

GEORGIA ASSOCIATION OF ZONING ADMINISTRATORS

LEGAL & LEGISLATIVE UPDATES

July 18, 2008

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I. ADMINISTRATIVE DECISIONS AND APPEALS

1. Jackson County v. Earth Resources, Inc., 280 Ga. 389, 627 S.E.2d 569 (2006).

In reviewing a decision by a local government in either granting or denying a conditional use permit, the court is bound to uphold the decision of the local government where there is any evidence supporting its decision. The court in this case found that the local government's denial of a conditional use permit to develop a construction and demolition landfill was supported by the evidence where there was more than merely "generalized fears" presented by neighboring property owners. Evidence of specific concerns was raised as to truck traffic to and from the site of the landfill. Moreover, the project was not consistent with a comprehensive land use plan which called for mid-density residential use, an appraiser opined as to a negative effect on surrounding land values, and the property owner's representations concerning ground water contamination were rebutted. The Jackson County Zoning Ordinance granted discretion to the county on whether to grant or deny a conditional use permit. It provided in Sec.13-60 that "[t]he conditional use would be consistent with the needs

of the neighborhood or the community as a whole, be compatible with the neighborhood and would not be in conflict with the overall objective of the comprehensive plan.”

Because of discretion given to the county, it may consider various factors in determining whether a conditional use permit would meet these criteria. For these reasons, the court upheld the county’s denial of the conditional use permit.

2. City of Roswell v. Fellowship Christian School, Inc., 281 Ga. 767, 642 S.E.2d 824 (2007)

Fellowship Christian School (FCS) applied to Roswell for a conditional use permit to construct several new buildings including a 1500-seat football stadium. After considering the evidence, the city approved the permit for the buildings, but did not approve the stadium.

In its decision, the Supreme Court upheld the decision of the city to deny the stadium. It reasoned that the city’s conditional use permit ordinances granted the city discretion on acting on an application rather than mandating approval of the application as a matter of right. Only if the city was guilty of a gross abuse of discretion would the denial of the permit be reversed. The court also concluded that if there is “any evidence” to support the city’s decision, it must be upheld.

The evidence presented to the city showed that there already existed two stadiums at other high schools within one mile of FCS’s property. FCS’s own traffic study showed that simultaneous varsity football games create the potential for multiple athletic events along the road. The evidence showed that two or three simultaneous

events along the two-lane road would create severe traffic congestion following a football game.

The court found that traffic congestion is a valid consideration in regulation of land use, and since the evidence showed that FCS's proposed stadium would exacerbate an already existing traffic problem, that it was reasonable for the city to deny the application for a permit to construct the stadium. According to the court, "preserving the character of an existing neighborhood is a legitimate purpose of zoning and planning."

Since the evidence showed a rational basis for the denial of the permit for the stadium, the court rejected FCS's contention that it was denied equal protection.

3. DeKalb County v. Cooper Homes, 283 Ga. 111, 657 S.E.2d 206 (2008).

Where DeKalb County's zoning ordinance provided appeal to the Board of Zoning Appeals from the denial of a building permit by the planning and development department, developer was required to pursue that appeal to the BZA before it could appeal to the superior court. The BZA had previously denied a variance to the same developer, but since a building permit would be issued on a different basis than a variance, it would not be a futile act to appeal to the BZA.

II. ZONING PROCEDURES LAW, O.C.G.A. §36-66-1 et seq.

1. Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991).

A property owner wished to use property for surface mining and needed to get a certificate of land use compliance from the county before such a permit was issued. The county denied the permit on the grounds that the property was zoned for agricultural uses only. The Supreme Court held that the zoning ordinance was invalid because it did not comply with the ZPL. The court held that the ZPL requires that, before a zoning ordinance is adopted, an ordinance detailing policies and procedures must be adopted, and that ordinance is also subject to the ZPL's notice and public hearing requirements. Further, where the zoning ordinance is procedurally invalid, there are no legal restrictions on the use of land, and the property owner was entitled to mandamus relief ordering the county to issue the certificate of land use approval.

A practice pointer worth mentioning that is not apparent on the face of the opinion is that the county readopted the zoning ordinance while the case was on appeal. Although the property owner was ultimately successful and allowed its intended use of the property, readoption of the zoning ordinance in a manner compliant with the Supreme Court's holding prevented a gap period in which the county was without zoning. Thus, other property owners were prevented from capitalizing on the procedural defect in the original zoning ordinance and vesting rights to undesirable uses.

2. Kingsley v. Florida Rock Industries, Inc., 259 Ga. App. 207, 576 S.E.2d 569 (2003).

Florida Rock challenged the validity of Lamar County's Comprehensive Land Use Plan on the ground that it was not adopted in accordance with the notice requirements of the Zoning Procedures Law, O.C.G.A. § 36-66-1 *et. seq.* Lamar County had given only 14 days notice of the public hearing on the plan rather than the minimum 15 days required by the ZPL. The court however reasoned that planning was not the same as zoning. "Comprehensive planning . . . refers to "any plan by a county," without any limitation to the type of planning involved." at p. 210. Planning, according to the court, does not impose immediate restrictions on land use, but "contemplates the evolvement of an over-all program or design of the present and future physical development of a total area and services. . . ." 101A CJS, Zoning and Land Planning, § 2(b) (1979). Zoning is a means by which the comprehensive plan is carried out; it is subject to the constitutional protections of equal protection and due process and the prohibition against taking private property without just compensation. The notice for adopting a comprehensive plan is that usually followed by a local government for public hearings, not zoning hearings. See DCA Regulations at Ga. Comp. R. & Regs. R. 110-3-2-.06(4)(a). Since Lamar County followed its usual public hearing procedure, it satisfied the notice requirements for a hearing on the comprehensive plan.

3. **City of Roswell et al., v. Outdoor Systems, Inc., 274 Ga. 130, 549 S.E.2d 90 (2001).**

After the City of Roswell's sign ordinance was struck down as unconstitutional, the city enacted a temporary moratorium on applications for billboard signs, but in enacting the moratorium the city did not follow the notice requirements of the Zoning Procedures Law, O.C.G.A. § 36-66-4(a). In a challenge to the moratorium, the Supreme Court found that the temporary moratorium on receiving applications for billboard signs was not a "zoning decision" as defined in the Zoning Procedures Law. The ZPL defines "zoning decision" as a "final legislative action by a local government" that adopts an ordinance, grants a special use permit, or approves an amendment to the text of the zoning ordinance, rezones property, or zones annexed property. Therefore, according to the court, the temporary billboard sign moratorium was not "final legislative action" as defined by the ZPL, and thus adoption of the temporary moratorium was not subject to the notice requirements of the ZPL. In addition, the Supreme Court approved the moratorium on the grounds that it was temporary; it was limited in scope to billboards exceeding a specific size; and it was enacted in response to a prior court order invalidating existing sign regulations. Thus the court found specifically that the moratorium was a reasonable interim action and exempt from the procedural requirements of the ZPL.

III. ADOPTION OF THE OFFICIAL ZONING MAP

**Mid-Georgia Env'tl. Management Group LLLP v. Meriwether County,
277 Ga. 670, 594 S.E.2d 344 (2004).**

Application for rezoning challenged validity of Meriwether County's zoning map because it didn't keep superseded portions of the zoning map; it only updated the map and discarded the superseded portions. This argument was rejected by the court; there is nothing in the ZPL, according to the court, that conditions the validity of a zoning map on the retention of superseded portions.

The court also rejected the challenge that the county did not correctly incorporate the zoning map into the zoning ordinance. Concluding that a zoning map is a "zoning decision" under the ZPL, it must be adopted in accordance with it. In this case the county properly adopted its zoning map for the following reasons:

- it incorporated the zoning map by reference stating that it was a part of the zoning resolution;

- the ordinance provided that the zoning administrator shall maintain a copy of the zoning map;

- the board minutes show that the board of commissioners had before it a copy of the zoning map at the time it was adopted;

- the zoning map was in existence at the time the zoning applicant bought the property and that the map was in the administrator's office.

IV. SIGN ORDINANCES

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

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

1) The city's sign ordinance which distinguishes between "off-premise signs" and "on-premise signs" violates the First Amendment to the United States Constitution and the Free Speech Clause of the Georgia Constitution. Since the city restricts the content of a sign based upon its location, it will not survive strict scrutiny. The city effectively prohibits signs bearing non-commercial messages in zoning districts where a sign of the same size and structure may display commercial messages.

2) The city's sign ordinance is also unconstitutional to the extent that it limits the messages on specific categories of signs, which are principal identification signs, marketing signs, construction signs, instructional signs, real estate directional signs, real estate signs, and special event signs. The effect of the ordinance was to limit the message of certain signs to those identifying the type of sign that may be used.

3) The ordinance provisions which restrict signs in residential zoning districts to on-premise signs and certain temporary or special signs, such as political signs, is likewise unconstitutional. The court reasoned that the ordinance prohibits vital expression through the unique medium of residential signs without providing a viable alternative.

4) The city's time limitation on political signs during a period of six weeks prior to and one week after an election is likewise unconstitutional. Since the ordinance does not place time limits that a resident may post a sign selling his house, for example, restrictions on political signs are necessarily content based and unconstitutionally restricted.

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

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

An example of the types of signs exempt from the regulations and thus not requiring a permit are 1) flags and insignia of any government, religious, charitable, fraternal or other organizations; 2) signs on private premises directing and guiding traffic and parking on private property; 3) and holiday lights and decorations. Thus the city's sign code discriminates against certain types of speech (signs) based on content. It exempts from regulation some categories of signs based on content, but does not exempt others based on content. Generally, laws that distinguish favored speech from unfavored speech on the basis of the ideas or views expressed are content based. A content-neutral ordinance applies equally to all and not just those with a particular message or subject matter in mind. But where the city exempts certain signs based upon the content or message within the sign is not content neutral.

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

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

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

Plaintiff filed eleven applications with the county for permission to erect billboards, which were prohibited under the existing sign ordinance. The applications were denied and the plaintiff filed suit claiming several provisions of the county's sign ordinance violated the U.S. and Georgia Constitutions.

Regulations that restrict expression of protected speech are analyzed under a four-part analysis, as follows: (1) commercial speech is protected "only if that speech concerns lawful activity and is not misleading;" (2) a restriction is valid if it seeks to

implement a substantial government interest; (3) the restriction directly advances that interest; and (4) it reaches no further than necessary to accomplish the given objection.

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

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

V. SOLID WASTE MANAGEMENT PLANS

McKee v. City of Geneva, 280 Ga. 411, 627 S.E.2d 555 (2006).

Property owners sought written verification from the city to locate a solid waste handling facility. The plaintiff's intent was to obtain a permit for a solid waste handling facility from the EPD. Issuance of the permit was dependent in part upon verification from the city that the proposed facility did not violate any zoning or land use ordinances and was consistent with the solid waste management plans (SWMP). O.C.G.A. § 12-8-31.1(b) requires that the SWMP "shall, at a minimum, ... identify those sites which are not suitable for solid waste handling facilities based on environmental and land use factors." Since the city's SWMP failed to comply with the statute in that areas unsuitable for solid waste facilities were not identified, the city could not rely upon its SWMP to deny the solid waste handling facility. The property owner therefore was

entitled to grant of writ of mandamus requiring the city to issue the verification so that he could seek a permit from the EPD.

VI. ENFORCEMENT OF ZONING CONDITIONS

Cherokee County et al., v. Martin, 253 Ga.App. 395, 559 S.E.2d 138 (2002).

Cherokee County rezoned Martin's property to a PUD classification based on a site plan which showed that a portion of the property would be used as an "assisted living" facility. But Cherokee County in the adopting ordinance approving the rezoning did not stipulate that the rezoning must comply with the site plan. Later Martin decided to build an apartment complex instead of an "assisted living" facility, but the county refused to issue a permit although both uses were permitted in the zoning district. Thereafter, Martin sued Cherokee County contending he had the right to build the apartment complex.

Finding in favor of Martin and his right to build the apartment complex, the court resolved that there was no language within the rezoning resolution adopted by the county which referenced conditions or required Martin to abide by the particular use specified in his site plan. The court reasoned that since a zoning ordinance restricts an owner's right to freely use his property, it must be strictly construed in favor of the property owner and never construed beyond its explicit terms. Furthermore, a court may not infer that the zoning of property is conditioned to a particular use, but should require that any conditions be expressly made a part of the rezoning resolution.

“Rezoning is conditional only if the conditions are set forth in the rezoning resolution itself or if an examiner of the resolution would be alerted to the existence of such conditions.” (at p. 397)

VII. ANNEXATION: RESOLUTION OF LAND USE CLASSIFICATION DISPUTES

In the 2007 session, the General Assembly adopted new statutes governing the resolution of zoning and land use disputes between cities and counties resulting from annexation of property by cities. The new provisions are effective on September 1, 2007. The statutes governing the new resolution procedure are found at O.C.G.A. § 36-36-11 and O.C.G.A. §§ 36-36-110 through 119.

The new procedures require a city to notify a county by certified mail or statutory overnight delivery of the receipt of a petition for annexation. The notice must include the proposed zoning and land use for the area to be annexed. If the county does not object, the annexation may proceed as otherwise provided by law.

On the other hand, the county may object to the proposed zoning and land use for the annexed property. Several conditions must obtain as a requisite to the county’s objection to the annexation. O.C.G.A. § 36-36-113 provides that the county may object if the annexation causes a material increase in burden on the county related to (1) the change in zoning or land use, (2) proposed increase in density, and (3) infrastructure demands related to the proposed change in zoning or land use. But, it further provides in subsection (d) of section 113 that the proposed change in zoning or land use must

result in (A) substantial change in intensity of the use of the property or a change to a significantly different allowable use or a use which significantly increases the net costs of infrastructure or diminishes the value of the useful life of a capital outlay project which the county developed in the area to be annexed.

The law requires the appointment of an arbitration panel composed of five members selected by the Department of Community Affairs from a pool of arbitrators consisting of appointees of various backgrounds related to experience. The arbitration panel must convene to receive evidence and argument from the city, the county, and the applicant for annexation. By majority vote it shall render a decision which will be binding on all of the parties. In arriving at its decision, the panel is required by statute to consider a number of standards including, in part, existing comprehensive land use plans for the city and county, and existing land use and zoning patterns and infrastructure of the area to be annexed.

If the city, county, or applicant for annexation is dissatisfied with the arbitration panel's decision, an appeal may be filed in the superior court of the county of the annexation within 10 days after receipt of the panel's findings.

After a final resolution is reached to an objection by the county to the zoning and land use of the annexed property, the city is prohibited from changing the zoning of the annexed property for one year with the exception that a change may be made if the service delivery agreement or comprehensive plan adopted by the city and county is amended to be consistent with the changed zoning or land use. If the city and the

applicant for annexation accept the recommendations of the arbitration panel, or the decision of the court on appeal, the annexation may proceed under the established annexation procedures. If, the arbitration panel recommendation or court decision is not accepted, then the city is not authorized to proceed with annexation.