

IN THE SUPERIOR COURT OF CLAYTON COUNTY
 STATE OF GEORGIA

KHALILAH FEW and CREATIVE CROWNS
 COLLECTIVE, INC.,

Plaintiffs/Petitioners,

v.

CLAYTON COUNTY, GEORGIA,

Defendant/Respondent.

CIVIL ACTION FILE
 NO. 2025CV03078-09

*On appeal from Clayton County
 BOC Case No. BOC-2505-0500*

CLAYTON COUNTY, GEORGIA’S MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW Defendant/Respondent Clayton County, Georgia (the “County”) and files this motion to dismiss Plaintiffs/Petitioners’ *Verified Complaint for Declaratory Judgment, Injunctive Relief, and Attorneys’ Fees or, in the Alternative, Petition for Review to Superior Court* (“Petition”) because this Court lacks subject matter jurisdiction to consider the petition for review filed by Plaintiffs/Petitioners Khalilah Few and Creative Crowns Collective, Inc. (collectively, “Petitioners”) and because Petitioners did not raise any constitutional objections before the Clayton County Board of Commissioners.

I. STATEMENT OF RELEVANT FACTS

Petitioner Khalilah Few submitted a conditional use permit application (“Application”) to the County seeking permission to use the property located at 9526 South Main Street, Jonesboro, Georgia 30236 (“Property”) as a barber shop/beauty salon. See Petition, ¶ 28; Ex. 1 to the Petition at p. 1. The Clayton County Board of Commissioners (“Board”) held a hearing on the Application on July 15, 2025. See Petition, ¶ 40. The record¹ is devoid of any constitutional objections raised by

¹ The record of the proceedings before the Board will be filed separately.

Petitioners before or during the hearing. At the hearing, the Board denied the Application. See Petition, ¶¶ 40-42.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Standard on Motion to Dismiss

In deciding a motion to dismiss, all pleadings are to be construed most favorably to the plaintiff, and all doubts regarding such pleadings must be resolved in plaintiff's favor. Stendahl v. Cobb Cnty., 284 Ga. 525, 525 (2008). The Court, however, is not required to accept as true a legal conclusion couched as fact. Z-Space, Inc. v. Dantanna's CNN Center, LLC, 349 Ga. App. 248, 251 (2019).

Under the recently enacted Superior and State Court Appellate Practice Act, O.C.G.A. § 5-3-1, *et seq.*, a petition for review may be dismissed for any of an enumerated list of reasons. See O.C.G.A. § 5-3-12(a). Included in this list, a petition for review may be dismissed if the reviewing court lacks jurisdiction. See O.C.G.A. § 5-3-12(a)(2). "Jurisdiction of a court to afford the relief sought is a matter which should be decided preliminarily at the outset. Jurisdiction either exists or does not exist without regard to the merit[s] of the case." Whitlock v. Barrett, 158 Ga. App. 100, 103 (1981). This Court does not have jurisdiction over Petitioners' petition for review in Count 2 because the Board's decision to deny the Application, which was an application for a special use of property, is a zoning decision subject to de novo review, not a petition for review. See O.C.G.A. § 36-66-3(4)(E)(defining zoning decisions as, among other things, "[t]he grant or denial of an application for a special use of property,"); O.C.G.A. § 36-66-5.1(a)(1)(zoning decisions are subject to direct challenge by de novo review); O.C.G.A. § 5-3-12(a)(2)(a petition for review is subject to dismissal if the reviewing court lacks jurisdiction).

Further, Petitioners' claims in Count 1 and Counts 3 through 6 are subject to dismissal because Petitioners failed to raise and preserve their constitutional objections before filing suit. "A

constitutional challenge to a zoning matter cannot be made for the first time in the superior court. [Cit.]” Ass’n of Guineans in Atlanta, Inc. v. DeKalb Cnty., 292 Ga. 362, 363 (2013).

B. Outline of Counts 1 through 6 of the Petition

In Count 1 of the Petition, Petitioners’ claim for declaratory judgment for de novo review hinges on Petitioners’ allegations that (1) the requirement to obtain a conditional use permit (“CUP”) and (2) the County’s treatment of existing businesses more favorably than new businesses violated the Georgia Constitution. See Petition, ¶¶ 62, 65, 68-70. Count 2 of the Petition contains Petitioners’ claim for petition for review, which was pled in the alternative. In Count 3 of the Petition, Petitioners’ claim for declaratory judgment for violation of due process hinges on Petitioners’ allegation that the County violated the Due Process Clause of the Georgia Constitution by treating new businesses less favorably if there are already similar businesses in the area. See id., ¶ 96. In Count 4 of the Petition, Petitioners’ claim for declaratory judgment for violation of equal protection hinges on Petitioners’ allegation that the County violated the Equal Protection Clause of the Georgia Constitution by requiring Petitioners to obtain a CUP and by treating established businesses better than new businesses. See id., ¶¶ 118-119. In Counts 5 and 6, Petitioners make claims for an interlocutory and permanent injunction, respectively, which claims must necessarily fail if Petitioners’ preceding claims in Counts 1 through 4 fail. See id., ¶¶ 121-127 (Count 5); 128-132 (Count 6).

C. The Denial of an Application for a Conditional Use of Property Is a Zoning Decision which Is Properly Challenged Through a De Novo Review, Not a Petition for Review

In Count 2, Petitioners pled, in the alternative, for a petition for review. See Petition, ¶¶ 71-78 (Count 2). But Petitioners and Defendant agree that the decision being challenged by

Petitioners is a zoning decision², which is not subject to a petition for review. See O.C.G.A. § 36-66-5.1(a)(1)(zoning decisions are subject to direct challenge by de novo review). Specifically, Georgia’s Zoning Procedures Law, (the “ZPL”) O.C.G.A. § 36-66-1, *et seq.*, defines a “zoning decision” as a:

final legislative action by a local government which results in:

- (A) The adoption or repeal of a zoning ordinance;
- (B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;
- (C) The adoption or denial of an amendment to a zoning ordinance to rezone property from one zoning classification to another;
- (D) The adoption or denial of an amendment to a zoning ordinance by a municipal local government to zone property to be annexed into the municipality;
- (E) The grant or denial of an application for a special use of property;** or
- (F) The grant or denial of an application for a variance or the imposition or modification of conditions concurrent and in conjunction with a decision pursuant to subparagraph (C) or (E) of this paragraph, or a subsequent modification to such a variance or condition.

O.C.G.A. § 36-66-3(4) (emphasis added).

The ZPL further explains the proper method by which to challenge a zoning decision, stating that:

Zoning decisions as described in this chapter, being legislative in nature, shall be subject to direct constitutional challenge regarding the validity of maintaining the existing zoning on the subject property or the validity of conditions or an interim zoning category other than what was requested in the superior court pursuant to its original jurisdiction over declaratory judgments pursuant to Chapter 4 of Title 9 and equity jurisdiction under Title 23. Such challenges shall be by way of a *de novo* review by the superior court wherein such review brings up the whole record from the local government and all competent evidence shall be admissible in the trial thereof, whether adduced in a local government process or not and employing the presumption that a governmental zoning decision is valid and can

² See, e.g., Petition, ¶ 2, ¶ 3 n. 1 (“A “grant or denial of an application for a special use of property” is defined in the Zoning Procedures Law as a “zoning decision,” O.C.G.A. § 36-66-3(4)(E), which means a “final legislative action by a local government[.]”).

be overcome substantively by a petitioner showing by clear and convincing evidence that the zoning classification is a significant detriment to the petitioner and is insubstantially related to the public health, safety, morality, or general welfare.

O.C.G.A. § 36-66-5.1(a)(1).

The language of the ZPL is clear: challenges to “zoning decisions” which include “the grant or denial of an application for a special use of property” must be brought by way of a de novo review. O.C.G.A. § 36-66-3(4)(E); O.C.G.A. § 36-66-5.1(a)(1). Here, Petitioners are challenging the Board’s denial of their application for a CUP. A CUP application is an application for a special use of property. Thus, Petitioners must challenge the County’s decision via a de novo action, not a petition for review. Accordingly, this Court lacks subject matter jurisdiction to consider Count 2 of the Petition. See, e.g., Goddard v. City of Albany, 285 Ga. 882, 885 (2009) (holding that because the city manager was not acting in a quasi-judicial capacity, the trial court did not err when it dismissed, for lack of subject matter jurisdiction, appellant's petition for writ of certiorari). Therefore, this Court should dismiss Count 2 of the Petition pursuant to O.C.G.A. § 5-3-12(a)(2).

Additionally, even if a petition for review was the proper method to challenge the Board’s denial of the Application, which it is not, this Court could “[r]eview only matters raised in the record of the proceeding in the lower judiciary.” See O.C.G.A. § 5-3-5(a)(1). Because Petitioners did not raise any constitutional claims in the record below, this Court could not review any constitutional claims now under a petition for review. And to the extent that Petitioners’ claims in Counts 5 and 6 (interlocutory and permanent injunctions, respectively) depend on the claims in Count 2, then Counts 5 and 6 should be dismissed as well.

D. Petitioners Failed to Properly Raise Their Constitutional Claims before the County

As for Count 1 and Counts 3 through 6, this Court should dismiss Petitioners’ claims contained therein because, even though a de novo challenge is the proper procedure for attacking

a zoning decision, Petitioners failed to raise and preserve their constitutional claims against the County before filing suit. “A constitutional attack on a zoning classification cannot be made for the first time in the superior court. That is to say, a constitutional attack upon a zoning classification has to be raised before the board of county commissioners (zoning authority).” [Citations and punctuation omitted.] Ashkouti v. City of Suwanee, 271 Ga. 154, 155 (1999). Here, Petitioners failed to raise any constitutional challenges before the Board voted to deny the Application. Therefore, the claims in the Petition based on the Georgia Constitution should be dismissed.

“[N]otice to a zoning authority concerning the constitutionality of an existing zoning classification does not have to meet a high standard of particularity. All that is required is that the zoning authority be given ‘fair notice that a constitutional challenge is being raised.’” Ashkouti, supra, at 155. The Supreme Court later expounded on this rule, stating that, while “[i]t is true that a challenge to the constitutionality of an ordinance cannot be mounted for the first time in the superior court[,] . . . a more relaxed standard applies when raising the initial constitutional attack before the local zoning authority.” Outdoor Sys., Inc. v. Cobb Cnty., 274 Ga. 606, 607 (2001). This is because the local zoning authority “cannot adjudicate a constitutional claim, and can only act legislatively,” and thus the “challenge need not be as specific as that which it was required to make before the superior court.” Id. Requiring a plaintiff to raise constitutional objections before the local zoning authority gives the local zoning authority an opportunity to amend the challenged ordinance, if necessary, prevents unnecessary intervention into local affairs, and promotes judicial economy. Cooper v. Unified Gov't of Athens Clarke Cnty., 277 Ga. 360, 361 (2003).

Here, the record is devoid of any constitutional challenge made by Petitioners to the County generally or to the Board, which is the local zoning authority, specifically. Although Counts 1, 3, and 4 all hinge on Petitioners’ allegations that the County violated the Georgia Constitution, Petitioners failed to raise their constitutional objections before the Board prior to the Board’s

decision to deny the Application. Therefore, Petitioner's claims in Counts 1, 3, and 4, as well as their claims in Counts 5 and 6 to the extent that their claims in Counts 5 and 6 depend on the claims in Counts 1, 3, and 4, should be dismissed because Petitioners failed to raise any constitutional challenges before the local zoning authority as required under Georgia law.

III. CONCLUSION

For the foregoing reasons, the County respectfully requests that this Court dismiss the Petition because this Court lacks jurisdiction over the petition for review pursuant to O.C.G.A. § 5-3-12 and because Petitioners failed to raise and preserve their constitutional claims against the County before filing suit.

Respectfully submitted, this 17th day of September, 2025.

FREEMAN MATHIS & GARY, LLP

/s/ J. Paul Mitchell

DANA K. MAINE
Georgia Bar No. 466580
J. PAUL MITCHELL
Georgia Bar No. 772142
R. CAMERON KLINE
Georgia Bar No. 919346

*Counsel for Defendant/Respondent Clayton
County, Georgia*

100 Galleria Parkway, Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000 – phone
dmaine@fmglaw.com
paul.mitchell@fmglaw.com
cameron.kline@fmglaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have electronically submitted the foregoing ***CLAYTON COUNTY, GEORGIA'S MOTION TO DISMISS AND BRIEF IN SUPPORT*** to the Clerk of Court using the e-filing system which will automatically send electronic mail notification and copy of such filing to the following counsel of record:

Simon H. Bloom
Andrea J. Pearson
BLOOM PARHAM, LLP
PO Box 700
977 Ponce de Leon Ave., NE
Atlanta, Georgia 30306
sbloom@bloom-law.com
apearson@bloom-law.com

Jessica Bigbie
William R. Aronin
Renee D. Flaherty
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
jbigbie@ij.org
waronin@ij.org
rflaherty@ij.org

This 17th day of September, 2025.

/s/ J. Paul Mitchell

J. PAUL MITCHELL
Georgia Bar No. 772142
*Counsel for Defendant/Respondent Clayton
County, Georgia*

FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, GA 30339-5948
(770) 818-0000 – phone
paul.mitchell@fmglaw.com