

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

Civil Action # 14CU3279-7

City of Brookhaven, Georgia
Cross-Petitioner-in-Certiorari

Plaintiff

VS

v. City of Brookhaven Zoning Board
of Appeals: Hope Bawcom, Jed
Beardsley, Don Balia, Kent Gibson,
Tim Ivama, Corey Self, and
Glenn Viers (Respondents)

Todd Fisher, Joyce
Behrmann, Larry Cook,
Todd Varino + Maxine Robinson
Defendant

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to file with the Clerk of said court and serve upon the Plaintiff's attorney, whose name and address is:

Thompson Kurrie, Jr
Emily Machoski - Preston
3475 Lenox Road, Suite 400
Atlanta, GA 30326

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, or if service by publication within 60 days of judges order of publication, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 15th day of March, 2014.

Debra DeBerry
Clerk of Superior Court

By: John Bender
Deputy Clerk

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CITY OF BROOKHAVEN, GEORGIA,)

Cross-Petitioner-in-Certiorari)

v.)

CITY OF BROOKHAVEN ZONING BOARD)
OF APPEALS: HOPE BAWCOM, JED)
BEARDSLEY, DON BOLIA, KENT GIPSON,)
TIM NAMA, COREY SELF, and)
GLENN VIERS.)

Respondent In Certiorari;)

v.)

TODD FISHER, JOYCE GEHRMANN,)
LARRY COOK, TODD VARINO, and)
MAXINE ROBINSON.)

Defendants.)

CIVIL ACTION FILE

NO. 14 CV 3279-7

CROSS-PETITION FOR CERTIORARI
TO THE SUPERIOR COURT OF DEKALB COUNTY

COMES NOW, Cross-Petitioner the CITY OF BROOKHAVEN, GEORGIA (hereinafter referred to as "the City," "the City of Brookhaven," or "Cross-Petitioner"), and hereby submits its Cross-Petition for Writ of Certiorari, petitioning this court pursuant to Section 27-921 of the City of Brookhaven, Georgia's Code of Ordinances and pursuant to O.C.G.A. § 5-4-3 for review of the February 19, 2013 decision of the City of Brookhaven Zoning Board of Appeals in ZBA14-04 for the following reasons:

1.

The City is a municipal government incorporated within the limits of DeKalb County, Georgia. The City is an aggrieved party from the February 19, 2013 decision of the City of Brookhaven Zoning Board of Appeals in ZBA14-04.

2.

Defendant Todd Fisher is a resident of Brookhaven, Georgia, and can be served with process at 2791 Ashford Road, Brookhaven, GA or through his counsel of record, Linda Dunlavy, Dunlavy Law Group, LLC, pursuant to O.C.G.A. § 5-4-6.

3.

Defendant Joyce Gehrman is a resident of Brookhaven, Georgia, and can be served with process at 2805 Ashford Road, Brookhaven, GA or through her counsel of record, Linda Dunlavy, Dunlavy Law Group, LLC, pursuant to O.C.G.A. § 5-4-6.

4.

Defendant Larry Cook is a resident of Brookhaven, Georgia, and can be served with process at 2799 Ashford Road, Brookhaven, GA or through his counsel of record, Linda Dunlavy, Dunlavy Law Group, LLC, pursuant to O.C.G.A. § 5-4-6.

5.

Defendant Todd Varino is a resident of Brookhaven, Georgia, and can be served with process at 2791 Ashford Road, Brookhaven, Georgia or through his counsel of record, Linda Dunlavy, Dunlavy Law Group, LLC, pursuant to O.C.G.A. § 5-4-6.

6.

Defendant Maxine Robinson is a resident of Brookhaven, Georgia, and can be served with process at 2794 Ashford Road, Brookhaven, Georgia or through her counsel of record, Linda Dunlavy, Dunlavy Law Group, LLC, pursuant to O.C.G.A. § 5-4-6.

7.

This court has jurisdiction over this appeal pursuant to Section 27-921 of the City of Brookhaven, Georgia's Code of Ordinances and O.C.G.A. § 5-4-3, and venue is proper.

8.

This appeal is filed within thirty days of the decision of the February 19, 2013 decision of the City of Brookhaven Zoning Board of Appeals in ZBA14-04, and is therefore timely.

FACTS

9.

On January 15, 2013, the City adopted a zoning ordinance as Chapter 27 to the City of Brookhaven's Code of Ordinances (hereinafter referred to as the "zoning ordinance") and a zoning map. The zoning ordinance incorporated the zoning map for the City of Brookhaven by reference and by attachment. The zoning map adopted was obtained from DeKalb County.

10.

Defendants are allegedly neighbors of 2802 Ashford Road, Brookhaven, Georgia (hereinafter referred to as "2802 Ashford Road").

11.

On July 15, 2013, a building permit was issued and posted at the property located at 2802 Ashford Road in accordance with Section 27-960 of the City of Brookhaven's Code of Ordinances.

12.

According to Section 27-960 of the City of Brookhaven's Code of Ordinances, all applications for a building permit must include site plans indicating the setback lines applicable to the property. The plans are reviewed by the City staff as part of the permitting process. Before a permit is issued, the property must be in compliance with all setback and zoning requirements.

13.

Therefore, the City determined 2802 Ashford Road met all setback requirements on July 15, 2013.

14.

No appeal was filed from the issuance of the building permit.

15.

Instead, substantial construction began at 2802 Ashford Road.

16.

In November of 2013, the City received complaints from Defendants Todd Fisher, Joyce Gehrmann, Larry Cook, Todd Varino, and Maxine Robinson (hereinafter collectively referred to as the "Applicants"), alleging the structure on 2802 Ashford Road violated the average setback requirements under Section 27-788(a) of the City of Brookhaven Code of Ordinances.

17.

During the November 12, 2013 City Council regular meeting, several of the Applicants were informed that the proper remedy for making a complaint about the issuance of a building permit was filing an appeal to the ZBA.

18.

Notwithstanding, in an effort to be responsive to its citizens, the City's staff conducted an investigation into 2802 Ashford Road.

19.

On November 15, 2013, a stop work order was placed on 2802 Ashford Road, Brookhaven, Georgia, alleging a violation of the average setback requirements under Section 27-788(a) and a violation of the side yard setbacks for retaining walls.

20.

After further investigation, it was determined that the average set back requirement did not apply to 2802 Ashford Road and the Community Development Director of the City of Brookhaven's lifted the stop work order based on the violation of the average setback requirement.

21.

Section 27-788(a) of the City of Brookhaven's Code of Ordinances states:

"The following regulations shall apply relating to yard requirements:

(a) *Average setback.* When a lot (or lots) is (are) located within a block where sixty (60) percent or more of the lots within said block have been developed, and where there are existing buildings fronting on the same street and within the same zoning district within seventy-five (75) feet of the side lot lines of such vacant lot (or lots), then set back averaging shall be required. The minimum required building set back line for said vacant lot (or lots) shall be determined by averaging the existing building setbacks of buildings within seventy-five (75) feet of the side lot lines of such vacant lot (or lots). The

minimum setback for additions to existing structures may be the average of the existing setbacks.” (*emphasis added*).

22.

According to the City’s zoning map, the property located at 2802 Ashford Road, Brookhaven, Georgia, is zoned R-100. However, the neighboring property, 2808 Ashford Road, Brookhaven, Georgia, is zoned R-85. Since there are not two existing buildings “within the same zoning district,” setback averaging does not apply.

23.

On December 17, 2013, The Dunlavy Law Group, on behalf of the Applicants, filed an application for an appeal from the Community Development Director of the City of Brookhaven’s decision to lift a stop work order on 2802 Ashford Road with the City of Brookhaven Zoning Board of Appeals (hereinafter referred to as “ZBA”).

24.

In the application, the Applicants alleged the Community Development Director of the City of Brookhaven (hereinafter referred to as the “Community Development Director”) acted arbitrarily because the Community Development Director’s decision to lift the stop work order was based on the City’s zoning map, which was adopted by the City on January 15, 2013.

25.

The Applicants alleged the City’s zoning map was not validly adopted in accordance with Georgia’s Zoning procedure laws. Therefore, according to Applicants, the Community Development Director was required to use DeKalb County’s zoning map and her failure to do so was arbitrary and a mistake of fact.

26.

The Applicants further alleged that 2808 Ashford Road, Brookhaven, Georgia, was zoned R-100 under unincorporated DeKalb County and alleged 2808 Ashford Road was improperly rezoned R-85 when the City's zoning map was adopted on January 15, 2013.

27.

In their appeal, the Applicants requested the ZBA to reverse the lifting of the stop work order. In order to reverse the stop work order, the ZBA must:

- a) declare the City's zoning ordinance and zoning map invalid;
- b) reverse the alleged rezoning of 2808 Ashford Road, Brookhaven, Georgia, the neighboring property; and
- c) apply DeKalb County's zoning maps to the City of Brookhaven.

28.

The City objected to the Applicants' appeal for the following reasons:

- a) The ZBA does not have the authority to declare the zoning ordinance or the zoning map adopted by the City invalid;
- b) The Applicants' appeal was a challenge to the issuance of the building permit on July 15, 2013 and was therefore untimely;
- c) The Applicants' challenge to the alleged re-zoning of the neighboring property, 2808 Ashford Road, Brookhaven, Georgia on January 15, 2013 was untimely;
- d) The Applicants' were barred from filing the appeal by the doctrine of laches since the Applicants waited until December 17, 2013 to file an appeal;
- e) The Applicants did not allege or prove standing to file an appeal;

- f) The City's interpretation of Section 27-788(a) was correct; and
- g) The City's zoning map and zoning ordinance was enacted in accordance with Georgia law.

29.

The City requested the ZBA to refrain from ruling on the Applicants' appeal and instead asked the ZBA to dismiss or deny the appeal.

30.

On February 19, 2013, a public hearing was held in front of the ZBA on ZBA14-04, the Applicant's appeal from an administrative decision to remove a stop work order.

31.

After a public hearing, the ZBA made two motions each of which were seconded, the first to approve the Applicant's appeal which resulted in a 3-3 tie and thereafter a second motion to deny the Applicant's appeal which too resulted in a 3-3 tie.

ALLEGED ERRORS

32.

The ZBA acted beyond the scope of its discretionary powers, abused its discretionary powers, and/or acted in an arbitrary and capricious manner to the extent it refused to refrain from ruling on the Applicant's appeal. The crux of the Applicants' appeal is the invalidity of the City's zoning map and zoning ordinance. However, the ZBA does not have the authority to declare the zoning ordinance or the zoning map adopted by the City invalid.

33.

The ZBA acted beyond the scope of its discretionary powers, abused its discretionary powers, and/or acted in an arbitrary and capricious manner erred by failing to accept the City's interpretation of Section 27-788(a). Under the plain language of Section 27-788, there must be existing buildings for Section 27-788(a) to apply.

34.

The ZBA erred by acting beyond the scope of its discretionary powers, abused its discretionary powers, and/or acted in an arbitrary and capricious manner by refusing to dismiss the Applicants' appeal for the following reasons:

- a) The Applicants' appeal was a challenge to the issuance of the building permit on July 15, 2013 and was therefore untimely;
- b) The Applicants' challenge to the alleged re-zoning of the neighboring property, 2808 Ashford Road, Brookhaven, Georgia on January 15, 2013 was untimely;
- c) The Applicants' were barred from filing the appeal by the doctrine of laches since the Applicants waited until December 17, 2013 to file an appeal;
- d) The Applicants did not allege or prove standing to file an appeal;
- e) The City's interpretation of Section 27-788(a) was correct; and
- f) The City's zoning map and zoning ordinance was enacted in accordance with Georgia law.

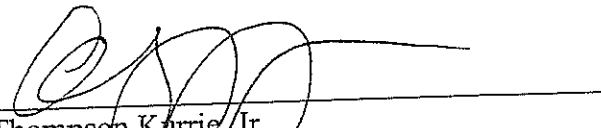
WHEREFORE, Cross-Petitioner respectfully prays the court to:

- a) Issue a summons to the Defendants;

- b) Direct the clerk to issue a Writ of Certiorari to the Respondents directing them to send the record of the February 19, 2013 public hearing on administrative appeal ZBA14-04 to the Superior Court of DeKalb County;
- c) Review the decision of the City of Brookhaven Zoning Board of Appeals; and
- d) Order any other relief deemed necessary by the Court.

Respectfully submitted this 21st day of March, 2014.

COLEMAN TALLEY LLP



Thompson Kurrie, Jr.
Georgia Bar No. 430475
Emily E. Macheski-Preston
Georgia Bar No. 641429
Attorneys for the City of Brookhaven, Georgia

3475 Lenox Road, NE Suite 400
Atlanta, Georgia 30326
(229) 242-7562
www.colemantalley.com

2014 MAR 21 AM 11:21
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

FILED

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CITY OF BROOKHAVEN, GEORGIA,)
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LARRY COOK, TODD VARINO, and)
MAXINE ROBINSON.)
)
Defendants.)

CIVIL ACTION FILE

NO. 14 CU 3279-7

**CERTIFICATE OF SERVICE OF
CERTIORARI PETITION AND WRIT**

This is to certify that, in accordance with O.C.G.A. § 5-4-6(b), the following filings in the above-referenced matter were served on Respondent and Defendants: (a) Writ of Certiorari, (b) Order Sanctioning Writ of Certiorari, (c) Petition for Writ of Certiorari (d) Certiorari Bond, (e) Certificate of Payment of Costs and (f) summons.

These filings were served on Respondents on March 21, 2014 by personally delivering a copy upon the following:

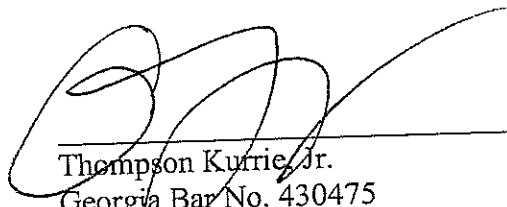
Respondent City of Brookhaven Zoning Board of Appeals
c/o Secretary of the City of Brookhaven Zoning Board of Appeals
Susan Cannon

These filings were served upon counsel for Defendants Todd Fisher, Joyce Gehrman,
Larry Cook, Todd Varino, and Maxine Robinson by first class U.S. Mail, postage prepaid,
addressed to the following:

Linda Dunlavy, Dunlavy Law Group, LLC
1026 B. Atlanta Avenue
Decatur, GA 30030

This the 21st day of March, 2014.

COLEMAN TALLEY LLP



Thompson Kurrie, Jr.
Georgia Bar No. 430475
Emily Macheski-Preston
Georgia Bar No. 641429

3475 Lenox Road, NE Suite 400
Atlanta, Georgia 30326
770-698-9556
www.colemantalley.com

Respectfully submitted this 21st day of March, 2014.

2014 MAR 21 AM 11:22
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

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CIVIL ACTION FILE
NO. 14 CU3279-7

WRIT OF CERTIORARI

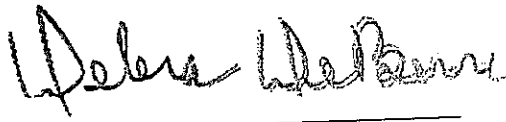
To the City of Brookhaven Zoning Board of Appeals members:

WHEREAS, Cross-Petitioner alleges by this petition of certiorari that on February 19, 2014, an appeal was heard which aggrieved the Cross-Petitioner, and whereas, Cross-Petitioner has complied with the requirements for the application for a certiorari under the circumstances,

NOW, THEREFORE, YOU ARE HEARBY NOTIFIED AND REQUIRED to certify and send up to the Superior Court, to be held in and for said county, 30 days after date of service, under your hand and seal, all the facts and proceedings in this case, in your court aforesaid.

Witness, this Honorable _____ Judge of said Court.

This the 21st day of March, 2014.



Deputy Clerk, Superior Court
DeKalb County, Georgia

Prepared by:
Emily E. Macheski-Preston
Attorney for Cross-Petitioner
Georgia Bar No. 641429
3475 Lenox Road, NE
Suite 400
Atlanta, GA 30326
(770) 698- 9729 (facsimile)
(770) 698-9556 (telephone)

CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

2014 MAR 21 AM 11:24

FILED

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CITY OF BROOKHAVEN, GEORGIA,)
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TIM NAMA, COREY SELF, and)
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)
Respondent In Certiorari.)

CIVIL ACTION FILE

NO. 14 CU 3279-7

CERTIORARI BOND

KNOW ALL PERSONS AND PARTIES BY THESE PRESENTS that the City of Brookhaven, Georgia, is exempt from the requirements of the bond as a municipality incorporated under the laws of the State of Georgia; However, to the extent the City of Brookhaven may be obligated under law or bound to pay any future costs under the law in the case above involving the City of Brookhaven Zoning Board of Appeals' February 19, 2014 review of the appeal from an administrative official decision regarding the property located at 2802 Ashford Road, Brookhaven, Georgia, the City of Brookhaven offers this bond under oath. The condition of this obligation is such that said counsel is filing a Cross-Petition for Writ of Certiorari and Complaint in the Superior Court of DeKalb County, Georgia, as styled above, on behalf of Petitioners in Certiorari resulting from the decision of the City of Brookhaven Zoning Board of Appeals on February 19, 2014, with which the Cross-Petitioners are dissatisfied. Now, therefore, should said Cross-Petitioners promptly pay all future costs in said matter as may be required by law, then this certiorari bond shall be void; otherwise of full force and effect.

APPROVED BY:



CHAIRMAN OF ZONING BOARD
OF APPEALS---ON BEHALF OF
ZONING BOARD OF APPEALS

(signatures of principals and surety on following page)

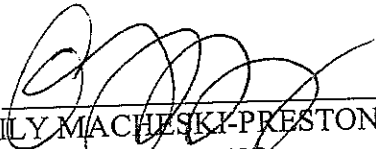
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CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

FILED

Witness the hand and seal of each party this 1st day of March, 2014.

PRINCIPAL/SURETY

CITY OF BROOKHAVEN:

BY: 
EMILY MACHLESKI-PRESTON
Ga. Bar Number 641429
THOMPSON KURRIE, JR., CITY ATTORNEY
Attorneys for the City of Brookhaven, Georgia
COLEMAN TALLEY LLP
3475 Lenox Road N.E.
Suite 400
Atlanta, GA 30326

FILED
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CLERK OF SUPERIOR COURT
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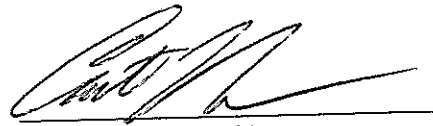
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Respondent In Certiorari.)
)
_____)

CIVIL ACTION FILE
NO. 14 CU 3279-7

CERTIFICATE CERTIFYING PAYMENT OF COSTS

I, **TIM NAMA** , acting in my capacity as Chairman of the City of Brookhaven Zoning Board of Appeals, hereby certify that said Board heard the City of Brookhaven, Georgia's request to refrain from ruling on the appeal of an administrative decision (ZBA 14-04) filed by Dunlavy Law Group, LLC, on behalf of Maxine Robinson, Todd Varino, Joyce Gehrman, and Todd Fisher, concerning property located at 2802 Ashford Road, Brookhaven, Georgia, on February 19, 2014, and that a final decision on said appeal was rendered by the Board on that same day and that no costs which have accrued in connection with the referenced hearing.



BY: **TIM NAMA**
TITLE: Chairman, City of Brookhaven
Zoning Board of Appeals
On behalf of the Zoning Board of Appeals

FILED
MAR 21 AM 11:22
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

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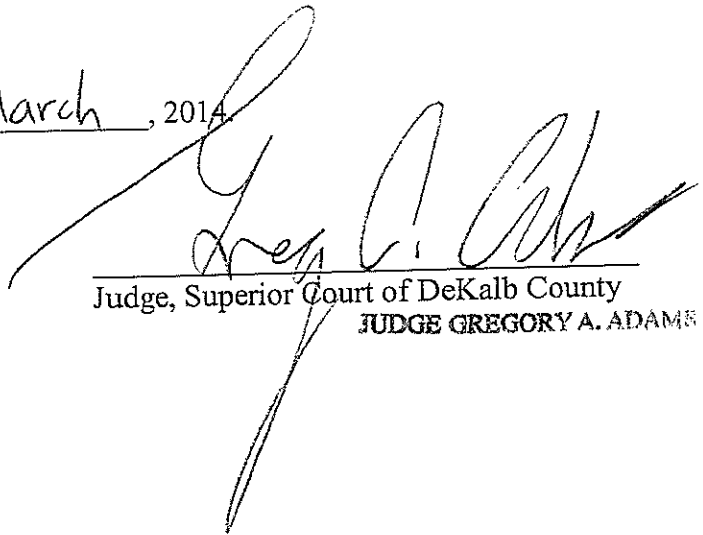
CIVIL ACTION FILE
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ORDER SANCTIONING PETITION FOR CERTIORARI AND DIRECTING SERVICE

The foregoing cross-petition for certiorari having been presented to me, the same is upon consideration thereof sanctioned. It is ordered that a writ of certiorari issue in accordance with law. The petition for certiorari proceedings shall be filed in the Clerk's office within a reasonable time after sanction thereof, and shall be served on the Respondent within five (5) days after such filing, by the Sheriff or his Deputy, or by the Cross-Petitioner or its attorney. A copy of the petition and writ shall also be served on the opposite party or his counsel or other legal representative, in person or by mail, and service shown by acknowledgment, or by a certificate of the counsel or person perfection such service. In addition, the petition and writ shall be served by the clerk on the secretary of the Board of Zoning Adjustment for the City of Atlanta. The

Respondent is directed to answer the writ of certiorari herein granted within thirty (30) days after service of such petition and writ upon the Respondent, in accordance with O.C.G.A. Section 5-4-6, as amended.

This the 24 day of March, 2014.



Judge, Superior Court of DeKalb County
JUDGE GREGORY A. ADAMS

Presented by:
Emily E. Macheski-Preston
Attorney for Cross-Petitioner
Georgia Bar No. 641429
3475 Lenox Road, NE
Suite 400
Atlanta, GA 30326
(770) 698- 9729 (facsimile)
(770) 698-9556 (telephone)

2014 MAR 21 AM 11:23
CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

FILED