



Board of Zoning Appeals Meeting August 18, 2020

CASE NUMBER:	V-20-002
PROPERTY LOCATION:	0 McGinnis Ferry Road, Johns Creek, GA 30097
CURRENT ZONING:	C-1 (Community Business District) Conditional
PARCEL SIZE:	1.08 Acres
PROPERTY OWNER:	JC Land Investment, LLC
PETITIONER:	Blanchard Real Estate
VARIANCE REQUEST:	Appeal of the Community Development Director's interpretation rejecting submittal of a Land Disturbance Permit without pursuing a rezoning.

Variance Request

Blanchard Real Estate (the “**Applicant**”) is appealing the Community Development Director’s (the “**Director’s**”) interpretation that the property at 0 McGinnis Ferry Road (Parcel ID #11 106003800242), located at the southeast quadrant of McGinnis Ferry Road and Medlock Bridge Road (the “**Property**”), may not be permitted for commercial development without first seeking a rezoning, due to existing conditions on the site pursuant to Z-90-037 and modification cases, M-91-023, M-92-030, M-95-052 and concurrent variance, V-95-184. The Applicant contends the Fulton County conditions existing on the Property are not applicable and are able to proceed with a commercial development on the site as a use-by-right of the C-1 zoning district.

Background Concerning Appeal

On May 19, 2020, the Applicant’s engineering firm, Haines Gipson & Associates (“**HGA**”) requested a land disturbance permit (LDP) pre-application meeting with the City of Johns Creek (the “**City**”). The City informed HGA that the proposed development is not compliant with the zoning conditions and that a rezoning is required to change the zoning conditions prior to LDP submittal. On May 28, 2020, the City received an email (*Exhibit 1*) from the Applicant requesting a formal interpretation of the zoning conditions, and in response, the City sent a formal interpretation letter (*Exhibit 2*) on May 29, 2020.

On June 9, 2020, the Applicant submitted a LDP application to the City, along with plans and a hydrology study. The Director rejected the application and referred to the interpretation letter as support for the rejection (*Exhibit 3*).

Director's Zoning Condition Interpretation

The Property was zoned C-1 (Community Business District) Conditional pursuant to Fulton County Zoning Case Z-90-037 and subsequently modified by M-91-023, M-92-030, M-95-052, and V-95-184.

The latest rezoning action for the Property took place on October 18, 1995, wherein the Fulton County Board of Commissioners approved Zoning Modification, M-95-052, and Concurrent Variance, V-95-184 (*Exhibit 4*). According to the approved zoning conditions, specifically condition 2.a., the granting of the rezoning modification was predicated on adherence “[t]o the Site Plan received by the Development Services Department on September 27, 1995 pursuant to 95ZM-052 NFC pertaining to 1.0776 acres on the northwest corner of the site.”



Additionally, conditions 3.a. and 3.b. granted a concurrent variance for landscape strip reductions on the Property based on the tract being “developed as a park as shown on the site plan referenced in condition 2.a. pursuant to 95ZM-052 NFC.”

The site plan referenced in the zoning conditions shows a park planted with 15 large trees and shrubs with a curved sidewalk to meet the tree density requirement at that time, as well as to provide for passive recreational use (*Exhibit 5*).

Applicable Code Requirements

All applicable code sections of the Zoning Ordinance are excerpted below for reference.

Article XXVI. Interpretation, Conflict and Enforcement; Section 26.1 Interpretation.

The Director of the Community Development Department shall interpret the provisions to this Ordinance, and may utilize opinions of the City Attorney and others in arriving at interpretations. Appeals from an interpretation of the Director of the Community Development Department shall be in accordance with the provisions of Article XXII.

Article XXII. Appeals; Section 22.2.2.B. Board of Zoning Appeals (BZA).

The Board of Zoning Appeals (BZA) shall have the following powers and duties under the provisions of this Zoning Ordinance: “[t]o hear and decide appeals from the interpretation of any of the provisions of this Ordinance by the Director of the Department of Community Development in accordance with Section 22.2.3.F”

To sustain an appeal, the BZA must expressly find that the Director’s action was based on erroneous finding of a material fact or the Director acted in an arbitrary manner. The BZA may reverse or affirm, wholly or partly an order, requirement, or decision; or present a clarifying interpretation according to Section 22.13.11 of the City’s Zoning Ordinance.

Staff Analysis

Prior to the incorporation of Johns Creek, Fulton County conditioned the subject property through rezoning on being “*developed as a park*” as shown on the site plan referenced in condition 2.a. pursuant to 95ZM-052 NFC.” The rezoning of the subject property included specific language requiring the applicant to abide by the particular uses specified in the site plan. Fulton County was authorized to impose the park condition on the subject property according to its Zoning Resolution which allowed General Amendments to the Zoning Resolution by the imposition of “conditions of approval as deemed necessary and appropriate to mitigate potentially adverse influences or otherwise promote the public health, safety or general welfare.” In other words, the conditional rezoning of the subject property *became an amendment* to Fulton County Zoning Resolution as of 1995.

Upon incorporation, the City of Johns Creek in 2007 adopted “[t]he Fulton County Zoning Resolution . . . *in its entirety* as the City of Johns Creek Zoning Ordinance.” In 2007, the Fulton County Zoning Resolution, adopted *in its entirety* by the City of Johns Creek included the amendment made by Fulton County in approving a rezoning for the subject property conditioning its use to the park use shown on the site plan. Further supported by the adopting ordinance which states in Section 3.2.(e) “Section 4.30.3 of the Fulton County Zoning Resolution reference to Fulton County zoning maps shall be amended to refer to Johns Creek zoning maps with Fulton County zoning index maps 3, 9, 10, 11 and 12 (*Exhibit 6*). There is nothing in the 2007 Johns Creek Zoning Ordinance that specifically repeals any amendments to the Fulton County Zoning Resolution made before 2007 including the general amendment that imposed the park condition on the subject property. Moreover, the 2007 Johns Creek Zoning Ordinances (*Exhibit 7*) provides for the continuation of conditional zoning in all districts - including the C-1 district, per Section 28.5.1: “Each zoning district shall have a designation thereunder to be known as Conditional for that district.”

In 2010, the City of Johns Creek organized its codes by moving its Zoning Ordinance from a standalone ordinance to part of its comprehensive Code of Ordinances. And like the 2007 Johns Creek Zoning Ordinance, the 2010 Johns Creek Zoning Ordinance: (1) did not include any provision that specifically repealed any amendments to the Fulton County Zoning Resolution, and (2) included the same Section 28.5.1 which provides that “[e]ach zoning district shall have a designation thereunder to be known as Conditional for that district” (*Exhibit 8*).

Fulton County properly adopted the conditional rezoning of the subject project as an amendment to its Zoning Resolution. The City of Johns Creek through action by its Mayor and Council adopted Fulton County’s entire Zoning Resolution – including the amendment imposing the conditional rezoning on the subject property. At no time after the adoption of the Fulton County Zoning Resolution in its entirety did the City of Johns Creek adopt any provision specifically eliminating the park use condition from the subject property.

The conditional rezoning of the subject property by Fulton County meets the test referenced by the applicant. There has been no evidence or argument that Fulton County failed to sufficiently identify the site plan showing a park use with certainty, failed to make the site plan public, failed to make it accessible, or failed to give notice of its accessibility. Fulton County properly adopted the conditional rezoning of the subject property which became a general amendment to its Zoning Resolution which the City of Johns Creek adopted in its entirety in 2007. And in 2010 the City of Johns Creek took no action to repeal the specific park use condition adopted in 2007. The City of Johns Creek has never taken action to specifically repeal the conditions imposed on the subject property.

The City of Johns Creek is not required by law to keep adopting the conditional rezoning of the subject property over and over again. It is a generally understood that variances to zoning run with the land and are not undone by a change in governing authority or owner. The City of Johns Creek incorporated the conditional rezoning of the subject property once and for all in 2007. It was accomplished with the adoption of the Fulton County

Zoning Resolution in its entirety – amendments and all. And since that time, the City of Johns Creek has done nothing to remove the particular conditional rezoning of the subject property. Therefore, the City of Johns Creek is not required to issue a land disturbance permit for construction of a land use other than a park.

Staff Recommendation

Staff recommends the Board of Zoning Appeals affirm the interpretation made by the Director in his letter dated May 29, 2020.

Staff Exhibits

- Exhibit 1 – Applicant email requesting interpretation
- Exhibit 2 – Interpretation letter dated May 29, 2020
- Exhibit 3 – Email from Department rejecting LDP submittal
- Exhibit 4 – Zoning certification letter for subject property
- Exhibit 5 – Zoning site plan for M-95-052 and VC-95-184
- Exhibit 6 – Certified copy of ordinance adopting Fulton County Zoning Resolution
- Exhibit 7 – Certified copy of ordinance adopting Johns Creek Zoning Ordinance adopted January 2, 2007 and further amended January 26, 2007
- Exhibit 8 – Certified copy of 2010 codified Johns Creek Zoning Ordinance