

BB REVIEW

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NEW RESTRICTIVE COVENANTS LAW

If it becomes law, Georgia General Assembly Act 64 (formerly HB-173) will have a dramatic effect on the legality of restrictive covenants, such as post-employment non-solicitation and non-competition covenants. Georgia courts have been among the most hostile in the nation to these types of agreements due to Georgia's strong public policy against contracts in partial restraint of trade. To that end, Georgia courts will strike down post-employment covenants deemed overly broad instead of "blue penciling" the agreements to make them reasonable as is done in most other states. Act 64 legislates presumptively reasonable time, territorial and scope of prohibited activities restrictions for non-compete, non-solicitation, non-recruitment and non-disclosure covenants and provides that courts shall strike only those portions of the covenants that are necessary to fit them within the parameters of the Act.

The one wrinkle in Act 64 is that it only becomes effective "on the day following the ratification at the time of the 2010 general election an amendment to the Constitution of Georgia providing for the enforcement of covenants in commercial contracts that limit competition." This oddity is explained by the fact that Act 64 is currently barred by Art. III, Sec. VI, Para. V(c) of the Georgia Constitution of 1983 which prohibits the General Assembly from authorizing any contract "which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging

a monopoly." If the constitutional amendment is passed, Act 64 will provide employers with significantly more protection from departing employees than they currently have.

FIRM VICTORY IN ZONING DISPUTE

Atlanta Partners Michael Bowers, Joshua Archer and Michelle Rothenberg-Williams and Associate Righton Johnson recently obtained an important victory for a Firm client in a zoning dispute. Firm clients Century Center at Braselton, LLC and CCB1, LLC sought to develop property they owned in the Town of Braselton that fronted on State Road 211. The Town of Braselton had passed a zoning ordinance, the Overlay District Zoning Ordinance, which required property owners wishing to develop property fronting State Road 211 to make streetscape improvements within the SR 211 right-of-way (including sidewalks, trees, and lighting). The Town of Braselton attempted to require these improvements even though the SR 211 right-of-way was owned by the Georgia Department of Transportation and therefore not within the territorial boundaries of the Town. The Town refused to grant Century Center and CCB1's development permits until they made the required improvements along SR 211. Century Center and CCB1 challenged the constitutionality of the Ordinance but were denied summary judgment in Jackson County Superior Court. Century Center and CCB1 hired Balch & Bingham to handle their appeal.

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Michelle Rothenberg-Williams and Mike Bowers argued Century Center and CCB1's case before the Supreme Court of Georgia. They argued that the Georgia Constitution provides that municipalities have only the authority provided them by the Constitution and legislature. No law gives a municipality the authority to zone outside its boundaries. Because the property the Town tried to require Century Center and CCB1 to make improvements upon was in the GDOT's right-of-way, the Town did not have the authority to require the improvements. The Town argued that it was not zoning property outside its boundaries. Instead, the Town argued, it was zoning property inside the Town by requiring improvements outside the Town. The Supreme Court unanimously agreed with Century Center and CCB1 and declared the Overlay District Zoning Ordinance unconstitutional as it applied to property outside the territorial limits of the Town. Century Center and CCB1 is now seeking damages against the Town for denying its development permits and causing unnecessary expense and delay.

ROTHSCHILD STANDING SUMMARY BY JOSHUA MOORE

The Georgia Supreme Court issued an opinion on June 8, 2009 that will make it easier for citizens to challenge certain government actions. In *Rothschild II v. Columbus Consolidated Government et al.*, the Court unanimously overruled a Georgia Court of Appeals decision that would have required citizens to prove the merits of their case at a preliminary hearing to have standing to maintain the action.

The consolidated city-county government of Columbus, Georgia sponsored a special purpose local option sales tax ("SPLOST") referendum, promising to use the proceeds to build a new public library and an adjacent park. Voters approved the SPLOST and the library was built, but the park was never constructed. The *Rothschild II* plaintiffs, Columbus voters who contended the government failed to perform its obligations under

the SPLOST purpose, sought to compel the government to construct the park. The trial court, affirmed by the Georgia Court of Appeals, determined the plaintiffs lacked standing to bring the suit because they could not prove Columbus's actions were illegal.

The Georgia Supreme Court rejected the local government's contention that the plaintiffs must prove the merits of their case in order to have standing. The Court held Georgia law confers standing to compel government action when a government defendant owes a public duty which the plaintiff, as a member of the public, is entitled to have enforced. The decision removes procedural hurdles to citizen suits seeking to compel the government to perform a non-discretionary obligation.

AMES JOINS ADVISORY BOARD OF ORANGEHALO.COM

Balch & Bingham attorney Matthew Ames has been invited to serve on the advisory board of Orangehalo.com, an exclusively eco-friendly promotional products company based in Atlanta, Georgia. Its primary mission is to educate customers on the importance of choosing eco-friendly products. Said founder and CEO David Solomon: "collectively, the decisions of relatively few people can and will have an enormous impact on the way in which promotional products, branded apparel and uniforms are brought to market. Our efforts in shaping consumer demand will help to drive fundamental change as manufacturers are reprogrammed to meet the needs of an environmentally educated consumer."

Matthew is a Partner in the Atlanta office.