An Overview of Local Government Land Use Regulation

City of Snellville, Georgia
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Brandon L. Bowen, Esq.
Jenkins, Olson & Bowen, P.C.
15 South Public Square
Cartersville, Georgia 30120
(770) 387-1373
bbowen@jnlaw.com
Chapter 1. Introduction to Zoning

- The first U.S. zoning ordinance was adopted in New York City on July 25, 1916.

- City of Euclid, Ohio v. Amber Realty Company, 272 U.S. 365, 47 S.Ct. 114 (1926)

- Zoning was approved in the State of Georgia in 1937 by an amendment to the 1877 constitution. This allowed the General Assembly to permit particular jurisdictions to zone.
In 1957, the General Assembly adopted an enabling statute which authorized all local governments in the state to exercise the power of zoning and established detailed procedures by which zoning should be implemented. When zoning was adopted by a local authority pursuant to the 1957 enabling statute, the city or county was required to conform strictly to the procedures for zoning and the adoption of rezoning amendments. No local jurisdiction was required to have zoning, but if zoning were adopted, the statutory provisions were required to be followed.
1983 CONSTITUTION

- The current Georgia constitution grants to each county and municipality the right to adopt a land use plan and exercise the power of zoning.

"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." Art. IX, § 2, ¶ 4 of the Georgia Constitution.
The authority to adopt zoning ordinances was granted directly to cities and counties *rather than by the General Assembly*.

However, the General Assembly may enact general laws establishing procedures to be followed by the local governments in the exercise of their constitutionally granted zoning power.
- Modern zoning ordinances in Georgia tend to be complex, but follow the pattern of Euclidean zoning.

- MODERN TRENDS:
  - Performance Zoning
  - Planned Unit Developments (PUDS)
  - Overlay Districts
  - Conservation Subdivisions
  - Transferable Development Rights
ZONING IS EXERCISE OF THE POLICE POWER

- Eminent domain vs. zoning

The distinction between use of eminent domain and use of the police power is that the former involves the taking of property because it is needed for public use while the latter involves the regulation of the property to prevent its use in a manner detrimental to the public interest.
Many regulations restrict the use of property, diminish its value or cut off certain property rights, but no compensation for the property owner is required.

- Nuisance Abatement
- Zoning
- Health Regulations
- Building Codes
Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga., 264 Ga. 764 (1994).

The fact that a land use regulation is designed only to improve aesthetics does not render it unreasonable exercise of police power.
ZONING IS NOT NORMALLY A TAKING

- In a zoning case, the most common challenge is to the constitutionality of the existing zoning classification under a takings analysis. DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997).
- The zoning ordinance is presumptively valid.

  “The presumption that a governmental zoning decision is valid can be overcome only by a plaintiff landowner’s showing by clear and convincing evidence that the zoning classification is a significant detriment to him, and is insubstantially related to the public health, safety, morality and welfare. Only after both of these showings are made is a governing authority required to come forward with evidence to justify a zoning ordinance as reasonably related to the public interest.”
SIGNIFICANT DETRIMENT

- Evidence that a landowner would suffer economic loss without rezoning was insufficient to show substantial detriment.

- “[A] significant detriment to the landowner is not shown by the fact that the property would be more valuable if rezoned, or by the fact that it would be more difficult to develop the property as zoned than if rezoned.”
- The decisions recognize that increasing density or intensity almost always increases value, but that does not prove that the current zoning is unconstitutional. “[I]n zoning challenges, the pertinent question is not whether rezoning would increase the value of property, but rather whether the existing zoning classification serves to deprive a landowner of property rights without due process of law. Hence, the evidence that the subject property would be more valuable if rezoned border on being irrelevant.”

- The notion that a property is not zoned for its “highest and best use” does not show that the existing zoning imposes a significant detriment.
Legacy Inv. Group, LLC v Kenn, 279 Ga. 778, 621 S.E.2d 453 (2005)

- Property owner had paid about $12,000 per acre for land zoned for agricultural land, with the (incorrect) presumption that it would be rezoned for residential uses.

- The evidence was that the property would have to be purchased for no more than just over $5,000 per acre in order to be developed in an economically viable manner, but the county's appraiser said the property was worth between $5,000 and $9,000 per acre.

- Thus, the property would have to be purchased for several thousand dollars less per acre than it was worth in order to be developed in an economically feasible manner.

- Part of a property subject to the appeal of a rezoning denial suffered a significant detriment, but part did not.

- The property was partially zoned for agricultural-residential uses, and partly zoned for office-institutional uses. The property owner wanted it all zoned for commercial uses.
- The court held that there was evidence that the portion zoned for agricultural-residential could not be developed as zoned, but there was no such evidence as to the office-institutional portion, and so the trial court erred in finding a significant detriment to that portion of that property.

- The evidence needed is not that the property can make more money with the rezoning, but that the property is not suited for development under the existing zoning classification, such that it cannot be used in an economically feasible manner under the existing zoning classification.
- After a property owner shows significant detriment, he still needs to prove that the current zoning is insubstantially related to the public health, safety, morality and welfare.

- Thus a significant detriment can be outweighed by a substantial public benefit

- This requires proof that there is no logic to the existing zoning classification.

- Incompatible with neighboring properties.
- But see fringe area doctrine
- Consistency with comprehensive plan or future land use map

- Proposed rezoning of single-family property for mixed-use development denied
- The existing zoning was consistent with the land use plan of Atlanta: “[T]he city’s zoning decision is consistent with the policies and long-range planning goals for the area as adopted in the comprehensive development plans and the Buckhead transit station report....The fact that TAP presented evidence that its proposed mixed-use development would also protect the single-family neighborhood is irrelevant. The issue is not whether the city could have made a different decision or better designation in zoning TAP’s property, but whether the choice that it did make benefits the public in a substantial way.” 273 Ga. at 685.

- If an existing zoning classification is consistent with the comprehensive plan, it is more likely to be upheld.
SUPERIOR COURT’S POWER AND LIMITS

- Because the power to zone property has been granted to the local governments, the courts have no power to zone, but must remand for determination of constitutional zoning classification.

- But if the local government fails to properly rezone the property, Court may find the elected officials in contempt, or declare the property without zoning at all.
Chapter 2. Proper Adoption of the Zoning Ordinance and Map and Zoning Decisions

- General Assembly has adopted the Zoning Procedures Law (ZPL).

- The courts have required strict compliance for the resulting decision to be upheld.
THE FUNDAMENTAL RULE

The power to zone is in the local government, and the courts should defer to the local government's decision making on the substance of the decision.

Procedure is set by the Zoning Procedures Law, and the Courts will not defer to the local government on this issue; substantial compliance probably will not be good enough.

*Therefore, do the process right, and the ultimate decision should stand.*
ADVERTISING REQUIREMENTS

A. Publish a public notice of the public hearing. This applies to:
   - zoning ordinance,
   - the policies and procedures for conducting public hearings,
   - the standards governing the exercise of zoning power,
   - the zoning map,
   - text amendments to the zoning ordinance,
   - rezonings,
   - conditions to zoning, and
   - special use permits
The public notice 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 public hearing before the governing authority. (O.C.G.A. §§ 36-66-4(a); 1-3-1(d)(3)).

The notice must state the time, place and purpose of the hearing. (O.C.G.A. § 36-66-4(a)).
If the hearing is for a rezoning, then also include:

- the location of the property
- the present zoning classification
- the proposed zoning classification

AND post a sign on the property at least 15 days before the date of the hearing
ADOPTION OF POLICIES AND PROCEDURES WHICH GOVERN THE CALLING AND CONDUCTING OF ZONING HEARINGS. (O.C.G.A. § 36-66-5)

- At the time and place designated in the advertised public hearing, the local government shall call a public hearing on the proposed policies and procedures for calling and conducting zoning hearings.

- At the hearing, copies of the proposed policies and procedures shall be made available to the attendees prior to the beginning of the public hearing;

- Following the hearing, the governing authority should officially adopt the policies and procedures.
The Zoning Procedures Act does not specify what policies and procedures must be adopted with the exception that the 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)).

Due process is the goal- remember the fundamental rule.
ADOPTION OF STANDARDS GOVERNING THE EXERCISE OF THE ZONING POWER. (O.C.G.A. § 36-66-5(B))

- At the time and place designated in the advertised public hearing, the local government shall call a public hearing on the standards governing the exercise of the zoning power.

- Following the hearing, the governing authority should officially adopt the standards.
THE GUHL FACTORS


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 property owner promotes the health, safety, morals or general welfare of the public;

(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.
REQUIREMENTS APPLICABLE TO BOTH STANDARDS AND POLICIES AND PROCEDURES

- Standards and policies and procedures may be incorporated into the zoning ordinance and adopted along with the zoning ordinance, but the public hearings on the standards and the policies and procedures should be conducted before the public hearing on the zoning ordinance.

- At every public hearing, copies of the standards and policies and procedures should be available for the attendees.

- The standards must be in writing and copies available to the public.
THE OFFICIAL ZONING MAP OR MAPS

- The official zoning map or maps to be adopted must be physically present at each hearing and the minutes of the meeting should say this. The same is true for the text of the ordinance, the standards, and the policies and procedures.

- The map should have a title that is incorporated into and referenced in the text of the zoning ordinance. See O.C.G.A. § 36-1-25.

- Zoning ordinance should specify the zoning map will be maintained in an administrator’s office, and be certified by that person.
Chapter 3. Legislative and Administrative Decisions, and Appeals

Zoning decisions at the local government level are of two types: legislative and administrative, which is sometimes referred to as quasi-judicial. Different procedural rules apply depending on which type of decision is being made. It is therefore imperative to understand the different nature of these decisions and then how the procedural rules differ.
ADMINISTRATIVE ZONING DECISIONS

Administrative zoning decisions are defined, not by the body or board that makes the decision, but by the nature of the decision being made. For example, at one instance a board of commissioners may make administrative decisions, such as the grant of a variance, while at another it makes legislative decisions, such as the rezoning of property.
Typical local administrative zoning decisions include:

- the grant or denial of variances,
- approval or disapproval of subdivision plats,
- review of administrative decisions made by zoning officials.
PROCEDURE FOR AN ADMINISTRATIVE HEARING

- The body considering the decision receives evidence, usually during a public hearing;
- decides the facts; and,
- applies the facts to the *established standards or criteria* in the zoning ordinance to arrive at a decision either approving or not approving the issue at hand.
COMMON CRITICISMS

- Administrative bodies don't follow due process.
- Administrative bodies don't follow the established criteria.
- Both may result in reversal- remember the fundamental rule.
LEGISLATIVE BODIES CAN AND DO HEAR ADMINISTRATIVE DECISIONS.

Example: when there is an appeal from a Board of Appeals issuance of a variance to the City Council. In such cases, the City Council is sitting effectively in a quasi-judicial capacity or administrative capacity, and should act accordingly.
LEGISLATIVE DECISIONS

Those have broad-based application and are in the nature of policy making by the local government. They are more apt to apply to the general population than impact specific individuals.

- adoption of a zoning ordinance;
- rezoning;
- text amendment to a zoning ordinance;
- the grant of a special use permit (this is a special case)

- Legislative decisions are committed to the discretion of the legislative body.

- Planning commission may make recommendations.
PROCEDURAL DUE PROCESS PROTECTION IN ADMINISTRATIVE ZONING HEARINGS

Since administrative zoning decisions typically affect the rights of individuals whose property is subject to regulation by a local government, certain procedural due process safeguards are necessary.

- notice of a hearing;
- a right to present evidence;
- a right to representation by counsel;
- the right to cross-examine witnesses; and
- the right to a written decision based on the evidence presented at the hearing.
This does not mean that all of the procedural requirements of a courtroom are required.
JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

Procedural hurdles.

- Exhaustion of Administrative Remedies
- Standing to Bring Challenge
  Special interest / aggrieved citizen
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- Appeal to superior court
  - writ of certiorari;
  - appeal;
  - or mandamus.

- The local government dictates the method or procedure for appeal in its ordinance.
REVIEW ON THE RECORD

- The court in its review will not receive new evidence, but will review the record of evidence presented to the administrative agency.

- The court does not substitute its judgment for that of the administrative agency, but merely reviews the record to determine whether the agency:
  - acted beyond its powers,
  - abused its discretion,
  - or acted arbitrarily or capriciously.
ANY EVIDENCE STANDARD

The court, in consideration of the record of the proceedings before the administrative agency, determines whether there is any evidence which supports the decision of the administrative agency. If so, then the court’s duty is to uphold the administrative decision.

Consider this in regards to the fundamental rule.
JUDICIAL REVIEW OF LEGISLATIVE DECISIONS

- Standing
  the substantial-interest/aggrieved citizen test
NATURE OF APPEAL

- Generally a constitutional challenge to the zoning classification.

  May be called a declaratory judgment action, an appeal, or a complaint, but is really just a lawsuit.

- De novo (New trial- not limited to evidence before local government)
NATURE OF REMEDY

- Generally, the only remedy is to have the existing zoning classification declared unconstitutional, and direction that the local government rezone the property.

- Damages and attorney fees are not generally available...

... unless the decision is so bad that:

- it is fraud or bad faith,
- the defense of the decision is itself sanctionable,
- the defense violates the Anti-SLAPP statute
BURDEN OF PROOF IN REZONING DECISIONS

It depends on who is challenging the decision:

The property owner must show by clear and convincing evidence that he has suffered substantial detriment without a countervailing benefit to the public health, safety, morality, and welfare.

Where a neighboring property owner challenges a rezoning of property, he is required to show fraud, corruption, or a manifest abuse of discretion to the detriment of the neighboring property owners.
SPECIAL USE PERMITS: A SPECIAL CASE

While the grant or denial of a permit such as special use permit had long been considered an administrative zoning decision, the Zoning Procedures Law was amended in 1998 to list them amongst the matters referred to as “legislative” zoning decisions.
Rather than treating special use permit decisions as legislative decisions, with de novo review at the superior court, or rather than continuing to treat them as quasi-judicial decisions, the Supreme Court has adopted a sort of hybrid analysis.

- legislative discretion of the City Council Board is honored, but
- the review is on the record, and
- the “any evidence” standard applies.

- Special use permit for football stadium for Christian school in Roswell denied.

- The only evidence against the requested school football stadium appeared to be neighbor comments that there were two other stadiums in the vicinity and that traffic would be negatively impacted.
The Court held, “Neither the superior court nor this Court has any discretion to exercise in connection with FCS’s application for a Permit. Whether to approve or to deny that application was addressed solely to the exercise of [City Councils'] sound discretion in accordance with the factors enumerated in the ordinance. There was evidence to support the decision to deny the Permit based upon the negative impact the stadium would have on traffic in the area.”
Chapter 4. Ethical Considerations

EARLY CASE LAW

Olley Valley Estates v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974), the Court crafted a rule and held that a zoning commissioner should be disqualified if:

- he holds a direct or indirect financial interest in the outcome of the zoning vote,
- which is not shared by the public in general and
- which is more than remote or speculative.

The planning commission chairman was also the vice president of the applicant. The court found that a question of fact as to a taint on the rezoning was created where the chairman presided without voting over the initial hearing and did not preside or vote at the second hearing.

Thus, abstaining may not be enough to remove the taint.

The trial court held that where two voting commissioners sold products or services to the applicant, the vote was tainted by fraud and corruption.
CONFLICT OF INTEREST IN ZONING ACT, O.C.G.A. § 36-67A-1 ET SEQ.

Applies to rezonings:

“action by local government adopting an amendment to a zoning classification which has the effect of rezoning real property from one zoning classification to another.” O.C.G.A. § 36-67A-1(9).

But not to special exceptions or variances, or even amendments that do not rezone the property (such as an alteration of conditions).
A local government official who knew or reasonably should have known he or she:

(1) Has a property interest in any real property affected by a rezoning action which that official’s local government will have the duty to consider;

(2) Has a financial interest in any business entity which has a property interest in any real property affected by a rezoning action which that official’s local government will have the duty to consider; or
(3) Has a member of the family having any such interest shall immediately disclose the nature and extent of such interest, in writing, to the governing authority of the local government in which the local government official is a member.

The local government official who has an interest as defined in paragraph (1) or (2) of this Code section shall disqualify himself from voting on the rezoning action.

WHAT IS A PROPERTY INTEREST?

A “property interest” means any amount of direct ownership. O.C.G.A. § 36-67A-1(7).

A “financial interest” means direct ownership of at least 10 percent of the stock or assets of a business entity. O.C.G.A. § 36-67A-1(3).

Therefore, a commissioner owning one percent of a property directly would be disqualified, but a commissioner owning 9% of an applicant corporation would not be disqualified.
WHO IS A LOCAL GOVERNMENT OFFICIAL?

It should also be noted that “local government official” includes “any member of a planning or zoning commission” in addition to the traditional members of the governing authority.

“The disqualified local government official shall not take any other action on behalf of himself or any other person to influence action on the application for rezoning.” O.C.G.A. § 36-67A-2.

However...

A city council member could take the steps that are normally and properly undertaken by any citizen to advance his rezoning once he recused himself. The actions referenced in the case include, “taking any action in support of his rezoning application, including supplementation thereof, responding to inquiries from zoning authorities, or altering the property at issue or the business conducted thereon.” 272 Ga. at 342.

Thus, local government officials can do anything that a citizen can do.
DISCLOSURE OF CAMPAIGN CONTRIBUTIONS

- applies to all applicants, opponents and attorneys
- any campaign contributions of more than $250.00
- within ten days after filing the rezoning application (for applicant)
- at least five days prior to the first hearing on the rezoning (for opponent)
FRAUD AND ABUSE OF THE ZONING POWER

“When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors.” Lindsey Creek Area Civic Association v. Columbus, 249 Ga. 488, 491, 292 S.E.2d 61 (1982).
CONSTITUTIONAL TRUST
Georgia Constitutional, Art. 1, Sec. 2, Para. I

“All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.”

Applies when a public officer has benefited financially as a result of simply performing their official duties.
Neighboring property owners challenged an approval of a telecommunications tower on the basis that the tower was erected on land owned by the county planning director, who had submitted the plans to his staffer for review. His staffer recommended approval. The Court held that there was potentially a claim under the constitutional trust doctrine.
LOCAL ETHICS CODES

The Supreme Court found that the rezoning was lawful under state law, but was improper under Cobb County’s ethics code. The county code required protection against the appearance of improper influence, and the fact that the son of one county commissioner worked in the firm representing the applicant was adjudged an interest. The rezoning application was remanded.
**LOBBYING**

Lobbyists are regulated in Georgia by the State Ethics Commission, and specifically the Ethics in Government Act, Article 4 of Chapter 5 of Title 21, the Elections Code. O.C.G.A. § 21-5-70 et seq. governs public officials’ conduct and lobbyist disclosure, and defines a lobbyist as “any natural person who, for compensation, either individually or as an employee of another person, undertakes to promote or oppose the passage of any ordinance or resolution by a public officer..., or any committee of such public officers, or the approval or veto of any such ordinance or resolution.” O.C.G.A. § 21-5-70(6).
EX PARTE CONTACTS

Contacts by one party when the other party is not present to hear them. This has long occurred in the legislative context and is generally known as lobbying, which is lawful. It is not appropriate in the administrative / quasi-judicial context. Why?

- "on the record" versus "de novo"
- individual rights versus public considerations
- decisions versus laws

This conflicts with due process.
Chapter 5. Vested Rights and Non-Conforming Uses

A *vested right* is a right to a future use of a property, despite a change in the regulations, that is obtained through actions of the property owner before the regulation changes.
Non-conforming uses are established uses which at one time were legal, but, due to a change in the ordinance, are no longer permitted.

If the ordinance expressly allows such uses to continue, then they are considered *grandfathered*.

Normally subject to termination because of destruction or abandonment.
AMORTIZATION CLAUSES

If the ordinance simply renders a non-conforming use illegal, then it may result in a taking; however, there appears to be support for amortization clauses:

require a non-conforming use to be removed over a time period which is sufficient to allow the property owner to achieve a reasonable return on his investment-backed expectations.
The Court determined that once vested rights were acquired, they could not be divested without consent. However, the Court also stated that the act of conveying a property was itself an act of consent.

This is dangerous for developers and builders.
O.C.G.A. § 44-5-40

Vested interests in property stemming from the approval of land disturbance, building, construction or other development plans, permits or entitlements in accordance with a schedule or time frame approved or adopted by the local government shall be descendible, devisable and alienable in the same manner as estates in possession.
Café Risqué/We Bare All Exit 10, Inc. v. Camden County, 273 Ga. 451 (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.
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.
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.

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.

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.
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.
CHAPTER 6. Annexation Law in Georgia

Several distinct methods of annexation:
- the 100 percent method,
- the 60 percent method,
- by resolution and referendum, and
- by Local Act of the General Assembly
TWO KEY ISSUES:

1. How do we prevent a gap in zoning?

2. How do we resolve disputes between City and County?
GENERAL PROVISIONS APPLICABLE TO ALL ANNEXATIONS

Notice to County

- within 5 days of application

- must include a map or other description sufficient to identify the area.

- a copy of the petition to the County, including indicating the proposed zoning and land use for the area.
COUNTY'S RESPONSE TO NOTICE

- within five business days of receipt, inform if any county owned facilities are located in the proposed area to be annexed.

- county has thirty days from receipt of the notice to object to the annexation.

- If no objection is received within 30 days of the county’s receipt of notice, final action on the annexation petition can proceed.

- If objection is lodged, then dispute resolution procedures apply.
OWNERSHIP OF COUNTY FACILITIES IN ANNEXED AREAS

In general, ownership of county properties and facilities is not affected by annexation of the area they are in. O.C.G.A. § 36-36-7(b). If a municipality annexes on both sides of a county road right-of-way, the municipality shall assume the ownership, control, care and maintenance of that property unless the county and municipality agree otherwise by joint resolution. O.C.G.A. § 36-36-7(c).
UNINCORPORATED ISLANDS

Annexations or deannexations which would create unincorporated islands are prohibited. An unincorporated island consists of an unincorporated area whose boundaries are entirely bounded by one or several cities, or an unincorporated area which the county has no reasonable means of “physical access” to for provisions of services. O.C.G.A. § 36-36-4.
ANNEXATION ACROSS COUNTY BOUNDARY LINES

Annexation across county boundary lines, when the municipality does not already have property in the new county, can only be performed subject to special procedures contained in O.C.G.A. § 36-36-23. Basically, the County has the right to object.
VOTING RIGHTS ACT

The requirements of the Voting Rights Act, 47 U.S.C. § 1971 et seq., and particularly Section 5 of the Act, apply to all annexations. O.C.G.A. § 36-36-3. The basis of this requirement is the effect annexation has on voting.
ZONING IN RELATION TO ANNEXATION

Once an annexation is effective, the property transfers from the jurisdiction of the county, losing whatever zoning the county provided. The Zoning Procedures Law provides a specific method so that the property can be zoned as part of the annexation process.
The ZPL process is coordinated with the annexation process so that the final vote on the rezoning cannot be held prior to adoption of the annexation ordinance or resolution or the effective date of the local Act annexation.

The proper order of events (which may occur at the same hearing) is:

- rezoning public hearing,
- vote on annexation,
- then vote on rezoning (only necessary if annexation approved)
Once the zoning procedures are followed and the municipality approves the zoning, it becomes effective on the date the annexation becomes effective, or on the date actually approved, whichever is later. See O.C.G.A. § 36-66-4(d).
RESOLUTION OF ANNEXATION DISPUTES

On September 1, 2007, new practices and procedures for resolving annexation disputes between cities and counties became applicable in this State. The following procedures apply to all annexations done after September 1, 2007 in the State of Georgia, with the exception of those accomplished through local Acts of the General Assembly. O.C.G.A. § 36-36-110.
NOTICE

When a petition for annexation is received, the city must notify the governing authority of the county by certified mail or statutory overnight delivery of the petition. The notice must include a copy of the annexation petition showing the proposed zoning and land use for the area. O.C.G.A. § 36-36-111. See also the general annexation notice provisions of O.C.G.A. § 36-36-6.
RESPONSE

- After being given notice, the county has thirty days to respond.

- No final action can be taken by the city.

- If the county raises no objection to the annexation, the annexation procedure may then move forward. O.C.G.A. § 36-36-112.
ONE YEAR REZONING HOLD

For a period of one year, the city may not change the zoning or land use plan for the annexed property to a more intense density or use than that stated in the notice given to the governing authority of the county.
OBJECTION

- After being given notice, the governing authority of the county can object to the annexation.

- There must be a material increase in burden upon the county related to one or more of the following:
  
  - change in the zoning or land use;
  - increase in density or
  - increase in demands on infrastructure because of the change in zoning or land use.

The change must be substantial, and must not be permitted under the county's comprehensive plan or land use ordinances.
ARBITRATION

- If an objection is made by the county, the city and county must submit the dispute to binding arbitration.

- Arbitrators are picked from pools of city officials, county officials and academics maintained by the DCA.

- The arbitration panel may establish zoning, land use or density conditions to the area proposed to be annexed.

- A decision by a majority of the panel is binding on all parties involved, and will be recorded on the deed records of the County.
The city, county, or annexation applicant can appeal the decision of the panel to the superior court.

The appeal must be based on very narrow grounds:

- errors or fact or law,
- bias or misconduct of an arbitrator,
- abuse of discretion.
ANNEXATION BY THE 100 PERCENT METHOD

- The simplest and most common annexation method.
- Requires consent of 100% of the property owners to be annexed.
CONTIGUITY

Cities can annex unincorporated areas contiguous to the existing corporate limits

“contiguous” means:

- at least 1/8th of the external boundary or 50 feet (whichever is less) abuts the municipal limits, or

- is separated by city land, or land owned by some other political subdivision, or the lands owned by the state or by the width of a street, river, or railroad/PSC regulated utility right-of-way. O.C.G.A. § 36-36-20.
SPECIAL CONTIGUITY PROVISION

If the property to be annexed is owned by the municipal corporation, and the county approves of the annexation by resolution, property can be contiguous if separated by city land, state land, or the width or length of a street, river or railroad right of way. This in effect authorizes “spoke” annexation down roads, if the county consents.
SIMPLE REQUIREMENTS

"a free election by the property owner and city"
ANNEXATION BY THE 60 PERCENT METHOD

- Much more technical

- Requires the consent of the owners of 60% of the acreage and 60% of the residents in the area to be annexed.

- Requires contiguity
EVALUATION

- City must verify the names on the application are 60% of the owners and residents;

- City must prepare a report showing:
  - Municipal plans for extending police, fire, garbage and street maintenance to the area, as well as the extension of water and sewer service.
- A map showing present and proposed boundaries of the city, the major water mains, sewer interceptors and outfalls, and proposed extensions of such.

- The plans for the extension of water mains and sewer outfall lines must provide for the extension of these services within 12 months from the effective date of the annexation.

- This report must be prepared and available to the public at least fourteen days prior to the public hearing. See O.C.G.A. § 36-36-35.
PUBLIC HEARING

- The City must hold a public hearing within 15 to 45 days after petition determined valid.

- Notice of time and place must be given in writing to the persons presenting the petition, and
- must be advertised once a week for two consecutive weeks in a newspaper of general circulation in the municipality and in the area proposed for annexation.

- All persons resident or owning property in the municipal corporation or the area to be annexed may be heard. See O.C.G.A. § 36-36-36.

- Any property owner or elector may withdraw his consent, and compliance must then be recalculated.
APPROVAL

If after the hearing, the municipal corporation wants to go forward with the annexation, it may do so by ordinance, within 60 days of the validation of all signatures.
APPEAL

- Within thirty days, any elector or property owner of the annexed area or the municipal corporation may appeal to challenge the annexation.

- Substantial compliance is the statutory standard of review, but courts have been fairly strict.
ANNEXATION BY THE RESOLUTION AND REFERENDUM METHOD

- Intended to bring in populous areas where a few people could make the annexation very difficult.

- The area to be annexed must be adjacent or contiguous.

- The annexation must be developed for urban purposes.
REPORT

The municipal corporation must prepare a report addressing a number of issues.

- plans for extending police, fire, garbage and street maintenance to the area,

- plans for the extension of water and sewer service (within 18 months),

- a map showing present and proposed boundaries of the city, the major water mains, sewer interceptors and outfalls, and proposed extensions of such should be included, and

- financing to accomplish all of this.
RESOLUTION

- The municipality must then pass a resolution stating the intent to annex.

- The resolution should describing the boundaries and set a date for a public hearing between 30 and 60 days after the passage of the resolution. The passage of the resolution triggers notice requirement to the county. See O.C.G.A. § 36-36-57.
NOTICE

- Notice of the public hearing must:
  - show the date, time and place of the hearing;
  - describe clearly the boundaries of the area under consideration;
  - state that the report is available in the city clerk’s office at least 14 days prior to the hearing.
- The notice must be advertised once a week for three successive weeks in a newspaper of general circulation within the municipality (last ad at least one week before hearing), or if there is no such paper, posted in at least three public places of area to be annexed and in three public places within the municipality for 30 days prior to the hearing. See O.C.G.A. § 36-36-57.
PUBLIC HEARING

At the public hearing, a city official presents and explains the report on the annexation. All persons resident or owning property in the territory described in the notice of the hearing and all residents of the municipality shall be given an opportunity to be heard. See O.C.G.A. § 36-36-57.
REFERENDUM

A referendum to ratify or reject annexation is then held between 30 and 60 days after the public hearing as a special election. Only persons registered to vote for members of the General Assembly, residing, on the date of the adoption of the resolution, in the proposed area to be annexed may vote on the referendum. If majority vote is not to annex, no attempt at annexation under of any portion of the property by this method can be tried again for two years. See O.C.G.A. § 36-36-58.
Chapter 7. Sign Ordinances

Sign ordinances must be dealt with differently from other land uses 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.
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

There are three levels of judicial scrutiny applied to zoning and land use ordinances.

THE RATIONAL BASIS TEST

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

- It is the easiest test for the local government to meet.
STRICT SCRUTINY

- The hardest test.

- Applies to all ordinances that regulate speech (i.e. signs) based upon the content of the message.

- In order to pass strict scrutiny, the local government must show that the ordinance is the narrowest means of achieving a compelling governmental interest.
INTERMEDIATE SCRUTINY

- The middle test.

- 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: Avoiding Content-Based Restrictions

*If you have to read the sign in order to determine whether or not it is regulated, then the ordinance is content based.*
EXAMPLES OF PROBLEM LANGUAGE:

1. Everything requires a permit except...
   - real estate signs
   - political signs
   - religious signs
   - governmental signs
   - holiday signs
   - construction signs
   - direction signs
   - time and temperature

2. On premises / off-premises

3. Political signs

4. Outdoor advertising signs
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

<table>
<thead>
<tr>
<th>Districts / Uses</th>
<th>No. of ground signs</th>
<th>Total area of all ground sign faces</th>
<th>Max area of single ground sign face</th>
<th>Max height of ground signs</th>
<th>Window Signs (number/maximum total area)</th>
<th>Wall Signs (number/maximum total area)</th>
<th>Max size of single wall sign</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU, RC</td>
<td>3</td>
<td>64 sq. ft.</td>
<td>32 sq. ft.</td>
<td>10 ft.</td>
<td>2, up to 8 sq. ft. total area</td>
<td>2/200 sq. ft.</td>
<td>200 sq. ft.</td>
</tr>
<tr>
<td>RR, IR, R1, R1A, MHP,</td>
<td>3</td>
<td>20 sq. ft.</td>
<td>4 sq. ft.</td>
<td>5 ft.</td>
<td>2, up to 8 sq. ft. total area</td>
<td>None</td>
<td>n/a</td>
</tr>
<tr>
<td>GB</td>
<td>2</td>
<td>200 sq. ft.</td>
<td>100 sq. ft.</td>
<td>20 ft.</td>
<td>Can cover 25% of windows</td>
<td>4/200 sq. ft.</td>
<td>200 sq. ft.</td>
</tr>
<tr>
<td>WLI</td>
<td>2</td>
<td>400 sq. ft.</td>
<td>200 sq. ft.</td>
<td>35 ft.</td>
<td>Can cover 25% of windows</td>
<td>4/250 sq. ft.</td>
<td>250 sq. ft.</td>
</tr>
<tr>
<td>H-I</td>
<td>3</td>
<td>600 sq. ft.</td>
<td>300 sq. ft.</td>
<td>35 ft.</td>
<td>Can cover 25% of windows</td>
<td>4/300 sq. ft.</td>
<td>250 sq. ft.</td>
</tr>
</tbody>
</table>
KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261 (C.A.11th 2006).

Sign ordinance allowed some noncommercial signs, but, by definition, limited billboards only to commercial messages. Because the section of the ordinance dealing with billboards limited these signs only to commercial messages, court struck provision in the ordinance which provided that “if not otherwise stated, any sign not specifically permitted in a zoning district as provided under the applicable section, shall be prohibited in that district.”
Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (C.A.11th 2005)

Sign ordinance had a variety of regulations relating to the need for permitting and the form that a sign may take (no visible movement, no flashing, rotating, etc. lights, etc.) but expressly exempted certain enumerated categories of signs such as: (1) “flags and insignia of government, religious, charitable, fraternal, or other organizations”; (2) government identification signs and informational signs; (3) holiday lights and decorations; and (4) religious displays.

Sign ordinance limited on-premise signs to messages advertising a product, person, service, place, activity, event, or idea directly connected with the property, thereby limiting on-premise signs to commercial messages concerning goods and services available on the property or which specifically pertain to the type of activity being advertised. The provision, in effect, prohibited the display of noncommercial messages in places where commercial signs were permitted.
Chapter 8. Zoning and Federal Law

- Generally, federal law does not apply to zoning cases.

- Exception: where a federal constitutional provision or statute applies.

- Pros and Cons of Federal court.
ADULT ENTERTAINMENT

- Subject to the First Amendment
- Content based versus content neutral
- Strict scrutiny versus intermediate scrutiny
In order to be found content-Neutral, the ordinance must:

1. be a time, place and manner restriction
2. that is aimed at regulating or preventing "secondary effects"

Examples of secondary effects:

- crime (prostitution, drugs, etc.),
- decreased property values,
- reduced retail trade, and
- preserving urban life.
There should be evidence in the record showing that the ordinance was tailored to combat these secondary effects.

- studies, anecdotal evidence, court cases, reports
- findings of fact
- statement of purpose
- Alternative avenues of communication must remain available.

- A zoning ordinance enacted by a local government should leave a number of sites available for adult businesses under the new zoning regime which are greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect.

- Just because properties on which adult businesses may locate are currently occupied and not for sale or lease will not necessarily mean that alternative avenues have been foreclosed by a local government.
Daytona's zoning ordinance provided that adult entertainment would be in one zoning classification, and rezoned one subdivision with a number of lots for that zoning classification. However, the owner of those lots was not willing to sell or lease to adult entertainment businesses. The Court said this was not a 1st Amendment violation.
RELIGIOUS ASSEMBLIES

- Protected by the free exercise clause of First Amendment.


- The issue there was whether a law prohibiting peyote use violated the free exercise rights of certain Native Americans.

- Generally applicable.

- Strict scrutiny did not apply.

- This means a zoning ordinance that is generally applicable could regulate churches without undergoing strict scrutiny.

- Ordinance banning ritual slaughter, aimed at Santeria.

- Guidance to local governments:

  The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.
RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 (RLUIPA)

42 USC 2000cc-1

- Applies to land use restrictions affecting religious assemblies.

- Intended to require strict scrutiny

- No substantial burden on religious exercise.

- “a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”
- Equal terms provision

- Must treat religious assemblies at least as favorable as secular assemblies and institutions.

- Assemblies and institutions are defined very broadly.
Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006)

- Three separate equal terms claims:

- Facially unequal treatment.

- Religious gerrymandering.

- The third potential claim is that a facially-neutral regulation is applied in a discriminatory manner
WHAT MUST A LOCAL GOVERNMENT DO OR NOT DO TO AVOID RLUIPA CHALLENGES?

- It is clear that RLUIPA does allow regulation of churches, and does not require more beneficial treatment of churches than of secular uses.

- A land use regulation may not treat secular assemblies and institutions more favorably than religious institutions.
THE EQUAL PROTECTION CLAUSE

- If a regulation classifies on the basis on any one of a number of suspect classifications such as race, alienage, or national origin, the regulation will be subject to strict scrutiny.

- Where a quasi-suspect class is implicated, the Court will apply an intermediate level of scrutiny.

- If no suspect class, then rational basis test applies.
In a seminal U.S. Supreme Court case based on the denial of a special use permit for an organization to operate a home for the mentally handicapped, the Court held that mental retardation is not a suspect class, nor a quasi-suspect class, for which a heightened level of scrutiny would apply. Nevertheless, the City’s requirement of a special use permit for a home for the mentally handicapped, while not requiring such a permit from other similar uses such as nursing homes, hospitals, and apartments, failed to satisfy even the Court’s lowest level of scrutiny: the rational basis test.
THE FAIR HOUSING ACT (FHA)

- Requires reasonable accommodations to make housing available to all classes of people.

- The courts have held that housing may become unavailable within the meaning of the FHA as a result of zoning decisions that effectively prohibit the construction of housing.

- An individual can also prove a violation of the FHA by a showing of significant discriminatory effect.
THE AMERICANS WITH DISABILITIES ACT (ADA)

- Local governments are required to make reasonable accommodations to people with disabilities.

- Group homes are a common pitfall