#### *Georgia Association of Zoning Administrators*

### *Summer Conference*

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*Key Issues in Making Zoning & Land Use Decisions*

### *by*

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1. **AMENDMENTS TO THE OPEN AND PUBLIC MEETINGS ACT**

**O.C.G.A. Chapter 50-14**

***Who is subject to the act?***

Every county, municipality, commission, agency, board, department or authority of each county or municipality.

***What meetings are required to be opened?***

A gathering of a quorum of the members of the governing body or any committee at which official business, policy, or public matter of the governing body or agency is formulated, presented, discussed, or voted upon.

***Meetings shall not include:***

1. The gathering of a quorum of the members of a governing body or committee for the purpose of making inspections of physical facilities or property under the jurisdiction of such agency at which no other official business of the agency is to be discussed or official action is to be taken;

2. The gathering of a quorum of the members of a governing body or committee for the purpose of attending state-wide, multijurisdictional, or regional meetings to participate in seminars or courses of training on matters related to the purpose of the agency or to receive or discuss information on matters related for the purpose of the agency at which no official action is to be taken by the members;

3. The gathering of a quorum of the members of a governing body or committee for the purpose of meeting with officials of the legislative or executive branches of the state or federal offices and at which no official action is to be taken by the members;

4. The gathering of a quorum of the members of a governing body of an agency for the purpose of traveling to a meeting or gathering as otherwise authorized by this subsection so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum; or

5. The gathering of a quorum of the members of a governing body of an agency at social, ceremonial, civic, or religious events so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum.

This subparagraph’s exclusions from the definition of the term meeting shall not apply if it is shown that the primary purpose of the gathering or gatherings is to evade or avoid the requirements for conducting a meeting while discussing or conducting official business.

***Open meetings shall be:***

1. Open to the public (visual and sound recording shall be permitted).
2. Set for a time, place, and date of the regular meeting of the agency pursuant to notice posted at least one week in advance and maintained in a conspicuous place available to the public at the regular meeting place of the agency, as well as the agency’s website, if any.

***Open meetings at a time or place other than that prescribed for regular meetings:***

Pursuant to written notice at least 24 hours at the place of regular meetings and notice at least 24 hours to the legal newspaper if the meeting is not held at a time or place for regular meetings of the agency.

***Published agenda of open meetings:***

An agenda of all matters expected to be considered at an open meeting shall be available upon request and posted at the meeting site in advance as soon as reasonably possible but not more than 2 weeks prior to the meeting. (Other agenda items may be considered and acted upon at the meeting)

***Summary of subjects acted on:***

Within two business days of the adjournment of an open meeting, a summary of the subjects acted on and the members present at the meeting is required to be available for public inspection.

***Minutes of an open meeting:***

1. Minutes shall be promptly recorded not later than immediately following the next regular meeting of the agency.
2. Minutes shall include names of the members present, a description of each motion or proposal, identity of the person making and seconding the motion or other proposal, and a record of all votes.
3. **LIABILITY OF COUNTY BUILDING INSPECTOR**

**Howell v. Willis, 317 Ga. App. 199 (2012).**

A county building inspector is entitled to official immunity from suit in its individual capacity if his inspection of a residence is a discretionary act rather than a ministerial act. Qualified immunity affords protection to inspectors for discretionary actions taken within the scope of their official authority. A ministerial act is commonly one that is simple, absolute, definite, and arising under conditions admitted or proved to exist and requiring the execution of a specific duty. A discretionary act, on the other hand, calls for the exercise of personal deliberation and judgment. Evidence showed that the building inspector was granted discretion in determining how he went about conducting the inspection, the methodology he employed, and the number of inspections that he made as well as requirements he placed on contractors afterwards. Therefore, the inspection of the residence was a discretionary act, and the building inspector was entitled to qualified immunity from suit by the building owner.

1. **GETTING THE SIGN ORDINANCE RIGHT**

Does your sign ordinance impose limits on the time a resident may display a political sign or a “for sale” sign? Does your ordinance specify certain districts in which a sign may only display a message related to an activity on property other than where the sign is located? (the so-called off-premises sign) If either or both of these provisions are found in your sign ordinance, it probably is unconstitutional and unlikely to withstand a legal challenge to its validity.

Both federal and state courts have laid down rules we must follow to protect against unconstitutional restriction of speech guaranteed under the First Amendment of the U.S. Constitution and the Free Speech Amendment of the Georgia Constitution. Yes, putting a message on a sign is a form of speech, and local governments may not restrict that speech in a sign ordinance unless constitutional protections are put in place.

The First Amendment and the Free Speech Amendment permit a local government to prohibit sign messages promoting unlawful activity or messages that are misleading. But any other restriction of otherwise protected speech is valid only if it “…seeks to implement a substantial government interest, …directly advances that interest, [and] reaches no further than necessary to accomplish the given objective.”[[1]](#footnote-1)

Some specific rules or conditions must be included in a sign ordinance for it to survive constitutional scrutiny. Following is a list of constitutional safeguards that often are missing from sign ordinances. Hopefully, this article will help you examine your sign ordinance and apply these judicial rules and thus determine if your sign ordinance will withstand a lawsuit challenging its constitutionality.

**Rule No. 1 Adopt a Statement of Legislative Purpose[[2]](#footnote-2)**

A sign ordinance, to be constitutional, must satisfy a “substantial government interest”; otherwise, it restricts speech without a basis for imposing limits on speech. We, as a government, are authorized to restrict signs if it advances the aesthetic interests of a local government, e.g. limits clutter and protects the visual landscape, or it promotes traffic safety. These purposes as justification for imposing limits on signs must be amply laid out as the underlying basis and purpose for a sign ordinance. Accompanying this purpose should be studies, including treatises, which have demonstrated the benefit of sign restrictions to advance the aesthetic and safety interests of a local government. These studies and treatises should be incorporated into and made a part of the preface or introduction to the sign ordinance. It is only upon showing that a local government’s aesthetic interests and traffic safety are advanced that it may constitutionally limit speech and thus restrict sign usage within a local government’s jurisdiction.

**Rule No. 2 Sign Ordinances must be Content-Neutral[[3]](#footnote-3)**

Content-neutral means that a sign ordinance must not regulate signs based upon the message. The introduction to this article shows an example of this, i.e. signs identified and regulated by a political message. There are exceptions to this rule, but the better practice is to regulate signs by the size, construction, materials, number, and location, but not by the message on the sign. If your ordinance identifies a sign by its message, it probably is not content-neutral.

**Rule No. 3 Sign Ordinances must have Standards for Granting or**

**Denying Sign Permit Applications[[4]](#footnote-4)**

Your ordinance must set forth standards which an administrative official or board must apply in determining whether a sign may be permitted. Giving the permit official unbridled discretion to decide whether a sign may be permitted is typically a constitutional problem. The better approach is to grant a permit for a sign if it satisfies the ordinance provisions; that is, an objective standard not based on the discretion of an administrative official or a board. In any event, the sign ordinance should set out those standards which have to be applied in determining whether a sign permit should be granted.

**Rule No. 4 Limit the Time in which a Decision on Sign Permit Applications must be Made[[5]](#footnote-5)**

If your ordinance does not specify the time within which a decision for a sign permit application must be made, it has serious constitutional problems. According to many court decisions, allowing a sign permit application to languish indefinitely without a decision is a denial of free speech. Fifteen to thirty days is usually adequate for a decision to be made, and your ordinance should state a specific time within which an applicant may expect a decision.

**Rule No. 5 Include a Provision that a Decision Denying a Sign Application Permit may be Judicially Appealed within 30 Days[[6]](#footnote-6)**

A local government may establish a procedure for appeal of an initial decision denying a sign permit application to a separate administrative official or board. That is to say, an initial decision may be made by an administrative official, and an aggrieved applicant may then appeal to a planning commission or even the city council or the board of commissioners. But what is essential as mandated by a number of court decisions is that a judicial appeal be provided within the ordinance. That is, an ordinance should provide that an unhappy applicant for a sign permit may appeal the final decision of the local government to the appropriate superior court within 30 days of the decision. Such a provision will satisfy the requirement that an aggrieved applicant has a right to immediate judicial review of the local government’s decision.

These rules are not intended to be exhaustive of all constitutional requirements necessary for a local government’s sign ordinance, but these are the most significant deficiencies in sign ordinances and the ones most often subject to challenge in either the federal or the state courts. Put your ordinance on the examining table, and if any of these rules are violated, you should immediately revise the ordinance or it may not withstand a judicial challenge.

**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, are 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. 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; 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.

**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 objective.

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.

IV. RECENT LAWS ADOPTED BY THE GENERAL ASSEMBLY RELATING TO ZONING AND LAND USE

1. Amendment to Article 2, Chapter 2, Title 8 of the O.C.G.A. Relating to Factory-Built Buildings and Dwelling Units

The Georgia General Assembly amended the Official Code of Georgia to add § 8-2-170 and § 8-2-171. The amendment applies to the right to install and occupy a pre-owned manufactured home. It prohibits any county or city from imposing health and safety standards or conditions based on the age of the manufactured home. It does provide for the establishment of health and safety standards and authorizes an inspection program for pre-owned manufactured homes when relocated from their current locations. It also absolves any inspector of pre-owned manufactured homes from any liability resulting from defects or conditions in the pre-owned manufactured homes.

**2. Mobile Broadband Infrastructure Leads to Development (BILD) Act, O.C.G.A. § 36-66b-1 et seq.**

This act provides that applications for collocation or modification of a wireless facility entitled to a streamlined process under the code may only be reviewed for conformance with an applicable site plan and building permit requirements, including zoning and land use conformity, but shall not be subject to the issuance of additional zoning, land use, or special use permit beyond the initial zoning, land use, or special use permit approvals issued for the wireless support structure or wireless facility. Its intent is to allow previously approved wireless support structures or facilities to be modified or collocations accepted without additional zoning and land use review beyond that typically required by the local government for issuance of building or electrical permits.

The streamlined process applies to applications for proposed modification or proposed collocations that meet the following requirements.

1. The modification or collocation does not increase the overall height or width of the structure or facility.

2. The proposed modification or collocation does not increase the dimensions of the equipment compound initially approved by the local government.

3. The proposed modification or collocation complies with applicable conditions of approval applied to the initial wireless facility or support structure.

4. The proposed modification or collocation does not exceed the applicable weight limits for the wireless support structure.

**3. Amendments to O.C.G.A. §§ 8-2-111 and 8-2-112 Establishing Limitations on Local Governments and Restricting Residential Industrialized Buildings**

The Georgia General Assembly adopted amendments to the Industrialized Building Code in which it identified a “residential industrialized building” as any dwelling unit designed and constructed in compliance with the minimum one- and two-family dwelling code made, fabricated or assembled in a manufacturing assembly which cannot be inspected at the installation site without disassembly or damage to the structure. It does not include a manufactured home. The act provides that all industrialized buildings and residential industrialized buildings bearing the insignia of approval issued by the commissioner of community affairs are deemed to comply with minimum standard codes and all ordinances and regulations enacted by any local government. It specifically prohibits any local government from excluding residential industrialized buildings from any residential district solely because the building is a residential industrialized building. But it reserves to the local government the right to restrict by land use and zoning laws such things as building setback, yard requirements, subdivision regulations, and architectural and aesthetic requirements.

**V. LEGISLATIVE v. ADMINISTRATIVE DECISION-MAKING**

1. LEGISLATIVE HEARINGS
2. Set up procedures for calling and conducting of the hearing as required by O.C.G.A. §36-66-5(a).
3. Give the required notice under the Zoning Procedures Law, O.C.G.A. §36-66-4.
4. Copy the entire zoning file for each application to be considered at the public hearing and distribute one copy to each planning commission member or elected official at least 72 hours before the hearing.
5. Record the public hearing, either by a tape recorder or a court reporter. If the case is appealed, prepare a transcript.
6. Prepare an agenda before the meeting listing all the applications with a description of each and provide the order in which they will

be considered by the hearing board. A copy should be available for all attendees.

1. Prepare a copy of the procedures for distribution to the attendees as required by O.C.G.A. §36-66-5(a).
2. Have the official zoning map and the future land use plan present during the public hearing.
3. Have a professional staff member give a report and make a recommendation to the hearing board.
4. A motion respecting the decision of the hearing board should be stated clearly. Especially, this is true in the case of conditions which apply to a rezoning.
5. The Planning Commission is not required to make findings, but it may do so in accordance with the standards previously adopted by the local governing authority.
6. A rezoning applicant has 30 days from a final decision to appeal to the Superior Court.
7. On appeal to the Superior Court, new evidence may be presented to the Superior Court, even though not presented to the local government.

**Appeals of Administrative Decisions to the Superior Court**

**Druid Hills Civic Association Inc. v. Buckler, --- Ga.App. --- (decided July 10, 2014).**

In administrative or quasi-judicial decisions (such as a variance or building permit) no new evidence may be introduced to the court or otherwise admitted into evidence. The only evidence to be considered by the court is that introduced at the administrative hearing before the local governing board or agency.

Standing of a party to appeal a local government decision shall be based on whether the person or entity appealing the decision has a substantial interest in the zoning board’s or agency’s decision such that the applicant would suffer some special damage as a result which is not common to other property owners similarly situated. An applicant who fails to object to the standing of an opponent at the administrative hearing may not object for the first time in superior court.

**City of Statesboro v. Dickens, 293 Ga. 540 (2013).**

A local ordinance may provide and thus require that an appeal of a decision regarding a permit, such as a variance, must proceed to superior court only by writ of certiorari.

**Mortgage Alliance Corporation v. Pickens County, 294 Ga. 212 (2013).**

Appeals of administrative decisions by local government must be filed in the superior court within 30 days that the decision is reduced to writing and signed by the appropriate official. Taco Mac v. Atlanta Board of Zoning Adjustment, 255 Ga. 538 (1986), and Chadwick v. Gwinnett County, 257 Ga. 59 (1987), City of Suwanee v. Settles Bridge Farm, LLC, 292 Ga. 434 (2013). Before a land owner may file a claim in court challenging the constitutionality of a special use permit or a requirement of a special use permit, it must first apply to the local authority for relief and exhaust the administrative remedies.

**Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).**

The property owners appealed the denial of a variance by the county and challenged the county’s ordinance which required appeals to the superior court by writ of certiorari and contended that they were not afforded a due process hearing before the county’s board of appeals.

The court concluded that the county’s ordinance may specify the proper judicial vehicle for appeals of administrative decisions on variances. In this case, the county’s ordinance required that the disappointed property owner travel by way of writ of certiorari from the board of appeals to the superior court. This is because the decision making process by the board of appeals is the nature of a judicial act; that means that the board of appeals determines the facts from the evidence and applies the ordinance’s legal standards to those facts to reach a decision.

The court rejected the plaintiffs’ contention that they were denied a due process hearing before the board of appeals. The court found that the due process requirements were met in that: (1) the board gave notice of the hearings; (2) the plaintiffs were allowed to explain their reasons for requesting the variance; (3) they presented evidence in support of the application, “including letters, photographs, plats, and schedules of property values in the community”; (4) they answered questions from board members; (5) a verbatim transcript or detailed account of the hearing was available and formed an adequate basis for judicial review; and (6) the board explained to the plaintiffs the reasons for the denial and put that in writing. The plaintiffs further asserted that they were denied the opportunity to cross-examine witnesses, but that was rejected by the court because the plaintiffs never sought the opportunity to cross-examine witnesses. However, this suggests that a property owner, or indeed an interested party in opposition to the grant of a permit, should have the opportunity to present testimony by witnesses and to cross-examine witnesses to satisfy due process requirements.

1. ADMINISTRATIVE HEARINGS
2. Provide the required notice of the hearing as set forth in the local ordinance.
3. Establish written procedures for conduct of the hearing and provide a copy to all attendees.

The recommended procedures are as follows:

a. Allow the applicant to make the first presentation.

b. Provide for witness testimony.

c. Allow for cross-examination by interested parties (require interested parties to be represented by someone).

d. Allow interested parties to introduce evidence.

e. Allow cross-examination of the interested parties by applicant.

f. Require that all documents be marked as exhibits.

g. Upon conclusion of the hearing for each application, make a decision.

h. Reduce all decisions to writing.

3. Prepare a record or file for each application which should include the application and any documents introduced or provided as exhibits and the transcript of the hearing. It is especially important that this be prepared in the event of an appeal.

4. Have a professional staff member explain the case to the Board. Allow him or her to be examined as appropriate by the applicant or interested parties. The professional staff may make a recommendation of a desired result, but it is not required.

5. Provide the same file to the applicant as is provided to each board member. Make sure each board member has a copy of the file prior to the hearing. Make the file available to the parties interested upon request.

6. Have the official zoning map and future land use plan present at the hearing for use by anyone at the hearing.

7. Record the public hearing, either by a tape recorder or a court reporter. If the case is appealed, prepare a transcript.

On appeal, the Superior Court only reviews the record of the hearing before the local government; no new evidence is presented.

**VI. ENFORCEMENT OF ZONING CONDITIONS**

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

“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.”

1. Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed.Appx. 268, 273 (11th Cir., 2006) [↑](#footnote-ref-1)
2. Tinsley Media, LLC v. Pickens County, Georgia, 203 Fed.Appx. 268, 273 (11th Cir., 2006) [↑](#footnote-ref-2)
3. Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir., 2005); Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir., 1993); Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir., 2004); and Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 467 S.E.2d 875 (1996) [↑](#footnote-ref-3)
4. Camp Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir., 2006) [↑](#footnote-ref-4)
5. Café Erotica of Florida, Inc. v. St. Johns County, 360 F.3d 1274 (11th Cir., 2004) [↑](#footnote-ref-5)
6. Boss Capital, Inc. v. City of Casselberg, 187 F.3d 1251 (11th Cir., 1999) (applying free speech safeguards to adult entertainment ordinances) [↑](#footnote-ref-6)