

SURVEY OF LEGAL ISSUES IN ZONING

BY

FRANK E. JENKINS, III

JENKINS, OLSON & BOWEN, P.C.

Cartersville, Georgia

Savannah, Georgia

SURVEY OF LEGAL ISSUES IN ZONING

**Frank E. Jenkins, III, Esq.
JENKINS, OLSON & BOWEN, P.C.
Cartersville, Georgia**

TABLE OF CONTENTS

	Page
I. Land Use Plans	1
II. Zoning Procedures Law, O.C.G.A. Chapt. 36-66	1
III. Sign Ordinance	4
IV. Enforcement of Zoning Conditions	6
V. Adult Businesses	7
VI. § 1983 Damage Claims	9
VII. Finality of Zoning Decisions	12
VIII. Constitutionality of Rezoning	12
IX. Regulatory Fees	13
X. Manufactured Homes	15
XI. Administrative Decisions	16
XII. Settling Zoning Cases	17
XIII. Transfer of Development Rights	18
XIV. Code Enforcement.....	18

SURVEY OF LEGAL ISSUES IN ZONING

*By: Frank E. Jenkins, III, Esq.
770/387-1373
fjenkins@JOandB.com*

I. LAND USE PLANS

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

Public benefit in zoning cases is evidenced when the zoning classification bears a substantial relationship to the public interest. Zoning and planning regulations, for example, which protect single-family homes are in the public interest. The evidence in this case showed that the city's designation of the subject property as solely residential under its land use plan is justified by the public's valid interest in protecting Atlanta's neighborhoods. The residential use was consistent with policies and long-range planning goals for the area as adopted in the comprehensive development plans and the Buckhead Transit Station Report. The court therefore upheld denial of the rezoning application. The issue, according to the court, is not whether the city could have made a different decision or a better designation in zoning, but whether the choice it did make benefits the public in a substantial way.

II. ZONING PROCEDURES LAW, O.C.G.A. CHAPT. 36-66

A. Amendment to the Zoning Procedures Law to Require Special Investigation Respecting Rezoning of Property within 3,000 Feet of a Military Base or Military Installation, O.C.G.A. § 36-66-6.

This amendment to the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq. provides that where a local government has established a planning department or similar agency, charged with reviewing zoning proposals, certain procedures are required where a rezoning is requested within 3,000 feet of any military base, military installation, or certain military airport. It requires the planning department to notify the commander of the military base or installation and request a written recommendation relating to the land being considered for a zoning decision. It also lists standards or criteria which the planning department shall respond to and which shall become part of the public record.

B. 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.

C. Fairfax MK, Inc. et al. v. City of Clarkston et al., 274 Ga. 520, 555 S.E.2d 722 (2001).

Fairfax applied for a building permit to construct a gasoline service station in Clarkston. But the station's proposed location violated the city's Gasoline Service Station Ordinance which required a minimum distance of 500 feet between a gas station and a school. Fairfax challenged the ordinance on the ground that it was subject to the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., and that the notice requirements as required by the ZPL were not followed in adopting the ordinance. The court rejected that argument on the ground that the distance restriction in the ordinance was not "zoning" as defined under the ZPL. According to the court, a local ordinance which applies to a particular land use activity regardless of where it is carried out in a jurisdiction, is not a zoning law, notwithstanding that it restricts land use. Where an ordinance regulates a particular occupation or a particular use, rather than general uses of land in accordance with zones or districts, it is not a zoning ordinance.

D. City of Walnut Grove v. Questco, Ltd., 275 Ga. 266, 564 S.E.2d 445 (2002).

The City of Walnut Grove appealed the trial court's holding that the city's 1998 comprehensive sign ordinance was enacted in violation of the Zoning Procedure's Law, O.C.G.A. Chapt. 36-66. The city's sign ordinance used the existing zoning districts to regulate signs depending on the zoning district in which the sign was placed. The Zoning Procedure's Law applies to zoning ordinances which regulate or classify property by separate districts. Since signs were restricted by the districts in which they were located, the city's sign ordinance fit within the ZPL's definition of zoning ordinance and was subject to the notice requirements of the ZPL. The city's sign ordinance, having been adopted in violation of the ZPL notice provisions, was invalidated by the court, and the city was ordered to issue permits to the applicant.

The court makes clear that not every sign ordinance is subject to the ZPL, and this is true even if the sign ordinance is placed within the zoning code. If the sign ordinance does not regulate use by zoning district, then the sign ordinance is not subject to the ZPL.

III. SIGN ORDINANCE

A. Outdoor Systems, Inc. v. Cobb County et al., 274 Ga. 606, 555 S.E.2d 689 (2001).

Cobb County adopted a sign ordinance which prohibited new outdoor advertising signs but allowed existing signs to remain as nonconforming signs. The ordinance permitted only minor maintenance and upkeep of nonconforming signs provided that

when a sign was destroyed or toppled by an act of God, a variance would not be issued to re-erect it. Outdoor Systems' restored its outdoor advertising sign after it was damaged by a tornado. Cobb then revoked Outdoor's sign permit relying on its ordinance which prohibited more than minor repairs. The court found the Cobb County ordinance in conflict with O.C.G.A. § 32-6-83 which requires payment of "just compensation" when the county acquires an owner's interest in nonconforming outdoor advertising signs. Since the county ordinance made no provision for compensating the owners, the ordinance violated the state statute and was unenforceable. For these reasons, Outdoor Systems was entitled to a permit to continue use of the nonconforming sign.

B. 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.

IV. 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)

V. ADULT BUSINESSES

- A. Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia, 217 F.3d 1360 (2000).

The 11th Circuit upheld that portion of the county’s ordinance that prohibited adult entertainment establishment licenses from being issued to businesses operating in the central business district. The court reasoned that zoning ordinances are acceptable

so long as they are designed to serve a substantial government interest and not to unreasonably limit alternative avenues of communication. Since the county's ordinance is content-neutral in that it focuses on secondary effects of serving alcohol in places where nude dancing is permitted, the zoning provision does not unreasonably limit alternative avenues of communication. An adult entertainment establishment may locate in districts other than the central business district subject to other applicable zoning restrictions.

B. Gold Rush II v. City of Marietta, 267 Ga. 683, 482 S.E.2d 347 (1997).

In 1995, acting pursuant to the 1994 amendment to the Georgia Constitution, the Marietta City Council adopted an amendment to its adult entertainment ordinance which provided that a liquor license would not be issued for a location where adult entertainment was performed. Responding to a constitutional challenge to the ordinance on First Amendment grounds, the court reasoned that an ordinance was "content-neutral" if it served purposes unrelated to the content of the expression regulated. An ordinance which is intended to combat the undesirable secondary effects of a sexually explicit business is deemed content-neutral. But before enacting an ordinance to combat the undesirable secondary effects, a local government is required to consider specific evidence of undesirable secondary effects that it believes relevant to the problems addressed in passing an ordinance.

In this case, the preamble to the Marietta ordinance specifically enumerated findings by other municipalities of criminal activity and other secondary effects

associated with nude dancing and serving of alcoholic beverages. If the ordinance is deemed content-neutral, then the court applies the *Paramount Pictures* 3-prong test: “(1) Does the ordinance further an important government interest? (2) Is that interest unrelated to the suppression of speech? and (3) Is the legislation an incidental restriction of speech no greater than essential to further the important governmental interest?” Hence, according to the court, the ordinance in question satisfied the *Paramount Pictures* test and was a proper exercise of the city’s police power.

The applicants further challenged the city’s enforcement of the ordinance on the ground that they acquired a vested right by the year-to-year renewal of an alcohol-pouring license. The court disagreed and reasoned that an alcohol license, like any other business license, does not create a vested right since there is no promise or intent that an alcohol license would be renewed from year to year. Therefore, no vested right was acquired and the city properly rejected the application for an alcohol-pouring license under the new ordinance.

VI. § 1983 DAMAGE CLAIMS

A. Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000).

The plaintiffs sought a rezoning of their property to permit construction of a 28-room motel, which the city denied. The only issue for this court dealt with the declaratory judgment action to determine whether the zoning ordinance as applied to the subject property is unconstitutional.

The first issue under declaratory judgment involves the right of the plaintiffs to recover attorneys' fees and expenses of litigation under O.C.G.A. § 13-6-11. Since the plaintiffs failed to comply with the ante litem notice requirement of O.C.G.A. § 36-33-5, the plaintiffs are not entitled to recover any damages, including attorneys' fees or cost of litigation.

The ante litem notice requirement does not apply to actions filed pursuant to 42 U.S.C. § 1983, a federal remedy in damages for violation of rights and privileges under the federal constitution and laws. But in this case, to state a claim under § 1983, the plaintiffs must show that the governmental restrictions deprived them of all economically beneficial use of the property. That was not the case here as the plaintiffs still possessed the property and had a right to develop it in accordance with its current zoning classification.

In a third finding by the court, the determination of the constitutionality of a zoning ordinance is not a jury issue. It is a matter of law and thus not a question of fact for a jury. But the question of whether an ordinance has been enforced in a uniform and discriminatory manner is a question of fact and this may be submitted to a jury for a special verdict.

B. City of Monterey v. Del Monte Dunes At Monterey, Ltd., 119 S.Ct. 1624 (1999).

Del Monte Dunes repeatedly sought approval of development plans for a particular piece of property from the city of Monterey. Each time, the city rejected the proposals put forth by the owner and imposed more rigorous requirements that would

need to be satisfied before development of the property would be approved. After the fifth such rejection, Del Monte came to believe the city would not approve development plans under any circumstances. They decided to file suit against the city under 42 U.S.C. § 1983, alleging that the denial of the final development proposal was a violation of the Due Process and Equal Protection provisions of the Fourteenth Amendment, and an uncompensated, regulatory taking.

The federal district court hearing the case decided that the takings and equal protection claims should be decided by the jury. The court instructed the jury to find for the owners if it found either that Del Monte Dunes had been denied all economically viable use of its property, or that the city's decision to reject the final proposal did not substantially advance a legitimate public purpose. The jury ruled in favor of Del Monte and the city appealed on grounds that these issues should not have been submitted to the jury.

The case eventually made its way to the United States Supreme Court. The court ruled that although § 1983 does not by itself confer a right to a jury trial, an action under the section is an "action at law" within the meaning of the 7th Amendment right to jury trial. Regarding the specific claims put forth, the court held that the issue of whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question which should be decided by the jury. As to the question of whether a land-use decision substantially advances legitimate public interests, the

court held that so long as the question submitted is narrow and fact-bound, the matter may be properly submitted to the jury.

VII. FINALITY OF ZONING DECISIONS

Taco Mac v. City of Atlanta Board of Zoning Adjustment, 255 Ga. 538, 340 S.E. 2d 922 (1986).

Where a local government agency makes a zoning decision, such as a variance or rezoning, the date on which the decision becomes final, and therefore appealable, falls not on the date an oral vote is taken, but the date on which the decision is put in writing and signed by the appropriate official. Thus appeals to the superior court shall be filed 30 days from the date the decision becomes final. Also, before the decision becomes final, usually upon the presentation and approval of the minutes of the next regularly scheduled meeting, a decision may be reconsidered by the agency.

VIII. CONSTITUTIONALITY OF REZONING

Town of Tyrone v. Tyrone LLC, 275 Ga. 383, 565 S.E.2d 806 (2002).

The Supreme Court reversed in part the trial court's order directing Tyrone to rezone 75 acres to a commercial zone. Tyrone rezoned part of the tract office and institutional and part it left agricultural-residential. It was error for the trial court to order the rezoning to a commercial district because the courts have no power to zone or rezone property. Rather the court may declare that a current zoning is unconstitutional, but it should then order the city council to rezone the property to a constitutional zoning

classification, but it may not dictate the zoning classification or order a specific zoning classification. If the city council fails to rezone the property to a constitutional classification, then the property owner has the right to judicial review of the new zoning or to request the court sanction the council members.

The Supreme Court also reversed the trial court's order that variances be granted to the property. The appropriateness of the variances must be determined after the zoning is decided. So the trial court couldn't order that variances be granted until the zoning is final. The court further found that the developer failed to prove that the current zoning of part of the tract to office and institutional was a significant detriment. The fact that the land may be more valuable if rezoned to a commercial classification borders on being irrelevant. With respect to the remaining 53 acres zoned agricultural-residential, the court affirmed the decision of the trial court that the property zoned cannot be developed under that classification and, therefore, the agricultural-residential zoning classification was unconstitutional.

IX. REGULATORY FEES

Homebuilders Association of Savannah, Inc. v. Chatham County, 276 Ga. 243, 577 S.E.2d 564 (2003).

This is a challenge by the Homebuilders Association against Chatham County and its building department alleging that the regulatory fees charged for inspections and other services were excessive and thus in violation of the law. By January 2000, the reserve account in which fees collected were deposited showed a surplus of almost two

million dollars. Nevertheless, in that same month the permit fee was increased and the valuation rate was increased. In June 2002 the permit fee was reduced to pre-2000 level, but the valuation rate remained unchanged. The evidence also showed that there were various distributions from the reserve account to other county departments, including the engineering department, the Savannah area GIS program, and other distributions from the fund.

The Homebuilders Association alleged that the county violated O.C.G.A. § 48-13-9(a). This statute provides that a local government is authorized to collect a regulatory fee for services it customarily performs for investigation or inspections, but the local government is not authorized to use the regulatory fee for raising revenue for general purposes as the regulatory fee shall only approximate the reasonable cost of the regulatory activity performed by the local government.

For procedural or technical reasons, the Court of Appeals reversed summary judgment entered for the county and returned the case to the trial court for trial. It did conclude that the two million dollars accumulated in the reserve account is some evidence that the fees may have exceeded the reasonable cost of the activity performed by the building department.

X. MANUFACTURED HOMES

King v. City of Bainbridge, 276 Ga. 484, 577 S.E.2d 772 (2003).

This is the long awaited decision in response to the Cannon v. Coweta County, 260 Ga. 56, 389 S.E.2d 329 (1990) case which established an ambiguous ruling at best on the right of local governments to exclude manufactured homes from zoning districts. In this well-reasoned case, the Supreme Court looked to various federal court decisions as well as decisions from other states to make clear the rule in Georgia. In affirming the right of the city to exclude manufactured homes from single-family residential districts, the court found the city's zoning ordinance constitutional and at the same time expressly overruled the Cannon case. So long as the ordinance is not arbitrary and unreasonable, according to the court, it is within the police power of the local government to exclude manufactured homes from zoning districts. The court listed a wide variety of reasons and various other cases for excluding manufactured homes, including preserving land for low density, protection of property values, guarding against increased crime, guarding against traffic congestion, maintaining ascetics, regulating population density, preventing waste and sewage problems, regulation of the quality of the housing stock, and concerns about wind vulnerability. In the case of Bainbridge, the city's purpose in restricting manufactured home placement was to regulate the quality of housing stock and promote general safety concerns. As these reasons were not arbitrary or unreasonable, the ban on placement of manufactured homes in single-family districts was not unconstitutional and thus upheld by the court.

Note in this case that the city's zoning ordinance excluded manufactured homes from all single-family districts and allowed them only in manufactured home parks.

XI. ADMINISTRATIVE DECISIONS

RCG Properties, LLC v. City of Atlanta Board of Zoning Adjustment, 260 Ga.App. 355, 579 S.E.2d 782 (2003).

In January 2001, Holder Properties submitted an application to Atlanta for a special administrative permit (SAP) to allow construction of an eleven-story concrete parking structure on Peachtree Center Avenue. RCG Properties filed an appeal of the city's administrative action approving the application to the Board of Zoning Adjustment. The BZA denied RCG's appeal and upheld the decision of the planning bureau granting the application for the parking facility. RCG then appealed that decision to the superior court which dismissed the appeal on the ground that RCG lacked standing to challenge the decision of the planning bureau.

RCG appealed to the Court of Appeals which in its decision reversed the superior court. In an informative discussion of the difference between administrative decisions and legislative decisions by local governments, the court found that the decision of the planning bureau and the review by the BZA was an administrative (quasi-judicial) decision. Under Georgia law, all issues have to be raised before the local government which is making an administrative decision. Since the issue of standing was not raised before the BZA, then the city, according to the Court of Appeals, could not raise that issue for the first time in the superior court. For this reason, the Court of Appeals

reversed the trial court's decision and remanded the case to the superior court with direction to reconsider the decision by the BZA.

XII. SETTLING ZONING CASES

Buckhorn Ventures, LLC v. Forsyth County, Georgia, 262 Ga.App. 299, 585 S.E.2d 229 (2003).

Buckhorn Ventures sued Forsyth County in an effort to hold the county commissioners in contempt for failing to comply with a court order that included a 1992 settlement agreement. The county responded that the 1992 agreement was ultra vires (not lawful). If, according to the county's argument, the agreement is ultra vires, then the county could reject the agreement and would thus not be bound by its terms.

The agreement in question provided that later amendments of the Forsyth County zoning ordinance may not further impede the activities allowed on the property in question. Under its terms the agreement bound forever future Forsyth County commissioners from changing the zoning ordinance on the subject property to prohibit or restrict the use that was otherwise authorized in the agreement. The court ruled for the county and concluded that the 1992 agreement was ultra vires. Thus the county was not subject to its terms. O.C.G.A. § 36-30-3(a) provides that "[o]ne counsel may not, by an ordinance, bind itself or its successors so as to prevent legislation in matters of municipal government [or county government]." Since the agreement restricted the legislative actions of future counsels, it was void as a matter of law and the county was not subject to its terms nor in contempt for failing to comply with the agreement.

XIII. TRANSFER OF DEVELOPMENT RIGHTS

Legislative Amendments to the Transfer of Development Right's Laws,
O.C.G.A. § 36-66a-1.

In this amendment, the key provision eliminates the requirement that separate approval is required by the local governing authority where the property owners agree to both sending and receiving property development rights. Although the local government still must establish ordinances authorizing transfer of development rights, it may not thereafter interfere with the rights of the transferring and receiving property owners who agree to transfer development rights.

XIV. CODE ENFORCEMENT

Local Government Code Enforcement Boards, O.C.G.A. § 36-74-1 et seq.

In this act, the General Assembly overhauled the prior local government code enforcement board laws. The new law provides detailed procedures for establishment of enforcement boards, jurisdiction of enforcement boards, procedures of enforcement boards, enforcement of local ordinances by enforcement boards, and other matters for enforcement boards created by a local government on or after January 1, 2003, and also separate provisions which apply to enforcement boards created prior to January 1, 2003.

Significant provisions of the Code Enforcement Act which apply to enforcement boards created on or after January 1, 2003 are as follows:

O.C.G.A. § 36-74-21

Codes and ordinances which may be enforced by the board include zoning ordinances, subdivision regulations, environmental ordinances, state minimum standard codes, ordinances relating to the development of real property, ordinances providing for control of litter and debris, control of junked or abandoned vehicles, and control of overgrown vegetation.

O.C.G.A. § 36-74-22

A local government may create an enforcement board consisting of three, five, or seven members.

O.C.G.A. § 36-74-23

The code inspector is required to notify a violator and allow a reasonable time to correct the violation. If the violation is not corrected, the inspector may proceed by calling a hearing before the enforcement board.

O.C.G.A. § 36-74-24

At the conclusion of the hearing, the board shall issue findings of fact and conclusions of law and shall issue an order with proper relief as provided under the act.

O.C.G.A. § 36-74-25

The enforcement board has to power to:

- adopt rules for its hearings
- subpoena violators and witnesses
- subpoena evidence to the hearing
- take testimony under oath
- issue orders having the force of law to bring a violation under compliance

O.C.G.A. § 36-74-26

If a violator fails to comply with the order of the board, it may do the following:

--impose a fine not to exceed \$1000.00 per day if the violation involves the health or safety of a third party

--for a violation not involving the health or safety of a third party, impose a fine not to exceed a total of \$1000.00

--the fine shall constitute a lien against the land in question and may be enforced as any other court judgment, including foreclosure