

**ZONING CASES: REVIEW OF CASE LAW  
PRECEDENTS AND PERTINENT STATUTES**

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## **I. CONSTITUTIONAL BASIS FOR ZONING**

### **A. Home Rule Provision of Georgia Constitution**

**Article IX.** Counties and Municipal Corporations

**Section II.** Home Rule for Counties and Municipalities

**Paragraph IV.** Planning and Zoning

“The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.”

Power to zone is specifically vested by the Georgia Constitution in local governing authorities, subject to the General Assembly's authority to enact procedures regulating exercise of that power. Cobb County Bd. of Com'rs v. Poss, 257 Ga. 393, 359 S.E.2d 900 (1987).

### **B. Zoning is Exercise of Police Power**

The distinction between use of eminent domain and use of the police power is that the former involves the taking of property because it is needed for public use while the latter involves the regulation of the property to prevent its use in a manner detrimental to the public interest. Many regulations restrict the use of property, diminish its value, or cut off certain property rights, but no compensation for the property owner is required. Among the valid regulations of property are abatement of nuisances, zoning, health regulations, and building standards. Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978).

The fact that a zoning ordinance is designed only to improve aesthetics does not render it an unreasonable exercise of police power. Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga., 264 Ga. 764, 450 S.E.2d 200 (1994).

### **C. Superior Court's Power and Limits**

Zoning is legislative, and a jury trial is unconstitutional. Bentley v. Chastain, 242 Ga. 348, 249 S.E.2d 38 (1978).

Superior courts have no power to zone, but must remand for determination of constitutional zoning classification. Town of Tyrone v. Tyrone LLC, 275 Ga. 383, 384, 565 S.E.2d 806 (2002)

If the existing zoning is struck down, the Court should remand for a constitutional zoning classification to be imposed. If all intervening classifications have been properly challenged, that leaves little choice. DeKalb County v. Post Properties, Inc., 245 Ga. 214, 263 S.E.2d 905 (1980).

Enforcement of the Court's order is through civil contempt. Declaring property free from zoning is too harsh, as generally would be criminal contempt. Alexander v. DeKalb County, 264 Ga. 362, 444 S.E.2d 743 (1994). A denied applicant can also launch another challenge within 30 days, simultaneously.

## **II. PROCEDURAL AND PREDICATE ISSUES**

### **A. Parties**

If the challenge is to a successful rezoning of another person's property, the successful applicant or owner has been called necessary or even indispensable. Riverhill Community Ass'n v. Cobb County Bd. of Com'rs, 236 Ga. 856, 226 S.E.2d 54 (1976). They would have the right to intervene were they not named, and the decision needs to be binding on them as well.

Individual city council members or county commissioners are not necessary or proper defendants in their individual capacity. They can be named in their official capacity, but that may be superfluous in a challenge to a rezoning denial.

When mandamus is sought, a public officer must be named, and the local government itself is not a proper party. See City of Homerville v. Touchton, 282 Ga. 237, 647 S.E.2d 50 (2007).

### **B. Standing**

Property owners have standing to file suits regarding their own property. Similarly, persons who have an interest in property, such as a contingent contract, have been held to have standing to bring a rezoning challenge. Gifford Hill & Co. v. Harrison, 229 Ga. 260, 191 S.E.2d 85 (1972).

Neighbors do not have an automatic right to challenge a rezoning. The courts have held that a neighbor must show that he has a special interest different from the area in general that has been specifically damaged. Brock v. Hall County, 239 Ga. 160, 236 SE2d 90 (1977).

The local government's challenge to the standing of the challenger could not be raised for the first time in court, and was waived because standing was not raised when the case was before the local government. RCG Properties, LLC v. City of Atlanta Bd. of Zoning Adjustment, 260 Ga.App. 355, 579 S.E.2d 782 (2003)

### **C. Form of the Action**

The courts have given some discretion to the local government as to how an administrative appeal proceeds, holding that there can be a direct appeal, if the ordinance so provides, or otherwise it should go by mandamus. Beugnot v. Coweta County, 231 Ga.App. 715, 500 S.E.2d 28 (1998). The courts have approved requiring an

administrative appeal to go by writ of certiorari, under O.C.G.A. § 5-4-1 *et seq.* Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).

The zoning appeal will ultimately be decided by the judge, as the constitutionality of a zoning decision is not a jury question. Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000).

The appropriate decision, if the court finds the current zoning unconstitutional, is not to rezone the property, but only to order the property rezoned in a constitutional fashion. Town of Tyrone v. Tyrone LLC, 275 Ga. 383, 384, 565 S.E.2d 806 (2002).

#### **D. Exhaustion of Administrative Remedies**

Filing a rezoning application is generally a necessary prerequisite to filing a zoning suit if the challenge is to the ordinance as applied to the land owner's property. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522 (1981).

The exception is the futility doctrine. In brief, the courts have carved out an exception to the requirement of first filing a rezoning application when it appears that it would be a futile act. Powell v. City of Snellville, 266 Ga. 315, 467 S.E.2d 540 (1996).

The second exception is when the property owner is making a "facial" challenge to the ordinance, rather than an "as applied" challenge. For a facial challenge to succeed, the challenger must show that the ordinance does not serve a legitimate government interest, and that it deprives the property owner of any economic use of his property. Greater Atlanta Homebuilders Association v. DeKalb Co., 277 Ga. 295, 588 S.E.2d 694 (2003).

#### **E. Raise Constitutional Objections**

Prior to filing suit, the applicant must raise a constitutional objection before the local government renders its decision. Cobb County Board of Commissioners v. Poss, 257 Ga. 393, 359 S.E.2d 900 (1987). This requirement affords the local government an opportunity to amend the zoning ordinance to the classification sought or to an intermediate classification which is constitutional, and puts them on notice of possible litigation if they do not.

Constitutional challenges need not be made with great specificity. Ashkouti v. City of Suwanee, 271 Ga. 154, 516 S.E.2d 785 (1999).

#### **F. 30-Day Limit to Appeals**

Challenges to zoning decisions must be brought within 30 days. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981). This time limit cannot be extended by the superior courts.

In some circumstances, due process violations can be raised later. Golden v. White, 253 Ga. 111, 316 S.E.2d 460 (1984).

### **G. Compliance with Local Charter or Enabling Act**

Failure to comply with procedures for legislative action in local charter or enabling act can invalidate a rezoning decision. Head v. DeKalb Co., 246 Ga.App. 756, 542 S.E.2d 176 (2000).

The ZPL has been held to preempt local notice procedures. Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000)

### **H. Failure to Follow Own Zoning Ordinance**

The Court erred in approving a rezoning when the applicant failed to submit a site plan as was required by the zoning ordinance. Harden v. Banks County, 294 Ga.App. 327, --- S.E.2d ----, 2008 WL 4764819 Ga.App., 2008.

Failure to follow local ordinance procedures justifies remand. Helmley v Liberty Co., 242 Ga.App. 881, 531 S.E.2d 756 (2000).

## **III. ZONING PROCEDURES LAW**

The Zoning Procedures Law (ZPL), O.C.G.A. § 36-66-1 *et seq.*, effective January 1, 1986, was adopted under the grant of authority in the Constitution given to the State to impose procedures on planning and zoning. Ga. Const., Art. 9, Sec. 2, Para. IV. It imposes notice requirements for zoning decisions, defined in the law as a) adoption of zoning ordinance, b) amendment of a zoning ordinance, c) rezoning of property, d) zoning of property by a city upon annexation of property, and e) grant of a special use permit.

The ZPL contains minimal procedural requirements, but the Supreme Court has required strict compliance with the terms of the Zoning Procedures Law. McClure v. Davidson, 258 Ga. 706, 373 S.E.2d 617 (1988).

Even a one-day defect in the timing can render the zoning void. C & H Development, LLC v. Franklin County, --- S.E.2d ----, 2008 WL 4966221 Ga.App., 2008.

### **A. 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 is entitled to mandamus relief ordering the county to issue the certificate of land use approval.

**B. 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 the same as 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.

**C. 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.

**D. Hollberg v Spalding Co., 281 Ga.App. 768, 637 S.E.2d 163 (2006)**

Any challenge to compliance with the ZPL must be raised within thirty days of the decision, or it is barred.

**IV. CONSTITUTIONAL CLAIMS**

**A. Taking under Georgia Constitution.**

The issue is the constitutionality of the existing zoning, not whether the proposed zoning is constitutional or provides a higher and better use.

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

The zoning ordinance is presumptively valid. Gradous v. Bd. of Commr's of Richmond County, 256 Ga. 469, 471, 349 S.e.2d 707 (1986). "The presumption that a governmental zoning decision is valid can be overcome only by a plaintiff landowner's showing by clear and convincing evidence that the zoning classification is a significant detriment to him, and is insubstantially related to the public health, safety, morality and welfare. Only after both of these showings are made is a governing authority required to come forward with evidence to justify a zoning ordinance as reasonably related to the public interest. If a plaintiff landowner fails to make a showing by clear and convincing evidence of a significant detriment and an insubstantial relationship to the public welfare, the landowner's challenge to the zoning ordinance fails." DeKalb County v. Dobson, 267 Ga. 624, 626, 482 S.E.2d 239 (1997)Id.

The significant detriment can be difficult to show. See Gwinnett Co. v. Davis, 271 Ga. 158, 517 S.E.2d 324 (1999)(evidence that a landowner would suffer economic loss without rezoning was insufficient to show substantial detriment). There are a number of cases where the courts found a property has not suffered a significant detriment. "[A] significant detriment to the landowner is not shown by the fact that the property would be more valuable if rezoned, or by the fact that it would be more difficult to develop the property as zoned than if rezoned." DeKalb v. Dobson, 267 Ga. at 626. Delta Cascade Partners, II v. Fulton Co., 260 Ga. 99, 100, 390 S.E.2d 45 (1990). "[E]vidence only that it would be difficult to develop the property under its existing zoning or that the owner will suffer an economic loss unless the property is rezoned is not sufficient to support the legal conclusion that the owner suffers a significant detriment." Gwinnett Co. v. Davis, 268 Ga. 653, 654, 492 S.E.2d 523 (1997); see, Holy Cross Lutheran Church, Inc. v. Clayton Co., 257 Ga. 21, 23, 354 S.E.2d 151 (1987).

The decisions recognize that increasing density or intensity almost always increases value, but that does not prove that the current zoning is unconstitutional. “[I]n zoning challenges, the pertinent question is not whether rezoning would increase the value of property, but rather whether the existing zoning classification serves to deprive a landowner of property rights without due process of law. Hence, the evidence that the subject property would be more valuable if rezoned border on being irrelevant.” DeKalb Co. v. Dobson, 267 Ga. at 626; see, DeKalb Co. v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 190, 281 S.E.2d 525 (1981). The notion that a property is not zoned for its “highest and best use,” a concept appraisers like to use, does not show that the existing zoning imposes a significant detriment. Gwinnett Co. v. Davis, 268 Ga. at 654. Furthermore, “the fact that the property currently has no economic return to the owners is immaterial; by definition, undeveloped property never offers owners any economic return.” DeKalb Co. v. Chamblee Dunwoody Hotel Partnership, 248 Ga. at 190. All this is not to say that the significant determinant requirement is an insurmountable burden; courts can and have found a significant detriment on numerous occasions, but the property owner will need to be prepared to put forth a detailed and compelling case on this point.

A relatively recent case to discuss the concept of significant detriment is Legacy Inv. Group, LLC v Kenn, 279 Ga. 778, 621 S.E.2d 453 (2005), which was on appeal from the grant of the local government's motion for summary judgment. There, the property owner had paid about \$12,000 per acre for land zoned for agricultural land, with the presumption that it would be rezoned for residential uses. When the rezoning was denied, the property owner appealed, arguing that it could not be developed in an economically feasible fashion based upon the purchase price. The superior court found that the fact that the property owner overpaid for the property did not mean that the zoning ordinance was a significant detriment to the property. On appeal, the Supreme Court reversed because the evidence was that the property would have to be purchased for no more than just over \$5,000 per acre in order to be developed in an economically viable manner, and the county's appraiser said the property was worth between \$5,000 and \$9,000 per acre. Thus, giving the non-movant the benefit of all the inferences from the evidence, the property would have to be purchased for several thousand dollars less per acre than it was worth in order to be developed in an economically feasible manner. The court also mentioned that the evidence was also that the property was not suited for agricultural uses; while not discussed much by the court, this would seem to be an important piece of evidence.

In City of Tyrone v. Tyrone, LLC, 275 Ga. 383, 565 S.E.2d 806 (2002), the Supreme Court found that part of a property subject to the appeal of a rezoning denial suffered a significant detriment, but part did not. The property in question was partially zoned for agricultural-residential uses, and partly zoned for office-institutional uses. The property owner wanted it all zoned for commercial uses. The court held that there was evidence that the portion zoned for agricultural-residential could not be developed as zoned, but there was no such evidence as to the office-institutional portion, and so the trial court erred in finding a significant detriment to that portion of that property. In reaching this conclusion, the Supreme Court discussed the fact that the owner had not tried to develop the property for office-institutional uses, and the fact that there was

evidence of a need for such property in the community and region. From these cases, we can see that the evidence needed is not that the property can make more money with the rezoning, but that the property is not suited for development under the existing zoning classification, such that it cannot be used in an economically feasible manner under the existing zoning classification.

After a plaintiff shows significant detriment, he still needs to prove that the current zoning is insubstantially related to the public health, safety, morality and welfare. DeKalb Co. v Dobson, 267 Ga. at 626; Browning v. Cobb County, 259 Ga. 430, 383 S.E.2d 126 (1989) (showing of detriment outweighed by public benefit of present zoning classification). This requires proof that there is no logic to the existing zoning classification. It can be shown by pointing to the incompatibility of the subject zoning with the neighborhood or the changing character of the neighborhood. However, it can be difficult to prove if the property is simply on the boundary of the zoning district, which is commonly referred to as a “fringe area.” See Holy Cross Lutheran Church v. Clayton County, 257 Ga. 21, 354 S.E.2d 151 (1987).

The degree of consistency between the existing and proposed zoning and the comprehensive or future land plan is a common element in this analysis. In City of Atlanta v. TAP Associates, 273 Ga. 681, 683, 544 S.E.2d 433 (2001), the court placed great emphasis on the fact that the existing zoning was consistent with the land use plan of Atlanta: “[T]he city’s zoning decision is consistent with the policies and long-range planning goals for the area as adopted in the comprehensive development plans and the Buckhead transit station report....The fact that TAP presented evidence that its proposed mixed-use development would also protect the single-family neighborhood is irrelevant. The issue is not whether the city could have made a different decision or better designation in zoning TAP’s property, but whether the choice that it did make benefits the public in a substantial way.” 273 Ga. at 685. Thus, if an existing zoning classification is consistent with the comprehensive plan, it is more likely to be upheld.

Takings claims are challenging to prove under Georgia law, but under federal law they are even more so. Federal courts have held that the property owner must show that the property has been deprived of all economically viable use. Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996). Cobb County v. McColister, 261 Ga. 876, 413 S.E.2d 441 (1992). Federal takings claims are generally not ripe unless the state has failed to provide a remedy. A federal claim cannot ripen if the state provides method of redress for a taking without just compensation, and the federal courts have held that Georgia provides such a remedy. See Bickerstaff Clay Products Co., Inc. v. Harris County, Ga., 89 F.3d 1481, 1491 (11th Cir. 1996). Because of these holdings, the aggrieved property owner will normally bring the takings claim in state court.

## **B. Due Process Violations.**

Due process encompasses a more limited challenge, mainly in the context of procedural due process. Substantive due process has been held to be subsumed into takings, and so does not typically constitute a separate challenge to a rezoning decision, but procedural due process may be a fertile avenue to challenge a rezoning decision.

The unsuccessful applicant can claim that there was some defect in the zoning procedure, and perhaps obtain another rezoning hearing. The applicant may also be able to challenge the adoption of the underlying zoning ordinance.

Basic procedural due process requires notice and a hearing. The procedures required in conducting a rezoning hearing have been codified in the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq. The basic requirements are published and posted notice and sufficient equal time at the hearing for all parties to speak (at least ten minutes per side). Failure to comply with the Zoning Procedures Law has been dealt with above.

### **C. Availability of Damages.**

There has been no success on the part of plaintiffs in seeking damages for unconstitutional rezonings. Generally, the remedy for an unconstitutional zoning is getting the property rezoned in a constitutional manner. One avenue that has been tried is to assert a temporary taking. That is, for the period that a property was subjected to an unconstitutional zoning, what are the damages? Some cases in federal court have awarded temporary takings, but Georgia courts have rejected them, unless the owner can show a complete deprivation of all economic use during the period. Powell v. City of Snellville, 275 Ga. 207, 563 S.E.2d 860 (2002).

Obtaining any damages from a city requires compliance with the ante litem notice provisions of O.C.G.A. § 36-33-5. That provision requires giving a city 30 days notice before filing suit, but that of course impacts the 30-day rule in zoning, which creates a bit of a conundrum. Some applicants solve this by filing suit timely, and amending to add a damage claim later, and this theory has not been tested by the appellate courts. Of course, damages are not likely to be obtained unless the taking is total, meaning absolutely nothing can be done on the property, and it is the equivalent to an inverse condemnation.

42 U.S.C. § 1983 claims have not been very successful in state court either, in that the state courts do not view there having been a violation of the federal law of zoning unless the taking is complete, and there has been a deprivation all economic use of the property. Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000). Moreover, raising federal claims under § 1983 may result in the case being removed to federal court.

On occasion an award has been made for attorney fees in zoning suits under O.C.G.A. § 9-15-14 and under the Anti-SLAPP statute. See Rabun County v. Mountain Creek Estates, LLC, 280 Ga. 855, 632 S.E.2d 140 (2006); EarthResources, LLC v. Morgan County, 281 Ga. 396, 638 S.E.2d 325 (2006); Hagemann v. City of Marietta, 287 Ga.App. 1, 650 S.E.2d 363 (2007).

**V. EVIDENTIARY ISSUES**

**A. Proving the Zoning Ordinance.**

**Flippen Alliance for Community Empowerment, Inc. v. Brannan,**  
**267 Ga.App. 134, 601 S.E.2d 106 (2004).**

Judicial notice cannot be taken of a city or county ordinance. The proper method for introducing a local ordinance is by production of the original or of a properly certified copy.

**B. Proving the Zoning Map.**

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).**

In this case the court rejected a 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; and

--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.

**C. Cherokee County v. Martin, 267 Ga.App. 134, 601 S.E.2d 106 (2002).**

Rezoning is conditional only if conditions are set forth in rezoning resolution itself or if examiner of resolution would be alerted to existence of such conditions.

**VI. ADMINISTRATIVE PROCEEDINGS IN CONTRAST TO LEGISLATIVE MATTERS; SPECIAL USE PERMITS**

**See Separate Paper by Frank E. Jenkins, III.**

## **VII. VESTED RIGHTS**

### **A. BBC Land and Development, Inc. v. Butts County, 281 Ga. 472, 640 S.E.2d 33 (2007)**

The plaintiffs bought land in Butts County for development. At the time of purchase, the zoning allowed construction of homes with a minimum size of 1,500 square feet. The plaintiff submitted plats showing houses of that size. The county approved the plat and the plaintiffs expended money developing the properties consistent with the existing zoning. Thereafter, and prior to requests for building permits, the county amended its zoning ordinance to require a minimum house size of 2,000 square feet in that zoning district. The plaintiffs later sold lots in the subdivision to builders. The county denied building permits to builders because the proposed houses did not comply with the 2,000-square feet minimum under the amended zoning ordinance.

The court reasoned that there was a crucial difference between vested rights and nonconforming uses. Nonconforming uses are uses or structures existing prior to the enactment of an ordinance which renders them nonconforming. A use which is merely contemplated for the future, but not yet realized as of the effective date of an amended ordinance, is not a nonconforming use.

A vested right is the constitutionally protected right to a future use. It cannot be divested without the consent of the person to whom it belongs. The court thus concluded that a vested right is earned by the owner's substantial change of position in relation to the land, including substantial expenditures, or in incurring substantial obligations. That gives the owner the right to develop property in accordance with prior zoning restrictions. But vested rights are personal to the owner and are not transferable with the land. The choice by the owner to sell the property is voluntary, but if it chooses to sell, then it sells with the knowledge that the vested right is not transferable to a purchaser since the lots in the subdivision were conveyed to the builder after the zoning ordinance was amended. Since a vested right to build under the former zoning ordinance was not transferable, a purchaser is subject to the new restrictions of the amended zoning ordinance.

### **B. § 44-5-40. Future Interests Descendible, Devisable, and Alienable**

Future interests or estates are descendible, devisable, and alienable in the same manner as estates in possession. Vested interests in property stemming from the approval of land disturbance, building, construction or other development plans, permits or entitlements in accordance with a schedule or time frame approved or adopted by the local government shall be descendible, devisable and alienable in the same manner as estates in possession.

**C. WMM Properties, Inc. v. Cobb County, 255 Ga. 436, 339 S.E.2d 252 (1986).**

A property owner has a right to a development permit in the following circumstances: a) when a building permit is issued, b) when an application is submitted in accordance with the zoning ordinance to the proper official, c) when a development plan is duly approved by the zoning authority, and d) upon a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit consistent with the applicable zoning ordinance and the assurances of the zoning officials.

**D. North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge, 248 Ga.App. 450, 546 S.E.2d 850 (2001).**

A land use that is merely contemplated for the future but unrealized as of the effective date of a new zoning regulation does not constitute a nonconforming use. A property owner may acquire a vested right to use property where he makes a substantial change in position by expenditures in reliance on the probability that a building permit will issue or based upon an existing ordinance and the assurances of zoning officials. But where the only change in position is the purchase of the property itself, the purchase does not confer a vested right to a particular use by the purchaser.

**E. Cohn Communities, Inc. v. Clayton County, 257 Ga. 357, 359 S.E.2d 887 (1987).**

“The rule in Georgia is that where a landowner makes a substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit.” The expenditure of \$600.00 was not substantial and thus did not accord the developer of a proposed multi-family building a vested right.

**F. Café Risqué/We Bare All Exit 10, Inc. v. Camden County, 273 Ga. 451, 542 S.E.2d 108 (2001).**

Where a local government issues a permit which is in violation of an existing ordinance, even if issued under a mistake of fact, the permit is void and the holder does not acquire any vested rights. This is true even if substantial expenditures were made in reliance on the void permit. A local government is not prohibited from revoking an improperly issued permit.

**G. Meeks v. City of Buford, 275 Ga. 585, 571 S.E.2d 369 (2002).**

The issue in this case is whether a property owner obtained a vested right to use undeveloped investment property in accordance with a variance granted in 1985, 14 years earlier. In finding the earlier variance no longer valid, the court relied on the rule

that a property owner must make a substantial change in position, make substantial expenditures, or incur substantial obligations in order to acquire a vested right. In this case, the mere reliance on a variance without showing substantial change in position by expenditures or other obligations, does not vest a right in the land owner to develop in accordance with the earlier variance which would no longer be valid by virtue of a subsequently adopted zoning ordinance.

**H. Cooper v. Unified Government of Athens-Clarke County, 277 Ga. 360, 589 S.E.2d 105 (2003).**

A property owner claiming a vested right to use property must make that claim to the local government before an appeal is made to the superior court. A claim of vested right to use property may not be made for the first time in superior court.

**I. Union County v. CGP, Inc., 277 Ga. 349, 589 S.E.2d 240 (2003).**

The issuance of a building permit results in a vested right only when the permit has been legally obtained, is valid in every respect, and has been validly issued. Where a permit was issued to build a subdivision which was in violation of the flood control ordinance, the permit was not valid and the developer did not obtain a vested right to complete the subdivision.

**J. Corey Outdoor Advertising, Inc. v. The Board of Zoning Adjustments of the City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985).**

Property owner did not obtain a vested right to build a sign even though the city issued a permit if the permit was invalidated because the location of the sign violated the sign ordinance.

**K. Flippen Alliance for Community Empowerment, Inc. v. Brannan, 267 Ga.App. 134, 601 S.E.2d 106 (2004).**

“To be vested, in its accurate legal sense, a right must be complete and consummated[.]” “[P]rior nonconforming uses are not absolutely protected from subsequent zoning regulations.” A governing authority can require a nonconforming use to be terminated in a reasonable time. Georgia law permits municipalities to terminate, over time, pre-existing nonconforming uses. “A property owner cannot move a ‘grandfathered’ use from one location to another.” Moreover, courts have consistently held that ordinances prohibiting the expansion of a nonconforming use to new lands are enforceable. “[I]t is incumbent upon one seeking to use the property for a nonconforming use after the rezoning ordinance to show that his prior use of the property was legal and not unlawful.”

**L. The Ansley House, Inc. v. City of Atlanta, 260 Ga. 540, 397 S.E.2d 419 (1990).**

The following city ordinance was in issue in this case:

When a **nonconforming use** of a major structure or a major structure and premises in combination is discontinued for a continuous period of one (1) year, the structure and premises in combination, shall not thereafter be used except in conformity with the regulations of the district in which it is located. Such restriction shall not apply if such cessation is as a direct result of governmental action impeding access to the premises.

The court found that an ordinance such as this one, which attempted to discontinue a nonconforming use based on cessation of use for a specific period of time, impliedly introduced the question of intent to abandon the use by the property owner. That is a fact question, for which evidence must be presented, either in favor of or against intent to abandon the use of the property.

To remove the issue of intent to abandon, the court shows that an ordinance may terminate a nonconforming use by cessation of use for a specified period of time, but the ordinance should state that the nonconforming use may not be resumed regardless of any reservation of an intent not to abandon. That language removes the subjective intent of the property owner as a factor.

**M. Henry v. Cherokee County, 290 Ga. App. 355, 659 S.E.2d 393 (2008).**

Nonconforming uses run with the land and benefit a subsequent purchaser of the property. But expanding a nonconforming use on the same lot may be prohibited, depending on the language of the nonconforming use ordinance. If it is intended that a nonconforming use may not be expanded on the same lot, the ordinance should state, “no such nonconforming use of land shall in any way be extended, either on the same or adjoining property.” Absent this language, a property owner may be allowed to expand a nonconforming use on the same lot.

## **VIII. FIRST AMENDMENT CLAIMS**

### **A. 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:

a) 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.

b) 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.

c) 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.

d) 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. Coffey v. Fayette County, 280 Ga. 656, 631 S.E.2d 703 (2006).**

The Georgia Supreme Court has interpreted the Georgia Constitution to provide even broader protection than the First Amendment, in that we require a government to adopt the least restrictive means of achieving its goals. Under this test, a government must draw its regulations to suppress no more speech than is necessary to achieve its goals. Trial court must consider evidence of whether the ordinance is the least restrictive means to achieve goals.

**3. Granite State Outdoor Advertising, Inc. v. City of Roswell, 283 Ga. 417, 658 S.E.2d 587 (2008).**

Sign and billboard owner had standing to contest only those provisions of sign ordinance that had caused injury to itself; thus, owner lacked standing to challenge constitutionality of provisions other than height and size restrictions. Sign and billboard owner lacked standing to challenge constitutionality of ordinance requiring city to process all sign applications within thirty business days of receipt, where city acted on all applications within thirty business days of receipt.

**4. 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 organization; 2) signs on private premises directing and guiding traffic and parking on private property; and 3) 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 requirements, 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.

**B. Adult Entertainment**

**1. Cafe Erotica, Inc. v. Peach County, 272 Ga. 47, 526 S.E.2d 56 (2000).**

Any adult entertainment ordinance should be a time, place, or manner regulation, which the courts classify as "content-neutral" in nature. For example, an ordinance providing that adult theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school has been held to be a content-neutral, time, place and manner regulation. Content-neutral time, place, and manner regulations can constitutionally be enacted so long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.

In regulating adult entertainment, the courts have found that ordinances aimed at the “secondary effects” of adult businesses, rather than the content of the materials shown or sold at such businesses, will usually be deemed time, place, and manner restrictions. Examples of such secondary effects are the prevention of crime, protection of the retail trade, maintaining property values, and preserving the quality of urban life. In order to prove the necessary nexus between such businesses and their secondary effects, local governments in enacting such ordinances should include evidentiary support for their contentions that such businesses would have negative secondary effects on certain areas within their jurisdiction. For instance, local governments can conduct studies, or they may rely on studies conducted by other cities showing such effects to particular neighborhoods.

**2. Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 870 (C.A.11<sup>th</sup> 2007)**

A zoning ordinance enacted by a local government should leave a number of sites available for adult businesses under the new zoning regime which are greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect. However, just because properties on which adult businesses may locate are currently occupied and not for sale or lease will not necessarily mean that alternative avenues have been foreclosed by a local government.

**IX. FEDERAL CLAIMS**

A. Certain types of uses are subject to protection by federal law. In such cases, the federal statute may provide an enforcement mechanism; otherwise, 42 USC § 1983 will apply.

B. Zoning regulations affecting people with a disability must satisfy the Fair Housing Act, the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act. A zoning ordinance that places burdens on residences of and institutions serving people with disabilities will be closely scrutinized. A common example is a special use permit requirement for personal care homes.

C. Land use ordinance regulations based upon the religious nature of a use must satisfy the Free Exercise Clause of the First Amendment and also the Religious Land Use and Institutionalized Persons Act of 2000. Courts will look to whether the zoning regulation places a substantial burden on religious exercise or whether it discriminates against religious uses. If so, the Court will apply the strict scrutiny test: whether the regulation is the least restrictive means of achieving a compelling governmental interest.

D. The First Amendment and RLUIPA

Churches, synagogues and mosques are a type of land use which, like signs and adult entertainment, are protected by the First Amendment to the U.S. Constitution and

also the Religious Land Use and Institutionalized Persons Act of 2000. 42 USC § 2000cc.

RLUIPA has several substantive provisions, the first of which subjects any land use regulation substantially burdening religious exercise to strict scrutiny. Substantial burden is not defined by the Act, but the Eleventh Circuit has held that “a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.” Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir., 2004). Any individualized determination is also subject to strict scrutiny.

The next substantive provision is the equal terms provision, which has several parts. It first holds that no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. Under this interpretation, the Eleventh Circuit found that a zoning ordinance that prohibited churches in zoning districts where private clubs and lodges were allowed violated the equal terms provision. Id.

The Eleventh Circuit recently discussed the various ways that a zoning ordinance could violate the equal terms provision in Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006). The Court listed three separate equal terms claims, beginning with the facial unequal treatment exemplified by the Midrash case above, where the ordinance treats religious assemblies less favorably than secular assemblies. Second, an ordinance that does not violate the equal terms provision on its face might still be void if it shows “religious gerrymandering.” The third potential claim is that a facially-neutral regulation is applied in a discriminatory manner, such as if a regulation required variances for all assemblies, but in practice variances are only granted to secular uses, or if a certain congregation was singled out for denial of the variance. Thus, the equal terms provision must be carefully considered, because it provides a number of grounds for challenging a local government ordinance or action.

The next substantive RLUIPA provision is similar to the preceding third equal terms claim: No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

The final substantive land use provision of RLUIPA is the exclusion and limitations provision: No government shall impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA does allow regulation of churches, and does not necessarily require more beneficial treatment of churches than of secular uses. However, a land use regulation may not treat secular assemblies and institutions more favorably than religious institutions. Thus, a zoning ordinance that allows secular assemblies in a given district

but not religious assemblies may be struck down. A common pitfall involves permitting certain secular assemblies as a matter of right, but requiring churches to obtain special use permits. Similarly, it would be a violation to place a minimum acreage requirement on churches but not secular assemblies. These would all be facial violations; at the same time, it is clear that if local government action under a facially-neutral ordinance results in disparate treatment, then RLUIPA will likely have been violated. For example, if all religious and secular assemblies require a special use permit under the ordinance, but in practice the local government only grants special use permits to secular uses, a RLUIPA claim will most likely lie. Similarly, it may be a violation if special use permits are granted to mainline religions, but not to a certain sect or denomination. And it might be a violation if a facially-neutral requirement, such as a minimum number of parking spaces, were strictly applied to a certain church, but was overlooked in regards to secular or other religious assemblies. Thus, in summary, RLUIPA requires a local government to allow religious exercise, within reasonable limits, and to treat religious institutions *at least* as favorably as secular assemblies.