



The Legis Report

Summer 2006

Analysis of Regulatory Issues in Property Development Projects

On October 24, 2005, the Supreme Court of Georgia released its decision on the case of Legacy Investment Group, LLC v. Kenn et al. The facts and subject matter of the case fall within the broad area of land use planning. Specifically, this case highlights the risk inherent in acquiring property in anticipation of rezoning. While the legal aspects of the case are not the focus of this article, presenting some of the procedural facts and standards of the case that do not require interpretation may provide some context. The primary purpose of this brief case study is to illustrate the importance of legal analysis of regulatory and compliance issues in the formation of a property development deal.

Facts

Legacy Investment Group, LLC (Legacy) purchased a parcel of property from Emmanuel Ministries on January 24, 2004. The agreement to purchase, executed on January 27, 2003, was for 41 acres of land in south Fulton County, Georgia for \$12,195 per acre. Legacy anticipated development of the property for single-family residential use.

At the time Legacy entered into the agreement to purchase, the property was zoned AG-1, agricultural. In Fulton County, this classification permits one residence to be built on one acre of land. Soon after entering into the purchase agreement, Legacy and Emmanuel Ministries applied to the Fulton County Department of Environment and Community Development to rezone the property. Legacy was planning to build two residences on one acre of land instead of one residence per acre. This requires Community Unit Plan (CUP) zoning.

Although the Legacy application was approved at lower government levels, it was denied by the Fulton County Board of Commissioners. Subsequently, Legacy filed this lawsuit in Fulton Superior Court on June 3, 2003.

Experts

Legacy and Fulton County filed cross-motions for summary judgment. Testimony was presented by experts for both parties. Experts for Fulton County were Fred Fisher, an engineer and Dennis Carr, an appraiser for Fulton County. Legacy utilized experts Robert Hughes, a land planner and Frederic Minnich, a licensed real estate appraiser and broker.

Fulton County

In the opinion of Mr. Fisher, for Fulton County, the existing AG-1 zoning would allow for development of the property with a maximum of 34 residential lots possible. Mr. Fisher estimated the cost to Legacy for developing the lots would be \$27,658 per lot.

In Mr. Carr's opinion, Legacy would have had to purchase the property for \$5,838 per acre for development to be profitable.

Legacy

Mr. Hughes, for Legacy, testified that Legacy's plan for development of the property represented the most appropriate use of the land when compared with use of surrounding land and with Fulton County's development plan.

Mr. Minnich testified that the property would be valued at \$15,000 to \$16,000 per acre if Fulton County approved rezoning to CUP, which would allow 2 residential units per acre.

Analysis

Fulton County brought the motion for summary judgment in Fulton Superior Court. As the moving party, the burden was on Fulton County to demonstrate to the court, under the legal standards, that the motion should be granted. The Superior Court ruled that Legacy had not proven that the present zoning caused it a significant detriment or that the present zoning was insubstantially related to public health, safety, and welfare. Legacy appealed the ruling.

Chief Justice Leah Sears, writing for the Supreme Court of Georgia, set out the standard for review of this case:

"In reviewing the trial court's grant of summary judgment to Fulton County, we must construe the evidence most favorably to Legacy, and we must give Legacy the benefit of all reasonable doubts and possible inferences. And, where, as here, the moving party (Fulton County) is the defendant, it need only show an absence of evidence to support an essential element of Legacy's case to prevail on summary judgment."

Note: Footnotes omitted

The appeal to this court stemmed from a lower court ruling on a motion for summary judgment. As a result, the court's analysis is focused on whether a factual issue exists regarding the economic viability of the property under the current zoning. Analysis of the economic viability of the property relates to whether the existing zoning is significantly detrimental to Legacy. Case law referenced by the court established that, "Evidence that property cannot be feasibly developed under its existing zoning supports finding that existing zoning imposes a significant detriment on the owner."

Therefore, the court reasoned, if an issue of fact exists as to the economic viability of the property under current zoning, then an issue of fact exists as to whether the current zoning imposes a significant detriment to Legacy. The court determined that the evidence inferred that Legacy could not feasibly develop the property under the current zoning, and the lower court ruling granting Fulton County's motion for summary judgment was reversed.

CONCLUSION

Further testimony from Frederic Minnich for Legacy clearly illuminates the potential risk in the transaction. Mr. Minnich testified that Legacy purchased the property for \$5,000 more per acre than his appraisal. Although one of Legacy's managing members testified that the property was purchased for the best price possible, it appears likely that both buyer and seller anticipated that the property would be rezoned to allow higher density development. Although we may assume that Legacy's attorneys participated in the original analysis of the deal and the purchase contract anticipated a problem with rezoning the property, that information is not provided in this case.

It seems unlikely that Legacy included the cost of appealing the rezoning issue to the Supreme Court of Georgia in its original financial analysis of this project. It is possible to view the legal costs in this case as insubstantial when compared with the potential profit in the project. However, that view does not eliminate those costs as financial risk exposure. Finally, this case is instructional in that it demonstrates one aspect of the need to include legal analysis of regulatory and compliance issues in the formation of a property development deal. A firmer grip on these issues should facilitate better financial analysis and give an indication of whether an important regulatory issue could end up in the Supreme Court of Georgia.

Special thanks to David J. Sergio, Sergio & Associates, P.C., for his editorial contributions to the Summer 2006 *Legis Report*.

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Legis has recently welcomed new associate, Zanthé Ferris, into its office. Upon receiving a bachelor's degree from Tulane University, Ms. Ferris was employed by two law firms located in Atlanta. She specialized in interpretation and organization of client documents related to technical, legal and financial issues, and she participated in the startup and marketing of a successful law firm. Ms. Ferris will be working at Legis in the areas of technical writing, document interpretation and legal and financial research.



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