



DeKalb County Department of Planning & Sustainability

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**Planning Commission Hearing Date: November 01, 2018, 6:30 P.M.
Board of Commissioners Hearing Date: November 13, 2018, 6:30 P.M.**

STAFF ANALYSIS

Case No.: 2018-2794/ Z-18-1235229 **Agenda #:** N.11

Location/Address: The north side of North Decatur Road, approximately 214 feet south of Emory Road, at 1526 N Decatur Road, Atlanta, Georgia 30307. **Commission District:** 2 **Super District:** 6

Parcel ID: 18-053-02-027

Request: To request a Rezone from MR-2 (Medium Density Residential-2) to OI (Office Institutional) to allow the use of an existing student center.

Property Owners: Emory Jewish Student Center

Applicant/Agent: Director of Planning and Sustainability

Acreage: 0.4 Acres

Existing Land Use: Student Center

Surrounding Properties: Single-Family detached residences, Multifamily residences, and office

Adjacent & Surrounding Zoning: North: R-75 (Residential Medium Lot) District
East: OI (Office Institutional District)
South & West: MR-2 (Medium Density Residential-2)

Comprehensive Plan: Neighborhood Center Consistent X

Proposed Square Footage: N/A	Existing: Student Center
Proposed Lot Coverage: N/A	Existing Lot Coverage: <65%

SUBJECT SITE & ZONING HISTORY

Property is located on the north side of North Decatur Road, approximately 214 feet south of Emory Road, at 1526 N Decatur Road, Atlanta, Georgia 30307. Per the submitted site survey, the site consists of 0.436 acres (19,002 square feet) with a frontage of 65 feet. The site configuration is a long rectangular shape. Access is from North Decatur Road. The character of the area immediately surrounding the site consists of established single-family residences to the west and north. Directly east of the subject property are offices, and south across North Decatur Road are multifamily residence.

The site is currently zoned MR-2 (Medium Density Residential-2) District but GIS shows the property zoned as OI (Office Institutional), because of a discrepancy in records as described below. This rezoning request aims to remedy this issue.

PROJECT ANALYSIS

The request is to rezone from MR-2 (Medium Density Residential-2) to OI (Office Institutional) to allow for an existing student center. Per the submitted materials, there was a rezoning petition that took place on April 30, 1998, pursuant to CZ-98036, from RM-75 at the time (now MR-2 Medium Density Residential-2) to OI (Office Institutional). The County Attorney at the time, Jonathan Weintraub, indicated to the Board that because the two district commissioners did not vote for the rezoning to OI (Office Institutional), that it was not valid. Staff confirmed with the current county attorney whose response was as follows:

“This matter was litigated, and it was ultimately determined by the Georgia Court of Appeals that the rezoning was invalid because neither the District nor Super District Commissioner where the property is located voted in favor of the rezoning. This is referred to as “ward courtesy” as is a prerequisite for any valid rezoning in DeKalb under Sec. 9(a) (10) of our Org Act. I do not know if there was a subsequent rezoning application that may have successfully rezoned the property, but the 4/30/98 vote was ineffective in rezoning the property.”

At some point after the meeting, Weintraub decided that his earlier opinion was erroneous and that the vote of the commissioners was in fact sufficient to approve the rezoning. He apparently concluded that the favorable vote of either superdistrict commissioner was sufficient to constitute the vote of a commissioner. On May 26, Weintraub sent a letter to the applicant’s attorney (Dr. Rock) indicating that the rezoning was effective. Apparently in reliance on the letter, the county zoning map was changed to reflect that the property had been rezoned OI. In response to a request from Dr. Rock, the county land use and Planning Division provided a letter stating that the property was zoned OI.

Around November 1998, the previous property owner, Dr. John Rock filed an application for a Certificate of Appropriateness with the DeKalb County Historic Preservation Commission (HPC), seeking approval of certain renovations to the property. When the application came before the HPC on November 12, 1998, Rock provided the letter from the Planning Division stating that the property was zoned OI. The HPC ultimately issued a Certificate of Appropriateness on December 9, 1998.

On that the same date, the Druid Hills Civic Association, Inc. and three individual homeowners sued DeKalb County, the Board of Commissioners, Dr. Rock, and the HPC seeking a declaration that the Board of Commissioners did not properly vote to rezone the property and that the amendment of the zoning map was thus unauthorized. The Druid Hills Civic Association, Inc. and the three individual homeowners also sought various forms of injunctive relief, including an order requiring the county to “rescind the unlawful amendment to the zoning map and ordinance, “to enjoin the HPC from approving the Certificate of Appropriateness based on the improper zoning, and to prevent the issuance of any development permits

based on the purported rezoning. On December 14, 1998, the trial court entered an order denying the Druid Hills Civic Association, Inc. and three individual homeowners’ motion for a temporary restraining order, based in part on its preliminary conclusion that the property had been validly rezoned.

On January 13, 1999, the Druid Hills Civic Association, Inc. and three individual homeowners filed an amended complaint to “recast their claims”. After appeal, a remand, and re-hearing, the Court of Appeals, in 2002, upheld an earlier trial court conclusion, specifically finding that “the trial court correctly found that the board’s vote did not constitute an approval of Rock’s application for rezoning.

Therefore, the property remained RM-75, but the zoning map was not changed back from OI to RM-75. The district name was changed in the zoning code update in 2015 to MR-2 (Medium Density Residential-2). Under the O-I district the current use of a student center is allowed.

COMPLIANCE WITH DISTRICT STANDARDS

The site must comply with minimum development standards of the OI (Office Institutional) District per Table 2.2 of the DeKalb County Zoning Ordinance. Per the chart below, the existing student center can comply with minimum development standards for the OI (Office Institutional) District per Article 2 of the DeKalb County Zoning Ordinance.

STANDARD	REQUIREMENT	EXISTING	COMPLIANCE
LOT WIDTH (OI)	A minimum 100 feet of lot width on a public street frontage	Approximately 69.75 feet of frontage along North Decatur Road.	Existing legal nonconforming structure.
LOT AREA (OI)	20,000 Square Feet	0.436 acres or 19,002 square feet.	Existing legal nonconforming structure.
FRONT BUILDING SETBACK	20/50 Front thoroughfares and arterials (min./max. feet)	Existing building on site is setback approximately 80 feet.	Existing legal nonconforming structure.
SIDE YARD SETBACK	20 Feet	14.6 feet along the western portion and 8.3 feet along the eastern portion.	Existing legal nonconforming structure.
REAR YARD SETBACK	30 Feet	Not provided	Existing legal nonconforming structure.
TRANS. BUFFERS Table 5.2(a)	50 feet adjacent to MR-2 and R-75 zoned district.	Not provided	Yes.
HEIGHT	5 stories/70 feet	Existing building is 2-stories	Yes.

PARKING Article 6	One (1) space for each one hundred (100) square feet of floor area.	Submitted site survey depicts 10 parking spaces.	Existing legal nonconforming structure.
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ZONING ANALYSIS

The requested OI (Office Institutional) District is compatible with existing non-residential districts and developments located east of the subject property. Adjacent to the site along the western property line and south of the subject property, across North Decatur Road, is zoned MR-2 (Medium Density Residential-2) District. Property located north is zoned R-75 (Residential Medium Lot) districts.

Given that the site is located within the Druid Hills Historic District, new construction will require a Certificate of Appropriateness from the DeKalb County Historic Preservation Board. This process will ensure consistency with development standards in the area and will not have a negative impact on the character of the overall neighborhood.

Chapter 27-Article 7.3.5. Standards and factors governing review of proposed amendments to the Official Zoning Map. The following standards and factors are found to be relevant to the exercise of the county's zoning powers and shall govern the review of all proposed amendments to the Official Zoning Map:

A. Whether the zoning proposal is in conformity with the policy and intent of the comprehensive plan.

The rezoning request to the OI (Office Institutional) District reflects consistency with the following NC character area Plan Policy: Promoting healthy living in neighborhoods by incorporating a pedestrian environment that encourages socialization, walking, biking and connectivity. The student center will be used by Emory University students only.

B. Whether the zoning proposal will permit a use that is suitable in view of the use and development of adjacent and nearby property or properties.

The rezoning request to OI (Office Institutional) District would allow low intensity non-residential uses compatible with other non-residential and residential uses along North Decatur Road.

C. Whether the property to be affected by the zoning proposal has a reasonable economic use as currently zoned.

The site has a reasonable economic use as currently zoned, MR-2 (Medium Density Residential-2).

D. Whether the zoning proposal will adversely affect the existing use or usability of adjacent or nearby property or properties.

The rezoning request will not adversely affect the existing use or usability of adjacent zoned properties.

E. Whether there are other existing or changing conditions affecting the use and development of the property which give supporting grounds for either approval or disapproval of the zoning proposal.

No other existing or changing conditions exist affecting the use and development of the property which give supporting grounds for either approval or disapproval of the zoning proposal.

F. Whether the zoning proposal will adversely affect historic buildings, sites, districts, or archaeological resources.

The proposed rezoning request should not have an adverse effect on historic buildings, sites, districts, or archaeological resources. Given that the site is located within the Druid Hills Historic District, new construction will require a Certificate of Appropriateness from the DeKalb County Historic Preservation Board. This process will ensure consistency with development standards in the area and will not have a negative impact on the character of the overall neighborhood.

G. Whether the zoning proposal will result in a use which will or could cause an excessive or burdensome use of existing streets, transportation facilities, utilities, or schools.

The site is located on a two-lane minor arterial (North Decatur Road). The proposed rezoning should not cause an excessive burden on existing streets and transportation facilities. The proposed use will have no impact on area schools.

H. Whether the zoning proposal adversely impacts the environment or surrounding natural resources.

The rezoning proposal to the O-I zoning district should not adversely impact the environment or surrounding natural resources.

Staff Recommendation: APPROVAL CONDITIONAL

The applicant is requesting to rezone the property from MR-2 (Medium Density Residential-2) to OI (Office Institutional) to correct a mislabeling to the Zoning Map. The rezoning request to the OI (Office Institutional) District reflects consistency with the following Neighborhood Center character area Plan Policy: Promoting healthy living in neighborhoods by incorporating a pedestrian environment that encourages socialization, walking, biking and connectivity, since the student center will be used by Emory University students only. The Department of Planning and Sustainability recommends **“APPROVAL CONDITIONAL”** of the rezoning request to O-I (Local Commercial) subject to the following conditions:

1. That all uses such as a student center, accessory residential, and uses restricted to OI are allowed
2. That to the extent necessary building, lot dimensions, and setbacks of the existing structures shall remain, pursuant to Art. 8.1.12.
3. The façade of the building shall be retained as residential.
4. Any free-standing sign shall be monument type.
5. There shall be no parking in the front yard.

Attachments:

1. Department Comments
2. Head vs Dekalb County Court Case
3. Site Survey

4. Zoning & Land Use Maps



DEKALB COUNTY GOVERNMENT PLANNING DEPARTMENT DISTRIBUTION FORM

The following areas below may warrant comments from the Development Division. Please respond accordingly as the issues relate to the proposed request and the site plan enclosed as it relates to Chapter 14. You may address applicable disciplines.

DEVELOPMENT ANALYSIS:

- **Transportation/Access/Row**

Consult the DeKalb County Transportation Department prior to land development permit. Verify widths from the centerline of the roadways to the property line for possible right-of-way dedication. Improvements within the right-of-way may be required as a condition for land development application review approval. Safe vehicular circulation is required. Paved off-street parking is required.

- **Storm Water Management**

Compliance with the Georgia Stormwater Management Manual, DeKalb County Code of Ordinances 14-40 for Stormwater Management and 14-42 for Storm Water Quality Control, to include Runoff Reduction Volume where applicable is required as a condition of land development permit approval, if one becomes necessary. Use Volume Three of the G.S.M.M. for best maintenance practices. Use the NOAA Atlas 14 Point Precipitation Data set specific to the site. Recommend Low Impact Development features and Green Infrastructure be included in the proposed site design to protect as much as practicable.

- **Flood Hazard Area/Wetlands**

The presence of FEMA Flood Hazard Area was indicated in the County G.I.S. mapping records for the site; and should be noted in the plans at the time of any land development permit

application. Encroachment of flood hazard areas require compliance with Article IV of Chapter 14 and FEMA floodplain regulations.

- **Landscaping/Tree Preservation**

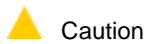
Landscaping and tree preservation plans for any building, or parking lot must comply with DeKalb County Code of Ordinances 14-39 as well as Chapter 27 Article 5 and are subject to approval from the County Arborist.

- **Tributary Buffer**

State water buffer was reflected within 200 feet of the site in the G.I.S. records. Typical state waters buffer have a 75' undisturbed stream buffer and land development within the undisturbed creek buffer is prohibited without a variance per DeKalb County Code of Ordinances 14-44.1.

- **Fire Safety**

Plans for land development permit must comply with Chapter 12 DeKalb County Code for fire protection and prevention.



Caution

As of: November 5, 2018 2:56 PM Z

Head v. DeKalb County

Court of Appeals of Georgia, Third Division

November 13, 2000, Decided

A00A1035.

Reporter

246 Ga. App. 756 *; 542 S.E.2d 176 **; 2000 Ga. App. LEXIS 1358 ***; 2001 Fulton County D. Rep. 31

HEAD et al. v. DEKALB COUNTY et al.

Subsequent History: [***1] Certiorari Applied For.

Prior History: Zoning. DeKalb Superior Court. Before Judge Hunter.

Disposition: Judgment reversed.

Core Terms

rezoning, zoning, trial court, elected, superdistrict, declaration, zoning decision, declaratory judgment, plaintiffs', voted, zoning ordinance, special damage, lawsuit, merits

Case Summary

Procedural Posture

Plaintiffs appealed from a grant of summary judgment for defendant property owner by a Georgia trial court in plaintiffs' suit for a declaration as to the zoning status of property owned by defendant property owner. The suit arose from a dispute over the effect of a rezoning vote by defendant DeKalb County Board of Commissioners.

Overview

Defendant property owner applied for rezoning of his property, and members of defendant board voted four to three in favor. The DeKalb County Organizational Act, 1981 Ga. Laws 4304, 4311, required that either the member representing the district in which the property was located or a member elected from the county at large was required to vote in favor in order to approve a zoning ordinance. The member who represented the district voted against rezoning. There were no at large members, but the county had been divided into two "superdistricts" and one superdistrict commissioner voted in favor. Plaintiffs sought a declaratory judgment that defendant board's vote resulted in denial of the

rezoning application. The trial court found that the suit was an untimely appeal of a zoning decision and that plaintiffs lacked standing. The appellate court reversed because plaintiffs were not seeking to reverse the zoning decision, but instead sought a declaration as to the effect of that decision. Therefore, time limits and standing requirements for zoning appeals did not apply.

Outcome

Judgment was reversed and remanded for consideration of whether plaintiffs had standing under the Declaratory Judgment Act; that is, whether plaintiffs had the ability to prevent development of the property in violation of its zoning status, and whether that ability would be jeopardized by the trial court's failure to declare the zoning status.

LexisNexis® Headnotes

Governments > Local

Governments > Administrative Boards

Real Property Law > Zoning > General Overview

[HN1](#) [↓] **Local Governments, Administrative Boards**

See 1981 Ga. Laws 4304, 4311.

Real Property Law > Zoning > Judicial Review

[HN2](#) [↓] **Zoning, Judicial Review**

Where plaintiffs do not seek to change a zoning board's decision in any way, but simply seek a declaration as to the legal effect of the board's action, the case cannot be considered an "appeal" of the zoning decision.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Real Property Law > Zoning > Judicial Review

[HN3](#) **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court will not rule on a constitutional question unless it clearly appears in the record that the trial court distinctly ruled on the point.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Constitutional Law > ... > Case or Controversy > Standing > General Overview

[HN4](#) **Case & Controversy Requirements, Actual Controversy**

Under the Declaratory Judgment Act, a court has the power to issue declaratory judgments in cases of actual controversy and in any civil case in which it appears to the court that the ends of justice require that the declaration should be made. [Ga. Code Ann. § 9-4-2\(a\), \(b\)](#). The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

[HN5](#) **Declaratory Judgments, State Declaratory Judgments**

In order to obtain a declaratory judgment, a plaintiff must show that he is in a position of uncertainty or insecurity because of a dispute and because of having to take some future action which is properly incident to his alleged right, and which future action without direction from the court might reasonably jeopardize his interest.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Real Property Law > Zoning > General Overview

[HN6](#) **Zoning, Ordinances**

Whether a property owner may challenge the rezoning of a neighbor's property is a different question than whether such owner may prevent his neighbor from developing his property in violation of its existing zoning. A property owner residing in that portion of a municipality where a zoning ordinance is in force restricting the use of property in the zone to residential purposes may properly apply for an injunction against the use of an existing structure within the restricted area, where such use is in violation of the zoning ordinance, without showing special damages.

Counsel: Susan M. Garrett, for appellants.

Jenkins & Nelson, Frank E. Jenkins III, Peter R. Olson, Dillard & Galloway, G. Douglas Dillard, Andrea C. Jones, for appellees.

Judges: RUFFIN, Judge. Andrews, P. J., and Ellington, J., concur.

Opinion by: RUFFIN

Opinion

[**177] [*756] RUFFIN, Judge.

The Druid Hills Civic Association, Inc. and three individual homeowners sued DeKalb County, the DeKalb County Board of Commissioners, and Dr. John Rock, seeking a declaration as to the zoning status of certain property owned by Dr. Rock. The trial court granted summary judgment in favor of Dr. Rock, holding

that the lawsuit was untimely and that the plaintiffs lacked standing to bring it. We granted the plaintiffs' application for discretionary appeal. Because the trial court erroneously treated this case as an appeal of a zoning decision, we reverse the trial court's ruling.

The ultimate issue in this case revolves around the meaning of Section 9 (a) (10) of the DeKalb County Organizational Act, which states that "[HN1](#)^[↑] no planning or zoning ordinance shall become law unless approved by the member of the Commission representing the district in which the subject property is located, or by one of the members of **[*757]** the Commission elected from the county at large." ¹

When this provision was originally enacted, **[***2]** the county commission consisted of five district members and two members elected from the county at large. ²

Subsequently, **[**178]** however, the act was amended to eliminate the two at-large seats, replacing them with "superdistrict" commissioners. ³

These superdistrict commissioners were not elected from the entire county; rather, the county was divided into two superdistricts, with one commissioner elected from each. ⁴

While the legislature eliminated the two at-large seats, however, it did not amend Section 9 (a) (10), which requires that any zoning ordinance be approved by the appropriate district commissioner or a commissioner "elected from the county at large."

On April 30, 1998, the Board of Commissioners held a public hearing to consider Dr. Rock's application for rezoning of his property from residential to office use. Four members of the Board voted in favor of the rezoning, **[***3]** while three members voted against rezoning. The district and superdistrict commissioners in whose respective districts the property was located both voted against the rezoning, while the other superdistrict commissioner voted in favor. The county attorney, Jonathan Weintraub, publicly announced his opinion that the rezoning did not become law because neither of the commissioners in whose district the property was located voted in favor of the rezoning. The vote was noted in the official minutes of the meeting, along with Weintraub's opinion that the rezoning was not approved.

¹ Ga. L. 1981, pp. 4304, 4311.

² Id. at 4305.

³ Ga. L. 1992, pp. 6566, 6572-6575, 6577-6578.

⁴ Id. at 6572-6575, 6577.

The minutes were reduced to writing and signed on April 30, 1998, the same day as the vote.

At some point after the meeting, after being contacted by Dr. Rock's attorney, Weintraub decided that his earlier opinion was erroneous and that the vote of the commissioners was in fact sufficient to approve the rezoning. He apparently concluded that the favorable vote of either superdistrict commissioner was sufficient to constitute the vote of a commissioner "elected from the county at large," even though neither of the superdistrict commissioners was actually elected from the county at large. On May 26, Weintraub **[***4]** sent a letter to Dr. Rock's attorney indicating that the rezoning was effective. Apparently in reliance on this letter, the county zoning map was changed to reflect that the property had been rezoned "O-I," an office classification. In response to a request from Rock, the county land use and planning coordinator provided a letter stating that the property was zoned O-I.

[*758] Around November 1998, Rock filed an application for a Certificate of Appropriateness with the DeKalb County Historic Preservation Commission (HPC), seeking approval of certain renovations to the property. When the application came before the HPC on November 12, 1998, Rock produced the letter from the land use and zoning coordinator stating that the property was zoned O-I. The HPC ultimately issued a Certificate of Appropriateness on December 9, 1998.

On that same date, the plaintiffs sued DeKalb County, the Board of Commissioners, Dr. Rock, the HPC, and several other defendants, seeking a declaration that the Board of Commissioners did not vote to rezone the property and that the amendment of the zoning map was thus unauthorized. The plaintiffs also sought various forms of injunctive relief, including an order requiring **[***5]** the county to "rescind the unlawful amendment to the zoning map and ordinance," to enjoin the HPC from approving the Certificate of Appropriateness based on the improper zoning, and to prevent the issuance of any development permits based on the purported rezoning. On December 14, 1998, the trial court entered an order denying the plaintiffs' motion for a temporary restraining order, based in part on its preliminary conclusion that the property had been validly rezoned.

On December 22, 1998, the Board of Commissioners amended the minutes of the April 30 meeting to state that "it is unclear whether the [April 30] vote approved the zoning item or not." On January 9, 1999, the county

informed Dr. Rock's attorney that, due to the uncertainty as to whether the rezoning had been approved, no permits or certificates of occupancy would be issued "until that matter is cleared up."

On January 13, 1999, the plaintiffs filed an amended complaint to "recast their claims" in light of developments since the filing of **[**179]** the original complaint. In the amended complaint, which was apparently intended to supersede the original complaint, the plaintiffs did not seek injunctive relief, but simply sought **[***6]** "a declaratory judgment that the vote of the Board of Commissioners on April 30, 1998 resulted in the denial of the rezoning application and that the subsequent purported amendment of the official zoning map was unlawful, ultra vires and void." The plaintiffs dismissed all defendants except DeKalb County, the Board of Commissioners, and Dr. Rock.

Dr. Rock filed a motion to dismiss, which by agreement of the parties was treated as a motion for summary judgment.⁵

The trial court granted the motion on two separate and independent grounds. First, it held that the lawsuit constituted an untimely appeal of a zoning decision. Second, it held that the plaintiffs lacked standing to **[*759]** appeal the zoning decision because they did not present evidence that their properties would suffer special damages as a result of the rezoning.

1. In holding that the plaintiffs' action was time-barred, the trial court characterized the action as "an **[***7]** appeal of a rezoning decision." Because [O.C.G.A. § 5-3-20](#) requires that appeals to superior court be filed "within 30 days of the date the judgment, order, or decision complained of was entered," and because the lawsuit was not filed within 30 days of the Board's vote on the rezoning application,⁶ the court held that the lawsuit was time-barred.

The trial court's reasoning is faulty because it is based upon the erroneous premise that this lawsuit is an appeal of a zoning decision. The plaintiffs are not

⁵ The other defendants did not join in Dr. Rock's motion or file motions of their own.

⁶ See [Chadwick v. Gwinnett County](#), 257 Ga. 59, 60 (1) (354 S.E.2d 420) (1987) (30-day period commences upon signing of initial document reducing zoning decision to writing). In this case, the minutes of the Board meeting were reduced to writing and signed on April 30, 1998, the same date as the vote.

seeking to reverse the Board's action, but are seeking a declaration that such action resulted in the *denial* of the rezoning application.

Whether the Board's vote was sufficient to approve **[***8]** the rezoning in compliance with the Organizational Act turns on a legal issue: Was the affirmative vote of one of the two superdistrict commissioners sufficient to constitute the approval of a commissioner "elected from the county at large"? If the plaintiffs are correct in their interpretation of the Organizational Act, then the vote of the Board operated as a denial of the rezoning application, since it did not receive the votes necessary for passage.⁷

[*9]** If the application was denied, there would have been no grounds for the plaintiffs to appeal the decision in their favor.⁸

To the contrary, it would have been incumbent upon Dr. Rock to file a timely appeal if he wished to challenge the Board's decision on the merits. [HN2](#)^[↑] Because the plaintiffs do not seek to change the Board's decision in any way, but simply seek a declaration as to the legal effect of the Board's action, this case cannot be considered an "appeal" of the zoning decision. Accordingly, the trial court erred in dismissing the action under [O.C.G.A. § 5-3-20](#).

[*760] 2. The trial court's alternative basis for granting summary judgment to Dr. Rock -- i.e., that the plaintiffs lacked standing to appeal the zoning decision because they failed to present evidence that they would sustain special damages -- suffers from the same problem, in that it is based on the erroneous assumption that this is an appeal from a zoning decision.

⁷ Although Dr. Rock argued below that Section 9 (a) (10) is unconstitutional to the extent that it prevents enactment of a zoning ordinance approved by a majority of the Board, the trial court did not rule on this issue. Accordingly, the constitutionality of the statute is not preserved for appellate review. See [Santana v. Georgia Power Co.](#), 269 Ga. 127, 129 (6) (498 S.E.2d 521) (1998) [HN3](#)^[↑] ("We will not rule on a constitutional question unless it clearly appears in the record that the trial court distinctly ruled on the point."). In any event, the constitutionality of the statute goes to the merits of the plaintiffs' contentions and does not change the nature of their action.

⁸ See [Holland v. State Farm &c. Ins. Co.](#), 244 Ga. App. 583 n.4 (536 S.E.2d 270) (2000) ("Only a party who has been 'aggrieved' by a judgment has the right to appeal the judgment.").

[180]** It is true that, "in order to challenge on the merits a decision of a governing authority to rezone, plaintiffs must show special damages under the substantial interest-aggrieved citizen test."⁹

The term "special damages" refers to damages that are not common to all "similarly situated" property owners.¹⁰

If the plaintiffs were appealing the merits of the Board's decision to rezone the property, this would be the proper test. As discussed above, however, the plaintiffs are not appealing the decision, but are seeking a declaration that **[***10]** the Board *did not* rezone the property. They are not seeking to change the Board's action, but simply seek a declaration as to the effect of such action. In essence, they are asking the court to declare what is the zoning status of Dr. Rock's property.

Under these circumstances, the proper question is not, "Do the plaintiffs have standing to appeal the merits of a rezoning decision?", but "Are the plaintiffs entitled to obtain a declaratory judgment as to the zoning status of Dr. Rock's property?" The answer depends upon whether the plaintiffs have standing under the Declaratory Judgment Act. [HN4](#)[↑] Under that act, a court has the power to issue declaratory judgments in "cases of actual controversy" and in "any civil case in which it appears to the court that the ends of justice require that the declaration should be made."¹¹

[*11]** "The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated."¹²

[HN5](#)[↑] In order to obtain a declaratory judgment, a plaintiff must show that he is "in a position of uncertainty or insecurity because of a dispute and of having to take some future action which is properly incident to [his] alleged right, and which future action without direction from the court might reasonably jeopardize [his] interest."¹³

⁹ [City of Marietta v. Traton Corp., 253 Ga. 64, 65 \(316 S.E.2d 461\) \(1984\).](#)

¹⁰ See [DeKalb County v. Wapensky, 253 Ga. 47, 48 \(315 S.E.2d 873\) \(1984\).](#)

¹¹ [O.C.G.A. § 9-4-2 \(a\), \(b\).](#)

¹² (Punctuation omitted.) [Royal Lepage Real Estate Svcs. &c. v. Spalding Partners, Ltd., 192 Ga. App. 284 \(1\) \(384 S.E.2d 424\) \(1989\).](#)

It is apparent that the plaintiffs (as **[***12]** well as the Board) are uncertain as to the zoning status of Dr. Rock's property. Whether the plaintiffs are entitled to have a court tell them what that status is, however, depends upon whether they are "in need of judicial guidance to **[*761]** enable [them] to avoid incurring additional liability or jeopardizing [their] rights."¹⁴

This, in turn, depends in part on (1) whether the plaintiffs have the ability to prevent Dr. Rock from developing the property in violation of its zoning status, whatever that may be,¹⁵

[*13]** and (2) whether this ability would be jeopardized by the court's failure to declare the property's zoning status. Because Dr. Rock did not raise this issue in his motion to dismiss and the trial court did not consider it in ruling on the motion, it would be improper for this Court to rule on the issue in the first instance.¹⁶

3. The plaintiffs contend that the trial court erred in holding that the property was legally rezoned. However, although a different judge, in denying the plaintiffs' motion for a temporary restraining order, preliminarily concluded that the property was legally rezoned, the trial court made no final **[**181]** ruling on this issue.¹⁷

¹³ (Punctuation omitted.) [Farm &c. Life Ins. Co. v. Skelton, 235 Ga. App. 507, 508 \(510 S.E.2d 76\) \(1998\).](#)

¹⁴ [Royal Lepage, 192 Ga. App. at 285 \(1\).](#)

¹⁵ [HN6](#)[↑] Whether a property owner may challenge the rezoning of a neighbor's property is a different question than whether such owner may prevent his neighbor from developing his property in violation of its existing zoning. See [Palmer v. Tomlinson, 217 Ga. 399, 400 \(6\) \(122 S.E.2d 578\) \(1961\)](#) ("A property owner residing in that portion of a municipality where a zoning ordinance is in force restricting the use of property in the zone to residential purposes, may properly apply for an injunction against the use of an existing structure within the restricted area, where such use is in violation of the zoning ordinance, without showing special damages."); [Graham v. Phinizy, 204 Ga. 638, 645 \(51 S.E.2d 451\) \(1949\).](#)

¹⁶ See [Hodge v. SADA Enterprises, 217 Ga. App. 688, 690 \(1\) \(458 S.E.2d 876\) \(1995\)](#) ("The issues that must be rebutted on motion for summary judgment are those raised by the motion.")

¹⁷ The order stated that "for the purpose of this decision, it is found that . . . the subject property was legally rezoned." The

While we have doubts as to whether a superdistrict commissioner who is not elected from the entire county qualifies as a commissioner "elected from the county at large," we do not believe it is appropriate to resolve this issue in the absence of a final ruling by the trial court, particularly since the plaintiffs' standing to seek a declaratory judgment has not yet been adjudicated.

*****14]** *Judgment reversed.*

Andrews, P. J., and Ellington, J., concur.

End of Document

plaintiffs subsequently abandoned their claims for injunctive relief when they amended their complaint.

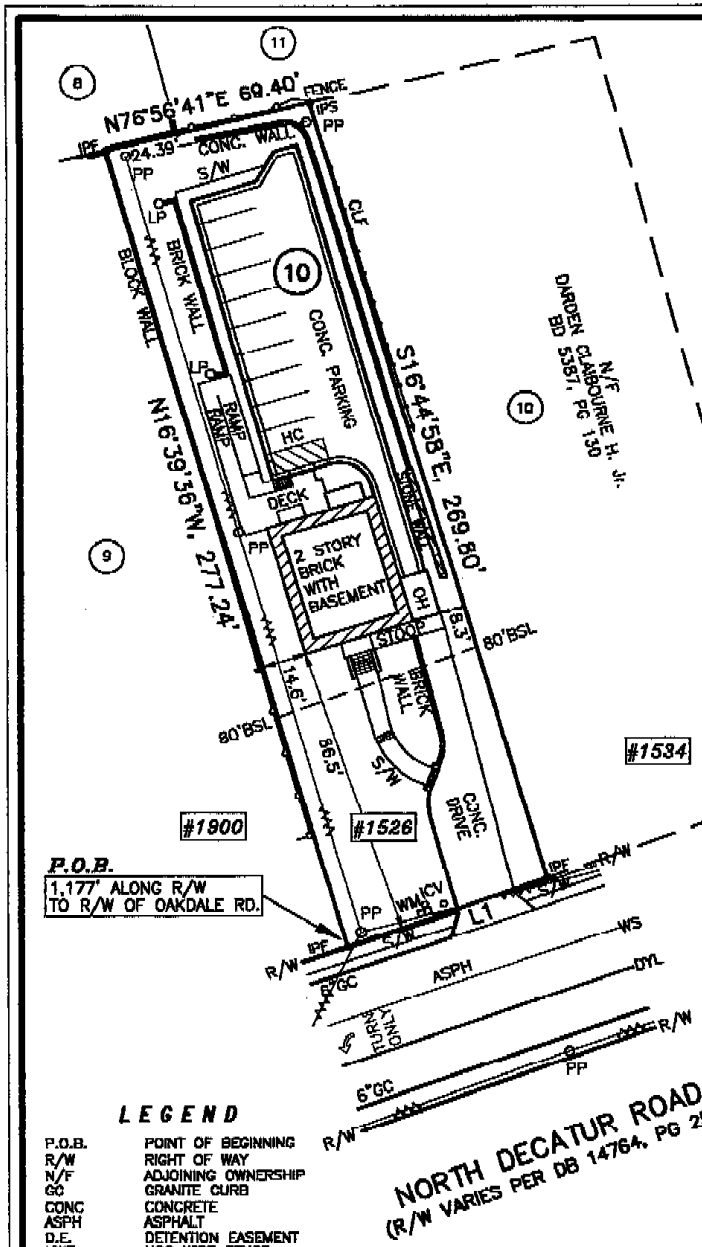
LINDA DUNLAVY

LINE TABLE		
LINE	LENGTH	BEARING
L1	69.75'	S70°48'42"W

THIS PROPERTY DOES NOT LIE WITHIN A 100-YR FLOOD HAZARD AREA AS PER PANEL NO. 13089C0062 H DATED: 05/07/2001

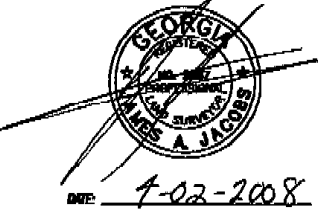
SITE AREA
0.436 Acres
19,002 Sq.Ft.

SCALE : 1" = 50'



P.O.B.
1,177' ALONG R/W
TO R/W OF OAKDALE RD.

IN MY OPINION, THIS PLAT IS A CORRECT REPRESENTATION OF THE LAND PLATED AND HAS BEEN PREPARED IN CONFORMITY WITH THE MINIMUM STANDARDS AND REQUIREMENTS OF THE LAW.



LEGEND

- P.O.B. POINT OF BEGINNING
- R/W RIGHT OF WAY
- N/F ADJOINING OWNERSHIP
- GC GRANITE CURB
- CONC CONCRETE
- ASPH ASPHALT
- D.E DETENTION EASEMENT
- HWF HOG WIRE FENCE
- SSMH SANITARY SEWER MANHOLE
- CLF CHAIN LINK FENCE
- WV WATER VALVE
- DYL DOUBLE YELLOW LINE
- FH FIRE HYDRANT
- WS WHITE STRIPE
- WM WATER METER
- S/W SIDE WALK
- LP LIGHT POLE
- DB DEED BOOK
- PC PAGE
- OVERHEAD POWER LINE

NORTH DECATUR ROAD
(R/W VARIES PER DB 14764, PG 257)

NOTES:

- ALL IRON PINS LABELED AS SET or FOUND (IPs or IPF), ARE 1/2" REBAR RODS, UNLESS OTHERWISE INDICATED.
- THIS SITE IS NOT LOCATED WITHIN 500 FEET OF A NATIONAL GEODETIC SURVEY MONUMENT.
- FIELD INFORMATION FOR THIS SURVEY WAS OBTAINED WITH NIKON 2 SECOND TOTAL STATION.
- THE FIELD DATA UPON WHICH THIS MAP OR PLAT IS BASED HAS A CLOSURE PRECISION OF ONE FOOT IN 16,686 FEET AND AN ANGULAR ERROR OF 03 SECONDS PER ANGLE POINT AND WAS ADJUSTED BY LEAST SQUARES.
- THIS MAP OR PLAT HAS BEEN CALCULATED FOR CLOSURES AND IS FOUND TO BE ACCURATE WITHIN ONE FOOT IN 385,414 FEET.
- THIS PLAT IS SUBJECT TO ALL EASEMENTS AND RIGHT-OF-WAYS PRIVATE AND PUBLIC, UNDERGROUND UTILITIES AND / OR STRUCTURES, IF ANY, MAY NOT BE SHOWN
- ALL MATTERS OF TITLE ARE EXCEPTED



DEED/PLAT DISCLAIMER: THIS PLAT MAY NOT CONFORM TO THE BEARINGS AND DISTANCES RECOMMENDED ON THE DEED AND/OR PLAT OF RECORD DUE TO SEVERAL FACTORS INCLUDING, BUT NOT LIMITED TO, THE NATURE OF THE ADVANCES IN SURVEYING TECHNOLOGY SUCH AS ELECTRONIC MEASURING DEVICES, MORE PRECISE ANGULAR MEASUREMENTS AND THE ADVENT OF SATELLITE SURVEYING TECHNIQUES USING "GPS" AND "GLONASS" SATELLITE CONSTELLATIONS. SURVEYS USING SATELLITE OBSERVATIONS ARE CORRECTED TO THE GEORGIA WEST STATE PLAIN COORDINATE SYSTEM AND USE "GEODETIC" OR "GRID" NORTH AS OPPOSED TO "MAGNETIC" NORTH.

SURVEY FOR:

ZALMAN LIPSKIER

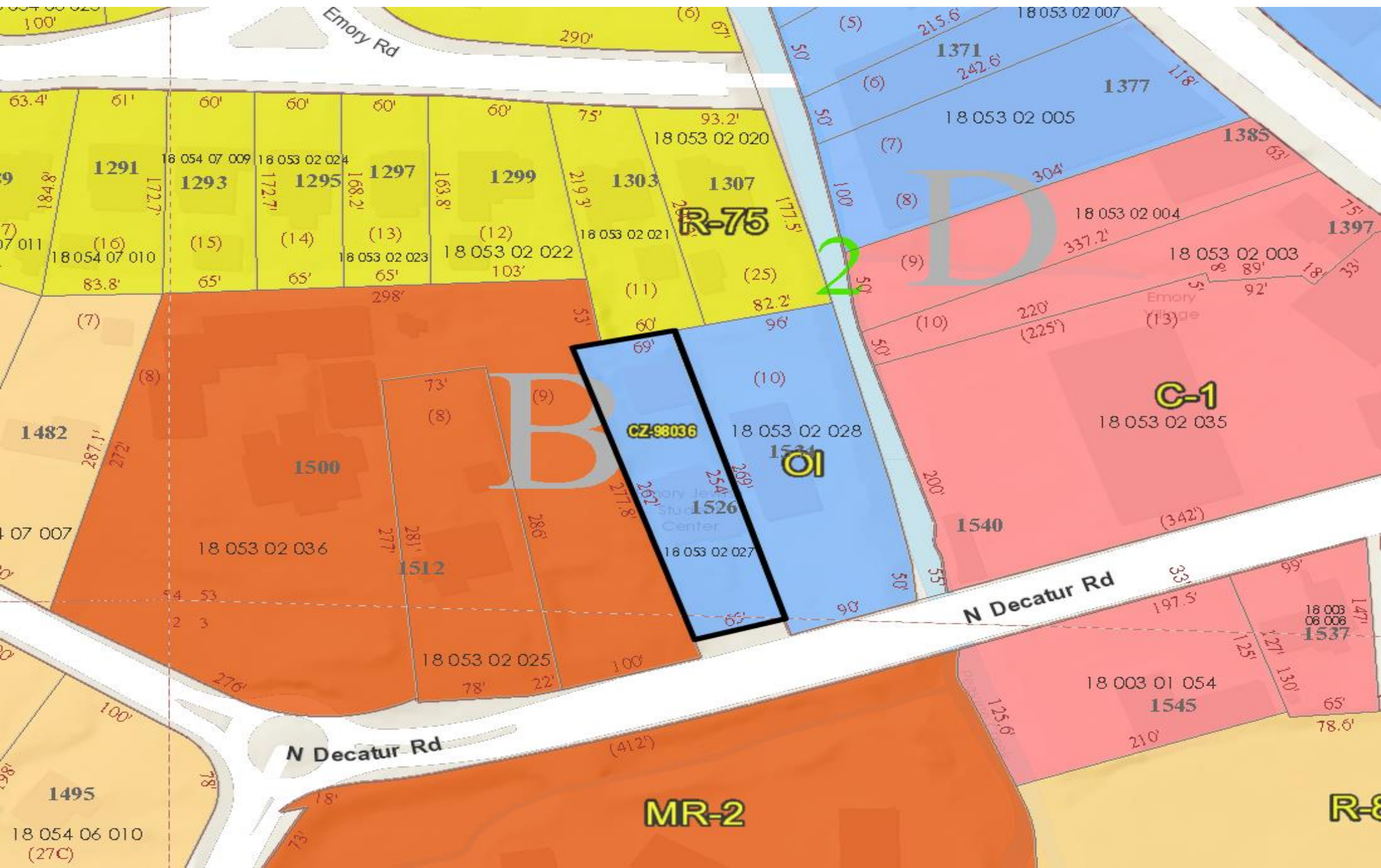
PROLINE SURVEYING, INC.
6679 HICKORY FLAT HIGHWAY - CANTON, GEORGIA 30115
770-345-0082

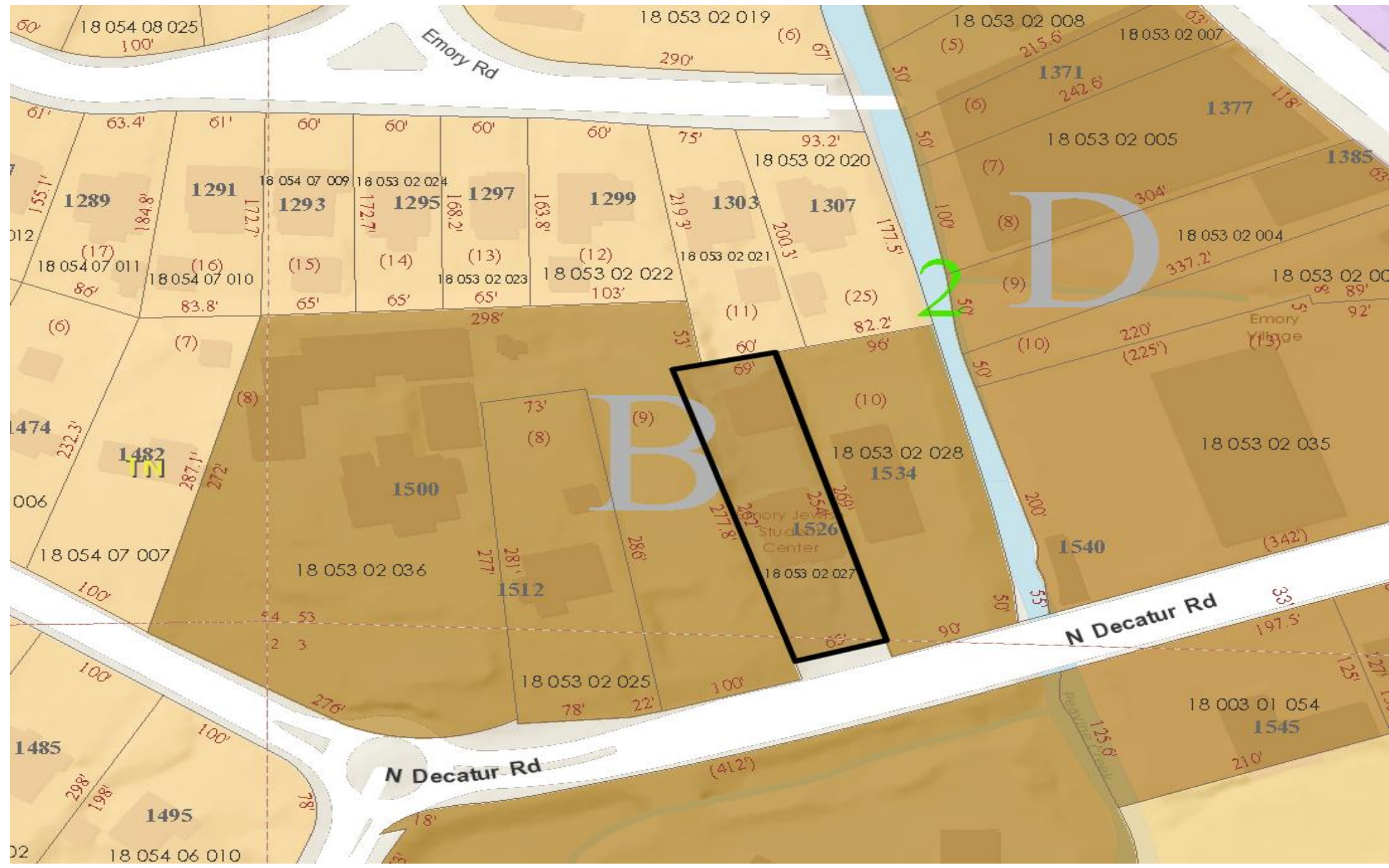
LAND LOT: 53	SURVEYED: 4/01/08
DISTRICT: 18th	DRAWN: 4/02/08 BY: DS
COUNTY: DeKALB	SCALE: 1"=50'

PART OF LOT 10
1526 NORTH DECATUR ROAD

SUBDIVISION: LULLWATER

PB 8, PG 36 PL2008-083





N.11

Z-18-1235229

Aerial



2 B