



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

**June 30, 2015**

**Presented by:**

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P R O M O T I N G   E X C E L L E N C E   I N   G O V E R N M E N T

# TOPICS

- **Constitutional Issues**
- **Zoning Procedures Act**
- **Using Zoning Standards**
- **Zoning Conditions / Special Use Permits**
- **Sign Ordinances**
- **Conflicts of Interest and Other Ethical Issues**

# 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**

# 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 Non-Conforming Use Provisions

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

# Equal Protection

- To treat two similarly situated properties differently
- To enforce the zoning ordinance differently for two similarly situated properties
- 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, O.C.G.A. § 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, O.C.G.A. § 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

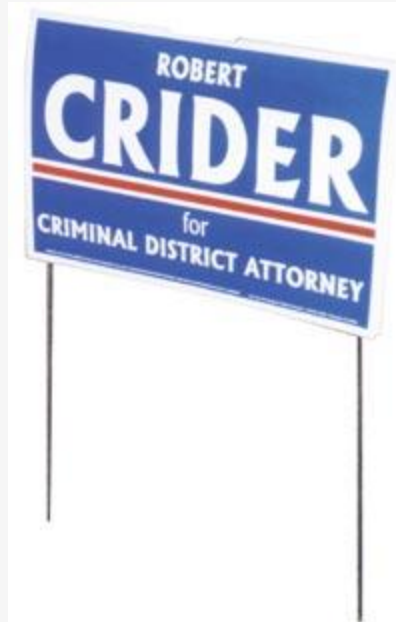
If you have to read the sign in order to determine whether or not it is allowed, then the ordinance is content based.

# Examples of Problem Language

Everything requires a permit except...



Residential lots may have one real estate sign.

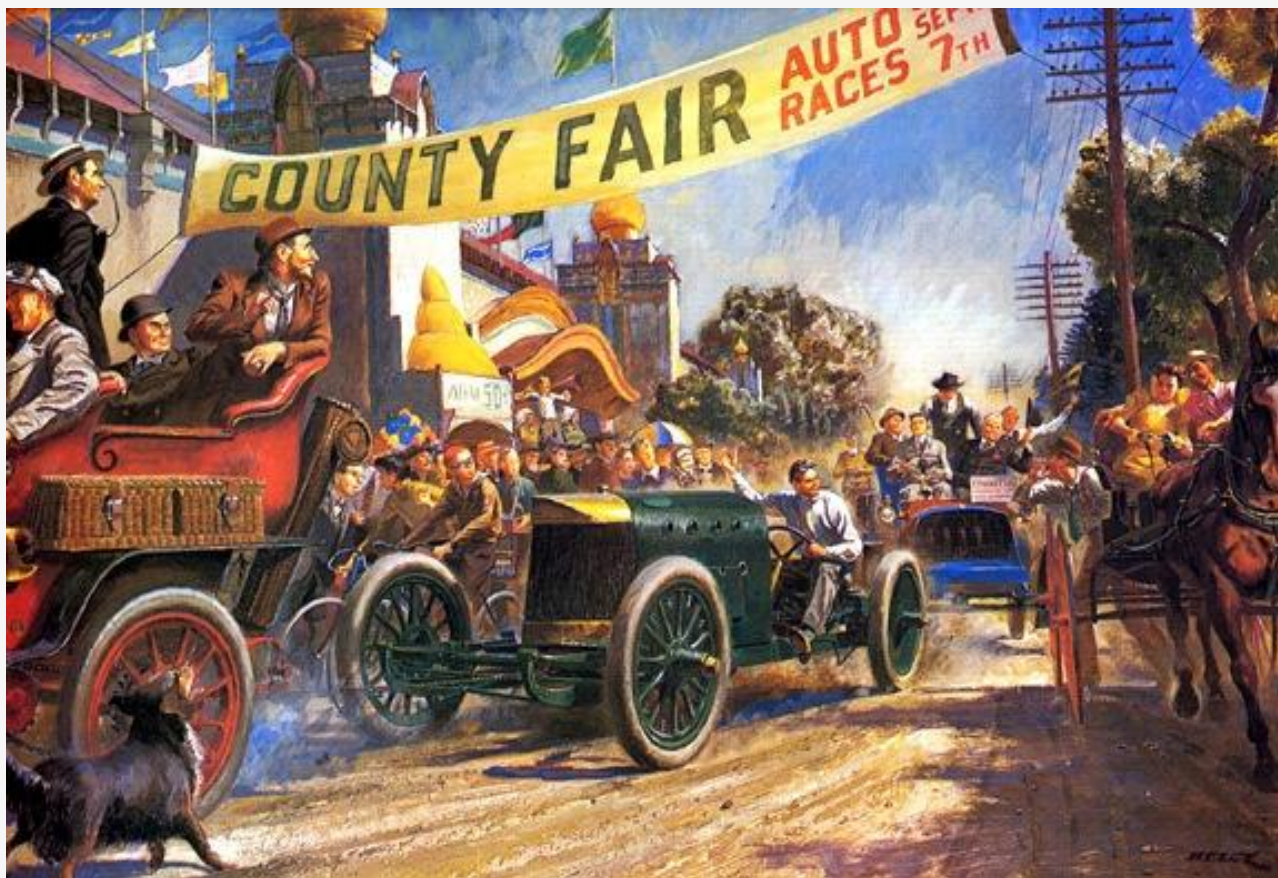


Each lot may have no more than one political sign, and only for a period of 30 days before an election or primary.



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



**CENSORED**

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, <u>R1A</u> , <u>MHP</u> ,	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.
<u>WLI</u>	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

# Staying Out of Trouble, cont'd

- Limit comments at hearing to relevant criteria
- Disclose and recuse if conflict of interest is questionable