted to the Athens-Clarke County Planning Commission, which will conduct an administrative hearing on the application).

[14] *See, e.g.*, ATHENS-CLARKE COUNTY, GA., CODE OF ORDINANCES § 9-4-4 (2019) (providing that the Athens-Clarke County Planning Commission has the power to make a recommendation on a rezoning application to the Athens-Clarke County Mayor and Commission, which then render a final decision on the application).

[15] *See infra* notes 28–29 and accompanying text.

[16] GA. CONST. art. VI, § 4, para. 1.

[17] *See* O.C.G.A. §§ 5-3-2 to -31 (West, Westlaw through Laws 2021, Act 6) (providing for direct appeals to superior court); *id.* §§ 5-4-1 to -20 (providing for certiorari to superior court).

[18] *See id.* § 5-3-2(a) ("An appeal shall lie to the superior court from any decision made by the probate court, except an order appointing a temporary administrator."); CHRISTOPHER J. MCFADDEN, CHARLES R. SHEPPARD, CHARLES M. CORK III, DAVID A. WEBSTER & KELLY J. WEATHERS, GEORGIA APPELLATE PRACTICE WITH FORMS § 4:3 (database updated Nov. 2020), Westlaw GAAPPLPRAC ("The appeal route provided by the appeals statute does not apply

party seeking review by direct appeal may simply file a notice of appeal with the lower tribunal, and the superior court will hear the case.[19] The appeal is subject to de novo review, meaning that the entire record from the lower tribunal will be brought up, and new competent evidence will be admitted for review as well.[20]

By contrast, a discretionary appeal is proper whenever a party seeks review of a lower tribunal's exercise of judicial powers.[21] Unlike the direct appeal procedure, the discretionary appeal procedure requires the party to seek permission from the superior court via a petition for certiorari before filing a notice of appeal with the lower tribunal.[22] If the petition is accepted, the superior court will issue a writ of certiorari, and the case will be heard,[23] with the scope of review limited to the record below.[24]

The Georgia General Assembly has not, through the Zoning Procedures Law or otherwise, provided a specific statutory procedure for appealing adverse zoning decisions.[25] Therefore, a direct appeal pursuant to O.C.G.A. Title 5 is not proper for these decisions.[26] Unless the discretionary appeal statute applies to the decision at issue, however, an aggrieved landowner may still be able to obtain de novo review in superior court by filing a

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to appeals from other tribunals or proceedings not specified either in those sections or in a specific incorporation of those sections." (footnote omitted)).

[19] *See* O.C.G.A. § 5-3-21(a) (West, Westlaw through Laws 2021, Act 6) ("An appeal to the superior court may be taken by filing a notice of appeal with the court, agency, or other tribunal appealed from.").

[20] *See id.* § 5-3-29 ("An appeal to the superior court . . . is a de novo investigation. It brings up the whole record from the court below; and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not.").

[21] *See id.* § 5-4-1(a) ("The writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers . . . .").

[22] *See id.* § 5-4-3 (permitting a "dissatisfied" party to "apply for and obtain a writ of certiorari by petition to the superior court").

[23] *See id.* (describing "the duty of the clerk to issue a writ of certiorari . . . requiring the tribunal . . . to certify and send up all the proceedings in the case to the superior court").

[24] *See id.* § 5-4-12(b) ("The scope of review shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence.").

[25] *See supra* note 8.

[26] *See* S. States Landfill, Inc. v. Atlanta Bd. of Zoning Adjustment, 410 S.E.2d 721, 723–24 (Ga. 1991) (holding that Title 5 did not provide for a direct appeal of a special use permit decision); MCFADDEN ET AL., *supra* note 18, § 7:23 (explaining that, for zoning classification decisions, "[a]n appeal de novo to the Superior Court is not available").

complaint in equity, a declaratory judgment action, or a mandamus petition.[27] Thus, Georgia courts must consider the nature of the decision at issue to determine the proper method for seeking judicial review. If the zoning decision is adjudicative, a petition for certiorari is proper;[28] if the zoning decision is not adjudicative, then certiorari is not proper and the landowner may be able to seek de novo review by filing an equitable action.[29]

The actions of a local governing authority or its agent may generally be classified as ministerial, legislative, or adjudicative. Ministerial acts are "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requir[e] merely the execution of a specific duty."[30] Legislative and adjudicative acts, on the other hand, require some level of discretion.[31] Because variance and rezoning decisions require discretion by the local governing authority or its agent, it seems clear that these decisions are not ministerial acts.

The question, then, is whether these zoning decisions should be characterized as legislative or adjudicative. As the Georgia Supreme Court explained in *State v. International Keystone Knights of the Ku Klux Klan, Inc.*, although "the line between legislation and adjudication is not always easy to draw," each classification has general "defining characteristics."[32] Legislative

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[27] *See* MCFADDEN ET AL., *supra* note 18, § 7:23 ("A zoning classification decision may be reviewed by a complaint in equity, a declaratory judgment action, and a petition for mandamus, within the limitations on those forms of review." (footnotes omitted)).

[28] *See* City of Cumming v. Flowers, 797 S.E.2d 846, 848 (Ga. 2017) (confirming that "a quasi-judicial decision . . . can be challenged in the superior court only by a petition for certiorari under [O.C.G.A.] § 5-4-1").

[29] *See* Presnell v. McCollum, 145 S.E.2d 770, 770 (Ga. Ct. App. 1965) ("Certiorari is not an appropriate remedy to review or obtain relief from the judgment, decision or action of an inferior judicatory or body rendered in the exercise of legislative, executive, or ministerial functions, as opposed to judicial or quasi-judicial powers."); *supra* note 27 and accompanying text. For a brief discussion of sovereign immunity as a potential bar to equitable actions against zoning authorities, see *infra* Part VI.

[30] Odum v. Harn, 811 S.E.2d 19, 20 (Ga. Ct. App. 2018) (quoting Brock v. Sumter Cnty. Sch. Bd., 542 S.E.2d 547, 550 (Ga. Ct. App. 2000)).

[31] *See id.* ("A discretionary act . . . calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." (quoting *Brock*, 542 S.E.2d at 550)).

[32] 788 S.E.2d 455, 463 (Ga. 2016) (quoting LC&S, Inc. v. Warren Cnty. Area Plan Comm'n, 244 F.3d 601, 603 (7th Cir. 2001)).

acts "are prospective in application, general in application, and often marked by a general factual inquiry that is not specific to the unique character, activities or circumstances of any particular person,"[33] while adjudicative acts "are immediate in application, specific in application, and commonly involve an assessment of 'facts about the parties and their activities, businesses, and properties.'"[34]

In *Jackson v. Spalding County*, the Georgia Supreme Court held that when a zoning authority grants or denies a variance application, it "function[s] as an administrative body" making an adjudicative decision.[35] In support of its holding, the court emphasized that a variance decision involves the application of a zoning ordinance's legal standards to the facts surrounding a specific piece of property.[36] Later, in *City of Cumming v. Flowers*, the Georgia Supreme Court made clear that an adjudicative variance decision may only be reviewed by a superior court via discretionary appeal,[37] regardless of whether the applicable zoning ordinance provides for a different method of appeal.[38] In so holding, the court clearly rejected a line of cases allowing direct appeals of variance decisions based on the language of zoning ordinances, stressing that a local government cannot, "without

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[33] *Int'l Keystone Knights*, 788 S.E.2d at 463 (citations omitted).

[34] *Id.* (citations omitted) (quoting RR Vill. Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1205 (2d Cir. 1987)); *see also* Bentley v. Chastain, 249 S.E.2d 38, 40 (Ga. 1978) (explaining that when an administrative agency is "called upon to make factual determinations and thus adjudicate . . . it is . . . considered to be acting in a quasi-judicial capacity" (quoting Dep't of Nat. Res. v. Linchester Sand & Gravel Corp., 334 A.2d 514, 522 (Md. 1975))).

[35] 462 S.E.2d 361, 363–64 (Ga. 1995).

[36] *See id.* at 363 ("In deciding a property owner's request for a variance, a board of zoning appeals considers whether the facts applying to a specific piece of property warrant relief from zoning under the standards set in the county ordinance. This decision-making process is akin to a judicial act: the board determines the facts and applies the ordinance's legal standards to them." (footnote omitted)).

[37] *See* 797 S.E.2d 846, 848 (Ga. 2017) (confirming that "the zoning variance decision was a quasi-judicial decision that can be challenged in the superior court only by a petition for certiorari under [O.C.G.A.] § 5-4-1").

[38] *See id.* at 852 ("[F]or generations this Court has held that judicial and quasi-judicial decisions made by city and county governing authorities may be appealed to the superior court by certiorari . . . with no reference to whether the local ordinance also provides for certiorari review.").

statutory authority, create a mechanism by which an appeal may be taken to the superior court."[39] Thus, Georgia law seems well-settled as to the nature of, and procedure for seeking judicial review of, a variance decision: because a variance decision is adjudicative, it must be reviewed by a superior court via a petition for certiorari, and review is limited to the record of the zoning authority.[40] The procedure for seeking judicial review of a rezoning decision, on the other hand, is not so clear.

III. THE TRADITIONAL VIEW: REZONING DECISIONS ARE LEGISLATIVE ACTS SUBJECT TO DE NOVO REVIEW

For decades, Georgia courts have labeled rezoning decisions as legislative acts by local zoning authorities.[41] One of the most recent published opinions dealing with an appeal of a rezoning decision, *Stendahl v. Cobb County*,[42] is illustrative. In *Stendahl*, the Cobb County Board of Commissioners granted an application to rezone a parcel of land in the county.[43] Neighboring landowners appealed the rezoning decision in Cobb County Superior Court, seeking both a declaration that the rezoning decision was

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[39] *Id.* at 855 (quoting Haralson Cnty. v. Taylor Junkyard of Bremen, Inc., 729 S.E.2d 357, 359 (Ga. 2012)).

[40] *See supra* note 24 and accompanying text.

[41] *See* Mayor & Aldermen of Savannah v. Rauers, 324 S.E.2d 173, 174 (Ga. 1985) (explaining that, in making a rezoning decision, "the zoning authority is acting in a legislative capacity" (citing Barrett v. Hamby, 219 S.E.2d 399, 401 (Ga. 1975))); Olley Valley Ests., Inc. v. Fussell, 208 S.E.2d 801, 803 (Ga. 1974) ("[T]he Georgia view is that commissioners in voting on either a zoning or rezoning proposal are functioning in a legislative capacity."); Toomey v. Norwood Realty Co., 89 S.E.2d 265, 267 (Ga. 1955) ("In exercising this delegated power [of making rezoning decisions], the commissioner acts, not in an administrative or judicial capacity, but in a legislative capacity."); Kohl v. Manning, 160 S.E.2d 666, 666 (Ga. Ct. App. 1968) ("The adoption of a rezoning ordinance is a legislative action by the county governmental authorities, from which the writ of certiorari does not lie."); Baker v. Macon-Bibb Cnty. Plan. & Zoning Comm'n, 165 S.E.2d 430, 430 (Ga. Ct. App. 1968) ("The [zoning authority], in zoning and rezoning property, acts as a legislative agency under powers delegated to it under the State Constitution and the implementing action of the City of Macon and Bibb County."); Presnell v. McCollum, 145 S.E.2d 770, 771 (Ga. Ct. App. 1965) ("The acts of a county commissioner in zoning matters are not a judicial or quasi-judicial function, but a legislature function, to which the writ of certiorari will not lie.").

[42] 668 S.E.2d 723 (Ga. 2008).

[43] *Id.* at 725.

unconstitutional and a writ of mandamus to deny the rezoning application.[44] Following dismissal by the trial court for failure to state a claim, the Georgia Supreme Court granted the neighboring landowners' application for discretionary appeal.[45] In holding that the trial court erred in failing to afford the landowners a de novo standard of review, the Georgia Supreme Court stated:

> When a zoning authority either grants or denies an application for re-zoning, it acts in a legislative capacity, and when the constitutionality of that legislative enactment is challenged in court, it is afforded de novo review, i.e., the superior court is not limited to examination of the evidence presented to the zoning authority.[46]

In the decades of precedent stating that rezoning decisions are legislative acts, however, no court appears to have ever explained why the decisions are classified this way. For example, in *Presnell v. McCollum*, one of Georgia's older authorities on rezoning appeals, the Georgia Court of Appeals held that the Cobb County Superior Court properly dismissed a petition for certiorari seeking review of a rezoning decision made by the Cobb County Commissioner of Roads and Revenues.[47] In support of its decision, the court noted that a writ of certiorari is not an appropriate vehicle for reviewing an inferior body's decision rendered in the exercise of legislative powers,[48] and that "[t]he acts of a county commissioner in zoning matters are not a judicial or quasi-judicial function, but a legislature function, to which the writ of certiorari will not lie."[49] The court did not provide any explanation for why a zoning authority's actions in relation to zoning matters are a legislative function.

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[44] *Id.*

[45] *Id.*

[46] *Id.* at 726 (citing *Mayor & Aldermen of Savannah*, 324 S.E.2d at 174).

[47] 145 S.E.2d 770, 771 (Ga. Ct. App. 1965).

[48] *See id.* at 770 ("Certiorari is not an appropriate remedy to review or obtain relief from the judgment, decision or action of an inferior judicatory or body rendered in the exercise of legislative, executive, or ministerial functions . . . .").

[49] *Id.* at 771.

After characterizing zoning decisions as legislative in nature, the *Presnell* court cited several older cases, but they provide little additional insight.[50] In one such case, *Toomey v. Norwood Realty Co.*, the Georgia Supreme Court simply stated—with no citation to authority—that "[i]n exercising this delegated power [of making rezoning decisions], the commissioner acts, not in an administrative or judicial capacity, but in a legislative capacity."[51] *Jernigan v. Smith*, also cited by the *Presnell* court, provides even less explanation, merely characterizing the DeKalb County Board of Commissioners as a "legislative department[]" following its denial of a landowner's rezoning application.[52] This line of precedent remained unbroken until 2017, when the Georgia Supreme Court decided *Diversified Holdings*.

IV. A NEW VIEW: THE *DIVERSIFIED HOLDINGS* DECISION

In 2016, Diversified Holdings, LLP (Diversified) applied to the City of Suwanee Planning and Zoning Commission to rezone its thirty-acre tract of undeveloped land from commercial use to multifamily use, arguing in part "that the existing zoning regulation was unconstitutional as applied to the Property."[53] On the recommendation of the Commission, the Suwanee City Council denied the rezoning application.[54] Diversified sued the City in Gwinnett County Superior Court, requesting that the court declare that the City's denial of the application was "unlawful, irrational, a manifest abuse of discretion, a taking of property, unconstitutional, null, and void" and enjoin the City from interfering with Diversified's use of the property for multifamily use.[55] The superior court found that Diversified failed to carry its burden to show by clear and convincing evidence that the zoning classification of its property "was not substantially related to public health, safety, and welfare," and that the City's denial of

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[50] *Id.*

[51] 89 S.E.2d 265, 267 (Ga. 1955).

[52] 126 S.E.2d 678, 680 (Ga. 1962) (quoting Vulcan Materials Co. v. Griffith, 114 S.E.2d 29, 32 (Ga. 1960), *overruled by* E. Lands, Inc. v. Floyd Cnty., 262 S.E.2d 51 (Ga. 1979)).

[53] Diversified Holdings, LLP v. City of Suwanee, 807 S.E.2d 876, 879–80 (Ga. 2017).

[54] *Id.* at 880.

[55] *Id.*

Diversified's rezoning application was not "an abuse of discretion" or "an unconstitutional taking."[56]

Diversified then filed "both a direct appeal and an application for discretionary appeal" with the Georgia Supreme Court, which granted the application for discretionary appeal.[57] For the first time, the court discussed the nature of rezoning decisions at length. The court stated that "an appeal from a superior court order reviewing a local government decision denying an application to rezone a specific property differs from an appeal from a lawsuit that challenges the enactment of a code of development or zoning code."[58] The court acknowledged that the enactment of a zoning ordinance is clearly a legislative act,[59] but reasoned that a decision on a rezoning application is adjudicative in nature:

> [A]n application to rezone a particular parcel like the application involved here involves an individualized determination based on the character and circumstances of that particular parcel of land. A landowner's challenge that seeks recognition that a zoning ordinance is unlawful with respect to a particular parcel of land thus is the type of individualized application of law to facts and circumstances that constitutes an adjudicative decision and requires a discretionary application.[60]

The court cited its definition of adjudicative acts from *International Keystone Knights* to assert that "the City's decision to reject [Diversified's] claim was immediate in application, specific in effect, and involved an individualized assessment of [Diversified's property]."[61] The court also specifically stated that "the local authority's decision is adjudicative in nature" and that

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[56] *Id.* at 880–81.

[57] *Id.* at 881.

[58] *Id.* at 883 (citing Schumacher v. City of Roswell, 803 S.E.2d 66, 68 (Ga. 2017)).

[59] *See id.* ("The enactment of a development or zoning code is, quintessentially, a legislative action that is prospective in application.").

[60] *Id.* (citing Jervey v. City of Marietta, 559 S.E.2d 457 (Ga. 2002)).

[61] *Id.* (citing City of Cumming v. Flowers, 797 S.E.2d 846, 851 (Ga. 2017)).

"[the zoning authority's] decision in the first instance, just like ours, was adjudicative in nature."[62] Ultimately, the court held that because a rezoning decision is an adjudicative act, Diversified could only appeal the City's rezoning decision from the superior court to the Georgia Supreme Court by discretionary appeal.[63]

The *Diversified Holdings* court correctly classified rezoning decisions as adjudicative rather than legislative. As the Georgia Supreme Court explained in *International Keystone Knights*, a legislative act is a general, prospective inquiry, while an adjudicative act involves the application of established law to the facts of a particular case.[64] When a zoning authority contemplates rezoning a particular parcel of land, it must consider how the zoning ordinance applies to that parcel, balancing the burdens imposed and benefits gained through the parcel's existing zoning classification.[65] If the rezoning application is approved, the authority's decision culminates in an amendment to the zoning map, but only as to that particular parcel, without affecting the zoning classification of any other parcel. This is quite different from the initial adoption of a zoning ordinance, which prospectively applies a set of rules to all landowners, without knowledge of how the zoning classification of any particular parcel will affect future development of that parcel.

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[62] *Id.* at 884.

[63] *See id.* at 890 (holding that "an appeal from a trial court's order reviewing a local authority's decision regarding an application to rezone property . . . is subject to the discretionary application procedure").

[64] *See supra* notes 32–34 and accompanying text.

[65] More specifically, courts consider the "*Guhl* factors":

> "(1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the property."

Guhl v. Holcomb Bridge Rd. Corp., 232 S.E.2d 830, 832 (Ga. 1977) (quoting La Salle Nat'l Bank v. Cnty. of Cook, 208 N.E.2d 430, 436 (Ill. App. Ct. 1965)).

V. COUNTERARGUMENTS TO CLASSIFYING REZONING DECISIONS AS ADJUDICATIVE ACTS

The *Diversified Holdings* court made clear that rezoning decisions are adjudicative, not legislative, in nature. However, several commentators have minimized the impact of *Diversified Holdings*, arguing that rezoning decisions should still be classified as legislative acts. These commentators generally advance three arguments in support of their position. The remainder of this Part addresses each argument.

A. LABELS ASSIGNED TO THE DECISION OR DECISIONMAKER

Some argue that because the Zoning Procedures Law defines "[z]oning decision"—which encompasses rezoning decisions[66]—as "final *legislative* action by a local government,"[67] rezoning decisions cannot be adjudicative in nature.[68] However, just because a rezoning decision was, at one point, labeled "legislative" does not make it so. As the Georgia Supreme Court stated in *State v. International Keystone Knights of the Ku Klux Klan, Inc.*, "In distinguishing between legislative and adjudicative determinations, there seems to be broad agreement that substance

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[66] O.C.G.A. § 36-66-3(4)(C) (West, Westlaw through Laws 2021, Act 6) (defining "[z]oning decision" to include "[t]he adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another").

[67] *Id.* § 36-66-3(4) (emphasis added).

[68] *See* Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, 70 MERCER L. REV. 301, 317–18 (2018) [hereinafter Galloway & Jones, 2018] (arguing that, in classifying rezoning decisions as adjudicative acts, the *Diversified Holdings* court "ignore[d] th[e] plain statutory language" of O.C.G.A. Section 36-66-3(4)(C)); Kenneth E. Jarrard, Jarrard & Davis LLP, Handling and Trying Administrative Zoning Hearings Including Ethical Issues from the Local Government's Perspective, Address at the Institute of Continuing Legal Education Seminar: Zoning Law (Oct. 4, 2018), https://www.gabar.org/membership/cle/upload/10045_Zoning_Law_10-4-18-compressed.pdf (emphasizing the use of the term "legislative" in O.C.G.A. Section 36-66-3(4)); *see also* Newton M. Galloway & Steven L. Jones, *Zoning and Land Use Law*, 71 MERCER L. REV. 363, 387 n.165 (2019) [hereinafter Galloway & Jones, 2019] ("[T]he [Georgia] Supreme Court's distinction (in . . . *Diversified Holdings*) between different types of zoning decisions ignores the plainly stated 'zoning decisions' definitions in [the Zoning Procedures Law]. Under O.C.G.A. § 36-66-3(4)(c) (2019), the rezoning of a single parcel is a legislative zoning decision, just like the adoption of a new zoning ordinance . . . .").

matters far more than form, and the courts need not 'capitulate to the label that a government body places on its action.'"[69] In the absence of a statute providing a method for appealing rezoning decisions to superior court, courts must consider the *nature* of a rezoning decision, not its *label*, to determine the proper method for seeking judicial review, and the Georgia Supreme Court has made clear that its nature is adjudicative.[70]

Commentators also argue that because the governing body that renders a rezoning decision—generally a city council or board of commissioners—is a legislative body, its decision on a rezoning application must be a legislative act.[71] But just as the classification of a rezoning decision as legislative or adjudicative cannot turn on the label placed on the decision, its classification similarly cannot turn on the label placed on the decisionmaker; the focus must be on the nature of the decision.[72] As the Georgia Court of Appeals stated in *Mack II v. City of Atlanta*, "It is not the description of the office, body, or board performing the action that is scrutinized; the 'character and nature of the authorized function' controls the issue of whether the function is judicial or quasi-judicial."[73]

B. DISTINGUISHING APPEALS TO SUPERIOR COURTS FROM APPEALS TO APPELLATE COURTS

The *Diversified Holdings* court held that an appeal of a rezoning decision from superior court to an appellate court must

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[69] 788 S.E.2d 455, 463–64 (Ga. 2016) (quoting 75 Acres, LLC v. Miami-Dade Cnty., 338 F.3d 1288, 1296 (11th Cir. 2003)).

[70] *See supra* notes 60–62 and accompanying text. The Georgia Court of Appeals recently rejected a similar argument. *See* York v. Athens Coll. of Ministry, Inc., 821 S.E.2d 120, 124 n.6 (Ga. Ct. App. 2018) (noting, in nonbinding precedent, that an ordinance's designation of a special use permit decision as a legislative act does not per se make it so (citing *Int'l Keystone Knights*, 788 S.E.2d at 463–64)).

[71] *See* Galloway & Jones, 2018, *supra* note 68, at 317 ("The City Council is the legislative body of the City, not an advisory local zoning board. The City Council is a legislative body, and its zoning decision is a legislative act.").

[72] *Cf. supra* note 69–70 and accompanying text.

[73] 489 S.E.2d 357, 360 (Ga. Ct. App. 1997) (quoting S. View Cemetery Ass'n v. Hailey, 34 S.E.2d 863, 866 (Ga. 1945)).

be by discretionary appeal.[74] The court did not, however, explicitly state that an appeal of a rezoning decision from the zoning authority to a superior court must also be by discretionary appeal. One commentator argues that the court's holding should be narrowly construed to require only a discretionary appeal procedure for appeals from superior court to an appellate court, but not from a zoning authority to superior court.[75]

Such a reading of *Diversified Holdings* is untenable. First, although the Georgia Supreme Court was addressing its own jurisdiction, its assessment of the nature of the rezoning decision made by the zoning authority compelled its conclusion. The court emphasized that a zoning authority's decision on a rezoning application is adjudicative, stating that "[the authority's] decision *in the first instance*, just like ours, was adjudicative in nature" and that "the *local authority's decision* is adjudicative in nature."[76] Second, it strains credibility to treat the zoning authority's decision as adjudicative in an appeal from the superior court to the appellate court, but as legislative in an appeal from the zoning authority to the superior court. Thus, *Diversified Holdings* must be read to classify rezoning decisions as adjudicative and to require that all appeals of such decisions be made by petition for certiorari, regardless of where review is sought.

C. THE GEORGIA SUPREME COURT'S FAILURE TO EXPLICITLY REPUDIATE PRIOR CASES

One commentator points out that the *Diversified Holdings* court did not expressly repudiate *Stendahl* and similar cases classifying rezoning decisions as legislative acts.[77] However, that the court did

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[74] Diversified Holdings, LLP v. City of Suwanee, 807 S.E.2d 876, 879 (Ga. 2017) ("We hold that because Diversified seeks review from an adjudicative decision made by a local government body acting in an administrative role, an application for discretionary appeal was required.").

[75] *See* Jarrard, *supra* note 68 (contending that *Diversified Holdings* "is limited to the Court's determination of how an appeal from the Superior Court travels to the appellate courts (concluding that it must be by discretionary appeal, rather than direct appeal)").

[76] *Diversified Holdings*, 807 S.E.2d at 884 (emphasis added).

[77] *See* Jarrard, *supra* note 68 (noting that *Diversified Holdings* "does not contain an explicit statement that it is overturning *decades* of authority").

not take this opportunity to overturn these cases explicitly is not, by itself, dispositive. As the court has stated:

> It is axiomatic that the decisions of this Court do not stand for points that were neither raised by the parties nor actually decided in the resulting opinion, and that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[78]

Thus, that *Diversified Holdings* did not explicitly repudiate prior authorities is of no import, and its central conclusion that rezoning decisions are adjudicative acts is unassailable.

VI. PRACTICAL EFFECTS OF *DIVERSIFIED HOLDINGS*

The above-referenced commentators may have resisted the natural interpretation of the *Diversified Holdings* decision due to the practical effects that such an interpretation would have on the procedure for appealing rezoning decisions.[79] If a rezoning decision is an adjudicative act, it must be appealed by writ of certiorari, and landowners may find this procedure unduly burdensome.[80]

First, a landowner must submit a petition for certiorari within thirty days of a zoning authority's decision on a rezoning application.[81] In that time, the petitioner must first give a bond and obtain a signed certificate from an official of the zoning

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[78] Palmer v. State, 651 S.E.2d 86, 88 (Ga. 2007) (alteration in original) (quoting Albany Fed. Sav. & Loan Ass'n v. Henderson, 31 S.E.2d 20, 32 (Ga. 1944)).

[79] *See* Galloway & Jones, 2019, *supra* note 68, at 371–74 (observing a "transformation of zoning decisions to quasi-judicial decisions" but expressing concern that, if rezoning decisions are classified as adjudicative acts subject to discretionary appeal, onerous procedural and evidentiary formalities will need to be imposed at the zoning authority level); Jarrard, *supra* note 68 ("Treating a rezoning decision as a true administrative hearing is procedurally challenging. It would require presenting a full 'trial' before a local government body.").

[80] *See supra* Part II.

[81] *See* O.C.G.A. § 5-4-6(a) (West, Westlaw through Laws 2021, Act 6) ("All writs of certiorari shall be applied for within 30 days after the final determination of the case in which the error is alleged to have been committed.").

authority stating that all costs associated with the application have been paid.[82] Gaining the attention and cooperation of such an official may be a challenge itself. Next, the petitioner must draft the petition, clearly setting forth each supposed error.[83] The petitioner must then present all of the materials to the superior court judge for approval.[84] Once the judge has sanctioned the writ, the petitioner must file the petition, certificate, and order sanctioning the writ with the superior court clerk.[85] Within five days of filing, the petitioner must serve copies of the petition and writ on the respondent.[86] The respondent must file an answer with the clerk's office within thirty days after service.[87] If the respondent fails to file an answer in a timely manner, it is the petitioner's duty to move for the superior court to order an answer; otherwise, the court may dismiss the petition for failure to prosecute.[88] Once an answer is filed, the petitioner must file any exceptions to the answer within fifteen days[89] and prepare for a

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[82] *See id.* § 5-4-5(a) (describing the process by which a petitioner for certiorari must obtain a bond and a certificate averring "that all costs which may have accrued on the trial below have been paid").

[83] *See id.* § 5-4-3 (requiring a petitioner for certiorari to "plainly and distinctly set forth the errors complained of"); *id.* § 5-4-12(a) (limiting judicial review to only those errors which are "distinctly set forth in the petition").

[84] *See id.* § 5-4-3 (providing that the petitioner "may apply for and obtain a writ of certiorari by petition to the superior court for the county in which the case was tried").

[85] *See id.* ("On the filing of the petition in the office of the clerk of the superior court, with the sanction of the appropriate judge endorsed thereon, together with the bond or affidavit . . . it shall be the duty of the clerk to issue a writ of certiorari . . . .").

[86] *See id.* § 5-4-6(b) (requiring the petitioner to serve a copy of the certiorari petition and writ "on the respondent, within five days after such filing").

[87] *See id.* § 5-4-7 ("The answer to the writ of certiorari shall be filed in the clerk's office within 30 days after service thereof on the respondent . . . .").

[88] *See* City of Atlanta v. Schaffer, 264 S.E.2d 6, 7 (Ga. 1980) ("It is well established that the plaintiff in certiorari to a superior court has the duty of ascertaining whether the [respondent] has filed [an] answer and, if not, to move the superior court to order it filed. . . . 'It has been held that the failure of the [respondent] to file a proper answer will be a sufficient reason to dismiss the certiorari, when no timely motion is made to perfect the same.'" (quoting Sutton v. State, 48 S.E. 342, 343 (Ga. 1904))); *see also* Ultra Grp. of Cos., Inc. v. Inam Int'l, Inc., 840 S.E.2d 708, 709 (Ga. Ct. App. 2020) ("The burden is on the petitioner to see that an answer to the petition is filed in a timely manner. If an answer is not filed, dismissal of the petition is the proper remedy." (citing Copeland v. White, 322 S.E.2d 523, 524 (Ga. Ct. App. 1984))).

[89] *See* O.C.G.A. § 5-4-9 (West, Westlaw through Laws 2021, Act 6) (providing fifteen days for a petitioner, in writing, to "traverse or except to the answer of the respondent").

hearing. This atypical procedure may be difficult to navigate even for experienced practitioners.[90]

A discretionary appeal process would also pose difficulties during the initial rezoning application phase. A superior court's review of a petition for certiorari is limited to the lower tribunal's record.[91] This means that, during the rezoning application process, a landowner would need to anticipate the possibility of an appeal and submit to the zoning authority all evidence that they would want a court to review on appeal.[92] Because the initial proceeding provides the only opportunity for the presentation of evidence, a landowner likely would need to hire counsel to represent them, even at the application phase. Further, the Zoning Procedures Law only requires zoning authorities to give ten minutes per side "for presentation of data, evidence, and opinion" at zoning hearings.[93] If a zoning authority does not provide more than ten minutes, a rezoning applicant and any opponents may not have enough time to effectively present their cases and establish the desired record.[94]

While a discretionary appeal process is not an ideal mechanism for appealing rezoning decisions, the alternative—filing an equitable action seeking de novo review—presents its own problems. Traditionally, Georgia landowners have sought judicial review of rezoning decisions via actions for declaratory and injunctive relief against the zoning authority.[95] Recently, however, the Georgia Supreme Court held that the doctrine of sovereign

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[90] *See* Galloway & Jones, 2018, *supra* note 68, at 309 (describing "[t]he procedural pitfalls of the certiorari process").

[91] *See* O.C.G.A. § 5-4-12(b) (West, Westlaw through Laws 2021, Act 6) ("The scope of review shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence.").

[92] *See* Galloway & Jones, 2019, *supra* note 68, at 372 (noting that, with a discretionary appeal process, "zoning practitioners, local governments, zoning applicants, and zoning opponents must prepare and preserve a legal, evidentiary record below, even if the likelihood of appeal is remote").

[93] O.C.G.A. § 36-66-5(a) (West, Westlaw through Laws 2021, Act 6).

[94] *See* Galloway & Jones, 2019, *supra* note 68, at 373 ("Time limits can be onerous on the ability of applicants and opponents to present or oppose a zoning case, especially if either the local government's planning staff or recommending body do not make recommendations favorable to an applicant's or opponent's position.").

[95] *See, e.g.*, Diversified Holdings, LLP v. City of Suwanee, 807 S.E.2d 876, 880 (Ga. 2017) (describing Diversified's constitutional claim and requests for declaratory and injunctive relief against the City of Suwanee in Gwinnett County Superior Court).

immunity extends to suits for declaratory and injunctive relief against the state, its departments and agencies, and its officers in their official capacities.[96] The availability of a sovereign immunity defense may effectively bar equitable actions for review of zoning authorities' rezoning decisions.[97] As such, a difficult procedure for obtaining judicial review of a rezoning decision—the certiorari process—may be better than no review at all.

VII. CONCLUSION

To determine the proper procedure by which a landowner may seek judicial review of a zoning authority's rezoning decision in superior court, Georgia courts consider the nature of the decision. For decades, Georgia courts have held—with little explanation—that rezoning decisions are legislative acts subject to de novo review. Then, in *Diversified Holdings*, the Georgia Supreme Court correctly classified rezoning decisions as adjudicative acts that may only be appealed by writ of certiorari. But because the court did not explicitly overturn *Stendahl* and similar cases classifying rezoning decisions as legislative acts, the nature of rezoning decisions—and thus the proper procedure for seeking judicial review of those decisions—remains unclear.

Moving forward, the Georgia Supreme Court should expressly address the status of precedent like *Stendahl*. Then, if the Georgia General Assembly determines that the certiorari process is not an appropriate method for landowners to seek judicial review of rezoning decisions, it may enact a statute specifically providing for direct appeal of such decisions. Until the Georgia Supreme Court or General Assembly acts, uncertainty will linger about what *Diversified Holdings* means for the future of rezoning decisions.

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[96] *See* Lathrop v. Deal, 801 S.E.2d 867, 869 (Ga. 2017) ("We hold today that the doctrine of sovereign immunity extends generally to suits against the State, its departments and agencies, and its officers in their official capacities for injunctive and declaratory relief from official acts that are alleged to be unconstitutional."); Olvera v. Univ. Sys. of Ga.'s Bd. of Regents, 782 S.E.2d 436, 438 (Ga. 2016) (holding that sovereign immunity extends to suits seeking declaratory relief); Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E.2d 184, 188 (Ga. 2014) (holding the same for suits seeking injunctive relief).

[97] *See* Galloway & Jones, 2018, *supra* note 68, at 305 ("Following *Lathrop*, declaratory and injunctive relief resting on constitutional grounds (as most zoning claims do) must be brought against local government officials individually.").