

**DEALING WITH LANDFILLS, QUARRIES  
AND OTHER OBNOXIOUS USES**

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## **I. INTRODUCTION**

The title of this paper perhaps suggests a negative connotation in regards to landfills, quarries and similar uses, and indeed the author has spent more time representing local governments and neighbors opposing the siting of such facilities than representing developers seeking to construct such uses. However, this paper is of use to both sides of the matter, in that by highlighting the useful tactics to strengthen regulations and ordinances, and the proper procedure for dealing with applications for such uses, it necessarily exposes the flaws that can be exploited for those jurisdictions that are not adequately prepared when these uses come calling. In other words, this paper suggests lawful mechanisms that would allow regulation and control of uses that most citizens frankly consider problematic or obnoxious, especially when such uses are to be sited in the vicinity of their homes – unless they stand to profit financially from the use.

This paper discusses several of the most common regulatory tactics and the legal issues associated with each, including zoning, particularly special use permits; solid waste management plans; and regulations other than zoning, such as use-based regulations.

## **II. ZONING ORDINANCES AND THEIR PROBLEMS**

The most common way to regulate uses is to adopt a zoning ordinance. A zoning ordinance is essentially a regulation that divides the jurisdiction into zones. While that might seem obvious on its face, the Supreme Court has been called upon more than once to determine whether a particular ordinance is a zoning ordinance. This is a key question, as a zoning ordinance is subject to the procedural requirements of the Zoning

Procedures Law, O.C.G.A. § 36-66-1 et seq. (the “ZPL”), which requires notice and a hearing prior to adoption. In contrast, most jurisdictions can adopt non-zoning ordinances during the course of a regular meeting simply by putting them on the agenda and voting to adopt the ordinance. For example, in City of Walnut Grove v. Questco, Ltd., 275 Ga. 266, 564 S.E.2d 445 (2002), the Supreme Court held that a sign ordinance was a zoning ordinance, in that it used zones to regulate the signage. In contrast, in Fairfax MK, Inc. v. City of Clarkston, 274 Ga. 520, 555 S.E.2d 722 (2001), the Court determined that a regulation that required gas stations to be a certain distance from daycare centers to receive a building permit was not a zoning ordinance, even though it concerned location. The Court held, “The presence of lot size requirements or space restrictions does not transform a local licensing or regulatory ordinance into one governed by a zoning procedures statute where it is clear from a reading of the ordinance as a whole that it is intended to regulate a particular occupation, rather than to regulate the general uses of land.” 274 Ga. at 512-522.

Likewise, in Artistic Entertainment, Inc. v. City of Warner Robins, 331 F.3d 1196 (11th Cir. 2003), an adult entertainment ordinance was found not to be a zoning ordinance, and in Greater Atlanta Homebuilders Ass’n v. DeKalb County, 277 Ga. 295, 588 S.E.2d 694 (2003), the Court determined that a tree ordinance, despite some reference to zoning districts, was not a zoning ordinance subject to the ZPL.

Finally, an emergency moratorium on sign permits was not found to be a zoning ordinance in City of Roswell v. Outdoor Systems, Inc., 274 Ga. 130, 549 S.E.2d 90 (2001). This is significant because trying to adopt an emergency moratorium while giving 15 days notice simply waives a red flag to the uses attempting to be halted by the moratorium to rush to file applications or otherwise vest their rights. Hence, if rumors

of a potential obnoxious use surface, a quick remedy for a local government is a moratorium crafted broadly enough to halt any building permit or other permission for such a use to proceed. Provided a moratorium is crafted without arbitrary distinctions, is of a limited duration, and is for a reasonable public purpose, such as preserving the status quo while ordinances are amended, it should be upheld. Jurisdictions get in trouble when they adopt moratoriums for extended periods, or allow the City Council to grant exceptions as they see fit, or if it is not for a reasonable purpose.

Of course, this suggests a natural course to the applicant. If, upon survey of a jurisdiction, it does not appear to have any regulations governing the use, the key goal is to file an application or otherwise vest your rights before the jurisdiction can act to impose a barrier to approval. Careful research is warranted, and in small jurisdictions this can be difficult to do surreptitiously without tipping the local clerk off, who will alert the governing authority of someone researching, for example, adult entertainment ordinances, or landfill regulations. Both of these industries have been known to use this tactic in seeking to site their use. In some cases, missing the existence of a key ordinance can greatly hinder this strategy, as the applicant discovers they failed to comply with some necessary prerequisite to getting permission to build, and therefore did not vest any rights.

Presuming a local government is acting proactively, and not desperately reacting to a pending threat of an undesirable use, the zoning ordinance is a strong defense to control and regulate undesirable uses, if the local government can be convinced to adopt zoning. The Georgia Tech Economic Development Institute determined in 2001 that of

Georgia's 159 counties, 96 had zoning regulations and 63 did not.<sup>1</sup> The unzoned counties were universally rural, and those are often the targets of uses such as landfills, quarries (which of course depend on geography) and other unloved industrial uses.

Having a zoning ordinance is no guarantee of having proper control of proposed uses. Typical problems that can be encountered are 1) improper adoption of the zoning ordinance or of any amendment thereto; 2) improper adoption or incorporation by reference of the official zoning map (or complete lack of an official zoning map); 3) weak or non-existent definitions for uses; and 4) inadequate or improper procedure.

#### **A. Improper Adoption**

Improper adoption of the zoning ordinance results from simple non-compliance with the Zoning Procedures Law. This error is slowly disappearing as counties and cities with zoning readopt ordinances and cure errors, but in the first few years after the ZPL was adopted, errors were rife. The Supreme Court has determined that the ZPL requires strict compliance; therefore, any error can invalidate a zoning ordinance. Failure to closely follow the ZPL doomed the adoption of the zoning ordinance by Bartow County in Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991). In that case, the proposed use was a quarry, and the County was found to have failed to conduct a public hearing on the adoption of procedures governing the calling and conducting of zoning hearings. Thus, adopting a zoning ordinance improperly is as worthless as not having any zoning at all.

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<sup>1</sup> "The Land Use Regulation – Economic Development Connection," Georgia Tech EDI, Sept. 2004. As an aside, the study concluded having zoning significantly impacted economic development, property values and employment.

## **B. Zoning Map Errors**

Zoning map errors can create a similar problem. If there is no official zoning map, then the zoning ordinance text is entirely useless. Many jurisdictions take a rather casual attitude towards the official zoning map. A particular map may have existed at one time, but over time it may have been misplaced or replaced by a new copy from the local RDC or by a “working copy.” If, for example, the zoning ordinance defines the “Official Zoning Map” as that map titled “Official Zoning Map of the City of YXY,” that is kept in the office of the zoning administrator, dated July 1, 2001, and signed by the mayor, and that city’s actual zoning map is an undated new GIS map that is unsigned, entitled “Zoning Map” and kept in the clerk’s office, that city will have difficulty proving the existence of an official zoning map.

## **C. Definition Problems**

Weak or non-existent definitions can arise when the zoning ordinance lacks the specificity to address the proposed use. For example, numerous zoning ordinances, apparently based on the same model, use language such as “uses which may cause injurious or obnoxious noise, vibration, smoke, gas, fumes, odors, dust, or other conditions objectionable to adjacent or nearby areas shall require special approval of the planning commission.” Such language was found void for vagueness in Lithonia Asphalt Co. v. Hall County Planning Com’n, 258 Ga. 8, 364 S.E.2d 860 (1988), when it was used to deny a permit to an asphalt plant. However, when very similar language was tied to performance rather than permission to build (and did not require approval of a planning commission), then it was considered a “performance standard” related to enforcement, and was upheld, in Stanfield v. Glynn County, 280 Ga. 785, 631 S.E.2d 374 (2006). Any ambiguities in a zoning ordinance are construed in favor of a property

owner, and so they need to be very carefully drafted. Bo Fancy Productions v. Rabun County Bd. of Commr's., 267 Ga. 341, 342, 478 S.E.2d 373 (1996). In that case, the Court held, “The Rabun County zoning ordinance specifically provides that those uses authorized for property zoned ‘residential’ shall not be employed for ‘commercial purposes,’ but does not specifically prohibit those uses authorized for property zoned ‘agricultural’ from being so employed.” 267 Ga. 342. That provides a perfect example of careless drafting.

#### **D. Improper Procedures**

Inadequate or improper procedure is another common failing of zoning ordinances, especially when they attempt to regulate uses through special exceptions or special use permits. Over and over the Supreme Court has struck down ordinances that contain no objective standards governing the decision as violating due process and being arbitrary and capricious. See, e.g., Davidson Mineral Properties, Inc. v. Monroe County, 257 Ga. 215, 357 S.E.2d 95 (1987) (rock quarry); Hixon v. Walker County, 266 Ga. 641, 468 S.E.2d 744 (1996) (chicken houses); and Dinsmore Development, Co., Inc. v. Cherokee County, 260 Ga. 727, 398 S.E.2d 539 (1990) (landfill). In Davidson, involving a quarry, the County adopted a moratorium on commercial development, prior to adopting any zoning. However, the moratorium allowed the County to decide on a case-by-case basis, without any standards, if a new use would be permitted. The uncontrolled discretion was found to be a violation of due process. In Fulton County v. Bartenfeld, 257 Ga. 766, 363 S.E.2d 555 (1988), involving a landfill, the opposite problem existed: the ordinance contained only objective standards, and the applicant having met all such standards, the permit for the landfill was required to be granted.

The proper balance on a special use permit, as will be discussed below, is to have a variety of standards that require exercise of discretion.

### **III. SPECIAL USE PERMITS AND SPECIAL EXCEPTIONS**

If zoning is already in place, an excellent option for regulation of undesirable uses is placing such uses under a category requiring special approval, whether it be denominated a special use permit, a special exception or a conditional use permit. The courts essentially treat all three as the same thing, approving it as a zoning technique “developed as a means of providing for types of land use which are necessary and desirable, but which are potentially incompatible with uses usually allowed in the particular district.” City of Roswell v. Fellowship Christian School, Inc., 281 Ga. 767, 768, 642 S.E.2d 824 (2007). In each type of use, the use must be authorized by approval of the governmental body. This zoning device allows the local governing body to anticipate proposed future land uses potentially in conflict with existing permitted uses, and affords the flexibility of permitting the proposed use upon compliance with conditions set out in the ordinance, or in the discretion of the local governing body. Id.

As discussed above, case precedent suggests if the governing body’s decision is entirely unconstrained, then the court may well find the denial of a special use to be arbitrary and unconstrained by due process. Likewise, if the zoning ordinance sets out strict objective criteria, the governing authority’s hands can be tied if the applicant can demonstrate it satisfied all conditions. The middle ground provides the most flexibility to the governing body, by having objective standards but also allowing discretion. In Gwinnett County v. Ehler Enterprises, Inc., 270 Ga. 570, 512 S.E.2d 239 (1999), the zoning ordinance was found to provide some standards, but the standards were not

exclusive. There the Supreme Court pointed out, “Under the guidelines for the issuance of special use permits, the board is to give ‘particular emphasis ... to the evaluation of the characteristics of the proposed use in relationship to its immediate neighborhood and the compatibility of the proposed use with its neighborhood.’ Additionally, the board is to consider the policies and objectives of Gwinnett County's Comprehensive Plan, the effect on traffic, storm drainage, and land values.” 270 Ga. at 570. This variety of standards provided enough guidance so that the decision was not arbitrary, but was discretionary.

Gwinnett Co. v. Ehler Enterprises was useful as well for affirming that the appropriate standard of review is “any evidence,” and that the evidence is that which was presented to the governing body, not to the trial court. The Court noted, “This is an important distinction. By focusing on whether the board's decision is supported by any evidence, we recognize that zoning is a legislative and not judicial function.” *Id.* The trial court is not to reweigh the evidence, only to ascertain if there was any evidence to support the denial. Hence, this does pose a challenge to the governing body to ensure that evidence supporting a denial is in the record if the use is to be denied. The governing body will not have the opportunity to present new evidence at the trial court, as would be the case in a rezoning denial.

The recent case of City of Roswell v. Fellowship Christian School, Inc., *supra*, affirmed these same principles of the “any evidence” review and review on the record below. In that case, the Court also approved denial of a permit based on increased traffic concerns. Properly handled, therefore, a decision to deny or grant a special use permit, when there is any reasonable evidence before the decision-making body to support the decision, should under normal circumstances be irreversible, presuming the

trial court follows the law. It would only be a circumstance where the decision was entirely arbitrary and there was no evidence in support of it that would justify a denial.

#### **IV. REGULATIONS OTHER THAN ZONING**

Zoning ordinances and particular special use permits are very effective tools, but as mentioned previously, in 2001, 63 counties (and an unknown number of cities) lacked zoning. In some jurisdictions in north Georgia, zoning is a four-letter word and any attempt to impose it would lead to quick electoral action to oust the governing authority. Hence, such jurisdictions must turn to tools other than zoning ordinances to provide any sort of regulation or control of obnoxious uses. The Georgia Department of Community Affairs began a project in 2001 to develop a model code of “Alternatives to Conventional Zoning.” The result, published in 2002, was designed to aid small and generally rural communities in adopting some controls to development. The Model Code has since been expanded and improved, and the 2007 version is available online at <http://www.dca.state.ga.us/development/PlanningQualityGrowth/programs/modelcode.asp>. The Model Code contains model regulations relating to environmental protection (including soil erosion and grading, flood damage prevention, hillside and ridgeline protection), subdivision and land development ordinances, performance based regulations that do not use a map, use based restrictions that do not use a map, and other more esoteric proposals such as regulation by “character area.”

Use based regulations that do not use a map are a simple solution. The idea is to have an ordinance, like the ordinance in Fairfax MK, Inc. v. City of Clarkston, *supra*, that regulates the use and not any particular zone. For example, the Model Code has sample provisions regulating uses such as “Solid Waste Handling Facilities,” “Junk

Yards” and “Adult Businesses.” The idea would be that any solid waste handling facility, which are defined, would have to meet the criteria listed, wherever it were to be located. The listed criteria include permitting requirements, hours of operation, buffers and screening, access requirements, and so forth. Thus, the use would be permitted anywhere in the jurisdiction, provided all the criteria could be met. These sorts of regulations are simple and effective, and the main drawback is that a regulation for each particular use that a local government seeks to regulate is required.

Performance based standards relate to imposing height, setback and other intensity restrictions on uses based on what uses they are near, and also regulate the impact of uses on their neighbors, such as lighting, noise, odor, and so forth. The key to such regulations is objective, enforceable criteria. For example, a standard might state that a commercial use adjacent to an existing single family residence cannot be located within 50 feet of the property line, must have a certain buffer, and must not exceed a certain height, etc. In that way, no particular zoning district is created, but each property is adjudged on a case-by-case basis, depending on its circumstances. These types of regulations are not yet in wide use and have not been the subject of reported decisions or much litigation; therefore, the local government should proceed cautiously when adopting such standards.

## **V. PARTICULAR LANDFILL ISSUES**

Landfills have merited particular mention throughout this paper because they of all uses seem to generate the most opposition and the most litigation. There have been at least forty reported Eleventh Circuit, Georgia Supreme Court and Georgia Court of Appeals decisions regarding landfills and landfill siting issues during the last 20 years,

which is far more than any other particular zoning category of uses, except adult entertainment and perhaps billboard and sign ordinance regulation. The latter two categories of use involve the First Amendment and have their own elaborate special case law that must be closely followed to adopt proper regulations, and are not subject to the general notions of this paper. The ICLE Zoning Law seminar has addressed both topics several times over the last decade, and those papers should be consulted on these specialty topics.

#### **A. Georgia Solid Waste Management Act**

The Georgia Comprehensive Solid Waste Management Act, O.C.G.A. § 12-8-20 et seq., contains the applicable regulations for landfills. O.C.G.A. § 12-8-24 contains specific requirements for obtaining a permit to develop a landfill. Subsection (g) is of particular interest since it requires that the permit applicant verify with the local government that the proposed landfill 1) is consistent with the local zoning ordinance and 2) is consistent with the applicable solid waste management plan. The applicant for a landfill thus approaches the local government and requests a letter of zoning compliance, and a letter of compliance with the solid waste management plan. This often results in a poorly regulated local government frantically attempting to adopt some regulations to prevent the landfill, and has led to a number of cases discussing vesting of rights. Generally, if there is no regulation in place that applies, it is going to be too late to try and adopt something once the request has been submitted.

Provided that there is zoning, then the issue turns on whether the landfill complies. Landfill companies have successfully attacked zoning ordinances for improper adoption under the ZPL, and also attacked special use permit provisions that were too vague so as to abuse due process. Hence, these sorts of provisions must be

carefully reviewed. Mid Georgia Environmental Management Group, L.L.L.P. v. Meriwether County, 277 Ga. 670, 594 S.E.2d 344 (2004), is an example of a case where the denial of a zoning compliance letter was affirmed. See also, Button Gwinnett Landfill, Inc. v. Gwinnett County, 256 Ga. 818, 353 S.E.2d 328 (1988)(denial of letter of compliance affirmed); EarthResources, LLC v. Morgan County, 281 Ga. 396, 638 S.E.2d 325 (2006)(denial of letter of compliance affirmed).

### **B. Solid Waste Management Plans**

Provided zoning compliance is verified, the next step is verification of compliance with the solid waste management plan (SWMP). O.C.G.A. § 12-8-31.1 requires each city and county to develop or be included in a comprehensive solid-waste management plan. SWMPs use to be considered of little use in opposing landfills, but recent decisions by the EPD and by the Supreme Court have radically changed that, and made it imperative on every local government that they update and revise their SWMP. In a long-running battle in Taliaferro County, the EPD at one point determined that the landfill was not consistent with the SWMP, and thereby denied the permit, even though the local government had been forced to issue a zoning compliance letter.

In Murray County v. R & J Murray, LLC, 280 Ga. 314, 627 S.E.2d 574 (2006), the Supreme Court overruled Butts County v. Pine Ridge Recycling, Inc., 213 Ga.App. 510, 445 S.E.2d 294 (1994), which had limited SWMPs to only incorporating environmental and land use factors specifically listed in EPD regulations. Instead, the Court found that “the comprehensive statutory and regulatory scheme applicable to landfill applications and SWMP development does not evidence an intent to so restrict local governments in their decision-making.... An examination of the applicable statutes and regulations clearly reveals that local governments are authorized, and indeed required, to consider

factors other than environmental and land use factors in developing a SWMP. In the absence of legislative restrictions on local governments' consistency decisions, then, we find that a local government is authorized to consider any relevant factor in determining whether a proposed facility is consistent with its SWMP that it properly considered in the SWMP itself.” 280 Ga. at 315. The only restriction the Court imposes is that the factors considered relate to the public health, safety and welfare, which of course is generally interpreted very broadly. In Murray County, the additional factors considered included the anticipated impacts on current solid-waste management facilities, impacts on collection and disposal capability within the planning area, and the environmental impacts on a municipal solid-waste landfill.

Thus, provided the local government has properly adopted a SWMP (q.v. McKee v. City of Geneva, 280 Ga. 411, 627 S.E.2d 555 (2006) which invalidated a SWMP for improper adoption), it can be expanded to consider many factors beyond the traditional factors listed in EPD regulations for environmental and land use criteria. The local government can take comfort in the EPD (at least for now) and the courts enforcing such criteria in their review of the landfill permit application.

## **VII. CONCLUSION**

A great deal of litigation is spawned when an undesirable use shows up and seeks permission to build or otherwise seeks approval. Only then do neighborhoods and local governments realize, to their dismay, that the existing regulations are insufficient to provide proper control or to otherwise deny the requested use. This paper summarizes a variety of methods that governments can use to provide some regulation of such uses, whether through zoning or an alternative method. It of course likewise points to the

flaws that can be exploited by the applicant. The courts have not hesitated to strike down improper zoning ordinances, reverse decisions that were not supported by objective criteria, and compel issuance of approvals that were not properly denied. The time for local governments to review and update their ordinances is before an applicant is knocking at the door.