

ETHICAL ISSUES IN ZONING
AND LAND USE CASES

BY

FRANK E. JENKINS, III

*JENKINS & OLSON, P.C.
Cartersville, Georgia*

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JENKINS & OLSON, P.C.
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*By: Frank E. Jenkins, III, Esq.
JENKINS & OLSON, P.C.
770/387-1373
fjenkins@jnlaw.com*

I. INTRODUCTION

This paper discusses not only the ethical issues involved in rezoning, but also the ethical issues involved in making quasi-judicial land use decisions, such as variances. As rezoning is legislative, it presents one set of ethical problems. A different standard applies to quasi-judicial decisions. This is relevant because appeal of zoning decisions are de novo, while appeal of quasi-judicial decisions are on-the-record. The permissible behavior and actions available to the applicant in each has not been well defined in Georgia, but is evolving in other jurisdictions, and is becoming quite distinct for each type of decision. This paper explores some of the current boundaries and guidelines of acceptable behavior and considers some of the issues being raised elsewhere and in the superior courts of this state.

II. ETHICAL CONSIDERATIONS REGARDING REZONINGS

The first and main area of conflicts of interest in zoning are rezonings. A rezoning is a legislative decision by the local governing body, whether county commission or city council. Ethics in rezonings are statutorily codified in the Conflict of Interest in Zoning Act, discussed below.

A. CONFLICT OF INTEREST IN ZONING ACT

In 1986, the General Assembly enacted the Conflict of Interest in Zoning Act, O.C.G.A. § 36-67A-1 et seq. (the “Act”). This was, perhaps, a reaction to several recent zoning cases that had addressed the issue of a conflict of interest in a zoning context. Olley Valley Estates v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974), the Court crafted a rule and held that a zoning commissioner should be disqualified if he holds a direct or indirect financial interest in the outcome of the zoning vote, which is not shared by the public in general and which is more than remote or speculative. Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983) concerned a planning commission chairman was also the vice president of the applicant. The court found that a question of fact as to a taint on the rezoning was created where the chairman presided without voting over the initial hearing and did not preside or vote at the second hearing. Finally, in Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984), the trial court held that where two voting commissioners sold products or services to the applicant, the vote was tainted by fraud and corruption. These cases show a sort of evolution of a doctrine of fraud and corruption in zoning that was judicially created. In 1986, the General Assembly stepped in to create its own rules.

The Act applies, by its own terms, only to “rezoning actions” which means “action by local government adopting an amendment to a zoning classification which has the effect of rezoning real property from one zoning classification to another.” O.C.G.A. § 36-67A-1(9). By its own terms, it would not cover things like special exceptions or

variances, or even amendments that do not rezoning the property (such as an alteration of conditions).

The Act essentially codified the basic rule of Olley Valley Estates. The statute states that:

A local government official who knew or reasonably should have known he or she:

- (1) Has a property interest in any real property affected by a rezoning action which that official's local government will have the duty to consider;
- (2) Has a financial interest in any business entity which has a property interest in any real property affected by a rezoning action which that official's local government will have the duty to consider; or
- (3) Has a member of the family having any interest described in paragraph (1) or (2) of this Code section

shall immediately disclose the nature and extent of such interest, in writing, to the governing authority of the local government in which the local government official is a member. The local government official who has an interest as defined in paragraph (1) or (2) of this Code section shall disqualify himself from voting on the rezoning action.

O.C.G.A. § 36-67A-2.

Hence, a local official with a property interest directly in the property, or a financial interest in the company owning the property, should recuse himself. A "property interest" means any amount of direct ownership. O.C.G.A. § 36-67A-1(7). A "financial interest" means direct ownership of at least 10 percent of the stock or assets of a business entity. O.C.G.A. § 36-67A-1(3). Therefore, a commissioner owning one percent of a property directly would be disqualified, but a commissioner owning 9% of an applicant corporation would not be disqualified. It should also be noted that "local

government official” includes “any member of a planning or zoning commission” in addition to the traditional members of the governing authority.

The Act further states, “The disqualified local government official shall not take any other action on behalf of himself or any other person to influence action on the application for rezoning.” O.C.G.A. § 36-67A-2. Prior to Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000), this prohibition appeared quite broad. Little, however, held that a city council member could take the steps that are normally and properly undertaken by any citizen to advance his rezoning once he recused himself. The actions referenced in the case include, “taking any action in support of his rezoning application, including supplementation thereof, responding to inquiries from zoning authorities, or altering the property at issue or the business conducted thereon.” 272 Ga. at 342.

The case limited the reach of the Act to actions taken in the official’s public capacity. Lobbying other council members is not specifically discussed, but it would seemingly be a normal action undertaken by any citizen, and therefore not prohibited; and yet it appear to be just the sort of action that the Conflict of Interest in Zoning Act sought to prevent. However, as the law stands, local government officials can do anything that a citizen can do.

The Act also requires disclosure of all applicants and attorneys representing the applicant of any campaign contributions of more than \$250.00, within ten days after

filing the rezoning application. Disclosure is also required of any opponent of a rezoning, at least five days prior to the first hearing on the rezoning.

Dealing with the Conflict of Interest in Zoning Act is dealt with more specifically in Section III, below.

B. FRAUD/ABUSE OF THE ZONING POWER

Another ethical dimension to rezoning is the challenge that can be brought by neighbors. As is well-known, if a property owner is unhappy with a rezoning, he challenges the constitutionality of the existing zoning classification. Neighbors have a much tougher standard: “When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors.” Lindsey Creek Area Civic Association v. Columbus, 249 Ga. 488, 491, 292 S.E.2d 61 (1982). This standard has rarely been met. Wyman v. Popham, supra, is an example of where the Supreme Court found that there was evidence sufficient to authorize such a finding, and in that case, two council members had sold their products and services to the applicant’s business.

C. LOBBYING

Lobbying is a traditional activity in connection with rezonings and is not circumscribed by the Conflict of Interest in Zoning Act. The Act does require disclosure of campaign contributions by both proponents and opponents. However, as Little v.

City of Lawrenceville, supra, shows, there is little restraint even on the lobbying activities of a recused council member.

D. LOCAL ETHICS CODES

Another boundary for rezoning actions is the local county or city ethics code. Some counties and cities have formal ethics codes that prohibit the appearance of improper influence. One case on point is Dick v. Williams, 215 Ga.App. 629, 452 S.E.2d 172 (1994), where the Supreme Court found that the rezoning was lawful under state law, but was improper under Cobb County's ethics code. The county code required protection against the appearance of improper influence, and the fact that the son of one county commissioner worked in the firm representing the applicant was adjudged an interest. The rezoning application was remanded.

III. **ETHICAL CONSIDERATIONS REGARDING QUASI-JUDICIAL DECISIONS**

Quasi-judicial decisions are decisions where the governing body applies some law to a set of facts. For example, a variance or a special exception. [Arguably a special use permit is now a legislative decision, under the recent amendment to O.C.G.A. § 36-66-3, but that is a topic for another paper]. If a local government is taking an existing ordinance with criteria and applying it to the applicant's facts, that is generally a quasi-judicial decision. These types of decisions raise different ethical considerations. The Conflict of Interest in Zoning Act does not apply, by its own terms. The general notion

of ethics would be bound up in the question of due process. The party is also entitled to an unbiased decision-maker.

A. DUE PROCESS IN QUASI-JUDICIAL DECISIONS

As a quasi-judicial action, local government officials are much more circumscribed in their action. They are not acting legislatively, they are generally applying some standard already in their ordinance, such as determining if the applicant has a hardship sufficient to qualify for a variance. Applicants are entitled to procedural due process. Jackson v. Spalding Co., 265 Ga. 792, 462 S.E.2d 361 (1995). “Procedural due process means notice and an opportunity for affected parties to be heard. The purpose of the hearing is to permit interested persons to furnish information that will assist the board in deciding whether a variance should be granted. To that end, the chairperson may conduct the hearing informally; strict adherence to the rules of evidence is not required. The goal is a fair hearing.” 265 Ga. at 795.

In Jackson, the Court looked at four factors to determine the applicant had due process: 1) the board gave notice; 2) the applicants could speak and present evidence, and never sought to cross-examine the opposing witnesses; 3) the board produced at least a detailed account of the hearing; and 4) the board gave a written explanation of the reasons for its decision. Id. That was adjudged sufficient for due process.

B. EX PARTE CONTACTS

An issue that has been arising are ex parte contacts in quasi-judicial actions. Ex parte contacts are contacts by one party when the other party is not present to hear

them. This has long occurred in the legislative context and is generally known as lobbying. See *supra*. However, this issue is surfacing in superior court cases in challenges to quasi-judicial actions. As is often the case, the applicant will submit an application and then perhaps sound out the commissioners, and make representations and promises to get their application approved. The reasonable concern of the opponents is that they do not know what was said and what was promised at such meetings. A quasi-judicial is supposed to be on the record, yet such discussions are not.

While no case in Georgia has given this concept teeth, cases in other jurisdictions have. For example, the Idaho Supreme Court has held that “when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process.” Idaho Historic Preservation Council v. Boise, 134 Idaho 651, 8 P.3d 646 (2000). The Idaho Supreme Court pointed to the lack of fairness and the inability for rebuttal to evidence taken outside the public hearing. The same allegations could be made in Georgia under Jackson v. Spalding Co., *supra*. The Court in that case discussed the importance of cross-examination, and of a transcript or detailed record to provide an adequate basis for judicial review. Evidence taken outside the hearing may not satisfy those requirements. In the Idaho case, the evidence was phone calls, which the commissioner disclosed at the hearing and stated what was said and that he was not affected. The dissent thought that was enough to vitiate any due process concerns, but the majority did not.

In many Georgia scenarios, the developer or applicant submits evidence to the board and meets with them privately, and then a decision is made at the hearing. These types of actions are open to challenge under due process grounds if the opponents are not given full opportunity to know about the evidence, cross-examine, rebut and make a record on the issues.

C. OTHER ISSUES

Fraud and abuse of the zoning power, discussed above, is also a challenge that is available to challenge quasi-judicial actions. See, Cocroft v. Peters, 241 Ga. 115, 244 S.E.2d 6 (1978). An applicant is entitled to a non-biased decision maker. A biased decision maker would be a deprivation of due process. As can be seen, these concepts bundle together.

IV. DEALING WITH THE CONFLICT OF INTEREST IN ZONING ACT

The Conflict of Interest in Zoning Actions Act (O.C.G.A. Chap. 67A) became law on July 1, 1986, and applies to all city and county governments in the state which exercise the power of zoning. Yet, several years later many local governments have not set up procedures for implementing the Act. But, even though it is the law, the failure to set up procedures is nonetheless understandable. Local government officials (nor anyone else for that matter) do not like to disclose their personal financial matters. Under this Act, however, disclosures of financial interests in property subject to a zoning action are required and failure to disclose may constitute a crime.

This article offers some suggestions on how to implement the Act and make certain that the required disclosures are being made.

A. GENERAL PROVISIONS OF THE ACT

The Act is essentially divided into three parts. One requires disclosure of financial interests by a public official who will consider a rezoning action, the second part requires disclosure of campaign contributions or gifts by the applicant or its attorney, and the third part requires disclosure by any person or attorney representing a person or entity who opposes a rezoning of property.

It is important to note that the Act applies only to actions by a local government to adopt an amendment to a zoning ordinance which rezones property from one zoning classification to another. It does not apply, and thus the disclosures are not required, where a local government is adopting a zoning ordinance which is not an amendment to an existing zoning ordinance.

B. REQUIRED DISCLOSURE BY GOVERNMENT OFFICIALS

All government officials, including commissioners, council members and planning commission members, are required to disclose in writing the nature and extent of any ownership interest they have or any family members have in real property made the subject of a request for rezoning. In addition, these officials are required to disclose in writing any financial interest they have or any family members have in any business entity which has an ownership interest in the real property subject to rezoning. In the

Act, financial interests in a business entity means at least 10% ownership of the total assets or capital stock of the entity.

1. Disclosure by Applicant of All Ownership Interests

The disclosure to the local government of the names of all business entities, as well as individuals, who have an interest in the property subject to rezoning is too often overlooked and presents the greatest trap for the unwary. This is because local governments seldom require an applicant for rezoning to list all of the business entities which have an ownership interest in the real property in question or fail to get a thorough and complete description of all of the business entities which have ownership interests in the property. Since a government official must disclose a financial interest of at least 10% ownership in any of those entities, it behooves every local government to be certain that all of those business entities are accurately revealed in a rezoning application.

To be sure that all business entities are identified, every applicant should be required to list all of the owners of the real property subject to a rezoning application and state whether the owner is an individual, corporation, limited partnership, partnership, joint venture, etc. If any owner of the property is a partnership, then all of the partners' names should be listed. If the property is owned by a joint venture, then the complete names of each of the venturers should be listed. Only by requiring this thorough revelation of all ownership

interests can government officials accurately identify all business entities in which they have an interest.

2. Notice To Government Officials Of All Ownership Interests

The list of all individuals and business entities which have an interest in the property subject to rezoning should then be transferred to a form directed to all government officials, including planning commissioners, with space on the form for the official to enter that he or she either does or does not have an interest in the property or owners involved or, if so, state on the form the nature and extent of that interest. The form should include also a full description of the property so that the government official may indicate any ownership interest in the real property affected by the rezoning request. Each government official should be required to complete this form for each application for rezoning, and it should be made a part of the rezoning file maintained by the zoning administrator. This form as completed will satisfy the public disclosure requirements of the Act for government officials and eliminate any embarrassing disclosures later in the process which may taint the rezoning procedure.

3. Disqualification Of The Local Government Official

Under the Act, a local government official is disqualified from voting on a rezoning under two conditions: (1) the official has a direct ownership interest in the property subject to rezoning, even if that ownership interest is only partial;

and (2) the official has a 10% or greater ownership in a business entity which has a direct ownership interest in the property proposed for rezoning.

If the local government official has a family member who has a direct ownership interest in the property, the Act does not require disqualification. That doesn't mean an official should vote on a rezoning where a family member has an interest, but at least the Act does not mandate disqualification.

An official with an ownership interest described above not only must refrain from voting on the rezoning at issue, but must not take any action for himself or any other person to influence the vote on the proposed rezoning. That means avoid any involvement in the process, even discussion of the rezoning with anyone eligible to vote on the rezoning, whether it be a planning commission member or public official.

C. REQUIRED DISCLOSURE BY APPLICANTS AND THEIR ATTORNEYS

To satisfy the requirement of disclosure by the applicant and the attorney for the applicant, which is the second part of the Act, it is recommended that the application for rezoning include a section for the applicant and its attorney to list all campaign contributions or gifts aggregating \$250.00 or more which were made within two years of the filing of the application for rezoning. The form to be completed by the applicant and its attorney should list the names of all government officials, including commissioners, council members and planning commission members, and the form should ask if campaign contributions or gifts to any of the listed officials which totaled

\$250.00 or more were made within two years prior to the filing of the application. If the answer to the question is yes, the form should provide space for the applicant to list the official's name, the dollar amount of the campaign contribution, the date of the contribution, and a description of those gifts which taken together have an aggregate value of \$250.00 or more. Since this information would be contained on the application and made a part of the files maintained by the zoning administrator, this disclosure would satisfy the requirements of the Act.

Remember the campaign or gift disclosures apply only to those made by the applicant named in the application or the applicant's attorney. If the applicant is a corporation, for example, no disclosure is required if the president of the corporation made campaign contributions aggregating more than \$250.00. On the other hand, if the applicant is a partnership, then each partner who individually made contributions totaling the required minimum value should be listed separately on the application.

D. DISCLOSURE BY OPPONENTS TO A REZONING ACTION

The most problematical provision of the Act is found in Section 3(c). It provides that any opponent to a proposed rezoning action must file a disclosure of all campaign contributions to a local government official made within two years of the rezoning application which aggregate \$250.00 or more in value. Where it may be easy to have an applicant complete a form at the same time a rezoning application is filed, it is anything but easy to require anyone who opposes a rezoning request to file a disclosure. How then does a local government cope with this administrative nightmare?

An opponent who is required to disclose campaign contributions is anyone or the attorney representing anyone who speaks in opposition to a rezoning at a hearing before the local government or planning commission or who otherwise has contact, either written or oral, with a local government official to argue against the proposed rezoning action. This disclosure must be in writing and must be filed with the local government at least five days prior to the first hearing by the local government or any of its agencies in which it considers the proposed rezoning. For most local governments, the time for filing would be five days before the first hearing before the planning commission. Obviously, requiring disclosure by anyone who telephones a government official to oppose a rezoning is simply not feasible. Attention therefore should be directed to that opponent who can be reasonably identified--the one who speaks at a public hearing.

A suggested way to obtain the required disclosures is to establish a procedure for the public hearing which requires disclosure by all opponents. To that end, the notice of the hearing provided in the newspaper and any notices to adjoining property owners should recite the requirement of disclosure provided by this section of the Act and encourage all persons planning to speak at the hearing to file the required disclosure if their campaign contributions meet the minimum. Then at each hearing the presiding officer should announce at the beginning of the hearing that all opponents who have made the minimum contributions must have completed a disclosure form at least five days prior to the first hearing or they will not be permitted to speak in opposition to the proposed rezoning action.

It is a cumbersome procedure and made more difficult where an opponent is denied the right to speak out of ignorance of the provisions of this section. But it is the law, and if it is to be enforced, the disclosure is required. And although the Act does not expressly forbid a person from arguing against the proposed rezoning if the disclosure is not timely made, if an opponent speaks at a hearing without the required disclosure it would likely taint the proceedings and subject the decision of the local government to reversal.

E. SUMMARY AND CONCLUSION

To summarize the procedures suggested, a form should be prepared for each rezoning application and submitted to each government official who will be involved in the rezoning process. That form should include a clear description of the property to be considered for rezoning, the names of all individuals who have an ownership interest in the property, and the complete names of all business entities which have an ownership interest in the property. The form also should include a space for the government official to indicate whether he has an ownership interest in the property affected by the rezoning application or a financial interest of 10% or more in any business entity which has an ownership interest in the property to be considered. If such an interest exists, the forms should require explicit detail from the government official about the nature and extent of that interest.

The application to be filed by the rezoning applicant and its attorney should require a list of all individuals or business entities which have any ownership in the

property affected by the rezoning request. In addition, the application should contain space for the applicant to list any of the government officials to whom the applicant or its attorney has made a campaign contribution or gift aggregating \$250.00 or more within two years prior to the date of filing the application. That form should contain space to enter the dollar amount of each campaign contribution, the date of the contribution, and a description of any gifts which fall within the disclosure requirements.

As for opponents to a proposed rezoning action, notice of public hearing in the newspaper should include notice of the disclosure requirements of the Act and encourage opponents who have made the minimum campaign contributions to file their disclosure at least five days before the first hearing.

It is difficult to over emphasize the need for these procedures to satisfy the disclosure requirements under the Act. It is enough said that any applicant or any government official who knowingly fails to make disclosures required under the Act will be guilty of a misdemeanor. But even if it doesn't rise to the level of a crime knowingly committed, a legal challenge for failure to disclose will not only embarrass those involved but may taint the rezoning decision.

V. RECENT CASES OF INTEREST

- A. White et al. v. Board of Commissioners of McDuffie County et al., 252 Ga.App. 120, 555 S.E.2d 45 (2001).

The McDuffie County Development Authority contracted to purchase a tract of land for use as an industrial park. Financing was arranged by the authority through several banks. The authority applied for a zoning change which was approved by the McDuffie County Board of Commissioners. Thereafter, residents who owned nearby property sued claiming the rezoning was procedurally defective and that conflicts of interest influenced the board's decision. The residents challenging the rezoning alleged that a member of the board was also vice president of the bank that participated in financing the purchase of the property. They also claimed that two of the county commissioners were members of the development authority which requested the rezoning.

In its decision, the court noted that when neighbors of rezoned property challenge a rezoning on its merits, they must show fraud, corruption, or manifest abuse of the zoning power to the oppression of the neighbors. Self-interested or conflicted participation by officials voting in a zoning decision will support a challenge and invalidate a zoning action. The type of conflict or self-interest that will void a zoning decision is financial, i.e., the transaction will directly and immediately affect the official's pecuniary interest. A remote or speculative financial interest will not sustain a conflict of interest allegation. In this case, the evidence did not support self-interested or conflicted participation in the zoning decision. As to the board member, there was no

evidence that the rezoning of the property “directly or immediately affect[ed] his pecuniary interests.” This is because the evidence showed that the board member was vice president of the bank that financed the acquisition of the property, but there was no evidence to show that he benefited financially or stood to benefit financially from performing his official duties. As to the two board members who were also on the development authority, one was not a voting member, and the other was authorized to participate under ordinances which allowed the appointment of the board member to the development authority board.

B. Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000).

The procedural requirements under the Zoning Procedures Law preempt provisions in a city charter for the purposes of the adoption and amendment of zoning ordinances. Therefore, even if the city did not follow the zoning requirements under its charter, the action was valid because it followed the requirements of the ZPL.

A member of the city council sought rezoning of his property. In so doing, he filed a written disclosure of his interest and disqualified himself from voting under the Conflict of Interest in Zoning Act, O.C.G.A. Chapt. 36-67A. The court found that the steps taken by the council member to influence his rezoning application was that normally and properly undertaken by any other private property owner. Therefore, his timely disclosure and recusal fully protected the residents of the city and did not violate the due process rights of any complaining party.