Environmental Practicum Memo
To: Laurie Fowler
From: Brad Odom
Date: February 27, 2009
RE: Regulatory Taking Challenges to Local Environmental Regulation

Question Presented
Under federal and Georgia Law, how should a community enacting progressive local conservation ordinances avoid a regulatory taking?

Brief Answer
Four types of regulations may constitute a taking under the Fifth Amendment to the United States Constitution: (1) a regulation requiring an owner to suffer a physical invasion of his or her property; (2) a regulation depriving an owner of all economically beneficial use of his or her property; (3) a regulation that involves a land use exaction under Nollan and Dolan; and (4) a regulation deemed overly burdensome under the three-factor Penn. Central test: (i) “the regulation’s economic impact on the claimant”; (ii) “the extent to which it interferes with distinct investment-backed expectations”; and (iii) “the character of the government action.” Georgia Courts have previously employed a less rigorous balancing test to interpret the Georgia Constitution and are consequently slightly more likely to find a taking. Since a regulation can be challenged under either the federal or Georgia Constitutions, or both, compliance with both is advisable.

Discussion
Regulatory takings claims often arise through the implementation of land use planning, zoning, and building codes. More specifically, regulatory takings claims frequently occur in response to comprehensive land use plans and environmental regulations designating lands as resource protection areas or otherwise restricting the permissible uses of an owner’s land. Such challenges, however, should not discourage local governments from adopting progressive environmental protection regulation. Courts have overwhelmingly upheld state and local environmental regulations. Local governments with fair, reasonable, and consistent regulatory programs should avoid many takings claims and prevail on any challenges that do arise.

1 See, e.g., Reahard v. Lee County, 968 F.2d 1131 (1992) (challenging designation of plaintiff’s property as resource protection area under newly adopted comprehensive land use plan); Parking Association of Georgia, Inc. v. City of Atlanta, 264 Ga. 764 (1994) (challenging city ordinance requiring parking lot landscaping for purpose of improved aesthetics and reduced stormwater runoff); Threatt v. Fulton County, 266 Ga. 466 (1996) (challenging Metropolitan River Protection Act’s Chattahoochee River fifty-foot vegetative buffer requirement and impervious surface restriction).
3 See JON KUSLER, WETLANDS REGULATIONS: AVOIDING LEGAL PROBLEMS; WINNING LEGAL CHALLENGES 6 (2004).
4 Id.
I. Local Government Authority to Zone

In Georgia, each municipal and county governing authority is constitutionally and exclusively granted the self-executing power to zone land for particular uses.\(^5\) Since the zoning power is a legislative, not judicial function,\(^6\) courts have no power to zone or rezone property.\(^7\) Local authorities’ power to zone necessarily includes the power to completely prohibit a particular use of land or to impose conditions on the use of land in pursuit of the zoning purposes.\(^8\) A municipality or county governing authority’s power to zone, like the municipality or county itself, may be “established, altered, amended, enlarged or diminished, or utterly abolished by the legislature.”\(^9\)

Local zoning power is broad, but not unlimited.\(^10\) In regulating zoning, counties and municipalities exercise broad police power.\(^11\) A local zoning ordinance only exceeds the police power if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”\(^12\) Even zoning ordinances based purely on aesthetics have been upheld as reasonable and proper exercises of police power.\(^13\)

Zoning ordinances are, however, constrained by the constitutional demands of due process, equal protection, and the constitutional prohibition against taking private property without just compensation.\(^14\) To ensure proper due process, Georgia counties and municipalities must follow the Zoning Procedures Law.\(^15\) Under the Zoning Procedures Law, local governments are authorized to: “(1) Provide by ordinance or resolution for such administrative officers, bodies, or agencies as may be expedient for the efficient exercise of their zoning powers; and (2) Provide by ordinance or resolution for procedures and requirements in addition to or supplemental to those required by this chapter.”\(^16\)

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\(^5\) G.A. CONST. art. 9, § 2, ¶ IV (“The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.”).

\(^6\) City of Roswell v. Fellowship Christian School, Inc., 281 Ga. 767, 768 (2007) (“[W]e recognize that zoning is a legislative and not [a] judicial function.”).

\(^7\) Town of Tyrone v. Tyrone, LLC, 275 Ga. 383, 384 (2002).


\(^9\) Signa Development Corp. v. Fayette County, 259 Ga. 11, 12 (1989); see also City of Mountain View v. Clayton County, 242 Ga. 163, 166 (1978).

\(^10\) “The importance of private property rights and the public's interest in orderly land development and use must be delicately balanced in the exercise of the zoning power. To preserve this balance, the law imposes restraints upon landowners and zoning authorities alike. The landowner's restraints are obvious. Broadly stated, the landowner is bound to the uses allowed by a valid zoning ordinance. This is vital to the balance of public and private interests. The restraints upon the zoning authority are no less real but perhaps more intricate.” Whidden v. Faigen, 255 Ga. 347, 348 (1986).


\(^12\) King v. City of Bainbridge, 276 Ga. 484, 488 (2003).


\(^15\) O.C.G.A. § 36-66-2(a) (2008) (“The purpose of these minimum procedures is to assure that due process is afforded to the general public when local governments regulate the uses of property through the exercise of the zoning power.”).

II. Regulatory Takings Standards

Regulations are frequently challenged as violations of both state and federal due process and eminent domain provisions. The Fifth Amendment to the U.S. Constitution and the Georgia Constitution prohibit taking private property for public use without just and adequate compensation. Consequently, local regulations challenged at the Georgia state court level are slightly more vulnerable than those attacked in federal court. Since, however, a zoning regulation can be challenged under either the federal or Georgia Constitutions, or both, compliance with both standards is advisable.

A. Federal Regulatory Takings Law

1. U.S. Supreme Court Precedent

Federal regulatory takings case law focuses “upon the severity of the burden that government imposes upon property rights” and aims to “identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property.” Consequently, two extraordinary categories of zoning regulations are per se compensable under the Takings Clause of the Fifth Amendment: “(1) where government requires an owner to suffer a permanent physical invasion of her property,” or “(2) where regulations completely deprive an owner of ‘all economically beneficial use’ of her property.” Outside those extreme cases, however, federal regulatory takings jurisprudence eschews any set formula in favor of an ad hoc, case-specific, and fact-intensive inquiry into the “justice and fairness of the governmental action.”

Case-specific federal regulatory takings analysis is guided by three factors set forth in Penn. Cent. Transp. Co. v. City of New York: (1) the regulation’s economic impact on the claimant; (2) the extent to which it interferes with distinct investment-backed expectations; and (3) the character of the government action. In examining these factors a court must compare the value that has been taken from the property with the value that remains.

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18 U.S. CONST. amend. V (“... nor shall private property be taken for public use, without just compensation); G.A. CONST. art. 1, Sec. 3, Par. 1 (“... private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.”).
19 See Robert L. Zoeckler, A SUMMARY OF TAKINGS LAW 10 (Georgia Environmental Policy Institute 1997) (“Several critical differences exist between [Georgia’s] state constitutional analysis and the rules applicable to federal takings cases articulated by the U.S. Supreme Court. First, the “significant detriment” caused by regulations in Georgia need not destroy all or nearly all of the property’s value to meet the state test, as is required by the federal courts when interpreting the Fifth Amendment takings clause. Serious detrimental value loss will do.”).
20 Id. at 11.
21 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 529 (2005); see also Cienega Gardens v. U.S., 331 F.3d 1319, 1336-1337 (Fed. Cir. 2003) (“A regulatory action only becomes a compensable taking under the Fifth Amendment if the government interference has gone “too far.” [T]he designation that a government action has gone “too far” refers to circumstances where the government has forced “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”) (citations omitted).
22 Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).
The clear focus of the court’s inquiry is “the severity of the burden that government imposes upon private property rights.” In its most recent regulatory takings precedent, *Lingle v. Chevron U.S.A.*, the United States Supreme Court expressly rejected the language first employed in *Agins v. City of Tiburon* and later quoted in *Nollan v. CA Coastal Comm’n.* and *Dolan v. City of Tigard* (that a regulation effects a taking if it does not “substantially advance” legitimate state interests), as an invalid method of identifying regulatory takings. The Court reasoned that the *Agins* language prescribed an inquiry into the nature of a due process (14th Amendment) test not a takings (5th Amendment) test.

2. 11th Circuit Precedent

The most recent regulatory takings case within the 11th Circuit, and the only regulatory takings case decided in the 11th Circuit since *Lingle*, is *Florida Retail Federation, Inc. v. Attorney General Of Florida*. There, plaintiffs challenged as a taking a Florida statute requiring some businesses but not others to allow customers and some workers to have guns secured in their vehicles in the parking lot. The U.S. District Court for the Northern District of Florida cited *Lingle and Nollan and Dolan* (exaction cases) and found no taking. The court reasoned, primarily by distinguishing the *Nollan and Dolan* facts, that since the statute does not change the number, identity, or location of the people or vehicles on the property, nor the frequency of their coming and going, nor the portions of the property they may use, nor their purposes or activities while there, the statute does not constitute a taking. The court did not use the “substantially advances” legitimate state interests test nor the “roughly proportional” test.

The most recent case heard by the 11th Circuit Court of Appeals preceded *Lingle*, but directly related to environmental regulation. In *Reahard v. Lee County*, a homeowner claimed the county’s designation of his property as a resource protection area pursuant to a newly adopted
comprehensive land use plan amounted to an unconstitutional taking.\textsuperscript{40} Although the 11th Circuit invoked the now abrogated “substantially advances” test from \textit{Agins v. City of Tiburon}, the 11th Circuit did not apply the test because the advancement of a legitimate government interest was conceded by the plaintiff.\textsuperscript{41} Instead, the 11th Circuit found the District Court did not set forth sufficient factual findings to analyze whether substantially all economically viable use of the property was destroyed by the regulation.\textsuperscript{42} Consequently, the Court remanded the case for proper factual findings and analysis under the three factors set forth in \textit{Penn. Cent. Transp. Co. v. City of New York}.\textsuperscript{43}

\textbf{B. Georgia Regulatory Takings Law}

\textbf{1. Georgia Regulatory Takings Standard}

Art. 1, Sec. 3, Par. 1 of the Georgia Constitution prohibits the taking or damage of private property for public purposes without just compensation.\textsuperscript{44} Georgia courts have interpreted this eminent domain provision to mean that when government regulation exceeds the police power it rises to the level of condemnation and requires compensation.\textsuperscript{45} Georgia courts have, in turn, used a balancing test to determine whether police power has been properly exercised.\textsuperscript{46} Georgia’s regulatory takings test seeks to balance an “individual's right to the unfettered use of his property” against the state’s “police power under which zoning is done.”\textsuperscript{47} Essentially, the Georgia test balances the benefit to the public against the detriment to the individual.\textsuperscript{48} Like the federal judiciary, Georgia courts generally use a fact-intensive, case-by-case, ad hoc approach to regulatory takings challenges.\textsuperscript{49}

Georgia’s regulatory takings test begins with the presumption that a regulation is valid.\textsuperscript{50} A property owner may then overcome the regulation’s presumptive validity by satisfying the two-part test established in \textit{Gradous v. Richmond County}: (1) “significant detriment” caused by the challenged regulation; and (2) “insubstantial relationship” between the challenged regulation and the public interest.\textsuperscript{51} The \textit{Gradous} test must be satisfied by clear and convincing evidence.\textsuperscript{52}

\textsuperscript{40} Reahard v. Lee County, 968 F.2d 1131, 1133 (1992).
\textsuperscript{41} \textit{Id.} at 1135-1136.
\textsuperscript{42} \textit{Id.} at 1136.
\textsuperscript{43} \textit{Id.} at 1136-1137.
\textsuperscript{44} G.A. CONST. art. 1, Sec. 3, Par. 1 (“. . . private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.”).
\textsuperscript{45} Gradous v. Board of Comm’rs of Richmond County, 256 Ga. 469, 470 (1986) (citing Pope v. City of Atlanta, 242 Ga. 331 (1978)).
\textsuperscript{46} DANIEL F. HINKEL, GEORGIA EMINENT DOMAIN § 8-6 (2008) (“The [Georgia] courts have adopted a balancing test to determine whether a zoning restriction is an unconstitutional taking of property.”).
\textsuperscript{49} Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 323 (1977) (“The validity of each zoning ordinance must be determined on the facts applicable to the particular case . . . .”).
\textsuperscript{50} Holy Cross Lutheran Church, Inc. v. Clayton County, 257 Ga. 21, 21 (1987). “The acts of the governing body of a municipality exercising zoning power will not be disturbed by the courts unless they are clearly arbitrary and unreasonable.” Koppar Corp. v. Griswell, 246 Ga. 539, 539 (1980).
\textsuperscript{51} ROBERT L. ZOECKER, A SUMMARY OF TAKINGS LAW 10 (Georgia Environmental Policy Institute 1997) (citing Gradous v. Richmond County, 256 Ga. 469, 471 (1986) (“The burden is on the plaintiff to come forward with clear and convincing evidence that the zoning presents a significant detriment to the landowner and is insubstantially related to the public health, safety, morality, and welfare.”)). Other Georgia courts have phrased the test slightly differently and required a challenger provide “clear and convincing evidence that he has suffered significant damage such that the property cannot reasonably be used for the purposes designated under the existing zoning, and that there are no significant benefits to the public to justify the restriction.” DANIEL F. HINKEL, GEORGIA EMINENT
If the plaintiff does not meet the initial burden of showing both significant detriment and insubstantial relationship to the public health, safety, morality and welfare, there is no need for the governing authority to present any evidence justifying the zoning. If, however, a challenger sustains his burden under the Gradous test and destroys the presumption of validity, Georgia courts then “balance the economic detriment to the property owner against the public interest advanced by the regulation.” In weighing the landowner and public’s interests, Georgia courts have generally considered five 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.

The challenger need not show his property is completely valueless under the regulation. Alternatively, a diminution in value alone does not result in an unconstitutional deprivation. A challenger must, however, show “the damage to the owner is significant and is not justified by the benefit to the public.” “Only if the regulation is substantially onerous to the claimant and without reasonable relationship to public concerns will it be found to have violated the state constitutional takings clause.”

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53 Gradous v. Board of Comm’rs of Richmond County, 256 Ga. 469, 471 (1986) (“A zoning ordinance is presumptively valid, and this presumption can be rebutted only by clear and convincing evidence.”).
54 ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 10 (Georgia Environmental Policy Institute 1997).
56 Barrett v. Hamby, 235 Ga. 262, 266 (1975) (“Moreover, we specifically rule that for such unlawful confiscation to occur, requiring that the zoning be voided, it is not necessary that the property be totally useless for the purposes classified. It suffices to void it that the damage to the owner is significant and is not justified by the benefit to the public.”) (citations omitted).
57 Brown v. Dougherty County, 250 Ga. 658, 659 (1983) (“However, it is not sufficient to show merely that the property would be more valuable if rezoned.”).
58 Barrett v. Hamby, 235 Ga. 262, 266 (1975). “[I]f the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void.” Id.
59 ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 10 (Georgia Environmental Policy Institute 1997).
2. Successful Environmental Regulation Defenses in Georgia

Two Georgia Supreme Court cases have clearly illustrated regulatory takings challenges to environmental regulation. In each case the environmental regulation was upheld under the Gradous test enumerated above.

a. Parking Association of Georgia v. City of Atlanta

In response to aesthetic and environmental concerns, the City of Atlanta enacted a comprehensive zoning regulation requiring parking lots in certain midtown and downtown zoning districts to have a specified minimal amount of landscaping. An association of parking lot owners claimed the ordinance caused a decrease in their profits due to a reduction in the number of available parking spaces and the costs of compliance. As a result, in 1994 the parking lot association sued the City of Atlanta claiming the ordinance effected an unconstitutional taking.

The Georgia Supreme Court disagreed and held that the parking lot owners failed both prongs of the Gradous test and consequently failed to rebut the regulation’s presumption of validity. First, the court found neither the plaintiff’s compliance costs and monetary loss nor the loss of, at most, 3% of their parking places, constituted a “significant deprivation.” Second, the court found the plaintiffs failed to present clear and convincing evidence the City’s ordinance was unsubstantially related to public health, safety, morality, and welfare. Instead, the court held that the ordinance furthered the public interest in regulating aesthetics, crime, water run-off, temperature, and other environmental concerns. The court, therefore, concluded the ordinance was constitutional and valid.

b. Threatt v. Fulton County

In 1996 a group of Fulton County residents sued the county alleging that provisions of the Metropolitan River Protection Act, requiring a fifty-foot vegetative buffer along the Chattahoochee River and additional impervious surface restrictions in the area, constituted a taking of their property adjoining the river. The Georgia Supreme court rejected the residents’ claims. First, the court found the vegetative buffer requirement and the impervious surface restriction did not destroy all economically viable and beneficial use of the residents’ property. Second, the court referred to Parking Association of Georgia v. City of Atlanta and stated, “[n]or is this a situation in which it can be argued that fairness and justice dictate that the burden imposed by the regulation be borne by the public as a whole.” Consequently, the court found no taking.

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61 Id. at 765.
62 Id. at 764.
63 Id. at 766.
64 Id. at 765.
65 Id.
66 Id.
67 Id. at 766.
68 Threatt v. Fulton County, 266 Ga. 466, 466-468 (1996).
69 Id. at 470 (“[T]here has been no showing that the buffer area or any other applicable regulation has deprived the condemnees of any or all economically viable or beneficial use of their property.”).
70 Id.
3. Recent Developments

The Georgia Supreme Court has not addressed a regulatory takings challenge since the United States Supreme Court decided *Lingle v. Chevron U.S.A. Inc.* The Georgia Supreme Court has, however, recently casted significant doubt on the continued relevance of the “substantiality of a regulation’s public purpose” in Georgia’s regulatory taking analysis.\(^71\) In *Mann v. Georgia Dept. of Corrections*, the Court cited *Lingle v. Chevron U.S.A. Inc.* and noted the United States Supreme Court’s recent explanation that a substantive due process inquiry regarding the legitimacy of the government’s exercise of power through regulation is fundamentally different than a takings clause inquiry which focuses on the magnitude or character of the burden a regulation places upon private property.\(^72\) With *Lingle* as its roadmap, the Georgia Supreme Court is likely to focus its future regulatory takings findings on the economic detriment to the property and not the public interest advanced by the regulation.\(^73\)


\(^{72}\) *Mann v. Georgia Dept. of Corrections*, 282 Ga. 754, 760 n.7 (2007) (“[A] due process inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property “for public use.” It does not bar government from interfering with property rights, but rather requires compensation “in the event of otherwise proper interference amounting to a taking.” Conversely, if a government action is found to be impermissible—for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”) (citations omitted); see also 2 GA. JUR. Property § 19:51 (“The writer believes that the courts are in error in conflating the due process and eminent domain restrictions on the police power in regulatory takings cases.”).

\(^{73}\) *Mann v. Georgia Dept. of Corrections*, 282 Ga. 754, 760 n.7 (2007) (“[T]he focus of the takings analysis is on whether the government act takes property, not on whether the government has a good or bad reason for its action.”). *See also* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 354 (2005-2006).
C. Exactions

A different takings standard applies in the special case of exactions, in which a land use decision conditions approval of development on the dedication of property to a public use.74 Where an exaction is at issue, the United States Supreme Court held in Dolan v. City of Tigard that a “roughly proportional” test is appropriate.75 The “roughly proportional” test “considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts.”76 Under the “roughly proportional” test, “no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”77 The Supreme Court has clearly limited the application of the “roughly proportional” test to the special context of exactions.78

Georgia courts generally require any conditions attached to development permits to “ameliorate” the adverse effects of the development.79 The Georgia “ameliorate” standard is closely related to the Nollan/Dolan test regarding conditions and exactions.80 The only major distinction between the Nollan/Dolan test and the Georgia “ameliorate” standard is that in Georgia the burden is on the property owner, not the government, to show a condition exceeds constitutional limits.81

75 Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (“We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment.”). The Lingle court specifically ruled its holding did not disturb the prior holding in Dolan. Ann K. Wooster, What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases, 10 A.L.R. Fed. 2d 231 (2006). Dolan further added that a “land use regulation does not effect a taking if it ‘substantially advances legitimate state interests’ and does not ‘deny an owner economically viable use of his land.’” Dolan v. City of Tigard, 512 U.S. 374, 385 (1994). Similarly, in Nollan v. CA Coastal Comm’n, 483 U.S. 825 (1987), the court held that conditioning a rebuilding permit for a beachfront lot on the owner’s grant of an easement allowing the public to pass across his beach amounted to an unconstitutional taking. The Nollan court applied the “substantially advances” standard from Agins v. City of Tiburon (“land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘deny[y] an owner economically viable use of his land’”), recognized that many governmental purposes and requirements satisfy this requirement, but found overcoming a perceived psychological barrier to using the beach and preventing beach congestion did not “substantially advance” legitimate state interests. Id. at 834-835, 837. These two cases, combined with Lingle, illustrate that, while the “substantially advances” test may still be relevant in exactions cases, it no longer applies to ordinary takings analysis.
78 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702-703 (1999) (“[W]e have not extended the rough-proportionality test of Dolan beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in Dolan considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development.”) (citations omitted).
79 See Cross v. Hall County, 238 Ga. 709, 713 (1977) (“Generally, such conditions will be upheld when they were imposed pursuant to the police power for the protection or benefit of neighbors to ameliorate the effects of the zoning change.”); Warshaw v. City of Atlanta, 250 Ga. 535, 536 (1983) (“Conditional zoning is permissible in Georgia, and ‘such conditions will be upheld when they were imposed pursuant to the police power for the protection or benefit of neighbors to ameliorate the effects of the zoning change.’”).
80 ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 11 (Georgia Environmental Policy Institute 1997).
81 Id. (citing Cross v. Hall County, 238 Ga. 709 (1977) and Warshaw v. City of Atlanta, 250 Ga. 535 (1983)).
D. Other Regulatory Takings Issues

1. Facial vs. As Applied Takings Claims
In challenging a regulation as an unconstitutional taking, a landowner may make a “facial” or an “as applied” challenge. A facial takings claim alleges the mere enactment of the regulation or statute constituted a taking. An as applied claim contends that the particular impact of a regulation on a specified piece of property requires just compensation. To win a facial challenge the plaintiff must prove the regulation is unconstitutional in all its applications. As applied claims, alternatively, only require the plaintiff to show the provision, applied in their circumstance, amounts to a deprivation of their property.

2. The Whole Parcel Rule
Both federal and Georgia courts have uniformly held that one must look at the parcel “as a whole” in a regulatory takings analysis.

3. Monetary Compensation Rule
When a regulation is found to constitute a taking in federal court, monetary compensation is required for the period from when the regulation was imposed until the regulation was rescinded. Rescission alone is insufficient and “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”

Thus far however, unlike federal courts, Georgia courts have focused on rescinding confiscatory regulations instead of requiring monetary compensation. In Georgia, when a zoning regulation is voided as a regulatory taking, the local governing authority is entitled to a grace period to rezone the property in a constitutionally valid manner. If, however, the local governing authority fails to enact a constitutionally valid zoning ordinance after a reasonable

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82 26 AM. JUR. 2d Eminent Domain § 11 (2008); see also Brubaker Amusement Co., Inc. v. U.S., 304 F.3d 1349, 1357 (Fed. Cir. 2002) (“Unlike the context of a facial challenge, where mere enactment is sufficient to make a claim ripe, the Supreme Court has not held that it is sufficient in the context of an as-applied challenge.”).
83 Id.
84 Brubaker Amusement Co., Inc. v. U.S., 304 F.3d 1349, 1356 (Fed. Cir. 2002) (“[P]laintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications.”).
85 Id. (“[P]laintiffs pursuing an as-applied challenge must show that the provision was applied to them in such a way that deprived them of their property.”).
86 ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 14 (Georgia Environmental Policy Institute 1997).
89 DANIEL F. HINKEL, GEORGIA EMINENT DOMAIN § 8-6 (2008). But see 2 GA. JUR. Property § 19:51 (arguing damages should be available for regulatory takings in Georgia). It should be noted, however, that at least one source indicates that, in light of First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Georgia’s “method of curing unconstitutional zoning may not be an adequate remedy in all cases, and an award of damages may be required in some circumstances.” DANIEL F. HINKEL, GEORGIA EMINENT DOMAIN § 8-6 (2008).
Alternatively, however, at least one other source acknowledges this dissent and insists it is incorrect. See ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 11 (1997) ("Despite claims from some quarters to the contrary, a line of at least three cases, Fulton County v. Wallace (1990), Cobb County v. McColister (1992) and Alexander v. DeKalb County (1994) clearly establish this principle.").
90 See Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 324 (1977); City of Atlanta v. McLenan, 237 Ga. 25, 27 (1976) (“Once the zoning regulations applicable to a particular tract of land have been declared unconstitutional and void by the judiciary, before the judiciary can require further mandatory action, the governing authority must be given a reasonable time for the rezoning of the tract to a use classification that is constitutional . . . .”).
time period, the court may declare the property “unzoned and free from all municipal or county zoning restrictions.”

4. Ripeness

Regulatory takings claims, like all legal actions, must be “ripe” before a federal or state court may adjudicate the matter. Ripeness in regulatory takings claims generally encompasses two steps: (1) a claim is not ripe “until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue”; (2) a claim is not ripe until the property owner has exhausted any federal or state procedure for seeking just compensation. Given the ripeness requirement any challenger must fulfill prior to filing suit, local governments “are well advised to consider authorizing administrative appeals for claimants that allow opportunity to raise and resolve takings claims.”

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91 City of Atlanta v. McLennan, 237 Ga. 25, 27 (1976) (“If the governing authority does not accomplish this purpose within a reasonable time after the current zoning has been declared unconstitutional and void, then the judiciary, as a last resort toward obtaining compliance with its judgment, may declare such tract unzoned and free from all municipal or county zoning restrictions.”); see also Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 324 (1977).

92 See generally Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (“Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.”); Mayor and Aldermen of City of Savannah v. Savannah Cigarette and Amusement Services, Inc., 267 Ga. 173, 174 (1996) (“[U]nless it would be futile to do so, a litigant must first petition the local authorities for relief by rezoning before asking a court of equity to find that a zoning ordinance is unconstitutional as applied.”).

93 Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). Reaching a final decision often involves “requesting variances, appeals, exceptions, waivers, or other local government relief that may be available to the claimant.” ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 6 (Georgia Environmental Policy Institute 1997).

94 Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-195 (1985) (“If the government has provided an adequate process for obtaining compensation, and if resort to that process “yield[s] just compensation,” then the property owner “has no claim against the Government” for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”) (citations omitted). Exhausting procedures for just compensation “often requires a trip through the state court system prior to filing suit in federal court. At a minimum, all state and local mechanisms providing for compensation must be exhausted prior to initiating a suit in federal court.” ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 6 (1997).

95 ROBERT L. ZOECKLER, A SUMMARY OF TAKINGS LAW 15 (Georgia Environmental Policy Institute 1997) “These administrative procedures can act as a regulatory takings safety valve, and often minimize time and effort by both the property owner and the regulator. ld.