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# Drafting Local Ordinances for Natural Resource Protection

Jamie Baker Roskie

*University of Georgia School of Law, jroskie@uga.edu*

James W. Hawhee

*University of Georgia School of Law*

Jeremy Cole

*University of Georgia School of Law*

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# Drafting Local Ordinances for Natural Resource Protection

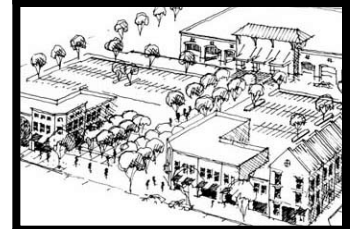
Jamie Baker Roskie  
James M. Hawhee  
Jeremy Cole

February 8, 2008

Land Use Clinic



university of georgia



The **UGA Land Use Clinic** provides innovative legal tools and strategies to help preserve land, water and scenic beauty while promoting creation of communities responsive to human and environmental needs. The clinic helps local governments, state agencies, landowners, and non-profit organizations to develop quality land use and growth management policies and practices. The clinic also gives UGA law students an opportunity to develop practical skills and provides them with knowledge of land use law and policy.

**For more information about the UGA Land Use Clinic contact:**

Jamie Baker Roskie, Managing Attorney  
UGA Land Use Clinic  
110 Riverbend Road, Room 101  
Athens, GA 30602-1510  
(706) 583-0373 • Fax (706) 583-0612  
jroskie@uga.edu

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Jamie Baker Roskie  
James M. Hawhee  
Jeremy Cole

Formatting and editing  
Maggie Nettles  
Beth Gavrilles

University of Georgia Land Use Clinic  
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## Contents

I. Introduction.....	1
II. Identifying the Environmental Issue.....	1
III. Expert Help and Other Resources.....	1
IV. Evaluating Existing Law.....	2
V. Drafting or Amending an Ordinance.....	3
Drafting the Controlling Provisions.....	3
Ordinance Structure.....	4
Incorporation of Model Codes.....	5
VI. Legal Principles in Environmental Protection.....	5
Retroactivity.....	5
Vested Rights.....	6
Takings.....	6
Due Process.....	6
Preemption.....	7
VII. Conclusion.....	8



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## I. Introduction

What steps can you as a citizen or group take to protect local natural resources or pristine areas? If adequate state and federal laws exist to protect these resources, you can call upon agencies to enforce current laws, or you may file a lawsuit invoking the citizen suit provisions contained in many environmental laws. But what if the existing law isn't adequate to address the problem? Varied approaches may be taken, one of which is drafting or amending local ordinances to protect the resources in question.

The purpose of this manual is to familiarize lay people interested in environmental protection with the tools necessary to draft and pass local ordinances that address their particular needs.

## II. Identifying the Environmental Issue

The first step in the ordinance drafting process is identifying a particular local environmental problem that needs to be addressed. For example, in the water protection context, a particular lake may have extreme amounts of unsightly algal growth that negatively affects fishing and swimming. Often this particular problem is caused by eutrophication, or an influx of nutrients into the system.<sup>1</sup> This influx of nutrients into the system may be caused by water runoff from the surrounding land that has introduced fertilizer and/or other nutrients into the stream system, affecting its ecological balance.<sup>2</sup> If so, this problem might be best addressed by a local ordinance that curbs the effects of runoff.

## III. Expert Help and Other Resources

As part of the process of identifying the cause of the environmental problem and deciding on a solution, you may wish to consider the resources and support that experts can provide to your project. Attorneys may be helpful when considering the language and implications of your current or proposed ordinance. Scientific advisors of all sorts may also be able to assist you with respect to the technical and scientific aspects of your problem.

In Georgia, a number of attorneys and other legal resources exist that may be able to help with these types of issues. The University of Georgia Land Use Clinic is a resource to consider for legal consultations or ordinance drafting.<sup>3</sup> The Turner Environmental Clinic at Emory University provides similar

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1 See Gary L. Hawkins & Daniel Thomas, *University of Georgia College of Agricultural and Environmental Sciences, Protecting Georgia's Surface Water Resources* 8 (2002), <http://pubs.caes.uga.edu/caespubs/pubs/PDF/B1217.pdf>.

2 United Nations Environment Programme, <http://www.unep.or.jp/ietc/Publications/techpublications/TechPub-11/5-3-1.asp> (explaining causes of eutrophication)(last visited Feb. 6, 2008).

3 University of Georgia Land Use Clinic, <http://www.law.uga.edu/landuseclinic/index.html> (last visited Feb. 5, 2008).

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services.<sup>4</sup> A number of nonprofit law firms focusing on environmental law may also be interested in such issues: GreenLaw<sup>5</sup> and the Southern Environmental Law Center<sup>6</sup> are two public interest law firms that address environmental problems regionally. Also, a private attorney with relevant expertise may be willing to assist with drafting the legislation and guiding its passage into law at the local level. In some cases, this work may be provided on a pro bono basis.

Protecting natural resources often requires scientific expertise as well. In the context of stream protection, national nonprofit groups such as the Center for Watershed Protection<sup>7</sup> and the Local Government Environmental Assistance Network<sup>8</sup> draft model ordinances and provide scientific expertise. In addition, state and local interest groups may provide a great deal of policy expertise and local knowledge necessary to support the ordinance drafting process. In Georgia these groups include the Georgia River Network<sup>9</sup> and Gwinnett Clean and Beautiful.<sup>10</sup> University of Georgia's River Basin Center<sup>11</sup> may also be a particularly good resource considering its mission of service and outreach.<sup>12</sup>

## IV. Evaluating Existing Law

After identifying the cause of the problem and securing expert assistance, you must identify the weaknesses in the applicable laws and regulations. Does the local government already have an applicable ordinance in effect? If it does, and the ordinance appears sufficient, the problem may be one of enforcement. In addition, find out if there are state and federal laws that also apply. These laws may affect how the local government may regulate in that particular area of law. This issue is discussed further below, particularly in the section on preemption.<sup>13</sup>

If there is an existing ordinance, assessing it with respect to a particular problem may bring some weaknesses to light. Other weaknesses may be identified by comparing the local ordinances in question to model ordinances drafted on the subject. For example, the Center for Watershed Protection has developed a model stormwater ordinance,<sup>14</sup> and the University of Georgia's River Basin Center has developed model ordinances for riparian buffers.<sup>15</sup> Also, a complementing approach might involve an analysis of ordinances from other localities that have been successful in addressing the issue at hand. Municipal Code Corporation's online library contains many local ordinances from all fifty states and is an excellent resource to consult when beginning this task.<sup>16</sup>

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4 Turner Environmental Law Clinic, <http://www.law.emory.edu/programs-centers-clinics/environmental-law/turner-clinic/html> (last visited Feb. 5, 2008).

5 GreenLaw, <http://www.green-law.org> (last visited Feb. 5, 2008).

6 Southern Environmental Law Center, <http://www.southern-environment.org> (last visited Feb. 5, 2008).

7 Center for Watershed Protection, [www.cwp.org](http://www.cwp.org) (last visited Feb. 6, 2008).

8 Local Government Environmental Assistance Network, <http://www.lgean.org> (last visited last visited Feb. 6, 2008).

9 Georgia River Network, <http://www.garivers.org> (last visited Feb. 6, 2008).

10 Gwinnett Clean & Beautiful, <http://www.gwinnettcg.org> (last visited Feb. 6, 2008).

11 University of Georgia River Basin Center, <http://www.rivercenter.uga.edu/> (last visited Feb. 8, 2008).

12 *Id.*

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13 See *infra* p. 16.

14 Center for Watershed Protection Post-Construction Runoff Model Ordinance, [http://www.stormwatercenter.net/Manual\\_Builder/stormwater\\_ordinance.htm](http://www.stormwatercenter.net/Manual_Builder/stormwater_ordinance.htm) (last visited Feb. 6, 2008).

15 Seth J. Wenger & Laurie Fowler, University of Georgia Carl Vincent Institute of Government, *Protecting Stream and River Corridors: Creating Effective Local Riparian Buffer Ordinances* (2000), [http://www.rivercenter.uga.edu/publications/pdf/riparian\\_buffer\\_guidebook.pdf](http://www.rivercenter.uga.edu/publications/pdf/riparian_buffer_guidebook.pdf).

16 Municipal Code Corporation, <http://municode.com> (last visited Feb. 6, 2008).

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## V. Drafting or Amending an Ordinance

Once corrective actions have been identified, the next step is to prepare a draft of the proposed ordinance. Again, expert assistance may be very useful here. For example, an attorney might suggest the language and structural formalities that ordinances customarily include. For those intrepid souls preparing a first draft without expert assistance, some general rules of thumb may be helpful.<sup>17</sup>

### Drafting the Controlling Provisions

In many cases, once a suitable model ordinance is found, drafting the ordinance will simply require minor adjustments to tailor the ordinance to the local community's needs. However, if a relevant model ordinance cannot be found, you may be required to draft the relevant substantive provisions yourself. Therefore, some general guidelines for sound ordinance drafting are provided below.

First, the language and organization of the draft ordinance should be no more complicated than necessary.<sup>18</sup> This simplicity has a number of advantages. Direct phrasing reduces the risk of inadvertent loopholes, and it decreases the likelihood that the ordinance will be misunderstood.<sup>19</sup> Furthermore, because lay people may be enforcing and abiding by the ordinance, plain language helps ensure that it will be enforced correctly.

There are some conventions for drafting an ordinance you can use to make the writing clear and understandable. You should write in the active voice (subject-verb-object).<sup>20</sup> Ordinances should be written in the present tense.<sup>21</sup> Use the term “may” before a

discretionary duty, and “shall” before a mandatory duty.<sup>22</sup> Finally, avoid overly wordy “legalese.” For example, the words “such” and “said” are often confusing replacements for “the.”<sup>23</sup> Replace “at such time as” with the word “when.”<sup>24</sup>

Logically organizing the ordinance is another way to improve its usability.<sup>25</sup> This organization may depend on the type of ordinance being drafted, but it should be apparent to the reader. Regulations intended for the use of lay people ordinarily follow chronological order—in an unfamiliar area lay people always want to know “what is the first thing I should do?” However, the “definitions” section in a chronologically organized regulation would still probably precede the first chronological section because it would contain information important and relevant to each section.<sup>26</sup> Good organization will also ensure that your ordinance is more easily understood and remembered.<sup>27</sup>

Consistency in an ordinance's language is also extremely important,<sup>28</sup> particularly regarding the use of key words and phrases.<sup>29</sup> For example, do not use “riparian buffer,” “stream buffer,” and “vegetated area” to refer to the same buffer area along a stream. Rather, pick one of those terms and stick to it throughout the ordinance. This reduces confusion for the reader. Also, to the extent that these important words and phrases are found in existing local ordinances, they should be carried over and applied to the new ordinance draft to ensure consistency throughout the code of ordinances.<sup>30</sup>

Finally, there are a few other good practices to consider. When amending an ordinance, you should provide a copy of the old ordinance with new words

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17 See, e.g., W. Eskridge, Jr. & P. Frickey, *Our Theory of Statutory Drafting: Cases and Materials on Legislation* 830-33 (1988).

18 *Id.* at 831.

19 *Id.*

20 Steve Lobertini, University of Tennessee Municipal Technical Advisory Service, *Ordinance Drafting and Enactment: Issues and Recommendations* 15 (2007), [http://www.tmaa.us/pdfs/mtas\\_ord\\_drafting.pdf](http://www.tmaa.us/pdfs/mtas_ord_drafting.pdf).

21 The City of Bowling Green, Kentucky Website, [http://www.bgky.org/code\\_enforcement/city\\_ordinances.php](http://www.bgky.org/code_enforcement/city_ordinances.php) (last

visited Feb. 5, 2008).

22 *Id.*

23 *Id.*

24 Lobertini, *supra* note 20, at 15.

25 Eskridge & Frickey, *supra* note 17, at 831.

26 Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, *Writing for Law Practice: Advanced Legal Writing* 23 (2004).

27 Lobertini, *supra* note 20, at 15.

28 *Id.*

29 Eskridge & Frickey, *supra* note 17, at 831.

30 *Id.*



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~~underlined~~ and ~~deleted words lined through~~.<sup>31</sup> This will help clarify the proposed changes to the draft.<sup>32</sup> A summary of the proposed ordinance's effects can also be helpful.<sup>33</sup>

## Ordinance Structure

The basic structure of a local ordinance should first be addressed. The city charter or local code of ordinances should contain procedures for enacting or amending local ordinances.<sup>34</sup> Within these rules, there may be requirements for ordinance structure and format. Cities may also provide forms for creating an ordinance, which allow a fill-in-the-blanks approach to the formalities of the ordinance.<sup>35</sup> In addition to these rules, some parts of an ordinance are customarily included. A brief caption or title should describe the subject area your ordinance is expected to govern.<sup>36</sup> Often a preamble is included, using the term “whereas” followed by nongoverning principles important to the ordinance.<sup>37</sup> These might include the purpose of the ordinance, history, or legal authority.<sup>38</sup> This would also be an appropriate place to describe any findings of environmental degradation that the ordinance intends to remedy. Next, a specific enacting (or ordination) clause may be required to give the ordinance legal effect; the clause should use the exact words if they are provided within the city charter.<sup>39</sup> Only the provisions following this clause will have controlling effects, although courts may be willing to give some consideration to information contained in the preamble.<sup>40</sup>

After the enacting clause, ordinances often begin with definitions. Definitions can serve many purposes. They can incorporate a long phrase, a list of words, or similar concepts into one word, which makes

the ordinance much more readable.<sup>41</sup> Some terms, such as “wetland,” are notoriously difficult to define succinctly and can be identified through a list of criteria.<sup>42</sup> Definitions can also eliminate “ambiguity and vagueness.”<sup>43</sup> Finally, definitions can make technical terms easy for the lay person to understand.<sup>44</sup> However, you should not include standards in the definition itself;<sup>45</sup> these should be reserved for the substantive provisions of the code. For example, a noise ordinance might provide standards for pitch and volume within the substantive provisions of the ordinance, instead of under the definition for “noise pollution.” Also, “[d]efinitions should not run counter to the generally accepted meaning of words and phrases.”<sup>46</sup> Don’t trick or confuse your reader by defining “air” to mean “water” or “black” to mean “white.”

After the definitions, the substantive provisions of the ordinance should follow. Guidelines for drafting these provisions are found below. Finally, it may be wise to attach some common legal clauses at the end of the document to protect the ordinance and ensure it is enforced as intended. If one aspect of the law is illegal in some way, a severability clause may protect the entire ordinance from being automatically invalidated.<sup>47</sup> A severability clause will help a court separate a portion of an ordinance that is found invalid from the rest of the ordinance.<sup>48</sup> This can help avoid the problem of the entire ordinance being struck down, which would require the local government to redraft and re-pass the entire ordinance.

Also, a date of effect can provide notice to citizens and enforcement personnel alike when the ordinance

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31 Gary Landers, *The Sixth Annual Riley Fletcher Basic Municipal Law Seminar, Ordinance Drafting* (2005), [http://www.tml.org/legal\\_pdf/OrdDrafting.pdf](http://www.tml.org/legal_pdf/OrdDrafting.pdf).

32 *Id.*

33 *Id.*

34 See, e.g., Gainesville Georgia Code of Ordinances, Ch. 2, Art.4 (2007).

35 Landers, *supra* note 31.

36 Lobertini, *supra* note 20 at 13.

37 *Id.*

38 *Id.*

39 Telephone Interview with Brandon Bowen, Partner, Jenkins & Olsen, in Cartersville, Ga. (Jan. 24, 2008).

40 *Id.*

41 Harvey S. Moskowitz & Carl G. Lindbloom, *The Latest Illustrated Book of Development Definitions* xvii (1993).

42 See Terra Hargett & Janet Ward, *Local Ordinances That Aren't All Wet, American City and County*, (Feb. 1, 2001), available at [http://americancityandcounty.com/mag/government\\_local\\_ordinances\\_arent/](http://americancityandcounty.com/mag/government_local_ordinances_arent/).

43 Moskowitz & Lindbloom, *supra* note 41, at xviii.

44 *Id.*

45 *Id.*

46 Harvey S. Moskowitz & Carl Lindbloom, *Why Definitions, Zoning News*, Dec. 2003 at 2.

47 Lobertini, *supra* note 20, at 13-14.

48 *Mun. Research & Serv. Center of Washington, Local Ordinances for Washington Cities and Counties*, Report No. 50, 13 (May 2000).

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begins to apply.<sup>49</sup> Finally, a savings clause can ensure that past violations of an amended ordinance can still be prosecuted under that ordinance after the new ordinance takes effect.<sup>50</sup>

### **Incorporation of Model Codes**

Some model ordinances are written to be copied fully into the local code by interested parties. These codes may provide alternative policy options, blanks to be filled in, or advanced provisions that may be adopted only by local governments with a high level of sophistication.<sup>51</sup> Environmental models, which are very often site-sensitive, commonly fit this structure.

Other model codes are written to be incorporated into an ordinance by reference.<sup>52</sup> These are often voluminous documents containing very detailed provisions that have been agreed upon by a large number of experts—for example, the stormwater design manual.<sup>53</sup> Many local governments adopt a stormwater manual to accompany their stormwater ordinance and/or use the *Georgia Stormwater Manual* for this purpose.<sup>54</sup> This lets them incorporate detailed technical guidelines without including them directly in the ordinance itself. This tactic provides ease of use and also allows the local government to change some technical specifications without having to re-pass the entire amended ordinance.

A third and more novel approach is to secure compliance with private-party standards. Audubon International's Signature Program provides environmental standards to govern golf course construction and management,<sup>55</sup> and localities throughout the United States have used local ordinances to require compliance with the program as

a condition for golf course permit approval.<sup>56</sup> Also, the U.S. Green Building Council has developed the LEED (Leadership in Energy and Environmental Design) standards, which many jurisdictions are adopting as part of their green building codes.<sup>57</sup> Such an approach may be useful when private organizations have established certification programs that require the attainment of objective criteria.

## **VI. Legal Principles in Environmental Protection**

At this point, the drafter should, at the very least, have a bare-bones concept of the form a new ordinance should take. However, before proceeding further, the drafter should consider a number of legal concepts that can affect the implementation of environmental protection laws and ordinances.

### **Retroactivity**

Any proposed law that has a retroactive effect on an owner's property rights must be considered in light of a number of limiting principles. A law might be considered retroactive in effect if the measure changes what is originally a conforming or legal use into one that is not consistent with the new rule.

No specific retroactivity clause exists in the federal constitution, so retroactive laws are allowed so long as they do not interfere with other constitutional rights.<sup>58</sup> However, some states have included retroactivity clauses within their own constitutions, which may muddy the issue. Georgia is one such state.<sup>59</sup> Despite what appears to be a blanket prohibition, Georgia courts have held that some laws may be applied retroactively as long as they don't interfere with a property owner's vested rights (explained below).<sup>60</sup>

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49 Bowling Green, *supra* note 21.

50 *Id.*

51 See *Center for Watershed Protection Post-Construction Runoff Model Ordinance*, <http://www.stormwatercenter.net> (last visited Feb. 5, 2008).

52 Bowling Green, *supra* note 21.

53 See, e.g., *Newton County Stormwater Local Design Manual* (2006), [http://www.co.newton.ga.us/dmdocuments/NC\\_Water\\_Resource-Article\\_1-2.pdf](http://www.co.newton.ga.us/dmdocuments/NC_Water_Resource-Article_1-2.pdf).

54 Atlanta Regional Commission, *Georgia Stormwater Manual* (1st ed. 2001).

55 Audubon International, <http://www.auduboninternational.org/programs/signature> (last visited Feb. 5, 2008).

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56 Peter Bronski, *Enforcing Environmentalism*, 71 *Planning* 8, 24-27 (2005).

57 *US Green Building Council, State and Local Government Toolkit 4* (2002), [https://www.usgbc.org/Docs/Member\\_Resource\\_Docs/toolkit\\_statelocal.pdf](https://www.usgbc.org/Docs/Member_Resource_Docs/toolkit_statelocal.pdf).

58 10 Am. Jur. 2D *Constitutional Law* § 691 (2007).

59 Ga. Const. art. I, § 2, ¶ X.

60 *Sturm v. City of Atlanta*, 560 S.E.2d 525, 531 (Ga. 2002).

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## Vested Rights

Zoning laws are generally appropriate under Georgia law so long as they do not improperly interfere with vested rights of property owners.<sup>61</sup> Property rights may become “vested” when a property owner relies upon current zoning to make “a substantial change of position in relation to the land,” “substantial expenditures,” or “substantial obligations.”<sup>62</sup> On the other hand, the mere purchase of property before rezoning does not necessarily shield the owner from rezoning by imbuing the owner with vested rights.<sup>63</sup>

In Georgia, ownership vested rights do not necessarily result in a non-conforming use remaining in perpetuity. The Supreme Court of Georgia has held that such uses may be phased out “within a reasonable time.”<sup>64</sup>

## Takings

A body of law generally referred to as “takings law” may also be relevant depending on the type of legislation considered. “Takings” refers to the Fifth Amendment of the U.S. Constitution, which requires just compensation when property is taken by the government.<sup>65</sup> At the state level, Georgia has embodied this principle in its own constitution, which provides that “private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.”<sup>66</sup>

“Regulatory takings” may occur when a government regulation negatively affects the value of property. *Pennsylvania Coal v. Mahon* is a landmark case concerning regulatory takings and states the rule that “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.”<sup>67</sup> However, it tempers that statement by also pointing out that “government could hardly go on if to some extent values incident to property could not

be diminished without paying for every such change in general law.”<sup>68</sup>

The United States Supreme Court issued a test for when regulation constitutes a taking in *Penn Central v. New York City*.<sup>69</sup> The test provides three factors that must be considered: “the economic impact of the regulation,” interference with “investment-backed expectations,” (what use was expected before regulation barred it, and can a reasonable return still be made?) and the “character of the government action” (can it “be characterized as a physical invasion by the government [?]”).<sup>70</sup>

When regulation more severely impacts the value of a property, a categorical taking may occur. A categorical taking “is defined as one in which all economically viable use . . . has been taken by the regulatory imposition.”<sup>71</sup>

Georgia has a slightly different takings test, especially in the context of zoning.<sup>72</sup> Under the Georgia test, the court balances the ordinance’s relationship to the public welfare against the detriment experienced by the property owner.<sup>73</sup> (This analysis ends up sounding remarkably similar to a due process analysis, which is discussed in the next section.)

## Due Process

Local governments may not regulate property without due process of law.<sup>74</sup> Due process must be granted both procedurally (proper procedures must be followed before property can be regulated) and substantively (the government must adequately justify its reason for regulation).<sup>75</sup>

In response to procedural due process concerns, Georgia has enacted the Zoning Procedures Law

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61 George P. Dillard, Ga. Jur. Property § 25:32 (2007).

62 *Id.*; see also *BBC Land & Dev., Inc. v. Butts County*, 640 S.E.2d 33 (Ga. 2007).

63 *North Ga. Mountain Crisis Network, Inc. v. City of Blue Ridge*, 546 S.E.2d 850 (Ga. 2001).

64 *Gifford-Hill & Co. v. Harrison*, 229 Ga. 260 (1972); *Flippen Alliance for Cmty. Empowerment, Inc. v. Brannan*, 601 S.E.2d 106 (Ga. 2004).

65 U.S. Const. amend. V.

66 Ga. Const. art. I, § 3, ¶ I(a).

67 *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

68 *Id.* at 413.

69 *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

70 *Id.*

71 26 Am. Jur. 2D Eminent Domain § 12 (2007).

72 See, e.g., *Barrett v. Hamby*, 235 Ga. 262 (1975).

73 *Id.* at 266.

74 U.S. Const. amend. XIV, § 1; See also Ga. Const. art. I, § 1, ¶1.

75 See, e.g., *F. P. Plaza, Inc. v. Waite*, 230 Ga. 161 (1973) (discussing procedural due process in Georgia); *Barrett*, 235 Ga. at 265-266 (discussing substantive due process in Georgia).

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(ZPL),<sup>76</sup> the purpose of which is to “assure that due process is afforded to the general public when local governments regulate the uses of property through the exercise of the zoning power.” In essence, the law requires local governments to comply with a number of procedures while taking action on any “zoning decision.”<sup>77</sup> First, a public hearing must be held on the zoning decision, and advance notice of the meeting must be advertised according to the statute.<sup>78</sup> Also, the ZPL requires localities to adopt procedures that “govern calling and conducting” of the public hearings, as well as standards governing the “exercise of zoning power.”<sup>79</sup> These standards may include factors that the locality considers relevant when “balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property.”<sup>80</sup> While the ZPL does not provide these factors specifically, the Georgia Supreme Court has listed a number of potential factors that might be considered relevant.<sup>81</sup> Noncompliance with the ZPL where it is applicable will render an amendment to the local zoning code void.<sup>82</sup>

Also, the government must provide an adequate justification for regulating property under the due process clause of the federal constitution. In situations

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76 O.C.G.A. §§ 36-66-1 to -6.

77 O.C.G.A. § 36-66-4. Actions resulting in a “zoning decision” are defined in O.C.G.A. § 36-66-3.

78 O.C.G.A. § 36-66-4.

79 O.C.G.A. § 36-66-5.

80 O.C.G.A. § 36-66-5(b).

81 See, e.g., *Guhl v. Holcomb Bridge Road Corp.*, 232 S.E.2d 830, 832 (Ga. 1977)(listing factors that include: “(1) existing uses and zoning of nearby property; (2) extent to which property values are diminished by the particular zoning restrictions; (3) extent to which the destruction of property values of plaintiffs promotes the health, safety, morals or general welfare of the public; (4) relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) suitability of the subject property for the zoned purposes; (6) 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”).

82 *Tilley Properties, Inc. v. Bartow County*, 401 S.E.2d 527 (Ga. 1991). It is important to note at this point that allowing public input is also beneficial in generating public support for the ordinance. Public input helps create a better, stronger ordinance by allowing feedback from as many perspectives as possible. Giving a voice to landowners, developers, local leaders, and other citizens can also help to avoid creating unintended consequences because of an improperly vetted ordinance.

concerning land use, a “rational basis” test is used, where the government must offer a rational basis for its regulation of property.<sup>83</sup> Great deference is usually granted to governments imposing regulation on this point.<sup>84</sup> For this reason, incorporating a purpose statement in the preamble to the ordinance should be strongly considered to show that the ordinance has a rational basis.

## Preemption

A final concept that may potentially limit the possible options for natural resource protection is preemption. Preemption occurs where a controlling law supplants or supersedes similar regulation at a lower level of government.<sup>85</sup>

The U.S. Constitution contains a supremacy clause, which preempts any conflicting laws so long as Congress has the authority to pass those laws.<sup>86</sup> Georgia’s Constitution provides that state law will preempt local law, except when the legislature grants the authority to exercise concurrent jurisdiction with respect to “certain police powers in areas of concern to both [governments].”<sup>87</sup> Where preemption exists, it may be expressly stated in state law, or it may be implied, or it may occur when there is a conflict between laws.<sup>88</sup>

Conflicts of law and express preemption present simple cases for the drafter—do not draft ordinances in conflict with existing laws,<sup>89</sup> and do not draft them at all where the state or federal government authority has taken responsibility for the area of regulation. Determining whether implied preemption exists is a fact-specific inquiry, with no bright-line rules. Some guidelines do exist, however. If the superseding government authority has issued extensive laws and regulations on a subject, it is likely that they intended to preempt any further regulation.<sup>90</sup>

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83 Edward H. Ziegler, Jr., *Rathkopf’s The Law of Zoning and Planning* § 3:15 (4th ed. 2007).

84 *Id.*

85 *Blacks Law Dictionary*, 1197 (7th ed. 1999).

86 U.S. Const. art. VI.

87 *Franklin County v. Fieldale Farms Corp.*, 507 S.E.2d 460 (Ga. 1998).

88 *Id.*

89 Laws that strengthen or augment a general law’s regulation are not conflicting laws. See *id.*

90 See *Cotton States Mut. Ins. Co. v. DeKalb County*, 251 Ga.

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## VII. Conclusion

Drafting, passing, and enforcing a successful ordinance can be a very difficult and complicated task. However, properly drafted local ordinances can have an immediate impact on local natural resources. There are many ordinance drafting resources online and elsewhere. Often model codes are available to be adopted for local use. When using model codes, a drafter needs to evaluate existing laws and to decide whether to draft a new ordinance or amend what is already on the books.

Following the regulatory drafting conventions and structuring the ordinance in a logical fashion will help the user. There are also some important legal doctrines, such as takings and due process, to consider when drafting. Help from a local attorney, public interest law firm, or legal clinic can be crucial.

In summary, a well-crafted ordinance can be a key tool in protecting the environment at the local level, and organizations and citizens can play a crucial role in drafting such laws.

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## Appendix – Summary of Ordinance Drafting Steps

- I. Identify environmental problems
- II. Identify expert help and other resources
  - A. The University of Georgia Land Use Clinic
  - B. The Turner Environmental Clinic at Emory University
  - C. Attorneys
  - D. Nonprofit law firms
    - 1. GreenLaw
    - 2. Southern Environmental Law Center
  - E. Scientific advisors
    - 1. Center for Watershed Protection
    - 2. Local Government Environmental Assistance Network
  - F. State & local interest groups
    - 1. Georgia River Network
    - 2. Gwinnett Clean and Beautiful
    - 3. University of Georgia’s River Basin Center
- III. Evaluate existing law
  - A. Local ordinances
  - B. State laws
  - C. Federal laws
- IV. Follow ordinance drafting principles
  - A. Consult resources
    - 1. Attorneys & other experts
    - 2. Model ordinances
    - 3. City Charters or local Codes of Ordinances
      - a. Investigate mandatory format requirements
      - b. Consult model ordinance forms
    - 4. Public input
  - B. Follow model drafting principles
    - 1. Use plain language
    - 2. Use active voice
    - 3. Use present tense
    - 4. Use “may” and “shall” appropriately
      - a. Use “may” to denote discretionary duties
      - b. Use “shall” to denote mandatory duties
    - 5. Avoid legalese
    - 6. Use terminology consistently

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C. Organize Relevant Sections Appropriately

1. Captions and titles
2. Preambles
3. Enacting/ordination clauses
4. Definition sections
5. Substantive provisions
6. Housekeeping provisions
  - a. Severability clauses
  - b. Savings clauses

V. Consider potentially relevant legal principles

- A. Retroactivity limitations
- B. Vested rights protections
- C. Takings limitations
- D. Due process limitations
- E. Preemption





**Land Use Clinic**  
**University of Georgia River Basin Center**  
**110 Riverbend Road, Room 101**  
**Athens, GA 30602-1510**  
**(706) 583-0373 • Fax (706) 583-0612**  
**<http://www.law.uga.edu/landuseclinic/>**