

Georgia Association of Zoning Administrators

Summer Conference

August 14, 2009

**ZONING LAND MINES:
THINGS TO WATCH OUT FOR**

BY

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I. CONDITIONAL USE PERMITS

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. C & H Development, LLC v. Franklin County, 294 Ga.App. 792, 670 S.E.2d 491 (2008).

Notice of public hearing on property owner's request for a conditional use permit was published 46 days before the scheduled hearing. The Zoning Procedures Law requires that such notice must be published "[a]t least 15 but not more than 45 days prior to the date of the hearing." O.C.G.A. § 36-66-4(a). Thus, the county's approval of the permit following the hearing is invalid, since the county failed to strictly comply with the Zoning Procedures Law's publication of notice requirements.

II. 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.

III. NON-CONFORMING USES

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

An ordinance that specifies termination of a nonconforming use by cessation of the use for a specific time should further state that the use terminates regardless of whether there is an intent to abandon.

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

Prior nonconforming uses are not absolutely protected from subsequent zoning regulations. A governing opportunity can require a nonconforming use to be terminated in a reasonable time.

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

Expanding a nonconforming use on the same lot may be prohibited if the ordinance specifically provides that a nonconforming use may not be extended on either the same or adjoining property.

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)