

1-1-1992

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Recommended Citation

Bentley G. Cline, *LOCAL GOVERNMENT Conflict of Interest In Zoning Actions: Provide for Disqualification of a Zoning Official When There is a Conflict of Interest and expand Rezoning Applicants' Political Contribution Disclosure Requirements*, 8 GA. ST. U. L. REV. (1992). Available at: <https://readingroom.law.gsu.edu/gsulr/vol8/iss1/4>

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LOCAL GOVERNMENT

Conflict of Interest In Zoning Actions: Provide for Disqualification of a Zoning Official When There is a Conflict of Interest and Expand Rezoning Applicants' Political Contribution Disclosure Requirements

CODE SECTIONS:	O.C.G.A. §§ 36-67A-1 to -4 (amended), -5 (new)
BILL NUMBER:	SB 67
ACT NUMBER:	500
SUMMARY:	The Act provides for disqualification of a zoning official from voting on a rezoning application where there is a conflict of interest. The Act expands a rezoning applicant's reporting requirements of political contributions to zoning officials. A rezoning applicant's agents (including attorneys) must disclose their contributions. The Act provides for disclosure of political contributions by opponents of rezoning applications.
EFFECTIVE DATE:	July 1, 1991

History

The purpose of zoning laws is to restrict the use of property¹ in order to promote the general welfare of a community.² In Georgia, local zoning authorities are given broad powers to zone and rezone property.³ Georgia's Constitution specifically grants zoning power to local governing authorities;⁴ however, the General Assembly can enact statutes which regulate local government's exercise of zoning power.⁵

Abuse of zoning powers may result because zoning power is broadly delegated to local government officials. The abuses generally fall into two categories. First, a local zoning official votes to rezone property in

1. *Stone Mountain Indus. v. Wilhite*, 144 S.E.2d 357 (Ga. 1978).

2. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). In *Euclid*, the Court established the constitutionality of zoning law. *Id.* at 395. The Court held that zoning ordinances do not violate due process unless the ordinance bears "no substantial relation to the public health, safety, morals, or general welfare." *Id.* *See also Nectow v. Cambridge*, 277 U.S. 183 (1928).

3. *Hodge v. Bd. of Appeal of Cartersville*, 176 S.E.2d 539 (Ga. Ct. App. 1970).

4. *See GA. CONST.* art. IX, § 2, ¶ 4.

5. *See Cobb County Bd. of Comm'rs v. Poss*, 359 S.E.2d 900 (Ga. 1987).

which she or her family has a financial or personal interest.⁶ Second, an official solicits or receives political contributions or bribes from a rezoning applicant.⁷ An angry homeowner, frustrated with the self-dealing of his county commission, stated “[t]his [self-dealing] is the heart of why so many citizens around the county are so disenchant[ed] . . . with dealing with our County Commission and feel that only developers and a small group of land speculators get the commission’s ear.”⁸

Such conduct by zoning officials and applicants may expose them to both criminal prosecution and civil actions. Any person who offers “any benefit, reward, or consideration” to a government official for the purpose of influencing that official’s vote is guilty of bribery, a felony under Georgia penal law.⁹ Any government official who solicits or

6. See *Olley Valley Estates, Inc. v. Fussel*, 208 S.E.2d 801 (Ga. 1974) (a county commissioner with a financial interest in property voted to rezone it to a mobile home park); See also David Pendred & Daryl Kirby, *Land Votes Turn Profits for Officials in Buford*, ATLANTA J. & CONST., Feb. 5, 1989, at A1 (city commissioners allegedly annexed and rezoned properties owned by themselves and their immediate families; the sales price for one piece of property increased in value by \$2.5 million after being annexed into the city); Gary Hendricks, *Lovejoy Residents Sue Mayor for Backing Rezoning*, ATLANTA J. & CONST., Feb. 4, 1989, at C7 (mayor voted to rezone property to a mobile home park when he owned property adjacent to the site and would have benefitted financially from the rezoning); Mark Sherman, *Dodd Votes on Zoning for Campaign Workers*, ATLANTA J. & CONST., Jan. 1, 1989, at J1 (Gwinnett Extra) (county commissioner voted to rezone property owned by a member of his own campaign committee); Douglas Lavin & Carrie Teegardin, *Zone Commission had Past Dealings with Dacula Landowner*, ATLANTA J. & CONST., Jan. 31, 1990, at J1 (Gwinnett Extra) (two commissioners voted to rezone property owned by a developer who had been involved in several financial transactions with the commissioners).

7. See *State v. Agan*, 384 S.E.2d 863 (Ga. 1989). In *Agan*, the defendant and his agents attempted to bribe two county commissioners. *Id.* at 864. The defendant had failed on two prior occasions to get the property rezoned. *Id.* On his third attempt, the defendant told a commissioner that a number of his friends desired to contribute to his campaign. *Id.* The defendant and his agents paid the commissioner more than \$4000, knowing that the commissioner did not have a campaign bank account. *Id.* The defendant and his agents paid another commissioner \$3000 for “campaign contributions,” despite knowing that the commissioner was not up for re-election for three years. *Id.* Interestingly, the defendant’s primary defense to the bribery charges was selective prosecution. *Id.* at 868. The defendant offered proof that several developers and a prominent attorney had also made “political contributions,” totalling 252 transfers of money, to these same two commissioners to influence their votes. *Id.* The defendant, who was of Turkish descent, argued that he was selectively prosecuted because other rezoning applicants were not prosecuted for the same conduct. *Id.* See also Anne Cowles, *4 Deny Election Donations were for DeKalb Property Rezoning*, ATLANTA J. & CONST., Oct. 23, 1990, at B4; *Page v. State*, 238 S.E.2d 210 (Ga. Ct. App. 1981) (defendant, an agent for a zoning applicant, was convicted of attempting to bribe a city alderman; the defendant sought to influence the alderman’s vote to rezone the property); Mike Williams, *Council Extortion Case Turns Sweetwater Sour*, ATLANTA J. & CONST., Apr. 15, 1990, at A16 (where a mayor and the majority of city councilmen of a Florida town were extorting money from rezoning applicants; the officials had been demanding a quid pro quo from developers over a span of years).

8. Lavin & Teegardin, *supra* note 6.

9. See O.C.G.A. § 16-10-2 (1988).

receives "such benefit, reward, or consideration" has also committed bribery.¹⁰ The Supreme Court of Georgia has held that a "political contribution" paid to influence a commissioner's vote on a rezoning application is a bribe regardless of what the parties call the payment.¹¹

Improper self-dealing and conflicts of interest may also subject zoning officials and rezoning applicants to civil proceedings. An aggrieved landowner can set aside the rezoning when she has suffered substantial damage due to improper conduct.¹² The Supreme Court of Georgia has stated that "[t]he acceptance of a bribe is an egregious conflict of interest, and will vitiate official acts that otherwise appear lawful."¹³ A court will also set aside a rezoning decision approved by self-interested voting.¹⁴ Such a manifest abuse of power and corruption bears no relation to the general welfare of the community, constitutes arbitrary zoning, and violates constitutional due process.¹⁵

In 1986, the General Assembly attempted to curb abuses in zoning decisions by passing statutes that require disclosure of conflicts of interest.¹⁶ The statutes require two types of disclosure. First, local government officials must disclose any property or financial interests they have in the property proposed to be rezoned.¹⁷ Second, rezoning applicants must disclose their campaign contributions to local government officials.¹⁸ If a government official knowingly fails to report her financial or property interests, or a rezoning applicant knowingly fails to disclose her campaign contributions, they will be guilty of a misdemeanor.¹⁹

SB 67

The intent of SB 67 was to "add teeth" to the existing disclosure requirements, broaden exposure of all conflicts of interest, and parallel

10. *Id.*; see also O.C.G.A. § 16-10-4(b) (1988). A felony exists if a government official "asks for or receives anything of value to which he is not entitled in return for an agreement to procure or attempt to procure the passage or defeat the passage of any legislation . . ." *Id.* (emphasis added).

11. *State v. Agan*, 384 S.E.2d at 867. The defendant in *Agan* argued that his payment of money, which he claimed was a "political contribution," did not constitute a bribe because an official is "entitled" to receive campaign contributions. *Id.* The Court stated, however, that a government official is entitled to receive "legitimate financial aid in support of nomination or election to public office . . . [but the officials are not entitled to] the 'right' to sell the powers of their offices." *Id.* The test is the intent of the offeror and the official. *Id.*

12. *Id.* at 867 n.4.

13. *Id.*

14. *Olley Valley Estates, Inc. v. Fussell*, 208 S.E.2d 801 (Ga. 1974). In *Olley Valley*, the court stated that where fraud, bad faith, or "self-interested voting has been alleged, the usual rule of only limited [judicial] review of zoning decisions is abrogated . . ." *Id.* at 805.

15. *See Cross v. Hall County*, 235 S.E.2d 379 (Ga. 1977).

16. *See* 1986 Ga. Laws 1269 (formerly found at O.C.G.A. §§ 36-67A-1 to -4 (1988)).

17. 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-2 (1988)).

18. 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-3 (1988)).

19. 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-4 (1988)).

existing ethics law.²⁰ The “extra teeth” come in the form of mandatory disqualification of a local government official from voting on a rezoning request when the official, or her family, has a property or financial interest in the property up for rezoning.²¹ The official not only must disqualify herself but also cannot “take any other action on behalf of [herself] or any other person to influence action on the [rezoning application].”²² Prior law only required an official to publicly disclose her interest;²³ an official, after disclosure, could still vote on the rezoning application.²⁴

The zoning authority must petition the Superior Court for a disinterested special master if a quorum cannot be attained because of the disqualification of an official.²⁵ Special masters conduct investigations of proposed rezoning actions and make recommendations to the zoning authority.²⁶ After the special master has made her recommendations, the disqualified local government official then may vote.²⁷ This exception would only apply to small zoning authorities (three members or less) which would be unable to obtain a quorum because a member was disqualified from voting.²⁸

The Act does not change the misdemeanor penalty carried by prior law.²⁹ The Act states that “[a]ny person knowingly failing to comply with the requirements of this Chapter . . . shall be guilty of a misdemeanor.”³⁰ Prior law required scienter for a violation. The Senate

20. Telephone Interview with Sen. James Tysinger, sponsor of SB 67, Senate District No. 41. (Apr. 2, 1991) [hereinafter Tysinger Interview].

21. O.C.G.A. § 36-67A-2 (Supp. 1991). A family member includes “spouse, mother, father, brother, sister, son, or daughter of a local government official.” O.C.G.A. § 36-67A-1 (Supp. 1991).

22. O.C.G.A. § 36-67A-2 (Supp. 1991).

23. 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-2 (1988)).

24. *Id.* After voting to annex into the city limits 260 acres owned by his wife and her family, one zoning official stated, “I disclosed [during the commission meeting] that my wife’s family had an interest. . . I have no problem with the way I acted. I’ve never tried to hide anything . . .” Pendered & Kirby, *supra* note 6. The Act fully intends to disqualify officials from voting even if they have disclosed their interests. Tysinger Interview, *supra* note 20.

25. O.C.G.A. § 36-67A-5 (Supp. 1991). This exception was necessary because some local zoning boards consist of only one official. If that official were disqualified, there would be no one to vote on the rezoning application. However, a special master has no authority to vote on the request. Tysinger Interview, *supra* note 20.

26. O.C.G.A. § 36-67A-5 (Supp. 1991). The mandate of the special master is to balance the public health, safety, morality, and general welfare against the right to the unrestricted use of property. O.C.G.A. § 36-67A-5(c) (Supp. 1991).

27. O.C.G.A. § 36-67A-5(e) (Supp. 1991). If the official were absolutely prohibited from voting then zoning decisions would be stymied because a quorum could not be attained. By requiring the recommendation of a special master, the conflict at least would be scrutinized by a disinterested third party. Tysinger Interview, *supra* note 20.

28. Tysinger Interview, *supra* note 20.

29. *See* 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-4 (1988)).

30. O.C.G.A. § 36-67A-4 (Supp. 1991).

increased the scope of the Act by amending it to compel disclosure by an official who knew or reasonably should have known of the interest.³¹

The second goal of the Act is to broaden the scope of disclosure required of all interested parties involved in a rezoning application.³² This goal is achieved by enlarging the definition of an "applicant" and including opponents of rezoning applications in the Act.

Prior law simply defined "applicant" as any individual or business entity applying for rezoning action.³³ Thus, rezoning applicants could evade reporting campaign contributions by simply having an agent, such as their attorney, make the contribution, or by forming a shell committee or partnership to pay the official.³⁴

The definition of who is a rezoning "applicant" was greatly expanded by the Act. An applicant is defined as "any person who applies for a rezoning action and any attorney or other person representing or acting on behalf of a person who applies for a rezoning action."³⁵ Moreover, the Act expanded who is an "applicant" by defining "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons."³⁶

The House State Planning and Community Affairs Committee amended the Act to require opponents of rezoning applications to disclose their campaign contributions to local government officials.³⁷ An "opponent" is defined as "any person who opposes a rezoning action or any attorney or other person representing or acting on behalf of a person who opposes a rezoning action."³⁸ An act of opposition is defined broadly as "appear[ing] before, discuss[ing] with, or contact[ing], either orally or in writing, any local government or local government official and argu[ing] against a rezoning action."³⁹ Apparently, the amendment would require disclosure by an individual who takes relatively minimal action to oppose the rezoning application. The sponsor of the Act, however, opines that this amendment supports the policy behind the Act.⁴⁰

31. See SB 67 (SCSFA), 1991 Ga. Gen. Assem.

32. Tysinger Interview, *supra* note 20.

33. 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-1(1) (1988)).

34. Tysinger Interview, *supra* note 20. See sources cited *supra* note 7 (accounts where developers had agents make the payments to the officials).

35. O.C.G.A. § 36-67A-1(1) (Supp. 1991). Land developers were circumventing prior law by having their attorneys or business associates pay "political contributions" or bribes to zoning officials. Tysinger Interview, *supra* note 20.

36. O.C.G.A. § 36-67A-1(6.3) (Supp. 1991).

37. SB 67 (HCS), 1991 Ga. Gen. Assem.

38. O.C.G.A. § 36-67A-1(6.1) (Supp. 1991).

39. O.C.G.A. § 36-67A-1(6.2) (Supp. 1991).

40. Tysinger Interview, *supra* note 20. Members in the House were of the opinion that fairness required that opponents to rezoning requests disclose their contributions. *Id.*

The Act, as well as prior law, requires an applicant to disclose all campaign contributions of \$250⁴¹ or more given within two years preceding the rezoning application.⁴² As introduced, SB 67 required an applicant to disclose contributions given over the five years preceding the rezoning application.⁴³ A floor amendment in the House changed the temporal requirement back to two years.⁴⁴ The House did not want to penalize applicants who had simply forgotten about a campaign contribution they had made five years earlier;⁴⁵ the House felt that a two year period was more reasonable because an applicant would not as easily forget a contribution made two years ago.⁴⁶

The Act deletes language from prior law requiring an applicant to disclose gifts to officials of \$250 or more.⁴⁷ This change seems to narrow the scope of disclosure because the Act requires disclosure of campaign contributions of \$250 or more.⁴⁸ However, the Act defines "campaign contributions" by referring to a definition of "contribution" in Georgia ethics law.⁴⁹ A "contribution" under Georgia ethics law "means a gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred . . ."⁵⁰ The change actually broadens prior law since prior law only required disclosure of money and gifts.⁵¹ The Act, by the expanded definition of "contribution," requires disclosure of other types of consideration (i.e., memberships, loans) that were not covered under prior law. The change made the rezoning conflicts of interest law parallel with existing Georgia ethics laws.⁵² In addition, the change implements the legislators' intent of broadening the scope of disclosure.⁵³ It closes significant loopholes in the prior law where an applicant could circumvent disclosure by making his contribution in the form of a "loan" or by purchasing a membership at a local club.⁵⁴

41. *Id.* A complete record of such contributions will also aid courts to determine if a bribe has been paid. *Id.*

42. O.C.G.A. § 36-67A-3 (Supp. 1991). *See also* 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-3 (1988)).

43. SB 67, as introduced, 1991 Ga. Gen. Assem.

44. *See* SB 67 (HCSFA), 1991 Ga. Gen. Assem. *See also* *Law Makers '91* (WGTV television broadcast, Mar. 13, 1991) (videotape available in Georgia State University College of Law Library).

45. Tysinger Interview, *supra* note 20.

46. *Id.*

47. O.C.G.A. § 36-67A-3 (Supp. 1991).

48. *Id.*

49. O.C.G.A. § 36-67A-1(2.1) (Supp. 1991).

50. O.C.G.A. § 21-5-3(6) (Supp. 1990).

51. 1986 Ga. Laws 1269 (formerly found at O.C.G.A. § 36-67A-3 (1988)).

52. Tysinger Interview, *supra* note 20.

53. *Id.*

54. *Id.*

Conclusion

The Act closes significant loopholes of the prior law and provides much needed changes in zoning ethics laws. The Act not only gives teeth to prior law but also expands the scope of who must disclose. By requiring the mandatory disqualification of local government officials from voting on a rezoning application in which they have a financial interest, the Act provides some assurance that decisions will be based on the general welfare of the community.

The Act expands the disclosure requirements of an applicant. No longer are rezoning applicants able to circumvent disclosure by having their agents make campaign contributions. Nor can rezoning applicants make contributions in the form of "loans" or memberships to avoid disclosure.

Bentley Greg Cline