

# **Preparing for a Zoning Hearing**

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# TOPICS

- Constitutional Issues
- Zoning Procedures Act
- Using Zoning Standards
- Zoning Conditions / Special Use Permits
- Development Impact Fee Act
- Conflicts of Interest and Other Ethical Issues

# What is Zoning?

# **Constitutional Authority to Plan and Zone**

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.

Ga. Const. Art. 9, §2, Para. IV

# Constitutional Restrictions on the Exercise of Zoning Power

1. Taking without just compensation
2. Due process
3. Equal Protection
4. Vested rights

# Letter of Constitutional Objections

# How do you know if a zoning decision is constitutional?

- Does the (1) existing zoning...
- (2) impose a **significant detriment** ...
- (3) that is insubstantially related to the public health, safety and welfare?

# Variance

When an ordinance by its strict construction would result in a taking, the ordinance usually has a variance provision.

# Common variance provisions

- Hardship not caused by the property owner;
- Due to the specific nature of the property (topography, geography, etc.);
- Ordinance can be varied in a way that preserves and accomplishes purpose of ordinance; and
- Ordinance varied only so much as necessary to avoid the hardship.

# Vested Rights

The right to create a use *not currently in existence* because of official approval and substantial expenditures in reliance of the approval

# Non-conforming / grandfathered use

- An *established use* that was once legal but which is no longer legal because of a change in the ordinances.
- Grandfathering is granted by ordinance
- Subject to the terms of the ordinance

# **Common non-conforming use provisions**

- May not be expanded except in conformity
- May not be rebuilt if destroyed

# Equal Protection

- To treat two similarly situated properties differently
- To enforce the zoning ordinance differently for two similarly situated properties
- Importance of Future Land Use Map

# Due Process

- Failure to provide notice and hearing
- Failure to comply with Zoning Procedures Law
- Not necessarily the same as a trial

# **ZONING PROCEDURES LAW**

**O.C.G.A. Chapter 36-66**

**ZONING DECISION** means final legislative action by a local government which results in:

- (A) The adoption of a zoning ordinance;
- (B) The adoption of an amendment to a zoning ordinance which changes the text of the zoning ordinance;
- (C) The adoption of an amendment to a zoning ordinance which rezones property from one zoning classification to another;
- (D) The adoption of an amendment to a zoning ordinance by a municipal local government which zones property to be annexed into the municipality; or
- (E) The grant of a permit relating to a special use of property.
- (F) The grant or denial of a variance or conditions concurrent and in conjunction with [(C) or (E) above].

O.C.G.A. § 36-66-3(4)

# NOTICE OF PUBLIC HEARING

- ❖ Notice published in a newspaper of general circulation within the territorial limits of the jurisdiction at least 15 days, but not more than 45 days, prior to the hearings.
- ❖ Under HB1405, some decisions get 30 days of notice, with letter to property owner.

# **PUBLIC HEARING PROCEDURES**

**A local government is required to give equal time to both proponents and opponents of the zoning application. In addition, the written procedures must state that each side shall have no less than 10 minutes.**

**O.C.G.A. § 36-66-5(a)**

# **How do you conduct a fair hearing?**

# **ZONING STANDARDS UNDER ZPL**

**[E]ach local government shall adopt standards governing the exercise of the zoning power, and such standards may include any factors which the local government finds relevant in balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property.**

**O.C.G.A. § 36-66-5(b)**

# How do you use the standards?

# Guhl Factors

**(Guhl v. Holcolmb Bridge Road Corp., 238 Ga. 322 (1977))**

- (1) existing uses and zoning of nearby property;
- (2) the extent to which property values are diminished by the particular zoning restrictions;
- (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public;

# Guhl Factors

- (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner;
- (5) the suitability of the subject property for the zoned purposes; and
- (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the property.

# How do we use comprehensive planning?

- Future land use map
- Character areas
- Service Delivery

# Rezonings

Legislative decisions

De novo appeals

# What about annexations?

- ZPL still applies
- Notice procedure to the County
- Annexation arbitration

# What if it is a DRI?

- Development of Regional Impact
- DRI review before any decision is made.

# Special use permits

- Uses which are permitted in a district only with special approval from the BOC or city council
- Importance of criteria
- Examples:
  - Landfill - Crematory - Asphalt Plant

# Quasi-Judicial hearings

- Special use permits, variances, administrative appeals
- Record review

# City of Roswell v. Fellowship Christian School, Inc.

- Special use permit denied because of traffic concerns.
- Statement of traffic concerns by neighbors on the record was sufficient evidence to support decision.

# **Can we put conditions on zoning decisions?**

# Zoning Conditions

- Conditions imposed so as to ameliorate the negative effects of the proposed rezoning for the protection of neighboring properties
- What does your ordinance say about conditional uses?
- Due process concerns

# Zoning Conditions

- Put in writing, or clearly state in the motion
- Condition to the site plan
- Conditions become part of the ordinance and can only be amended by rezoning action

# **Development Impact Fee Act, OCGA § 36-71-1**

- To ensure that new growth pays no more than its proportionate share of the costs of public facilities needed to serve new growth.
- Public facilities include: Water system, sewer system, stormwater system, road system, parks and recreation, public safety (fire, police, E911) and libraries.

# **Development Impact Fee Act, OCGA § 36-71-1**

- Development “exaction”: compels payment, dedication, or contribution of goods, services, land, or money as a condition of approval.
- System improvements can only be imposed by impact fee. Project improvements can still be required.

# **CONFLICT OF INTEREST IN ZONING ACT**

## **O.C.G.A. Chapter 36-67(A)**

# WHICH PUBLIC OFFICIALS?

- PLANNING COMMISSION
- GOVERNING AUTHORITY
  - MAYOR
  - COUNCIL
  - COUNTY COMMISSION

# WHEN?

- Only “Rezoning action”: action by local government adopting an amendment to a zoning ordinance which has the effect of rezoning real property from one zoning classification to another.
- Not ZPL Definition: adopt ordinance, amend text, amend map, rezone annexed property, and special use permit

# PUBLIC OFFICIALS

- Any ownership interest in the property
  - Disclose and disqualify
- Financial interest in business entity with any ownership in the property
  - Financial interest = 10%
  - Disclose and disqualify

# **PUBLIC OFFICIALS (continued)**

- Family members with ownership or financial interest
  - Family = spouse, mother, father, sister, brother, son, daughter
  - Disclose

# PUBLIC OFFICIALS

- Prohibited activities: actions carried out in the official's public capacity
- Permitted activities: actions normally and properly undertaken by any other private property owner including supplementation of application, responding to inquiries from zoning authorities, or altering the property at issue or the business conducted thereon.
- Little v. City of Lawrenceville, 272 Ga. 340 (2000)

# APPLICANTS and OPPONENTS

- Applicant, opponent or attorneys.
- Campaign gifts or contributions totaling \$250.
- 2 yrs. preceding the zoning application.
- File within 10 days of application for applicant,  
5 days prior to hearing for opponent.

# **ADDITIONAL ETHICAL CONSIDERATIONS CONCERNING VOTING**

# Ethical Issues

Improper Conflict of Interest: When a public officer, in the discharge of his public function, acts upon a measure relating to a *specific transaction* and such transaction shall *directly* and *immediately* affect his pecuniary interest. A remote or speculative financial interest will not support a conflict of interest allegation.

# Ethical Issues

White v. Board of Com'rs of McDuffie County, 252 Ga.App. 120 (2001) – bank officer on Board

Dunaway v. City of Marietta, 251 Ga. 727 (1983) –  
VP disclosed but still presided

# Ethical Issues

Public officers are the trustees and servants of the people and are at all times amenable to them.  
Const. Art. I, §2, ¶ 1

Crozer et al. v. Reichert et al., 275 Ga. 118 (2002) –  
planning director sought approval, subordinate reviewed

Wyman v. Popham, 252 Ga. 247 (1984) –  
Commissioners sold to applicant

# **Staying Out of Trouble**

- Avoid prejudgment
- Avoid pre-hearing public comments
- Avoid ex parte communications

## **Legislative versus quasi-judicial meetings**

- Limit comments at hearing to relevant criteria
- Disclose and recuse if conflict of interest is questionable