

# KEY ISSUES IN MAKING ZONING & LAND USE DECISIONS

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**I. KEY ISSUES IN CONSIDERATION OF CONSTITUTIONALITY OF ZONING CLASSIFICATION**

Zoning is a quasi-legislative matter, but it is subject to constitutional prohibition against taking private property without just compensation. [U.S.C.A.Const. Amend. 14](#); Const. art. 1, § 1, par. 3.

Zoning classification may only be justified if it bears a substantial relation to public health, safety, morality or general welfare; lacking such justification, the zoning may be set aside as arbitrary or unreasonable. [U.S.C.A.Const. Amend. 14](#); Const. art. 1, § 1, par. 3.

If zoning regulation results in relatively little gain or benefit to public while inflicting serious injury or loss on owner, such regulation is confiscatory and void; for such unlawful confiscation to occur, it is not necessary that the property be totally useless for the purposes classified; it suffices if the damage to the owner is significant and not justified by the benefit to the public. [U.S.C.A.Const. Amend. 14](#); Const. art. 1, § 1, par. 3.

**Barrett v. Hamby, 235 Ga. 262 (1975)**

In zoning, the legal issue is the constitutionality of the existing zoning—not whether the proposed zoning is constitutional or provides a higher and better use.

**DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997)**

Zoning ordinances are presumed to be valid.

**Gradous v. Board of Commissioners of Richmond County, 256 Ga. 469, 349 S.E.2d 707 (1986)**

To successfully challenge a denial of rezoning, a land owner must show by clear and convincing evidence that the current zoning is a substantial detriment without a substantial benefit to the public benefit.

**DeKalb County v. Dobson, 267 Ga.App. 624, 482 S.E.2d 239 (1997)**

A substantial detriment is difficult to show.

- Evidence of economic loss alone is not sufficient to show substantial detriment.
- Evidence of difficulty to develop property under existing zoning is not sufficient to support a legal conclusion of substantial detriment.
- Evidence that property more valuable if rezoned is not sufficient to show substantial detriment.

**DeKalb County v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 281 S.E.2d 525 (1981)**

Consistency of the zoning with the comprehensive plan is important evidence of substantial benefit to the public.

**City of Atlanta v. Tap Associates, 273 Ga. 681, 544 S.E.2d 433 (2001)**

**II. AMENDMENTS TO THE OPEN AND PUBLIC MEETINGS ACT  
O.C.G.A. Chapter 50-14**

***Who is subject to the act?***

Every county, municipality, commission, agency, board, department or authority of each county or municipality.

***What meetings are required to be opened?***

A gathering of a quorum of the members of the governing body or any committee at which official business, policy, or public matter of the governing body or agency is formulated, presented, discussed, or voted upon.

***Meetings shall not include:***

1. The gathering of a quorum of the members of a governing body or committee for the purpose of making inspections of physical facilities or

property under the jurisdiction of such agency at which no other official business of the agency is to be discussed or official action is to be taken;

2. The gathering of a quorum of the members of a governing body or committee for the purpose of attending state-wide, multi-jurisdictional, or regional meetings to participate in seminars or courses of training on matters related to the purpose of the agency or to receive or discuss information on matters related for the purpose of the agency at which no official action is to be taken by the members;
3. The gathering of a quorum of the members of a governing body or committee for the purpose of meeting with officials of the legislative or executive branches of the state or federal offices and at which no official action is to be taken by the members;
4. The gathering of a quorum of the members of a governing body of an agency for the purpose of traveling to a meeting or gathering as otherwise authorized by this subsection so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum; or
5. The gathering of a quorum of the members of a governing body of an agency at social, ceremonial, civic, or religious events so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum.

This subparagraph's exclusions from the definition of the term meeting shall not apply if it is shown that the primary purpose of the gathering or gatherings is to evade or avoid the requirements for conducting a meeting while discussing or conducting official business.

***Open meetings shall be:***

1. Open to the public (visual and sound recording shall be permitted)
2. Set for a time, place, and date of the regular meeting of the agency pursuant to notice posted at least one week in advance and maintained in a conspicuous place available to the public at the regular meeting place of the agency, as well as the agency's website, if any.

***Open meetings at a time or place other than that prescribed for regular meetings:***

Pursuant to written notice at least 24 hours at the place of regular meetings and notice at least 24 hours to the legal newspaper if the meeting is not held at a time or place for regular meetings of the agency.

***Published agenda of open meetings:***

An agenda of all matters expected to be considered at an open meeting shall be available upon request and posted at the meeting site in advance as soon as reasonably possible but not more than 2 weeks prior to the meeting. (Other agenda items may be considered and acted upon at the meeting)

***Summary of subjects acted on:***

Within two business days of the adjournment of an open meeting, a summary of the subjects acted on and the members present at the meeting is required to be available for public inspection.

***Minutes of an open meeting:***

1. Minutes shall be promptly recorded not later than immediately following the next regular meeting of the agency.
2. Minutes shall include names of the members present, a description of each motion or proposal, identity of the person making and seconding the motion or other proposal, and a record of all votes.

**III. TIME LIMITATIONS FOR FILING AN APPEAL TO SUPERIOR COURT**

**Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981)**

A suit challenging a local government zoning decision must be filed in the superior court within 30 days of that decision.

**Chadwick v. Gwinnett County, 257 Ga. 59 (1987)**

30-day window for filing appeal of zoning decision begins to run when the decision is reduced to writing and signed by the authorized official.

**IV. LIABILITY OF COUNTY BUILDING INSPECTOR**

**Howell v. Willis, 317 Ga.App. 199, 729 S.E.2d 643 (2012)**

A county building inspector is entitled to official immunity from suit in its individual capacity if his inspection of a residence is a discretionary act rather than a

ministerial act. Qualified immunity affords protection to inspectors for discretionary actions taken within the scope of their official authority. A ministerial act is commonly one that is simple, absolute, definite, and arising under conditions admitted or proved to exist and requiring the execution of a specific duty. A discretionary act, on the other hand, calls for the exercise of personal deliberation and judgment. Evidence showed that the building inspector was granted discretion in determining how he went about conducting the inspection, the methodology he employed, and the number of inspections that he made as well as requirements he placed on contractors afterwards. Therefore, the inspection of the residence was a discretionary act, and the building inspector was entitled to qualified immunity from suit by the building owner.

**V. ETHICAL CONSIDERATIONS IN ZONING DECISIONS  
CONFLICT OF INTEREST IN ZONING ACT,  
O.C.G.A. Chapter 36-67(A)**

1. DISCLOSE/DISQUALIFY
  - Public Officials
  - Applicants/ Attorneys
  - Opposition/ Attorneys
2. WHEN?
  - Only Rezoning
3. WHICH PUBLIC OFFICIALS?
  - Planning Commission
  - Governing Authority
    - Mayor
    - Council
    - County Commission
4. PUBLIC OFFICIALS
  - Any ownership interest
    - Disclose and disqualify

- Financial Interest in entity with any ownership
  - Financial interest = 10%
  - Disclose and disqualify
- Family members with ownership or financial interest
  - Family = spouse, mother, father, sister, brother, son, daughter
  - Disclose
- Campaign contributions
  - None

5. APPLICANT

- Applicant or attorney
- Campaign gifts or contributions totaling \$250
- 2 years preceding the zoning application
- File within 10 days of application

6. OPPOSITION

- Opposition/attorney
- \$250
- File 5 days prior to the hearing
- 2 years preceding application

7. ADDITIONAL ETHICAL ISSUES

**Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984)**

Evidence that one member of the board of commissioners sold all the sand to a zoning applicant used in his business and another commissioner did all the applicant's gutter work was sufficient to find fraud and corruption in commissioners' vote to approve zoning for the applicant.

**Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974)**

The issue before the court is whether a commissioner “. . .had a direct or indirect financial interest in the outcome of the zoning vote—an interest which was not shared by the public generally, and which was more than remote or speculative.” A judicial inquiry into the circumstances of the conflict of interest of the commissioner is proper

even though the bias of the commissioner was not raised in the zoning hearing before the board of commissioners.

**Vickers v. Coffee County, 255 Ga. 659, 340 S.E.2d 585 (1986)**

A county commissioner had a conflict of interest when he voted to purchase a tract of land for use by the county as a landfill. Three tracts were under consideration by the county for the landfill. The two tracts rejected by the county were in close proximity to a tract of land co-owned by the commissioner which he intended to develop as a subdivision. The commissioner admitted in testimony that the proximity of the two rejected tracts would affect the value of his land and his ability to sell lots in the subdivision. The Supreme Court found that the effect on the commissioner's pecuniary interest was direct and immediate. Because of this conflict of interest, the court voided the vote by the county to purchase the third tract under consideration for its landfill.

**Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983)**

The chair of the city planning commission who was also an officer of the corporation applying for rezoning may have tainted the proceedings although he only presided at the planning commission hearing on the application, but did not vote.

**VI. GETTING THE SIGN ORDINANCE RIGHT**

Does your sign ordinance impose limits on the time a resident may display a political sign or a "for sale" sign? Does your ordinance specify certain districts in which a sign may only display a message related to an activity on property other than where the sign is located? (the so-called off-premises sign) If either or both of these provisions are found in your sign ordinance, it probably is unconstitutional and unlikely to withstand a legal challenge to its validity.

Both federal and state courts have laid down rules we must follow to protect against unconstitutional restriction of speech guaranteed under the First Amendment of the U.S. Constitution and the Free Speech Amendment of the Georgia Constitution. Yes, putting a message on a sign is a form of speech, and local governments may not restrict that speech in a sign ordinance unless constitutional protections are put in place.

The First Amendment and the Free Speech Amendment permit a local government to prohibit sign messages promoting unlawful activity or messages that are misleading. But any other restriction of otherwise protected speech is valid only if it “...seeks to implement a substantial government interest, ...directly advances that interest, [and] reaches no further than necessary to accomplish the given objective.”<sup>1</sup>

Some specific rules or conditions must be included in a sign ordinance for it to survive constitutional scrutiny. Following is a list of constitutional safeguards that often are missing from sign ordinances. Hopefully, this article will help you examine your sign ordinance and apply these judicial rules and thus determine if your sign ordinance will withstand a lawsuit challenging its constitutionality.

### **Rule No. 1 Adopt a Statement of Legislative Purpose<sup>2</sup>**

A sign ordinance, to be constitutional, must satisfy a “substantial government interest”; otherwise, it restricts speech without a basis for imposing limits on speech. We, as a government, are authorized to restrict signs if it advances the aesthetic interests of a local government, e.g. limits clutter and protects the visual landscape, or it promotes traffic safety. These purposes as justification for imposing limits on signs must be amply laid out as the underlying basis and purpose for a sign ordinance.

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<sup>1</sup> Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed.Appx. 268, 273 (11<sup>th</sup> Cir., 2006)

<sup>2</sup> Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed.Appx. 268, 273 (11<sup>th</sup> Cir., 2006)

Accompanying this purpose should be studies, including treatises, which have demonstrated the benefit of sign restrictions to advance the aesthetic and safety interests of a local government. These studies and treatises should be incorporated into and made a part of the preface or introduction to the sign ordinance. It is only upon showing that a local government's aesthetic interests and traffic safety are advanced that it may constitutionally limit speech and thus restrict sign usage within a local government's jurisdiction.

**Rule No. 2 Sign Ordinances Must be Content-Neutral<sup>3</sup>**

Content-neutral means that a sign ordinance must not regulate signs based upon the message. The introduction to this article shows an example of this, i.e. signs identified and regulated by a political message. There are exceptions to this rule, but the better practice is to regulate signs by the size, construction, materials, number, and location, but not by the message on the sign. If your ordinance identifies a sign by its message, it probably is not content-neutral.

**Rule No. 3 Sign Ordinances Must Have Standards for Granting or Denying Sign Permit Applications<sup>4</sup>**

Your ordinance must set forth standards which an administrative official or board must apply in determining whether a sign may be permitted. Giving the permit official unbridled discretion to decide whether a sign may be permitted is typically a constitutional problem. The better approach is to grant a permit for a sign if it satisfies the ordinance provisions; that is, an objective standard not based on the discretion of an administrative official or a board. In any event, the sign ordinance should set out those

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<sup>3</sup> Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11<sup>th</sup> Cir., 2005); Dimmitt v. City of Clearwater, 985 F.2d 1565 (11<sup>th</sup> Cir., 1993); Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11<sup>th</sup> Cir., 2004); and Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996)

<sup>4</sup> Camp Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11<sup>th</sup> Cir., 2006)

standards which have to be applied in determining whether a sign permit should be granted.

**Rule No. 4 Limit the Time in which a Decision on Sign Permit Applications Must be Made<sup>5</sup>**

If your ordinance does not specify the time within which a decision for a sign permit application must be made, it has serious constitutional problems. According to many court decisions, allowing a sign permit application to languish indefinitely without a decision is a denial of free speech. Fifteen to thirty days is usually adequate for a decision to be made, and your ordinance should state a specific time within which an applicant may expect a decision.

**Rule No. 5 Include a Provision that a Decision Denying a Sign Application Permit May be Judicially Appealed Within 30 Days<sup>6</sup>**

A local government may establish a procedure for appeal of an initial decision denying a sign permit application to a separate administrative official or board. That is to say, an initial decision may be made by an administrative official, and an aggrieved applicant may then appeal to a planning commission or even the city council or the board of commissioners. But what is essential as mandated by a number of court decisions is that a judicial appeal be provided within the ordinance. That is, an ordinance should provide that an unhappy applicant for a sign permit may appeal the final decision of the local government to the appropriate superior court within 30 days of the decision. Such a provision will satisfy the requirement that an aggrieved applicant has a right to immediate judicial review of the local government's decision.

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<sup>5</sup> Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11<sup>th</sup> Cir., 2004)

<sup>6</sup> Boss Capital, Inc. v. City of Casselberg, 187 F.3d 1251 (11<sup>th</sup> Cir., 1999) (applying free speech safeguards to adult entertainment ordinances)

These rules are not intended to be exhaustive of all constitutional requirements necessary for a local government’s sign ordinance, but these are the most significant deficiencies in sign ordinances and the ones most often subject to challenge in either the federal or the state courts. Put your ordinance on the examining table, and if any of these rules are violated, you should immediately revise the ordinance or it may not withstand a judicial challenge.

**1. Union City Board of Zoning Appeals et al. v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996).**

In a multifaceted challenge to the Union City sign ordinance, the court made the following holdings, among others:

- A. The city’s sign ordinance which distinguishes between “off-premise signs” and “on-premise signs” violates the First Amendment to the United States Constitution and the Free Speech Clause of the Georgia Constitution. Since the city restricts the content of a sign based upon its location, it will not survive strict scrutiny. The city effectively prohibits signs bearing non-commercial messages in zoning districts where a sign of the same size and structure may display commercial messages.
- B. The city’s sign ordinance is also unconstitutional to the extent that it limits the messages on specific categories of signs, which are principal identification signs, marketing signs, construction signs, instructional signs, real estate directional signs, real estate signs, and special event signs. The effect of the ordinance was to limit the

message of certain signs to those identifying the type of sign that may be used.

- C. The ordinance provisions which restrict signs in residential zoning districts to on-premise signs and certain temporary or special signs, such as political signs, are likewise unconstitutional. The court reasoned that the ordinance prohibits vital expression through the unique medium of residential signs without providing a viable alternative.
- D. The city's time limitation on political signs during a period of six weeks prior to and one week after an election is likewise unconstitutional. Since the ordinance does not place time limits that a resident may post a sign selling his house, for example, restrictions on political signs are necessarily content based and unconstitutionally restricted.

**2. Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (2005).**

Neptune Beach's sign code violated the First Amendment in two ways: it exempted from regulation certain categories of signs based on their content without compelling justification for the differential treatment, and it contained no time limits for responding to applications for sign permits.

An example of the types of signs exempt from the regulations and thus not requiring a permit are: 1) flags and insignia of any government, religious, charitable, fraternal or other organizations; 2) signs on private premises directing and guiding traffic and parking on private property; and 3) holiday lights and decorations. Thus, the city's sign code discriminates against certain types of speech (signs) based on content. It

exempts from regulation some categories of signs based on content, but does not exempt others based on content. Generally, laws that distinguish favored speech from unfavored speech on the basis of the ideas or views expressed are content based. A content-neutral ordinance applies equally to all and not just those with a particular message or subject matter in mind. But where the city exempts certain signs based upon the content or message within, the sign is not content neutral.

Where the sign code is a content based restriction on speech, to be constitutional it must serve a compelling state interest and be narrowly drawn to achieve that end. The city's sign ordinance was based on general purposes of aesthetics and traffic safety, but these reasons are not "compelling government interests" for purposes of First Amendment analysis. Moreover, the sign code's exemptions are not narrowly tailored to achieve the city's traffic safety or aesthetic goals. The code thus is not justified by a compelling government purpose and therefore fails to survive strict scrutiny required under First Amendment analysis.

The ordinance is also unconstitutional because it fails to impose time limits for permitting decisions and thus is an invalid prior restraint on speech. To satisfy time limit requirements, an ordinance must insure that permitting decisions are made within a specified time period. But here the city's sign code contains no time limits on permitting and therefore is an unconstitutional restraint on speech for that reason.

**3. Tinsley Media, LLC v. Pickens County, Georgia, United States Court of Appeals, Eleventh Circuit, decided October 12, 2006.**

Plaintiff filed eleven applications with the county for permission to erect billboards, which were prohibited under the existing sign ordinance. The applications

were denied, and the plaintiff filed suit claiming several provisions of the county's sign ordinance violated the U.S. and Georgia Constitutions.

Regulations that restrict expression of protected speech are analyzed under a four-part analysis, as follows: (1) commercial speech is protected "only if that speech concerns lawful activity and is not misleading"; (2) a restriction is valid if it seeks to implement a substantial government interest; (3) the restriction directly advances that interest; and (4) it reaches no further than necessary to accomplish the given objective.

The court found that the county's ordinance contained no statement of purpose at all. Without a statement of purpose, according to the court, the statute cannot satisfy the "substantial government interest" requirement under federal law.

In its decision, the court pointed out other constitutional requirements in a sign ordinance. The ordinance must contain standards for approval, a time limit for granting or denying a permit, and procedures for appeal. If a sign ordinance lacks any of these provisions, it is subject to challenge that it is unconstitutional.

**VII. RECENT LAWS ADOPTED BY THE GENERAL ASSEMBLY RELATING TO ZONING AND LAND USE**

1. Amendment to Article 2, Chapter 2, Title 8 of the O.C.G.A. Relating to Factory-Built Buildings and Dwelling Units

In 2010 the Georgia General Assembly amended the Official Code of Georgia to add § 8-2-170 and § 8-2-171. The amendment is effective on and after September 1, 2010, and applies to the right to install and occupy a pre-owned manufactured home. It prohibits any county or city from imposing health and safety standards or conditions based on the age of the manufactured home. It does provide for the establishment of health and safety standards and authorizes an inspection program for pre-owned

manufactured homes when relocated from their current locations. It also absolves any inspector of pre-owned manufactured homes from any liability resulting from defects or conditions in the pre-owned manufactured homes.

2. The Following Chapter was Adopted by the 2010 Georgia General Assembly, O.C.G.A. § 36-66b-1 et seq., and is Known as the “Advanced Broadband Collocation Act.”

The intent of this legislation is to limit a local government’s review and evaluation of an application to either modify or collocate wireless support structures located within its jurisdiction. Modification of a wireless support structure means improvement, upgrade, expansion, or replacement of an existing wireless facility that does not increase the height of the structure or the dimensions of the equipment compound. Collocation, as used in the act, means the placement or installation of new wireless facilities on previously approved wireless support structures that negates the need to construct a new freestanding wireless support structure.

If an applicant applies to a local government for modification or collocation of a preexisting wireless support structure, the act limits the review and evaluation of the local government to conformance with an applicable site plan, building permit requirements, zoning, and land use conformity. But an application may not be subject to additional zoning, land use, or special use permit approvals beyond the initial zoning, land use, or special permit approval issued for the existing wireless support structure. Its intent is to require that previously approved wireless support structures may be modified or accept collocations without additional zoning or land use review beyond that required by the local government for issuance of building or electrical permits.

This streamlined process required by this act applies when the proposed collocation does not increase the height or width of the wireless support structure, or

dimensions of the equipment, or exceed the weight limits for the wireless support structure. Any proposed collocation must comply with applicable conditions of approval applied to the initial approval of the wireless support structure.

The act also requires a local government to make its final decision to approve or disapprove the application within 90 days of the filing of the application for modification or collocation. If the application is incomplete, an applicant must be notified within 30 days of filing the incomplete application. The 90 days within which the local government must make its decision is tolled until the application is complete.

3. Amendments to O.C.G.A. §§ 8-2-111 and 8-2-112 Establishing Limitations on Local Governments and Restricting Residential Industrialized Buildings

In 2010, the Georgia General Assembly adopted amendments to the Industrialized Building Code in which it identified a “residential industrialized building” as any dwelling unit designed and constructed in compliance with the minimum one- and two-family dwelling code made, fabricated or assembled in a manufacturing assembly which cannot be inspected at the installation site without disassembly or damage to the structure. It does not include a manufactured home. The act provides that all industrialized buildings and residential industrialized buildings bearing the insignia of approval issued by the commissioner of community affairs are deemed to comply with minimum standard codes and all ordinances and regulations enacted by any local government. It specifically prohibits any local government from excluding residential industrialized buildings from any residential district solely because the building is a residential industrialized building. But it reserves to the local government the right to restrict by land use and zoning laws such things as building setback, yard requirements, subdivision regulations, and architectural and aesthetic requirements.

## **VIII. GEORGIA LAW ON MANUFACTURED HOUSING**

### **1. Excluding Manufactured Homes from Residential Districts**

In King v. City of Bainbridge, 276 Ga. 484, 577 S.E.2d 772 (2003), King, a resident of the city, was sued for placing her manufactured home in the R-2 zoning district from which such homes were excluded under the zoning ordinance. In her defense of the action against her, she challenged the zoning ordinance in a two-pronged attack. One was under the National Manufactured Housing and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426. King contended that the fact that manufactured homes were excluded from the R-2 district, while modular homes (Department of Community Affairs homes) were permitted, evinced a regulatory scheme in violation of the national act. In her second attack, King asserted that the exclusion of manufactured homes from the R-2 district exceeded the police power of the city; thus, the ordinance according to her challenge was unconstitutional.

The Supreme Court's response was a sweeping rejection of both challenges. In upholding the city's zoning ordinance, the court concluded that the ordinance did not violate the HUD Act, nor was it an unconstitutional exercise of the city's police power. But, of significance to those of us who practice in the planning and zoning field are the rules laid down by the court which now guide us in crafting zoning ordinances. Those rules are as follows:

- A. Local governments may draw a distinction in their zoning ordinances between manufactured homes (HUD homes) and modular homes (DCA homes). As was the case in City of Bainbridge, a zoning ordinance may exclude manufactured homes in a zoning district, but permit modular homes in the same district.

- B. The City of Bainbridge's zoning ordinance excluded manufactured homes from all zoning districts, except manufactured home parks and subdivisions. Since this zoning ordinance was approved by the court, local governments may also adopt the same restrictions or similar variations with reasonable assurance that they will be upheld if challenged in court.

The purpose for excluding manufactured homes is still important, however. Without a purpose, a restriction in a zoning ordinance is arbitrary and unreasonable, and thus unconstitutional. In City of Bainbridge, the court found the zoning ordinance valid and constitutional because the restrictions were designed to regulate the quality of housing and advance general safety concerns. Other reasons may also be used and many of those are enumerated in this decision. The Supreme Court specifically noted courts routinely uphold zoning ordinances broadly restricting mobile home placement. A wide variety of rationales have been found sufficient to justify these ordinances: preserving land for low density, single-family dwellings, protection of property values, guarding against increased crime, guarding against traffic congestion, maintaining aesthetics, regulating population density, preventing waste and sewage problems, regulating quality of housing stock, and concerns about wind vulnerability. Hence, those reasons all appear to be legitimate. The reasons don't have to be stated in the zoning ordinance, but it is a better practice to develop acceptable reasons when preparing the record prior to adopting a zoning ordinance. The best place to put the basis for manufactured home restrictions is in the comprehensive land use plan.

Placement of manufactured homes is now largely up to the discretion of the local government. A careful and reasoned approach to restrictions on manufactured homes

best serves the community, as manufactured homes should be permitted in every community.

## **IX. NON-CONFORMING USES**

### **1. Cox v. City of Sasser, 300 Ga.App. 251, 684 S.E.2d 385 (2009).**

The plaintiff property owners placed a mobile home on their property where the parents of one of the property owners resided until their deaths in 1994 and 1995. In 2006, one of the property owners decided to replace the mobile home, which was a 660-square foot mobile home, with a 1980-square foot manufactured home. The property was located in an R-1 single-family residential zoning district which did not permit mobile homes or manufactured homes. The city clerk nonetheless issued a permit for a “manufactured/modular/home” which the property owner purchased and placed on the property in 2006.

The property owners contended they had a right to replace the former mobile home with the new manufactured home. The court, however, disagreed as the ordinance permits all residences that have been determined to be nonconforming to “make needed routine improvements to include replacement.” The ordinance further provided that a nonconforming use may not be expanded or extended. The court found that the mobile home was a nonconforming use and the placement of the new 1980-square foot home was not a replacement authorized by the ordinance.

The property owner also alleged that the city was estopped from requiring the removal of the manufactured home since the city clerk had issued a permit. But the court found that the clerk’s act of issuing the permit was unauthorized as she did not

have the authority to waive any of the conditions of zoning, and therefore, the city was not estopped from enforcing the zoning ordinance despite the issuance of the permit.

**2. The Ansley House, Inc. v. City of Atlanta, 260 Ga. 540, 397 S.E.2d 419 (1990).**

The following city ordinance was in issue in this case:

When a **nonconforming use** of a major structure or a major structure and premises in combination is discontinued for a continuous period of one (1) year, the structure and premises in combination, shall not thereafter be used except in conformity with the regulations of the district in which it is located. Such restriction shall not apply if such cessation is as a direct result of governmental action impeding access to the premises.

The court found that an ordinance such as this one, which attempted to discontinue a nonconforming use based on cessation of use for a specific period of time, impliedly introduced the question of intent to abandon the use by the property owner. That is a fact question, for which evidence must be presented, either in favor of or against intent to abandon the use of the property.

To remove the issue of intent to abandon, the court shows that an ordinance may terminate a nonconforming use by cessation of use for a specified period of time, but the ordinance should state that the nonconforming use may not be resumed regardless of any reservation of an intent not to abandon. That language removes the subjective intent of the property owner as a factor.

**3. Henry v. Cherokee County, 290 Ga.App. 355, 659 S.E.2d 393 (2008).**

Nonconforming uses run with the land and benefit a subsequent purchaser of the property. But expanding a nonconforming use on the same lot may be prohibited,

depending on the language of the nonconforming use ordinance. If it is intended that a nonconforming use may not be expanded on the same lot, the ordinance should state, “no such nonconforming use of land shall in any way be extended, either on the same or adjoining property.” Absent this language, a property owner may be allowed to expand a nonconforming use on the same lot.

**4. Noble Parking, Inc. v. Centergy One Associates LLC**

“The construction of a zoning ordinance, under the facts, is a question of law for the courts, and in construing it the cardinal rule is to ascertain and give effect to the intention of the lawmaking body.” (Citation and punctuation omitted.) Northside Corp. v. City of Atlanta, 275 Ga.App. 30, 31(1), 619 S.E.2d 691 (2005). And “[i]n construing a legislative act, a court must first look to the literal meaning of the act. If the language is plain and does not lead to any absurd or impracticable consequences, the court simply construes it according to its terms and conducts no further inquiry.” (Citation and punctuation omitted.) City of Atlanta v. Miller, 256 Ga.App. 819, 820(1), 569 S.E.2d 907 (2002). “Further, we must strictly construe the zoning ordinance in favor of the property owner, resolving ambiguities in the language in favor of the free use of property.” Trubey v. Hall, 237 Ga.App. 498, 499–500(1), 515 S.E.2d 639 (1999). Under the Atlanta Zoning Ordinance, a nonconforming use will not lose its permitted use status, if there is a temporary intervening use that is not permitted under the zoning code. To lose its status as a nonconforming use, the temporary intervening use must be a permitted use under the code.

**X. ZONING PROCEDURES LAW, O.C.G.A. Chapter 36-66**

1. **ZONING** means the power of local governments to provide within their respective territorial boundaries for the zoning or districting of property for various uses and the prohibition of other or different uses within such zones or districts and for the regulation of development and the improvement of real estate within such zones or districts in accordance with the uses of property for which such zones or districts were established.

O.C.G.A. § 36-66-3(3)

2. **ZONING ORDINANCE** means an ordinance or resolution of a local government establishing procedures and zones or districts within its respective territorial boundaries which regulate the uses and development standards of property within such zones or districts. The term also includes the zoning map adopted in conjunction with a zoning ordinance which shows the zones and districts and zoning classifications of property therein.

O.C.G.A. § 36-66-3(5)

3. **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)

4. **NOTICE OF PUBLIC HEARING  
(Application for Rezoning by Property Owner)**

- A. 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.
  - B. The notice must state the time, place and purpose of the hearing.
  - C. Notice shall include location of the property, the present zoning classification of the property, and the proposed zoning classification of the property.
  - D. 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)

5. **NOTICE OF ZONING HEARING  
(Application by City Council or Board of Commissioners)**

- A. 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.
  - B. The notice must state the time, place and purpose of the hearing.
- O.C.G.A. §36-66-4(a)

6. **PUBLIC HEARING PROCEDURES**

A. Local governments shall adopt policies and procedures which govern calling and conducting hearings required by Code Section 36-66-4, and printed copies of such policies and procedures shall be available for distribution to the general public.

B. 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)

C. **PUBLIC HEARING ON PUBLIC HEARING PROCEDURES:**

The policies and procedures which govern calling and conducting a public hearing may be included in and adopted as part of the zoning ordinance. But prior to adoption of any zoning ordinance, a local government is required to conduct a public hearing on the policies and procedures for conducting public hearings.

Notices of a public hearing for adopting policies and procedures shall be the same as for adoption of a zoning ordinance.

7. **ZONING STANDARDS**

In addition to policies and procedures required by subsection (a) of this Code section, each 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. Such standards shall be printed and copies thereof shall be available for distribution to the general public.

O.C.G.A. §36-66-5(b)

**A. PUBLIC HEARING FOR ADOPTION OF STANDARDS**

Standards to be adopted by a local government may be included in and adopted as part of the zoning ordinance. But before its adoption, a local government is required to conduct a public hearing on the proposed standards. Notices relating to public hearings for adoption of zoning standards shall be advertised and conducted in the same manner as public hearings for adoption of a zoning ordinance.

**XI. LEGISLATIVE v. ADMINISTRATIVE DECISION-MAKING**

**1. LEGISLATIVE HEARINGS**

- A. Set up procedures for calling and conducting of the hearing as required by O.C.G.A. § 36-66-5(a).
- B. Give the required notice under the Zoning Procedures Law, O.C.G.A. § 36-66-4.
- C. Copy the entire zoning file for each application to be considered at the public hearing and distribute one copy to each planning commission member or elected official at least 72 hours before the hearing.

- D. Record the public hearing, either by a tape recorder or a court reporter. If the case is appealed, prepare a transcript.
- E. Prepare an agenda before the meeting listing all the applications with a description of each and provide the order in which they will be considered by the hearing board. A copy should be available for all attendees.
- F. Prepare a copy of the procedures for distribution to the attendees as required by O.C.G.A. § 36-66-5(a).
- G. Have the official zoning map and the future land use plan present during the public hearing.
- H. Have a professional staff member give a report and make a recommendation to the hearing board.
- I. A motion respecting the decision of the hearing board should be stated clearly. Especially, this is true in the case of conditions which apply to a rezoning.
- J. The Planning Commission is not required to make findings, but it may do so in accordance with the standards previously adopted by the local governing authority.
- K. A rezoning applicant has 30 days from a final decision to appeal to the Superior Court.
- L. On appeal to the Superior Court, new evidence may be presented to the Superior Court, even though not presented to the local government.

2. ADMINISTRATIVE HEARINGS

- A. Provide the required notice of the hearing as set forth in the local ordinance.
- B. Establish written procedures for conduct of the hearing and provide a copy to all attendees.

The recommended procedures are as follows:

- a. Allow the applicant to make the first presentation.
- b. Provide for witness testimony.
- c. Allow for cross-examination by interested parties (require interested parties to be represented by someone).
- d. Allow interested parties to introduce evidence.
- e. Allow cross-examination of the interested parties by applicant.
- f. Require that all documents be marked as exhibits.
- g. Upon conclusion of the hearing for each application, make a decision.
- h. Reduce all decisions to writing.

**Jackson v. Spalding County, 265 GA. 792, 462 S.E.2d 361 (1995)**

- 3. Prepare a record or file for each application which should include the application and any documents introduced or provided as exhibits and the transcript of the hearing. It is especially important that this be prepared in the event of an appeal.

4. Have a professional staff member explain the case to the Board. Allow him or her to be examined as appropriate by the applicant or interested parties. The professional staff may make a recommendation of a desired result, but it is not required.
5. Provide the same file to the applicant as is provided to each board member. Make sure each board member has a copy of the file prior to the hearing. Make the file available to the parties interested upon request.
6. Have the official zoning map and future land use plan present at the hearing for use by anyone at the hearing.
7. Record the public hearing, either by a tape recorder or a court reporter. If the case is appealed, prepare a transcript.

On appeal, the Superior Court only reviews the record of the hearing before the local government; no new evidence is presented.

## **XII. PROCEDURES FOR ADOPTION OF A ZONING ORDINANCE**

1. Advertising Requirements.
  - A. Notice of the hearing must be 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. (O.C.G.A. §§ 36-66-4(a); 1-3-1(d)(3)).
  - B. The notice must state the time, place and purpose of the hearing. (O.C.G.A. § 36-66-4(a)).
    - a. The statute does not specify how many times the notice must appear. It is generally accepted that the notice need appear

one time, but it is important to check the local government's local act for advertising requirements;

- b. If there is no newspaper of general circulation in the county, then the notice presumably should appear in the newspaper in which legal advertisements appear (O.C.G.A. § 9-13-142);
- c. While the statute only requires publication in a newspaper of general circulation, it is suggested that the ad should appear in the newspaper in which the county's legal advertisements customarily appear.

2. Items to be considered.

- A. Policies and procedures which will govern the calling and conducting of zoning hearings. (O.C.G.A. § 36-66-5).
  - a. At the hearing, copies of the proposed policies and procedures governing the calling and conducting of the hearing must be made available to the attendees prior to the beginning of the hearing.
  - b. Following the hearing, the governing authority should officially adopt the policies and procedures.
  - c. If the final adoption (read "official adoption") of the policies and procedures takes place at a subsequent meeting of the governing authority, it is recommended that the date, place and time of the final adoption be included in the published notice.

- d. At a minimum, the policies and procedures must provide equal time for proponents and opponents to make presentations, with a minimum of ten minutes per side. (O.C.G.A. § 36-66-5(a)).
    - B. Standards governing the exercise of the zoning power. (O.C.G.A. § 36-66-5(b)).
      - a. The standards must be in writing and copies available to the public.
      - b. Suggested standards are set out in **Guhl v. Holcombe Bridge Road Corp., 238 Ga. 322, 232 S.E.2d 830 (1977)**; O.C.G.A. § 36-66-5(b).
    - C. The proposed zoning ordinance and official zoning map or maps.
      - a. The official zoning map or maps to be adopted must be physically present at each hearing. The same is true for the text of the ordinance, the standards, and the policies and procedures.
      - b. The map should have a title that is referenced in the text of the zoning ordinance.
- 3. After the hearing.
  - A. Subsequent to the hearing, an original of the map should be maintained in a location specified in the text of the ordinance.
  - B. Written copies of the policies and procedures and the standards governing zoning decisions must be copied, and made available to the public. (O.C.G.A. § 36-66-5).

4. Comments.
  - A. Adoption of the zoning ordinance requires a three step process: First, the policies and procedures should be adopted; Second, the standards should be adopted; and Third, the ordinance itself is adopted.
  - B. While the statute does not specify the number of times a matter must be considered before final action is taken, it is recommended that if local legislation provides for a specified manner official action must be conducted, that those requirements also be followed.
  - C. While the statute does not explicitly refer to the Comprehensive Long Range Planning Map, it is recommended that the same procedure be followed prior to the official adoption of the future land use map. This is particularly pertinent if a rezoning request under the ordinance must comply with the future land use map.
  - D. Attached as exhibits are samples of advertisements, policies and procedures and standards governing zoning decisions.

### **XIII. STANDARDS GOVERNING THE EXERCISE OF ZONING POWER**

The following standards governing the exercise of the zoning power are adopted in accordance with O.C.G.A. § 36-66-5(b):

1. The existing land uses and zoning classification of nearby property;
2. The suitability of the subject property for the zoned purposes;
3. The extent to which the property values of the subject property are diminished by the particular zoning restrictions;

4. The extent to which the destruction of property values of the subject property promotes the health, safety, morals or general welfare of the public;
5. The relative gain to the public as compared to the hardship imposed upon the individual property owner;
6. Whether the subject property has a reasonable economic use as currently zoned;
7. 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;
8. Whether the proposed zoning will be a use that is suitable in view of the use and development of adjacent and nearby property;
9. Whether the proposed zoning will adversely affect the existing use or usability of adjacent or nearby property;
10. Whether the zoning proposal is in conformity with the policies and intent of the land use plan;
11. 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;
12. 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.

**XIV. HEARINGS BEFORE THE GOVERNING AUTHORITY**

1. All persons who wish to address the Commission at a hearing concerning a proposed zoning decision under consideration by the Commission shall first

sign up on a form to be provided by the [local government] prior to the commencement of the Hearing.

2. The Zoning Administrator will read the proposed zoning decision under consideration and the departmental reviews pertaining thereto prior to receiving public input on said proposed zoning decision. Proposed zoning decisions shall be called in the order in which they were filed.
3. The Zoning Administrator shall then call each person who has signed up to speak on the zoning decision in the order in which the persons have signed up to speak, except the applicant who will always speak first. Prior to speaking, the speaker will identify himself or herself and state his or her current address. Only those persons who signed up to speak prior to the commencement of the hearing shall be entitled to speak, unless the Commission, in its discretion, allows the persons to speak to the zoning decision, notwithstanding the failure of the person to sign up prior to the hearing.
4. Each speaker shall be allowed ten (10) minutes to address the Commission concerning the zoning decision then under consideration, unless the Commission, prior to or at the time of the reading of the proposed zoning decision, allows additional time in which to address the Commission on said proposed zoning decision. The speaker may initially use all of the time allotted to him to speak, or he may speak and reserve a portion of his allotted time for rebuttal. A member of the Commission's staff shall be designated as the time keeper to record the time expended by each speaker.

5. Each speaker shall speak only to the merits of the proposed zoning decision under consideration and shall address his remarks only to the Commission. Each speaker shall refrain from personal attacks on any other speaker or the discussion of facts or opinions irrelevant to the proposed zoning decision under consideration. The Commission may limit or refuse a speaker the right to continue, if the speaker, after first being cautioned, continues to violate this subsection.
6. Nothing contained herein shall be construed as prohibiting the Commission from conducting the hearing in an orderly and decorous manner to assure that the public hearing on a proposed zoning decision is conducted in a fair and orderly manner.

**XV. VESTED RIGHTS**

1. **Café Risqué/We Bare All Exit 10, Inc. v. Camden County, 273 Ga. 451, 542 S.E.2d 108 (2001).**

Where a local government issues a permit which is in violation of an existing ordinance, even if issued under a mistake of fact, the permit is void and the holder does not acquire any vested rights. This is true even if substantial expenditures were made in reliance on the void permit. A local government is not prohibited from revoking an improperly issued permit.

2. **North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge, 248 Ga.App. 450, 546 S.E.2d 850 (2001).**

A land use that is merely contemplated for the future but unrealized as of the effective date of a new zoning regulation does not constitute a nonconforming use. A property owner may acquire a vested right to use property where he makes a substantial

change in position by expenditures in reliance on the probability that a building permit will issue or based upon an existing ordinance and the assurances of zoning officials. But where the only change in position is the purchase of the property itself, the purchase does not confer a vested right to a particular use by the purchaser.

**3. Meeks v. City of Buford, 275 Ga. 585, 571 S.E.2d 369 (2002).**

The issue in this case is whether a property owner obtained a vested right to use undeveloped investment property in accordance with a variance granted in 1985, 14 years earlier. In finding the earlier variance no longer valid, the court relied on the rule that a property owner must make a substantial change in position or make substantial expenditures or incur substantial obligations in order to acquire a vested right. In this case, the mere reliance on a variance without showing substantial change in position by expenditures or other obligations does not vest a right in the land owner to develop in accordance with the earlier variance which would no longer be valid by virtue of a subsequently adopted zoning ordinance.

**4. Cooper v. Unified Government of Athens-Clarke County, 277 Ga. 360, 589 S.E.2d 105 (2003).**

A property owner claiming a vested right to use property must make that claim to the local government before an appeal is made to the superior court. A claim of vested right to use property may not be made for the first time in superior court.

**5. Union County v. CGP, Inc., 277 Ga. 349, 589 S.E.2d 240 (2003).**

The issuance of a building permit results in a vested right only when the permit has been legally obtained, is valid in every respect, and has been validly issued. Where a permit was issued to build a subdivision which was in violation of the flood control

ordinance, the permit was not valid and the developer did not obtain a vested right to complete the subdivision.

**6. Cohn Communities, Inc. v. Clayton County, 257 Ga. 357, 359 S.E.2d 887 (1987).**

“The rule in Georgia is that where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit.” The expenditure of \$600.00 was not substantial and thus did not accord the developer of a proposed multi-family building a vested right.

**7. Corey Outdoor Advertising, Inc. v. The Board of Zoning Adjustments of the City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (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.

**XVI. THE OFFICIAL ZONING MAP MUST BE ADOPTED AS PART OF THE ZONING ORDINANCE**

**Newton County v. East Georgia Land and Development Company, LLC, 296 Ga. 18, 764 S.E.2d 830 (2014).**

An official zoning map is in integral part of a zoning ordinance as it identifies the lands to which the various zoning classifications apply. Therefore, adoption of the text of the zoning ordinance without adopting an official zoning map invalidates the zoning ordinance. To properly adopt an official zoning map along with a zoning ordinance: 1) it must be sufficiently identified so there is no uncertainty as to what was adopted; 2) it

must be made a public record; 3) it must be accessible to members of the public; and 4) the adopting resolution must give notice of the official zoning map's accessibility. The incorporation of a zoning map into the text of the zoning ordinance is met when the local government's minutes show that it had the official zoning map before it at the time it considered the ordinance. The best practice in properly identifying and authenticating the official zoning map is for the text of the zoning ordinance to show that the official zoning map incorporated into the zoning ordinance is labeled as the "official zoning map of \_\_\_\_\_," is dated on the date of its adoption, and is signed by an official of the local government, such as the mayor, chairman of the board, or clerk of the local government.