

# **The Legal Foundations of Planning and Zoning in Georgia**

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**Presented by:**

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# TOPICS

- ⦿ Constitutional Issues
- ⦿ Zoning Procedures Act
- ⦿ Using Zoning Standards
- ⦿ Zoning Conditions / Special Use Permits
- ⦿ Sign Ordinances
- ⦿ Development Impact Fee Act
- ⦿ Conflicts of Interest and Other Ethical Issues
- ⦿ Code Enforcement

# **Constitutional Authority To Plan And Zone**

**The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the general assembly from enacting general laws establishing procedures for the exercise of such power.**

**Ga. Const. Art. 9, §2, Para. IV**

**Direct Constitutional Authority to  
Counties and Cities to Plan and Zone  
Trumps All Statutes and Ordinances**

# Constitutional Restrictions on the Exercise of Zoning Power

1. Taking without just compensation
2. Due process
3. Equal Protection
4. Vested rights
5. Eminent domain

# Taking without Just Compensation

- Traditional Zoning Challenge: whether the existing zoning imposes a significant detriment and is insubstantially related to the public health safety and welfare

# Eminent Domain / Inverse Condemnation

- ⦿ Physical possession of property for government purposes, or deprivation of all economic use
- ⦿ Regulations that impose costs on property (health, building, zoning, environmental) are not eminent domain takings, but valid exercises of the police power

# Variance

- When an ordinance by its strict construction would result in a taking, the ordinance usually has a variance provision.



# Common variance provisions

- ⦿ Hardship not caused by the property owner;
- ⦿ Due to the specific nature of the property (topography, geography, etc);
- ⦿ Ordinance can be varied in a way that preserves and accomplishes purpose of ordinance; and
- ⦿ Ordinance varied only so much as necessary to avoid the hardship.

# Vested Rights

- The right to create a use *not currently in existence* because of official approval and substantial expenditures in reliance of the approval

# Non-conforming / grandfathered use

- ⦿ An *established use* that was once legal but which is no longer legal because of a change in the ordinances.
- ⦿ Grandfathering is granted by ordinance
- ⦿ Subject to the terms of the ordinance

# Common nonconforming use provisions

- ⦿ May not be expanded except in conformity
- ⦿ May not be rebuilt if destroyed
- ⦿ Amortization

# Equal Protection

- ① To treat two similarly situated properties differently
- ① To enforce the zoning ordinance differently for two similarly situated properties
- ① Importance of Future Land Use Map

# Due Process

- ⦿ Failure to provide notice and hearing
- ⦿ Failure to comply with Zoning Procedures Law
- ⦿ Not necessarily the same as a trial.
- ⦿ Compare legislative vs quasi-judicial decisions.

# ZONING PROCEDURES ACT

**O.C.G.A. Chapter 36-66**

**ZONING DECISION** means final legislative action by a local government which results in:

- (A) The adoption 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 of an amendment to a zoning ordinance which rezones property from one zoning classification to another;
- (D) The adoption of an amendment to a zoning ordinance by a municipal local government which zones property to be annexed into the municipality; or
- (E) The grant of a permit relating to a special use of property.

O.C.G.A. § 36-66-3(4)

# **NOTICE OF PUBLIC HEARING**

## **(Application for Rezoning by Property Owner)**

- ❖ Notice published in a newspaper of general circulation within the territorial limits of the jurisdiction at least 15 days, but not more than 45 days prior to the hearings.
- ❖ The notice must state the time, place and purpose of the hearing.

# **NOTICE OF PUBLIC HEARING**

## **(Application for Rezoning by Property Owner)**

### ***(continued)***

- ❖ Notice shall include location of the property, the present zoning classification of the property, and the proposed zoning classification of the property.
- ❖ A sign placed in a conspicuous location on the property containing information required by the zoning ordinance not less than 15 days prior to the date of the hearing.

O.C.G.A. §36-66-4(b)

# **NOTICE OF PUBLIC HEARING**

## **(Application by City Council or Board of Commissioners)**

- ❖ Notice published in a newspaper of general circulation within the territorial limits of the jurisdiction at least 15 days, but not more than 45 days prior to the hearings.
- ❖ The notice must state the time, place and purpose of the hearing.

O.C.G.A. §36-66-4(a)

# PUBLIC HEARING PROCEDURES

A local government is required to give equal time to both proponents and opponents of the zoning application. In addition, the written procedures must state that each side shall have no less than 10 minutes.

O.C.G.A. §36-66-5(a)

# ZONING STANDARDS UNDER ZPL

[E]ach local government shall adopt standards governing the exercise of the zoning power, and such standards may include any factors which the local government finds relevant in balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property.

O.C.G.A. §36-66-5(b)

# ZPL PREEMPTS LOCAL PROVISIONS

- ⦿ Supreme Court held that the ZPL preempted the provisions in a City Charter for the purposes of the adoption and amendment of zoning ordinances.

Little v City of Lawrenceville, 272 Ga. 340 (2000)

- ⦿ Failure to strictly comply renders decision void.

# USING ZONING STANDARDS

- ⦿ Required for Rezoning, Special Use Permits, Text Amendments
- ⦿ Guhl Factors



# Guhl Factors

(Guhl v. Holcolmb Bridge Road Corp., 238 Ga. 322 (1977))

- (1) existing uses and zoning of nearby property;
- (2) the extent to which property values are diminished by the particular zoning restrictions;
- (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public;

# Guhl Factors

- (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner;
- (5) the suitability of the subject property for the zoned purposes; and
- (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the property.

# Zoning Conditions

Conditions imposed so as to ameliorate the negative effects of the proposed rezoning for the protection of neighboring properties

What does your ordinance say about conditional uses?

Due process concerns

# Zoning Conditions

- ⦿ Put in writing, or clearly state in the motion
- ⦿ Condition to the site plan
- ⦿ Conditions become part of the ordinance and can only be amended by rezoning action

# Special use permits

- ⦿ Uses which are permitted in a district only with special approval.
- ⦿ Similar to a conditional use approval, except that any special use will require special approval.
- ⦿ Importance of criteria
- ⦿ Examples:
  - Landfill      Crematory      Asphalt Plant

# Development Impact Fee Act, OCGA § 36-71-1

- To ensure that new growth pays no more than its proportionate share of the costs of public facilities needed to serve new growth.
- Public facilities include: Water system, sewer system, stormwater system, road system, parks and recreation, public safety (fire, police, E911) and libraries.

# Development Impact Fee Act, OCGA § 36-71-1

- Development “exaction”: compels payment, dedication, or contribution of goods, services, land, or money as a condition of approval.
- System improvements can only be imposed by impact fee. Project improvements can still be required.
- Contract zoning always illegal.
- How does this differ from conditional uses?

# Sign Ordinances

Sign ordinances must be dealt with differently from other land use regulations because unlike most land uses, they are protected by the First Amendment to the U.S. Constitution:

Congress shall make no law...abridging the freedom of speech...

Likewise, signs are protected by the Georgia Constitution:

No law shall be passed to curtail or restrain the freedom of speech or of the press.



Regulate the  
structure, not the  
message.

# How Does the Sign Ordinance Challenge Typically Rise?

- Billboard challenges
- Facial challenge to the ordinance as a whole
- May strike the entire ordinance
- May award damages and attorney fees

# The Levels of Judicial Scrutiny

## THE RATIONAL BASIS TEST (EASIEST)

- Only requires that the local government show that the ordinance is rationally related to a lawful governmental purpose.

## STRICT SCRUTINY (HARDEST)

- Applies to ordinances that content based regulations (i.e. signs) based
- The local government must show that the ordinance is the narrowest means of achieving a compelling governmental interest.

## INTERMEDIATE SCRUTINY (MIDDLE)

- Applies to content neutral, time, place, and manner restrictions.
- A local government can survive this test if it can show that the ordinance is reasonably tailored to meet a legitimate governmental interest, and it leaves open ample alternative means of communication.

# Crafting Effective Sign Ordinances

## Rule 1: Avoid Content-Based Restrictions

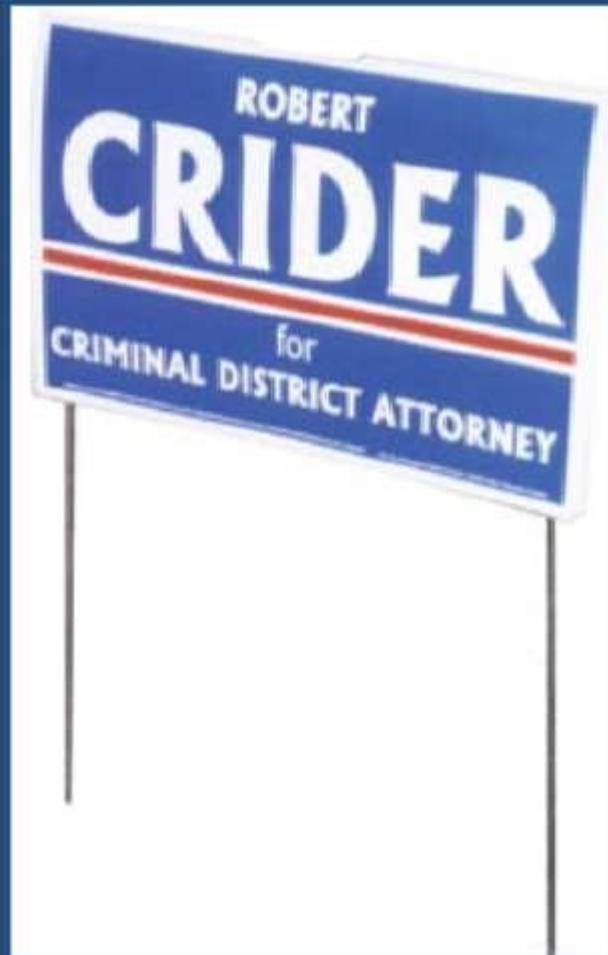
If you have to read the sign in order to determine whether or not it is allowed, then the ordinance is content based.

# Examples of Problem Language

Everything requires a permit  
except...



Residential lots may have one real estate sign.



Each lot may have no more than one political sign, and only for a period of 30 days before an election or primary.



Each lot may have one sign or decoration which conveys a holiday message.





No sign shall be maintained without a permit, except for signs maintained by a governmental entity, which shall not require a permit.



A sign ordinance that exempts signs of churches and religious institutions.



All signs require permits except... directional signs.



Illuminated or electronic signs are prohibited, except for signs telling the time or temperature.





Only on premises signs are permitted.



Off premises signs a/k/a "outdoor advertising signs" are prohibited.

Can any sign be regulated  
based upon its content?

**GO ALABAMA!  
BEAT AUBURN!  
POISON THE HISTORIC  
OAKS OF TOOMEY'S  
CORNER!**

Signs that encourage criminal behavior.



**BOBBY RAY, YOU STOLE  
MY GIRL, YOU GOOD FOR  
NOTHING SON OF A  
\$&(#@, AND I'M GONNA  
CUT YOU!**

Fighting words



Signs that depict obscenity. OCGA § 32-6-52



Signs that tend to cause official confusion or obstruct official signs are banned by state law. OCGA § 32-6-51(b)(1)

# Other Common Problems

Failure to properly justify the sign ordinance in the record.

- evidence (studies and reports, cases)
- findings and conclusions
- purpose

# Permitting

- Unbridled discretion.
- No specified or reasonable time for decisions.
- Appeal process.

# How Do You Do It Right?

- Regulate structures only, and not message content
- Allow reasonable and adequate speech (and sign) opportunities

Table of Standard Permitted Signs.

Districts /Uses	No. of ground signs	Total area of all ground sign faces	Max area of single ground sign face	Max height of ground signs	Window Signs (number/ maximum total area)	Wall Signs (number/ max total area)	Max size of single wall sign
AU, RC	3	64 sq. ft.	32 sq. ft.	10 ft.	2, up to 8 sq. ft. total area	2/200 sq. ft.	200 sq. ft.
RR, R1, R1A, MHP,	3	20 sq. ft.	4 sq. ft.	5 ft.	2, up to 8 sq. ft. total area	None	n/a
GB	2	200 sq. ft.	100 sq. ft.	20 ft.	Can cover 25% of windows	4/200 sq. ft.	200 sq. ft.
WLI	2	400 sq. ft.	200 sq. ft.	35 ft.	Can cover 25% of windows	4/250 sq. ft.	250 sq. ft.
H-I	3	600 sq. ft.	300 sq. ft.	35 ft.	Can cover 25% of windows	4/300 sq. ft.	250 sq. ft.

- Permitting
  - As a matter of right
  - Fast
  - Appeal process
- Maintenance
  - You can regulate and require maintenance of the structure.
  - International Building Code has some good provisions.



## Corey Outdoor Advertising, Inc. v. The Board of Zoning Adjustments of the City of Atlanta, 254 Ga. 221 (1985).

Property owner did not obtain a vested right to build a sign even though the city issued a permit if the permit was invalidated because the location of the sign violated the sign ordinance.

# **CONFLICT OF INTEREST IN ZONING ACT**

**O.C.G.A. Chapter 36-67(A)**

# WHICH PUBLIC OFFICIALS?

- ⦿ PLANNING COMMISSION
- ⦿ GOVERNING AUTHORITY
  - MAYOR
  - COUNCIL
  - COUNTY COMMISSION

# WHEN?

- ⦿ Only “Rezoning action”: action by local government adopting an amendment to a zoning ordinance which has the effect of rezoning real property from one zoning classification to another.
- ⦿ Not ZPL Definition: adopt ordinance, amend text, amend map, rezone annexed property, and special use permit

# PUBLIC OFFICIALS

- ⦿ Any ownership interest in the property
  - Disclose and disqualify
- ⦿ Financial Interest in business entity with any ownership in the property
  - Financial interest = 10%
  - Disclose and disqualify

# PUBLIC OFFICIALS (continued)

- ⦿ Family members with ownership or financial interest
  - Family= spouse, mother, father, sister, brother, son, daughter
  - Disclose

# PUBLIC OFFICIALS

- ⦿ Prohibited activities: actions carried out in the official's public capacity
- ⦿ Permitted activities: actions normally and properly undertaken by any other private property owner including supplementation of application, responding to inquiries from zoning authorities, or altering the property at issue or the business conducted thereon.
- ⦿ Little v. City of Lawrenceville, 272 Ga. 340 (2000)

# APPLICANTS and OPPONENTS

- ⦿ Applicant, opponent or attorneys.
- ⦿ Campaign gifts or contributions totaling \$250.
- ⦿ 2 yrs. preceding the zoning application.
- ⦿ File within 10 days of application for Applicant, 5 days prior to hearing for opponent.



# **ADDITIONAL ETHICAL CONSIDERATIONS CONCERNING VOTING**

# Ethical Issues

- Improper Conflict of Interest: When a public officer, in the discharge of his public function, acts upon a measure relating to a *specific transaction* and such transaction shall *directly* and *immediately* affect his pecuniary interest. A remote or speculative financial interest will not support a conflict of interest allegation

# Ethical Issues

- ◎ White v. Board of Com'rs of McDuffie County, 252 Ga.App. 120 (2001) – bank officer on Board
- ◎ Dunaway v. City of Marietta, 251 Ga. 727 (1983) – VP disclosed but still presided

# Ethical Issues

- Public officers are the trustees and servants of the people and are at all times amenable to them.” Const. Art. I, §2, ¶ 1
- Crozer et al. v. Reichert et al., 275 Ga. 118 (2002) – planning director sought approval, subordinate reviewed
- Wyman v. Popham, 252 Ga. 247 (1984) – Commissioners sold to applicant

# Staying Out of Trouble

- ⦿ Avoid prejudgment
- ⦿ Avoid pre-hearing public comments
- ⦿ Avoid ex parte communications
  - Legislative versus quasi-judicial meetings
- ⦿ Limit comments at hearing to relevant criteria
- ⦿ Disclose and recuse if conflict of interest is questionable

# TOOLS FOR CODE ENFORCEMENT

- State minimum standard codes
- Permissive codes
- Useful ordinance provisions
- Unfit Property actions

# STATE MINIMUM STANDARD CODES (MANDATORY CODES); WITH GEORGIA AMENDMENTS

1. International Building Code (ICC 2006 Ed.)
2. National Electrical Code (NFPA 2008 Ed.)
3. International Fuel Gas Code (ICC 2006 Ed.)
4. International Mechanical Code (ICC 2006 Ed.)
5. International Plumbing Code (ICC 2006 Ed.)
6. International Residential Code for One and Two-family Dwellings (ICC 2006 Ed.)
7. International Energy Conservation Code (ICC 2006 Ed.)
8. International Fire Prevention Code (ICC 2006 Ed.)

O.C.G.A. §§ 8-2-20, 8-2-25

# ENFORCEMENT OF CODES

Local governments must adopt reasonable administrative procedures in order to enforce them (e.g., hearings, appeals)(O.C.G.A. § 8-2-25(a)).



# PERMISSIVE CODES (WITH GEORGIA AMENDMENTS); MAY BE ADOPTED IF DESIRED; NOTIFY DCA OF ADOPTION

1. International Existing Building Code (ICC 2006 Ed.) (focuses on remodeling existing buildings)
2. International Property Maintenance Code (ICC 2006 Ed.) (focuses on property maintenance)

O.C.G.A. § 8-2-25

- ◎ **304.4 Structural members.**

All structural members shall be maintained free from *deterioration*, and shall be capable of safely supporting the imposed dead and live loads.

- ◎ **304.13 Window, skylight and door frames.**

Every window, skylight, door and frame shall be kept in sound condition, good repair and weather tight.

### ● 302.5 Rodent harborage.

All structures and *exterior property* shall be kept free from rodent harborage and *infestation*. Where rodents are found, they shall be promptly exterminated by *approved* processes which will not be injurious to human health. After pest elimination, proper precautions shall be taken to eliminate rodent harborage and prevent reinfestation.

### ● 302.9 Defacement of property.

No person shall willfully or wantonly damage, mutilate or deface any exterior surface of any structure or building on any private or public property by placing thereon any marking, carving or graffiti.

It shall be the responsibility of the *owner* to restore said surface to an *approved* state of maintenance and repair.

- **308.1 Accumulation of rubbish or garbage.**

All *exterior property* and *premises*, and the interior of every structure, shall be free from any accumulation of *rubbish* or garbage.

- **301.3 Vacant structures and land.**

All vacant structures and *premises* thereof or vacant land shall be maintained in a clean, safe, secure and sanitary condition as provided herein so as not to cause a blighting problem or adversely affect the public health or safety.

# USEFUL ZONING ORDINANCE PROVISIONS

1. Appearance of Property: junk, trash, debris, tall grass and vegetation.
2. Junk, inoperative, untagged vehicles; commercial parking limits (side, rear).
3. Storage, storage containers, vehicles as storage, storage of tires.
4. Residential living: no RVs, no tents, etc.
5. Parking commercial vehicles, RVs
6. Minimum Fines

# UNFIT PROPERTY ORDINANCES

A city or county may take action against such buildings or structures which “are unfit for human habitation or for commercial, industrial, or business occupancy or use and not in compliance with the applicable state minimum standard codes as adopted by ordinance.” O.C.G.A. § 41-2-7

# ADOPTION OF ORDINANCES RELATING TO UNFIT BUILDINGS

- Can adopt Unfit Property Ordinance  
O.C.G.A. § 41-2-9
- A public officer must be identified to exercise the powers prescribed by the ordinance
- Law has detailed notice standards; includes title search



# WHAT IS UNFIT FOR USE?

Determination that building is unfit may rest upon some or all of the following conditions:

- Defects increasing hazards of fire or accidents
- Lack of adequate ventilation and light or sanitary facilities
- Dilapidation
- Disrepair
- Structural defects
- Uncleanliness

O.C.G.A. § 41-2-10

# Steps to Unfit Property Enforcement

- File Complaint
- Notice and hearing
- Order to repair or demolish, or authorize local government to do so; costs of demolition cast as lien against property. O.C.G.A. § 41-2-9

# Foreclosure and Vacant Property Registry

O.C.G.A. § 44-14-14

- Allows local governments to adopt a limited and uniform registration requirement for vacant property.
- Preempts other local registration requirements.

# Vacant Real Property Defined

- ⦿ Real property that is intended for habitation, but has not been inhabited for 60 days, has no evidence of utility usage, and is not actively being marketed for sale or rent, or
- ⦿ Partially constructed without a valid building permit, or
- ⦿ Is held as a result of foreclosure.
- ⦿ Excludes multi-family structures where any one unit is being inhabited.

# Foreclosure Registration

- ⦿ Grantee of the foreclosure deed or deed in lieu of foreclosure and next subsequent transferee must give local government the following information:
  - owner's name, address, phone, fax, e-mail
  - agent's name, address, phone, fax, e-mail
  - vacant property's address
  - transfer date
  - recording info (deed book and page #)

# Foreclosure Registration, cont'd

- ⦿ Owner has at least 90 days to file.
- ⦿ If they file the deed with the Clerk of the Superior Court within 60 days, it contains all the required information, and they notify the County and provide the recorded deed and information, then no fee.
- ⦿ Otherwise, fee of no more than \$100.
- ⦿ Penalties of no more than \$1,000 for failing to register

# **O.C.G.A. § 44-14-14 is Not Self-Effectuating**

- ⦿ The local government is required to adopt an ordinance complying with the statute in order to enforce a vacant property registration requirement.
- ⦿ Requires administrative procedures.