

REPRESENTING NEIGHBORS
IN ZONING CHALLENGES

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TABLE OF CONTENTS

	Page
I. Introduction	1
II. Standing Issues for Neighbors	2
A. Standing for Individuals	2
B. Standing for Civic Associations	8
C. Timeliness of Standing Challenge.....	9
III. Claims of Neighbors	11
A. Procedural Issues	11
B. Manifest Abuse of the Zoning Power	15
C. Zoning Procedures Law / Due Process Challenges	16
D. Failure to Follow Own Procedures	17
E. Fraud or Conflict of Interest	18
F. Constitutional Trust	20
G. Spot Zoning	21
IV. Practical Issues	22

I. INTRODUCTION

Representing neighbors in land use cases has its own unique set of problems and issues. Neighbors often have a keen interest in development on adjacent property, but have relatively little input. The courts recognize that the question of neighbors input in rezoning cases is a question of how much influence the neighbors have on other people's property. The courts are especially aware of this issue when it comes to an attack on a rezoning that has been granted by the local government. In such a circumstance, where the property owner has asked for a certain zoning classification, and the local government has agreed and granted the change, that the courts are most reluctant to interfere. As the Supreme Court stated in a seminal neighbor case Lindsey Creek Area Civic Assoc. v. Columbus, 249 Ga. 488, 292 S.E.2d 61 (1982), "It is important to keep in mind that the governing authority has approved the zoning change, thereby giving its permission to the landowner to use the property as the landowner desires. It is also important to keep in mind that we deal now with the right or power of neighbors to deny to the landowner the right to use the property as the landowner desires and as approved by the governing authority." 249 Ga. at 490.

Thus, despite the feeling of many neighbors that they should have more influence over rezoning changes, the courts are reluctant to intervene. The General Assembly has mandated public hearings under the Zoning Procedures Law, and so neighbors have access into the public hearing process, but once a decision is made, the standard to challenge becomes much tougher. In addition, from a practical point of view,

representing neighbors has its own set of difficulties that will be touched on briefly. First, this paper will discuss the standing issues for neighbors, and the substantive challenges available to neighbors who are dissatisfied with a zoning decision.

II. STANDING ISSUES FOR NEIGHBORS

Many cases that were brought by neighbors get no farther than a challenge to standing. That is because simply being upset with the zoning change does not give a neighbor standing to bring any sort of challenge. Typically two sorts of plaintiffs attempt to bring challenges: individual neighbors and civic associations or neighborhood groups.

A. STANDING FOR INDIVIDUALS

Individual property owners may or may not have standing to enjoin rezoning depending upon the effect of such rezoning on the owners and their property. Since the question at issue is interference with others' property rights, the courts have adopted a tough standing test. Although diminution in the values of the neighbors' property (damages) is not considered when the merits are reached, it is considered on the issue of standing. It is in fact essential that the individual show damages that are different from the community in general. This can be a frustrating point to make to clients who are neighbors. The ultimate issue is not going to be decided on whether the neighbor's property suffers some loss in value through the rezoning, but that question is central to the standing issue. As the Supreme Court stated in Lindsey Creek, "Allegations of

damage to person or property sufficient to confer standing, or even proof sufficient to sustain the allegations when put in issue, do not in themselves determine the merits of the controversy and may even be irrelevant thereto. However, they are necessary in order to qualify the claimant as one entitled to present the controversy to the court for adjudication.” 249 Ga. at 491. In Brock v. Hall County, 239 Ga. 160, 236 SE2d 90 (1977), the Supreme Court adopted for use in zoning cases the “substantial interest-aggrieved citizen” test prescribed by the General Assembly as the requirement for standing to appeal board of adjustment decisions, noting that the test of standing in rezoning suits is similar to the special damages standing test as to public nuisances.

The “substantial interest-aggrieved citizen” test has two steps to show standing. First, a person claiming to be aggrieved must have a substantial interest in the zoning decision, and second, this interest must be in danger of suffering some special damage or injury not common to all property owners similarly situated. Neighbors who merely suffer inconvenience would not qualify, but persons who stand to suffer damage or injury to their property which derogates from their reasonable use and enjoyment of it would meet this test.

Damages that are not sufficient to be special damages distinct from those experienced from all property owners in the area would include increased traffic, potential for storm water issues, crime threats, and generalized claims that home values will diminish. These sorts of general claims are typically rejected.

1. Traffic Concerns

In both Lindsey Creek, and Victoria Corporation v. Atlanta Merchandise Mart, Inc., 101 Ga.App. 163, 112 S.E.2d 793 (1960), the courts held that the mere increase in traffic congestion adjacent to one's property as the result of improvements erected on nearby property and the attendant inconvenience resulting therefrom which are damages suffered alike by all property owners similarly situated, does not give to one individual such a substantial interest in a zoning decision to authorize a challenge. The courts call increased traffic a condition incident to urban living. "It is merely the result of normal, urban growth and development. To hold that such an inconvenience would give to any resident or property holder of an urban area the right to override the decisions of boards of zoning appeals any time such property owner or resident disagreed with such decision would be a dangerous precedent to establish. It would result in materially slowing, if not completely stopping, the inevitable and necessary growth of large modern cities." 249 Ga. at 491.

2. Flooding

Neighbors in the Lindsey Creek case, supra, complained of flooding potential from the proposed development, which was a 42-acres site zoned to commercial and apartments. The court noted that the ordinance rezoning the property includes conditions that water drainage be handled adequately to reduce or maintain the same flow that is currently shed from the now undeveloped land, which is a provision contained in most all current development regulations. The court concluded

that those conditions are enforceable when permits are issued, and do not raise a damage issue.

3. Crime, Noise, Other Nuisance

Generalized claims of crime, noise and other nuisances in the neighborhood increasing have been rejected. See, Vineville, supra. However, in DeKalb Co. v. Wapensky, 253 Ga. 47, 315 S.E.2d 873 (1984), the court held, “In the present case not only was there testimony that the value of neighboring properties would be reduced, but that additional damages in the form of noise, odor, and visual intrusions on peace and privacy would occur to deny in varying degrees the complainants’ use of their property.” This appears to be no more than generalized claims, but the record may have contained more specific detail.

4. Home Value Diminution

Generalized claims that home values in the neighborhood will decline have also repeatedly been rejected as insufficient to give standing. In Lindsey Creek, the court held that, although the neighbors testified that in their opinions the value of their homes would be reduced by the increased traffic and the proximity of the proposed psychiatric hospital, evidence of a general reduction in property values is not the substantial interest required to meet the aggrieved citizen test for standing. Similarly, in Macon-Bibb Co. Planning & Zoning Comm. v. Vineville Neighborhood Assoc., 218 Ga.App. 668, 462 S.E.2d 764 (1995), the court rejected general claims from the neighbors about lower property value, noting that no expert real estate appraiser, traffic

engineer, land planner, or other expert witness testified at the zoning hearing that any member of the Association, whether adjoining landowner or otherwise, would suffer any substantial damage to any substantial interest. The court also pointed to Lindsey Creek as standing for the proposition that neither the homeowners' opinions that their property values would decrease nor their claims of nuisance met the substantial interest required to satisfy the aggrieved citizen test for standing.

5. Specific Home Value Diminution

As can be seen, the generalized claims for damages are typically insufficient. The best evidence for standing is a specific showing of a decline in home values supported by expert testimony from adjacent property owners. In DeKalb County v. Wapensky, 253 Ga. 47, 315 S.E.2d 873 (1984), and in Brand v. Wilson, 252 Ga. 416, 314 S.E.2d 192 (1984), the Supreme Court concluded that evidence of a 15-20 percent decline in value of a neighbors adjoining property was sufficient evidence upon which a trial court might find substantial damage to a substantial interest. As the court put it in Wapensky, homeowners who will "bear the brunt of the changed conditions" typically will have a substantial interest. Such persons are not casting themselves in the role of "champions of the community," if they have presented evidence of an interest of real worth and importance.

Thus, the best way to have standing is to have directly adjacent neighbors, who can present evidence, from an expert, of potential diminished value, in addition to other nuisances such as specific noise, odor, light pollution, etc.

6. Property Directly Adjacent

At least two cases have held that directly adjacent property to the subject property being rezoned would suffer a significant impact such that proof of an economic loss is not required. In AT & T Wireless v. Leafmore, 235 Ga.App. 319, 509 S.E.2d 374 (1998), nearby owners of condominium units launched a challenge to the issuance of building permits for a cell tower on the property of a veterinary clinic. To show standing, the condominium owners submitted affidavits stating that they owned units adjacent to and located within 40 to 100 feet of the clinic and 130 to 150 feet of the tower; that the tower would be visible from their units and interfere with their enjoyment of their units and the common areas; and that the change in the use of the clinic property would affect their property. As to special damage or injury, the owners produced evidence that the location of the tower on the adjacent lot might cause a decline in the value of their property. Although AT & T produced evidence to the contrary, the Court, citing to Moore v. Maloney, 253 Ga. 504, 506(1), 321 S.E.2d 335 (1984), concluded “the evidence in its totality establishes a substantial interest on the owners' behalf. We note that loss of economic value of land may be one manifestation of damages caused by rezoning and may be sufficient by itself to support standing, but evidence of a change in property value is not required as a prerequisite for the attainment of standing. Where the parties who seek standing own property contiguous to the rezoned lot and have to live with any changes in the use of the property, such a requirement would be inappropriate.” 235 Ga.App. at 321. [cits. omitted].

The Supreme Court in Moore had stated, “while the loss of economic value of land may be one manifestation of specific damages caused by rezoning and may be sufficient by itself to support standing, we will not require evidence of a specific change in property value as a prerequisite for the attainment of standing. Where, as here, the parties who seek standing own property contiguous to the rezoned lot and have to live with any changes in the use of the property, such a requirement would be particularly inappropriate.” 253 Ga. at 506. It is important to recognize in both cases, however, that the Court looked to other sorts of evidence to support standing.

B. STANDING FOR CIVIC ASSOCIATIONS

Civic associations and subdivision clubs do not have standing to enjoin rezoning unless they own property affected by the rezoning, or unless they are joined by individual plaintiffs who have standing to do so. Normally the standing of one party is not dependent upon the standing of another party. Nevertheless, in zoning cases the courts find this “dependent standing” preferable to (a) detailed inquiry as to the membership of the civic association to determine its independent standing, or (b) requiring those individual property owners who have standing to bear the entire burden of opposing the rezoning. See, Lindsey Creek, supra.

In DeKalb Co. v. Druid Hills Civic Assoc., 269 Ga. 619, 502 S.E.2d 719 (1998), the Supreme Court provided additional insight into the logic of not permitting civic associations to have standing alone, holding “Zoning ordinances and determinations do not confer a public right to the extent that they can be attacked by anyone interested in

having the laws executed and the duty in question enforced. A party must have a special interest in order to enforce or attack a zoning determination. To rule otherwise would bestow a procedural advantage upon remote parties as opposed to those who are directly affected. This is true because remote parties could proceed directly to court by means of mandamus or injunction while parties with special damage would be required to exhaust administrative remedies.”

C. TIMELINESS OF STANDING CHALLENGE

A certain inconsistency can be found in the case law regarding whether a challenge to a party’s standing can be raised for the first time in superior court. Of course, this issue would only be relevant to an “on the record” review of a quasi-judicial or administrative decision, and not a de novo appeal such as the challenge to a zoning ordinance. In a de novo appeal, the superior court is not limited to considering matters raised before the decision-making body, and thus standing challenges are frequently made for the first time in that court.

RCG Properties, LLC v. City of Atlanta Bd. of Zoning Adjustment, 260 Ga.App. 355, 579 S.E.2d 782 (2003), involved an administrative, quasi-judicial appeal. In that case, the adjacent property owner (RCG) challenged the issuance of a building permit for a parking structure. The City tried to challenge the standing of RCG to bring its challenge, and the Court dismissed it as being raised too late since it was not raised before the BZA. The Court relied upon the notion that no new evidence can be presented in an appeal of a quasi-judicial decision, and the standing issue was raised for

the first time in superior court, and thus too late. Thus, if the standing issue is not raised at the first hearing, it is too late to challenge it later.

However, the Supreme Court did not appear to apply that rule in Massey v. Butts County, 281 Ga. 244, 637 S.E.2d 385 (2006), where it considered the standing to challenge the issuance of a building permit for a barn, a clearly administrative, quasi-judicial proceeding. A footnote in the case notes that the record does not contain the portion of the Butts County Zoning Ordinance containing procedures for appeals and “accordingly we will not address appellant’s standing to appeal the decision of the Butts County Board of Zoning Appeals.” 281 Ga. at 245. Yet, despite not caring to address standing to bring the challenge below, the Court went on to find that the appeal, seeking a declaration that the barn was not a permitted use, and an injunction requiring its removal, must be dismissed for lack of standing. The Court further found that the “substantial-interest/aggrieved citizen” test applied to all attempts to bring equitable relief or declaratory relief to attack or enforce a zoning decision.

This opinion, which overtly refers to two lines of cases on standing, would seemingly overrule *sub silentio* the decision of the Court of Appeals in Rock v. Head, 254 Ga.App. 382, 562 S.E.2d 768 (2002), where the Court held that nearby property owners have standing to bring an appeal to challenge a zoning decision without showing special damages: “It is well settled that property owners may seek to prevent their neighbors from developing or using their property in violation of its existing zoning without showing special damages.” 254 Ga. at 383. Apparently, it is not well-settled enough!

A cautious practitioner would do well to have evidence to satisfy the substantial-interest/aggrieved citizen standing test even in an administrative appeal, as it is never clear which standard the Courts will choose to apply.

III. CLAIMS OF NEIGHBORS

Once sufficient neighbors with standing have been identified, the challenge can go forward. Neighbors can attempt to launch challenges to the merits themselves, they can attempt to find a procedural flaw, or they can attempt to find a fraud or conflict of interest flaw. Of course, like any zoning suit, there are certain procedural prerequisites that should be addressed first, and these will be discussed first below.

A. PROCEDURAL ISSUES

In addition to standing, attorneys representing neighbors need to keep some additional procedural issues in mind.

1. Thirty Days to Sue

The thirty-day requirement for appealing a zoning decision should be considered the statute of limitations for neighbor challenges, except in two limited circumstances. First is the circumstance mentioned above where the challenge is actually cast as a declaratory judgment seeking a determination as to the effect of a zoning action, rather than the appeal of a zoning decision. This is a subtle distinction, however, and it should not be routinely relied upon. The typical challenge to a zoning action is an appeal, and should be filed timely.

The second exception is a challenge to the validity of the zoning under the Zoning Procedures Law or general notions of due process, which can serve to invalidate a zoning even years later. This will be discussed further below.

2. Proper Venue, Jurisdiction and Parties

Zoning suits are suits in equity, and are heard in superior courts. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522 (1981). The typical challenge is a challenge to the constitutionality of a zoning ordinance, and hence cannot be tried in state court. The challenge, incidentally, is always to the constitutionality of the existing zoning, not whether the proposed zoning is constitutional or provides a higher and better use.

Zoning cases are brought against the city or county making the zoning decision. Suits against counties should be brought against the county. Ga. Const., Art. 9, Sec. 1, Para. I. Bringing suit against an entity such as a Board of Commissioners is equivalent to suing the county. Guhl v. Tuggle, 242 Ga. 412, 249 S.E.2d 219 (1978). Entities such as planning commissions or boards of zoning appeals are not proper parties as they do not have the power to zone. Riverhill Community Ass'n v. Cobb County Bd. of Com'rs, 236 Ga. 856, 226 S.E.2d 54 (1976).

Since this is a neighbor challenge, the challenge is to a successful rezoning of other person's property, and the successful applicant should be named as a party. Riverhill Community Ass'n v. Cobb County Bd. of Com'rs, 236 Ga. 856, 226 S.E.2d 54

(1976). They would have the right to intervene were they not named, and the decision needs to be binding on them as well.

Individual city council members or county commissioners are not necessary or proper defendants in their individual capacity. They can be named in their official capacity, but that is generally superfluous. However, mandamus requires naming an individual. In the distant past, the courts were strict about this requirement. In the more recent past, the issue seemed forgotten as there are many examples of mandamus cases that proceeded against the entity, and had no individual defendants. However, the old law has been revived. In the recent case of City of Homerville v. Touchton, 282 Ga. 237, 647 S.E.2d 50 (2007), the Supreme Court affirmed the requirement of individuals as defendants, and in fact held that a city is not a proper party to a mandamus action. Since mandamus is a writ compelling an official to take action, this of course is a logical requirement.

If a claim of personal wrongdoing exists, claims can of course be brought against individual government officials. Otherwise, claims against officials in their individual capacity are dangerous, and can lead to sanctions. The officials have legislative immunity in their individual capacity against challenges in zoning suits. Whipple v. City of Cordele, 231 Ga.App. 274, 499 S.E.2d 113 (1998).

The proper jurisdiction is of course the county where the local government sits, which is also where the land sits, and so this is never an issue.

3. Proper Form of Suit

Zoning appeals are frequently either brought as declaratory judgment actions or mandamus cases. Sometimes they are simply styled appeals. Because the appeal of a zoning decision is a de novo review, this aspect of the form matters relatively little, unless the ordinance specifies a particular form for the appeal.

The courts have curiously given some discretion to the local government as to how an administrative appeal proceeds, holding that there can be a direct appeal, if the ordinance so provides, or otherwise it should go by mandamus. Beugnot v. Coweta County, 231 Ga.App. 715, 500 S.E.2d 28 (1998). An administrative appeal would be a permit or variance denial. Mandamus, under O.C.G.A. § 9-6-20 et seq., has some of its own rules, including a very short timeframe for the hearing. Thus, the well-prepared applicant can get its case ready, and file mandamus and seek a quick hearing, leaving the local government little time to prepare. The courts have even approved requiring such an appeal to go by writ of certiorari, a truly arcane proceeding under O.C.G.A. § 5-4-1 et seq. Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995). Electing the writ of certiorari prevents the mandamus sort of ambush, and so it has been selected by many jurisdictions.

The zoning appeal will ultimately be decided by the judge, as the constitutionality of a zoning decision is not a jury question. Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000). Further, the appropriate decision, if the court finds the current zoning unconstitutional, is not to rezone the property, but only to

order the property rezoned in a constitutional fashion. Town of Tyrone v. Tyrone LLC, 275 Ga. 383, 384, 565 S.E.2d 806 (2002).

B. MANIFEST ABUSE OF THE ZONING POWER

Once Plaintiffs with standing have been located, and the attorney is ready to file suit within thirty days and has identified the essential parties, venue, and form of the case, the next question is what claims to bring. The most basic claim is simply a direct challenge to the rezoning. Again, however, because the courts are dealing with the right or power of neighbors to undertake to control the use of nearby land owned by another, diminution in the values of the neighbors' property (i.e., damages), unlike the usual property damage case, is not in and of itself cause to set aside the rezoning. Neighbors of rezoned property cannot invalidate the rezoning by showing that the preponderance of the evidence was against the zoning change. 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. Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977). Fraud or corruption will be dealt with below, and this section discusses the "manifest abuse of the zoning power" standard.

Manifest abuse of the zoning power to the oppression of the neighbors is a difficult concept to grasp, as it is frequently intertwined with claims of fraud or conflict of interest, or it is co-joined with procedural defects. That is to say, it is rarely separated as a concept in and of itself. It is difficult to say if there could be a rezoning that was

procedurally proper, where no person had a conflict, and yet still constituted a manifest abuse just based solely on the rezoning itself. Passing references to showings of constitutional rights that have been abridged suggest one avenue. Another seems to be a showing that the action taken, whether a rezoning or other land use grant, flatly violates the provisions of the zoning ordinance. For example, if the ordinance requires a certain minimum size or some other provision, and the decision simply violates the ordinance, that may constitute manifest abuse. The concept indeed has not appeared much in neighbor cases in recent years.

C. ZONING PROCEDURES LAW/ DUE PROCESS CHALLENGES

A much stronger potential challenge by neighbors is a challenge to the due process of the rezoning, and/or a challenge under the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq. If the rezoning was conducted without complying with the Zoning Procedures Law, it would be invalid. Typically this would be because of a defect in the sign posting or the newspaper requirements, such as not being put up or published sufficiently early. The ZPL requires the notice be published at least 15 but no more than 45 days before the hearing, and that the sign be published at least 15 days before the hearing. Challenges have been successfully made to the content of the notice, when for example the rezoning is ultimately granted to some other classification than the sign and notice provided. The Supreme Court requires strict compliance, not the usual “substantial compliance” with the terms of the Zoning Procedures Law. McClure v. Davidson, 258 Ga. 706, 373 S.E.2d 617 (1988).

For challenges asserting a denial of procedural due process, the Courts have allowed challenges years later to go forward, and succeed. The reasoning is that without due process, the rezoning is void and can be challenged at any time, as it was void. Golden v. White, 253 Ga. 111, 316 S.E.2d 460 (1984). This of course can be very frustrating to an innocent developer who is relying on actions taken years before. In the Golden case, it did not matter that the persons bringing the due process challenge for lack of notice did not even live in the area at the time of the rezoning, and could not possibly have received notice. Rezoning runs with the land and not the person, and if the notice was defective, the rezoning is defective.

The downside to these challenges is that the local government that granted the rezoning can cure the problem by running the zoning through the process again. Unsuccessful applicants often try to challenge the entire ordinance under the ZPL and knock it down, but neighbors rely on the protection of the ordinance to protect their land, and so should not advance ZPL claims against the entire ordinance.

D. FAILURE TO FOLLOW OWN PROCEDURES

Another useful challenge for neighbors is to challenge whether the local government followed all the procedures in its own ordinance. Even if the procedures are not required by the ZPL, they can be binding. In such cases, one option for the trial court is to remand the decision. Helmley v. Liberty Co., 242 Ga.App. 881, 531 S.E.2d 756 (2000). In Brand v. Wilson, 252 Ga. 416, 314 S.E.2d 192 (1984), the Supreme Court agreed with the trial court that the rezoning was defective because of a failure of the

applicant to submit a plat, which was a requirement of the zoning ordinance, and would serve to give the surrounding property owners notice of the use to which the property would be put if rezoned. The Court has repeatedly required strict compliance with the notice requirements of zoning ordinances. See, South Jonesboro Civic Assoc. v. Thornton, 248 Ga. 65, 67, 281 S.E.2d 507 (1981), and cases there cited.

An interesting defense to this type of challenge, not seen frequently, would be the claim that the Zoning Procedures Law preempts any local procedure. In the case of Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000), a neighbor challenged the adoption of a rezoning as not complying with the City Charter. The Supreme Court held that the Zoning Procedures Law (O.C.G.A. . 36-66-1 et seq.), as a special law, controlled over the general law of the charter and preempted any local procedure in conflict therewith: “we hold that the ZPL has preempted the provisions in the City Charter for the purposes of the adoption and amendment of zoning ordinances. Accordingly, even assuming that the City did not follow the procedural provisions of its own Charter, we find no error in this rezoning case.” Thus, since the adoption complied with the ZPL, it was valid. 272 Ga. at 341.

E. FRAUD OR CONFLICT OF INTEREST

Finally, there is the very useful claim of fraud or conflict of interest. As noted above, this is often paired with the concept of “manifest abuse of the zoning power”. The basic formulation for a fraud would be 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. Olley Valley Estates v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974). A case where the planning commission chairman was also vice president of the applicant corporation raised a potential conflict (Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983)) as did a case where voting commissioners sold products or services to the applicant (Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984)).

The burden of proof on showing a fraud or conflict of interest has been found to be a preponderance of the evidence. In Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984), the Court considered the issue: “The general rule against inquiring into the motives of the legislative body gives way as a matter of public policy where there is an allegation or appearance of corruption or fraud. Bearing in mind that fraud is often subtle and difficult of proof, and, in addition, that the integrity of the process of public deliberation is of the utmost importance to the public weal, we will not impose upon those claiming fraud or corruption in the promulgation and administration of zoning ordinances any standard other than that of the preponderance of the evidence.”

The General Assembly has also created a somewhat weak statutory provision, the Conflict of Interest in Zoning Act, O.C.G.A. § 36-67A-1 et seq. This act requires disclosure and recusal of commissioners with a direct financial interest or direct ownership interest in the property. If their relative has a direct financial or ownership interest, this act simply requires disclosure. It also requires disclosure of campaign contributions by supporters and opponents.

The Act requires that the disqualified local government official not take any other action on behalf of himself or any other person to influence action on the application for rezoning after disqualification. The case of Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000), narrowed this prohibition to “official action.” In other words, local government officials can do anything that a citizen can do.

F. CONSTITUTIONAL TRUST

One slight variation on the fraud and conflict of interest claim would be the violation of the constitutional trust provision of the Georgia Constitution, Art. 1, Sec. 2, Para. I, which states, “All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.” The constitutional trust provision is applied when a public officer has definitely benefited financially (or definitely stood to benefit financially) as a result of simply performing their official duties. Ianicelli v. McNeely, 272 Ga. 234, 527 S.E.2d 189 (2000). This is of course very close to the traditional fraud in zoning test. Interestingly, in the case of Crozer v. Reichert, 275 Ga. 118, 561 S.E.2d 120 (2002) the Court stated, “In Dunaway v. City of Marietta, 251 Ga. 727, 308 S.E.2d 823 (1983), we held that the constitutional trust provision prohibits the chairman of the city planning commission from any participation in zoning applications filed by a corporation in which the chairman served as an officer.” This is an interesting comment because Dunaway does not mention the constitutional trust provision nor cite to the Constitution. In any event, it is now seen as

falling under the ambit of this provision, which simply provides another basis to attack a financial conflict of interest in any public officer.

This is useful to neighbors to the extent the definition of a “public officer” is quite broad, and is broader than the traditional analysis would cover, with its focus on the decision makers themselves. In Crozer, the official at issue was the planning director, who had an application in on his own property, and asked a staffer to review it. The Court noted that the term “public official” consistently has been given broad application by the appellate courts. The Court recognized that if the individual is appointed, the determination of whether he is a public officer is to be made based on an analysis of that person’s duties, powers and obligations, not the extent of his authority. The record did not contain enough evidence, so summary judgment in the planning director’s favor was reversed.

G. SPOT ZONING

An additional favorite claim of neighbors is that the rezoning constitutes “spot zoning.” “Spot zoning” is a term used by the courts to describe a zoning amendment which is invalid because it is not in accordance with a comprehensive or well-considered plan. East Lands, Inc. v. Floyd County, 244 Ga. 761, 262 S.E.2d 51 (1979). It has been defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. Spot zoning is generally used to refer to rezoning a small parcel to a classification that differs from the general surrounding area.

However, just because a small area is zoned differently from the surrounding area does not equate to spot zoning. Spot zoning has been found in relatively few cases. The general test for spot zoning is whether the zoning is arbitrary or whether it is done in accordance with the comprehensive plan. The analysis depends heavily on the facts of the particular case.

Spot zoning has not been mentioned in a decision of the Georgia Supreme Court since 1987 and has not been seriously discussed since 1983. Bobo v. Cherokee County, Ga., 248 Ga. 554, 285 S.E.2d 177 (1981). In Bobo, the Supreme Court found that the decision to deny the rezoning of property from residential to commercial amounted to the denial of due process, and held that, despite the fact that it would inject commercial into a primarily residential area, it did not constitute spot zoning, because there was little evidence of harm to other owners and substantial evidence of harm to Bobo. The doctrine appears to have little life left in Georgia. Instead, a radically inconsistent use is attacked under the framework of an insubstantial relation to the public health, safety, welfare and morality.

IV. PRACTICAL ISSUES

The preceding sections discussed the technical aspects of representing neighbors and thinking about the claims they can bring. There are additional practical difficulties that bear mention. Specifically, representing a group of neighbors creates problems with funding, control and divergent interests.

First of all, there are always more neighbors frustrated by a rezoning decision than are willing to pay to actually go to court. Hence, an ad hoc group that has formed to oppose a decision may have numerous members, but few actual deep pockets. Occasionally a well-funded civic association has been incorporated, and in that case the civic association can be the client. Of course, given standing concerns, adjacent property owners need to be located to be plaintiffs as well, and then there are multiple parties to represent. The key is to form a good relationship with the deep pockets and the plaintiffs, and hopefully those will be the same persons. If not, it should be made clear that as an attorney, one actually represents the interests of the plaintiff, and that if that causes a conflict with the interest of those paying, there may have to be a withdrawal.

Ideally, if there is a civic association, contact can be maintained just with the president or other officer of that group, who will coordinate communications with the other interested parties. If there is no real formal group, then the task is to insure each plaintiff and the major supports are kept in the loop, but they should be asked to designate a spokesperson or contact point so that the attorney does not get conflicting instructions.

There is always the potential of interests diverging between the various parties. Immediately adjacent neighbors can sometimes be satisfied by promises of buffers and other consideration, which may make the use palatable, especially when that person is paying to fund the litigation. Such a solution does not make happy the neighborhood

gadfly who opposes the rezoning on principal but does not live adjacent and does not fund the suit. The real problem can arise when that person is the one funding the suit.

Additionally, on the funding question, the attorney needs to make sure he or she has a good fee letter or contract with the key parties, and not with the unincorporated association. The neighbors need to understand that certain individuals will ultimately be held financially responsible for fees and costs. Just having an agreement with an unincorporated association without assets is worthless if fees run up at trial and no one wants to pay. Like any new client, a retainer is a good idea, but groups of neighbors often have to bundle smaller checks to achieve a reasonable retainer.

Thus, combining a difficult chance at success with the practical issues of funding, control and divergent interests always makes representing neighbors a challenge.