

# A Survey of Recent Federal Zoning Cases

*by*

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## **I. INTRODUCTION**

The federal courts have shown a reluctance to sit as zoning appeals courts, and so most zoning cases in Georgia tend to get resolved in the State courts. However, a review of recent federal zoning and land use decisions shows that the practitioner should keep the federal courts in mind, especially where there is a federal constitutional statute that creates a claim or right. The following is a summary of 11th Circuit and local District Court decisions over the previous year or so.

## **II. FIRST AMENDMENT CASES**

### **A. Adult Entertainment**

#### **1. Augusta Video, Inc. v. Augusta-Richmond Co., 2007 WL 2510151 (C.A.11 Ga. 2007)**

In this case, Plaintiff sought to open an adult bookstore. In order to do so, it had to receive a “special exception” to the commercial zone in which it was located from the County Commission, obtain a business tax certificate, and obtain an adult business license, which in turn required proof that a business had obtained a special exception. The County Commission ultimately denied the application for a special exception. Plaintiff did not seek a licensing permit because of the fact that it had been denied the special exception. The district court entered a preliminary injunction, finding that the special exception requirement violated the First Amendment because it gave the County Commission too much discretion. While the injunction was under consideration, the Commission amended the ordinance to eliminate the special exception requirement. The Commission further amended the ordinance after issuance of the injunction to eliminate adult businesses from the zone in which the Plaintiff was located. Plaintiff

filed a motion for additional injunctive relief based on the aforementioned amendments, and the injunction was granted, finding that the County had failed to follow the proper procedural requirements. Relying on this ruling, Plaintiff opened for business. After Plaintiff opened its doors, the Court of Appeals reversed the 2<sup>nd</sup> preliminary injunction. Thereafter, the Commission revoked Plaintiff's business tax certificate because it had failed to obtain a licensing permit, and ordered it to cease operations. Plaintiff then filed a 3<sup>rd</sup> motion for preliminary injunction, which was denied, and the Court granted summary judgment to the Defendant on a motion for declaratory judgment.

Upon review, the Court of Appeals found that the Defendant's special exception requirement was unconstitutional; therefore, Plaintiff had a lawful, pre-existing use at the time the ordinance was amended. The Court determined that the Plaintiff's use was "existing" at the time the statute was amended, despite the fact that it had not yet opened its doors to the public. It also found that Plaintiff's use was lawful since it had complied with the ordinance in every way, except obtaining the special exception. The fact that Plaintiff had not applied for a business license did not change the determination, because such an application would have been futile since it required showing that the applicant had been granted a special exception. However, the Court affirmed the district court's decision that the current ordinance met constitutional scrutiny, and said that Plaintiff's challenge to the current ordinance was moot after its decision granting Plaintiff grandfathered status. Finally, the Court made it clear that Plaintiff still had to comply with the remaining valid requirements of the zoning ordinance, and if it failed to do so, the City could withhold building and occupancy permits to enforce compliance.

**2. Flanigan’s Enterprises, Inc. v. City of Sandy Springs, 2006 WL 3191183 (N.D.Ga. 2006)**

The Plaintiffs made both facial and “as applied” challenges to four different regulations which were part of the Alcohol and Adult Zoning and Licensing Codes of the City of Sandy Springs. The City filed a motion to dismiss alleging that there was no present case or controversy ripe for review because the City had not issued a conclusive decision on the applicability of the ordinances to the Plaintiffs. The City had, however, sent the Plaintiffs a letter which explicitly put the Plaintiffs on notice that they had to choose between applying for an adult entertainment license or an alcohol beverage license. The Court concluded that a formal appeal of the City’s decision to the City itself was not required. The letter from the City was sufficient to constitute a conclusive response from someone with the knowledge and authority to speak for the administrative body, thereby satisfying the first prong of the ripeness test. The Court also held that the claims of adult bookstore plaintiffs were also fit for judicial review despite the fact that at least part of the letter from the City did not apply to their businesses. Although their claims were anticipatory, they were nonetheless justiciable because the City’s letter to their co-plaintiffs created a credible threat of prosecution. The Court also concluded that the second prong of the ripeness analysis was satisfied because undue hardship would likely result if the Court withheld adjudication, due to the fact that the Plaintiffs sought to continue to engage in activities in which the City has legislated against. For these reasons, the City’s Motion to Dismiss was denied and the Plaintiffs’ claims were held to be ripe for review.

**3. 2025 Emery Highway, LLC v. Bibb County, 377 F.Supp.2d 1310 (M.D.Ga. 2005)**

Plaintiff claimed violations of its rights as guaranteed by the First, Fourth and Fourteenth Amendments to the U.S. Constitution after Bibb County revoked its alcoholic beverage license based on its status as nude entertainment establishment. The Parties filed cross motions for summary judgment, whereby the Court addressed each of Plaintiff's voluminous claims individually. The Court found for the purposes of summary judgment that the lap dance performances were outside the merits of First Amendment protection; however, it found that the on-stage performances were protected by the First Amendment. The Court went on to say that despite the fact that some of the expression taking place at the club was constitutionally protected, the County's Alcoholic Beverage Code was still not unconstitutionally broad. Therefore, the Court granted summary judgment to the County as to Plaintiff's facial prior restraint challenge, its facial vagueness claims, and its "as applied" challenges to the Alcoholic Beverage Code. Ultimately, the Court granted summary judgment to the Defendant as to all claims except Plaintiff's Fourth Amendment claims arising out of the warrantless search of its premises by the sheriff's department. Furthermore, the Court denied Plaintiff's motion for partial summary judgment in full, and dismissed without prejudice Plaintiff's claims arising out of alleged constitutional infirmities in the County's Adult Entertainment Licensing Code.

**B. Establishment Clause**

**Pelphrey v. Cobb Co., 2007 WL 1991432 (N.D.Ga 2007)**

In this case, the District Court previously granted summary judgment in part to the Plaintiffs based on a § 1983 claim, concluding that the Cobb County Planning

Commission's procedure for inviting guests to deliver invocation prayers at its public meetings violated the Establishment Clause of the First Amendment. Therefore, the purpose of this decision was determining the appropriate relief, where the Plaintiffs sought a declaration of unconstitutionality, a permanent injunction, and nominal damages. Since the Court had previously determined the clergy selection procedures of the Planning Commission violated the Establishment Clause, the Court focused solely on the appropriateness of Plaintiffs' request for nominal damages and injunctive relief. As an initial matter, the Court held that Plaintiffs had both traditional Article III standing and taxpayer standing in the present action. In regards to Article III standing, the Court found that each of the plaintiffs came into direct contact with the practices at issue and were forced to observe the practices as a condition of their attendance; therefore, they each suffered an individualized injury which could be remedied by the court through the issuance of an injunction, a nominal damages award, or a declaration that the practice is unconstitutional. Furthermore, since it was undisputed that the plaintiffs were all taxpayers and that tax funds were used for the practice at issue, the plaintiffs were found to also have taxpayer standing. Thereafter, the Court determined that the Plaintiffs were entitled to nominal damages since the right to be free from a state establishment of religion is a fundamental right and the plaintiffs were not able to demonstrate actual injury. However, the Court held that Plaintiffs were not entitled to injunctive relief since the Commission had already stopped the practice prior to the commencement of the litigation.

Finally, it is worth noting that in a footnote, the Court distinguished the recent U.S. Supreme Court decision in Hein v. Freedom From Religion Foundation, Inc., 127

S.Ct. 2553 (2007), which held that taxpayer standing is not available to challenge discretionary expenditures by Executive Branch officials under the Establishment Clause. The Court reasoned that the action in Hein was not directed at an exercise of congressional power, whereas in this case the expenditures attacked were made by a local legislative body - the county planning commission.

### **C. Sign Ordinances**

#### **Spratlin Outdoor Media, Inc. v. City of Douglasville, 2006 WL 826077 (N.D.Ga. 2006)**

Plaintiff submitted an application to Defendant for two zoning variances, one for the reduction of the required set-back and one for a height increase, to build a commercial billboard along Interstate 20. Plaintiff claimed the variances were necessary because existing trees, vegetation, and natural features on the adjacent property would completely impair the visibility of the sign. Ultimately, the City Council voted to deny Plaintiff's request and Plaintiff appealed. The Court dismissed all the claims against the City Councilpersons in their official capacities, because it found that the direct suit against the municipality was the functional equivalent. After considering motions to strike several affidavits by both the plaintiff and defendant, the Court turned to the Plaintiff's and Defendant's motions for summary judgment. Finding that the administrative record supported the denial, the Court granted the City's Motion for Summary Judgment as to the Plaintiff's appeal of the City's variance denial. The Court also granted Defendant's Motion for Summary Judgment as to Plaintiff's Substantive Due Process, Equal Protection, Commerce Clause, and Takings Clause claims. Finally, the Court denied Plaintiff's Motion for Summary Judgment since it dealt with the same issue as Defendant's already granted summary judgment motion.

### **III. FEDERAL STATUTORY CASES**

#### **A. Telecommunications Act of 1996**

##### **Powertel/Atlanta, Inc. v. City of Clarkston, 2007 WL 2258720, (N.D.Ga. 2007)**

Plaintiff sought to expand its telecommunications network in the Metro Atlanta area by constructing a new antenna in the City of Clarkston. After some investigation, Plaintiff entered into a lease agreement with a property owner whereby Plaintiff could construct a tower on the owner's property in return for monthly rent payment. At the time of the lease, the property owner operated a business out of a building located on the property. Telecommunications towers were permitted uses in the classification in which the property was zoned; however, the Planning and Zoning Board recommended denial of Plaintiff's application based on the provision in the City's Zoning Ordinance which provided that only one building, structure or use, and its customary accessory buildings and uses, could be located on any one lot. Ultimately, the City Council voted to deny the Plaintiff's application. The City sent a letter to the property owner, on whose behalf the Plaintiff prosecuted the application, stating that the application had been denied. Thereafter, Plaintiff appealed the decision, alleging violations of the Telecommunications Act of 1996 (TCA) and seeking either mandamus or injunctive relief. One of the mandates of the TCA was that local governments were prohibited from taking actions "that prohibit or have the effect of prohibiting the provision of personal wireless service." Also, any decision denying a request to locate a wireless facility must be in writing and supported by substantial evidence contained in the record. In the present action, Plaintiff sought partial summary judgment on its Telecommunications

Act claims. Ultimately, the Court held that Plaintiff failed to carry its burden of demonstrating a “significant gap” in its service coverage. The Court said that there was no doubt that gaps existed in Plaintiff’s coverage in the City; however, the Plaintiff failed to establish that the gaps were significant within the meaning of the TCA. In the same vein, the Court ruled that the Plaintiff failed to make the required showing that the Defendant did not satisfy the writing requirement of the TCA.

**B. Americans with Disabilities Act / Fair Housing Act**

**1. Akridge v. City of Moultrie, 2006 W.L. 292179 (M.D.Ga. 2006)**

Plaintiff sought to open a home for elderly disabled individuals. As a preliminary matter, the Plaintiff met with City officials to determine whether the home would be prohibited by the City’s zoning code. She was told that it would not, and as a result, she purchased a residence located on 10 acres of land. The City received several complaints from neighbors and, after hearing from Plaintiff as to her planned use for the property, the City determined that her intended use was prohibited by the City’s zoning code. Plaintiff consulted with the Georgia Office of Regulatory Services and was told that her proposed use was protected by the Fair Housing Act. After criminal charges were brought against Plaintiff based on her use of the property, she requested a formal exemption, which was ignored, and then initiated the present suit alleging violations of the Fair Housing Act, the ADA, and her constitutional right to equal protection. The City sought summary judgment on all of the claims, alleging that old age is not a protected disability, and, even if it was, that the City did not discriminate. Plaintiff countered that the City’s code only allowed elderly homes in commercial areas, thereby preventing the elderly disabled individuals from residing in residential neighborhoods.

The Court found that there was sufficient evidence that would allow a jury to conclude that the Plaintiff's planned use was for the care of elderly handicapped or disabled individuals. The Court found that there was no evidence of intentional discrimination by the City and, therefore, granted the City's Motion for Summary Judgment as to any violations of the ADA and FHA based on intentional discrimination. The Court, however, denied Defendant's motion insofar as it asked the Court to dismiss Plaintiff's ADA and FHA claims based on the City's failure to provide a reasonable accommodation. Finally, Defendant's Motion for Summary Judgment was granted as to Plaintiff's equal protection claim because of the Court's finding that there was no evidence of intentional discrimination as required to prevail in an "as applied" challenge.

**2. Agan v. Carroll County, 2005 WL 2875097 (N.D.Ga. 2005)**

Plaintiffs sought to convert their home into a personal care home for mentally disabled women. They applied for a conditional use permit and were denied based on the size of Plaintiffs' lot and its proximity to a local day care center. At the reconsideration hearing, Plaintiffs were once again denied the CUP. At the hearing where the Plaintiffs were denied the CUP, no discussion occurred regarding a problem with the septic system. However, at the hearing one of the Commissioners expressed disagreement with two strangers sharing a bedroom, and his corresponding Motion to deny was successful. Approximately two months after the denial, Plaintiffs received a letter from the County implying that the reason they were denied the CUP was the capacity of the septic system. Defendant brought a suit for discrimination in violation of the ADA, FHA, and the Fourteenth Amendment to the U.S. Constitution. At issue in the

present case was the County's Motion for Summary Judgment. The County contended that the Plaintiffs lacked standing to bring the claims alleged. The Court quickly rejected this argument, and, as to the Plaintiffs' claims under the ADA and FHA, the Court determined that there was a genuine issue of material fact as to whether Plaintiffs' CUP was denied on the basis of the intended residents' handicaps since the after-stated reason for denial could be seen as a pretext for discriminatory action. As such, the County's motion was denied.

**3. Hallmark Developers, Inc. v. Fulton County, 386 F.Supp.2d 1369 (N.D.Ga. 2005)**

Plaintiff sought to rezone a 182-acre parcel in order to build low-income housing. Defendant's denied the request, and Plaintiff brought suit alleging violations of the FHA, the Civil Rights Act, the Fifth and Fourteenth Amendments, and alleging that denial amounted to exclusionary zoning. The Court granted summary judgment to Defendant as to the equal protection and exclusionary zoning claims, held that Plaintiff's federal takings claims was not ripe, and declined to exercise jurisdiction over Plaintiff's state takings claim. As to the FHA claim, the Court denied Defendant's motion for summary judgment due to evidence put forward that the denial had a disparate impact on African-Americans. It was this latter claim that was the focus of the present decision. After the Plaintiff submitted his original development plan, there was strong opposition from both the community-at-large and the Board of Commissioners. As a result, Plaintiff sought to work with the County and neighboring citizens to change its development plans to better suit the surrounding area; however, Plaintiff's application was ultimately denied by the Board. The Court found that the Commissioners were heavily influenced by at least two of the community groups in opposition to the development who wanted a

more “upscale” community. After considering evidence from experts employed by both Plaintiff and Defendant concerning disparate impact on African-Americans by excluding the planned development, the Court found, that at the time the Plaintiff’s application was denied, there were no significant barriers to entry into the housing market for African-Americans, including those in low and moderate income groups. As to Plaintiff’s FHA claim, the Court found that Plaintiff’s showing of disparate impact was too weak to establish the requisite prima facie case under the FHA, and, therefore, directed that judgment be entered in favor of the Defendant.

### **C. Miscellaneous § 1983 Cases**

#### **1. Griffin Industries, Inc. v. Couch, 2006 WL 783354 (N.D.Ga. 2006)**

Plaintiff brought a § 1983 action alleging that certain state, city and county government officials conspired to harm its business and shut down its Dublin, Georgia, rendering facility, thereby unlawfully depriving Plaintiff of its constitutional rights. Plaintiff alleged that the Defendants acted in furtherance of this conspiracy by engaging in disparate and arbitrary environmental and administrative regulation. Specifically at issue was an emergency order suspending Plaintiff’s LAS permit for its facility, along with several corresponding lawsuits and proceedings brought against the Plaintiff. As an initial matter, the Court denied both the Plaintiff’s and the Defendants’ motions to transfer. The Court then granted Defendants’ motion to dismiss Plaintiff’s claims to the extent that they were based on conduct which occurred more than two years prior to the filing of Plaintiff’s Complaint. As to the State Defendants, the Court considered Plaintiff’s equal protection claims, procedural due process claims, and claims for injunctive relief. The Court also considered whether the State Defendants were entitled

to qualified immunity with respect to the Plaintiff's claims against them in their individual capacities for their alleged violation of its right to procedural due process. The Court denied Defendants' motion to dismiss Plaintiff's equal protection and procedural due process claims, as well as its claims for injunctive relief. However, the Court did find that the State Defendants were entitled to qualified immunity as to the procedural due process claims against them in their individual capacities. Next, the Court considered the City Defendants' motion to dismiss the Plaintiff's § 1983 conspiracy claims based on Defendants' contention that they were entitled to qualified immunity. The Court found Plaintiff's allegations to be sufficient to state a § 1983 claim for conspiracy, and therefore denied Defendants' motion as to those claims. As to the qualified immunity claims, the Court granted Defendants' motion as to the Plaintiff's procedural due process claims, but denied the motion as to its equal protection claims. Finally, as to the County Defendants' motion for judgment on the pleadings, the Court denied the motion based on the specific allegations in Plaintiff's complaint which alleged that the County reached an understanding with the State Defendants to violate Plaintiff's constitutional rights.

**2. Burt Development Co. v. Bd. of Comm. of Lee County, 2007 WL 1339856 (C.A. 11<sup>th</sup> 2007)**

The Plaintiff filed an action in the Superior Court of Lee County challenging a denied rezoning by the Board of Commissioners which would have allowed the Plaintiff to build townhouses on a particular parcel of land within the county. After a trial, the Court entered judgment in favor of the County, rejecting all of the Plaintiff's claims. The Georgia Supreme Court declined to hear the Plaintiff's appeal, and also denied subsequent motions to reconsider their denial. Thereafter, the Plaintiff filed a

complaint in the District Court asserting essentially the same claims the Superior Court had rejected. The Court granted the Defendant's Motion for Summary Judgment, ruling that the Plaintiff's claims were barred under the *Rooker-Feldman* Doctrine, which recognizes that the power to review the final judgments of state courts lies solely in the U.S. Supreme Court. The Court of Appeals held that the District Court properly determined that the *Rooker-Feldman* Doctrine was applicable; however, it vacated the decision of the Court because it erred in granting summary judgment. The Court pointed out that when the Doctrine applies, the District Court lacks subject matter jurisdiction to review the state court judgment. Therefore, the proper action was for the Court to dismiss the claim for a lack of subject matter jurisdiction.