Coates' Canons Blog: When Can a Biased Elected Official Participate in a Zoning Decision?

By David Owens

Article: https://canons.sog.unc.edu/when-can-a-biased-elected-official-participate-in-a-zoning-decision/

This entry was posted on September 11, 2012 and is filed under Land Use & Code Enforcement

A rezoning petition is pending before the city council. The parcel involved is zoned for single-family residential use. The landowner wants to build a retail store on the site, so she is seeking a change in the zoning to a commercial zoning district. The planning board has recommended approval, noting the adjacent street can handle the additional traffic and that the land use plan calls for more commercial activity in this general area. Most of the neighbors strongly oppose the rezoning, objecting to the extra traffic, noise, and "commercialization" of their quiet residential neighborhood.

The day before the public hearing on the rezoning the local newspaper has a front page story about the controversy. The article quotes the landowner on her plans and the leader of the neighborhood opposition about his concerns. The article then includes the following –

> Things could get interesting when the council holds its public hearing tomorrow night. Council member Hamilton Berger said he strongly supports the proposed rezoning. Burger said the jobs that will be provided will greatly benefit the community and the tax revenues from this business will help reduce the tax burden on town residents. "I'm pumped. I can't wait to help cut the ribbon at the store opening," Burger said. But Council member Della Street also expressed strong opinions about the rezoning. "I got elected to prevent exactly this type travesty," she said. "Hamilton and his fast talking buddies may throw a lot of figures around, but I know in my heart just how bad this would be for the neighborhood. I don't care what they say tomorrow at the hearing, I can tell you right now I'm going to do everything I can to stop this terrible project.

We have two council members with strongly held opinions about a pending land use decision. Both have proudly and unequivocally announced prior to the public hearing just how they intend to vote. Does this pose a legal problem? If they have indeed already made up their minds prior to the hearing, can they still vote on the rezoning?

Yes they can.

It is not unusual for members of city councils and county boards of commissioners to have a personal interest in the outcome of a zoning decision. It is common for developers, real estate agents, neighborhood activists, and others strongly interested in development to be represented on local government boards. Given the strong impact development regulations have on their interests, it is hardly surprising that those most directly affected by the decisions actively seek out board membership. These members bring expertise and well-informed perspectives to the crafting and implementation of development regulations. But the participation in decision-making by persons who may be personally affected by the decisions presents the need for safeguards to assure that these decisions are made in the public interest. The law on conflicts of interest defines when it is permissible for an official to take those personal interests into account in a zoning decision and when those personal interests mandate that the official not participate.

Conflict of Interest Standards

The resolution of conflict of interest issues when it comes to zoning decisions depends on two factors – what type of zoning decision is involved and what type of personal interest is involved. First, the rules vary depending on whether the decision is characterized as legislative (such as a rezoning or text amendment) or quasi-judicial (such as a special or conditional use permit). Second, the rules also vary depending on the type of personal interest involved. Our topic for today is bias, but there are differing rules for other types of personal interest, such as financial conflicts of interest, personal relationships with affected persons, and the like.

The North Carolina Supreme Court has summarized the general rule on conflicts of interest for boards making land use regulatory decisions, first setting out the standard for legislative decisions and then for quasi-judicial decisions:

> "With legislative zoning decisions, an elected official with a direct and substantial financial interest in a zoning decision may not participate in making that decision. Where there is a specific, substantial, and readily identifiable financial impact on a member, nonparticipation is required. Additional considerations beyond these financial interests require nonparticipation in quasi-judicial zoning decisions. A fixed opinion that is not susceptible to change may well constitute impermissible bias, as will undisclosed ex parte communication or a close familial or business relationship with an applicant."

County of Lancaster v. Mecklenburg County, 334 N.C. 496, 511, 434 S.E.2d 604, 614 (1993). It is important to note that the prohibition against bias is included for quasi-judicial decisions, but not for legislative decisions. This is because the parties have a due process right to an impartial decision-maker with quasi-judicial decisions, but not with legislative ones.

The same rules on conflicts of interest in land use decision-making are also now in the statutes. In 2005 the zoning statutes were amended to address conflicts of interest in both legislative and quasi-judicial settings, codifying the rules set out in the County of Lancaster case.

G.S. 160A-381(d) and 153A-340(g) provide that members of city councils and county boards of commissioners "shall not vote on any zoning map or text amendment where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member." These statutes apply the same standard to appointed boards making recommendations on legislative decisions (such as a planning board comment on a proposed rezoning). For a more detailed review of the statutes dealing with board member voting and financial conflicts of interest, see this **blog post** from my colleague Frayda Bluestein.

G.S. 160A-388(e1) and 153A-345(e1) provide that members of boards making quasi-judicial land use decisions "shall not participate in or vote on any quasi-judicial matter in a manner that would violate affected persons' constitutional rights to an impartial decision-maker. Impermissible conflicts include, but are not limited to, a member having a fixed opinion prior to hearing the matter that is not susceptible to change, undisclosed ex parte communications, a close familial, business, or other associational relationship with an affected party, or a financial interest in the outcome of the matter." It is important to note that, as was the case with the court decision, the statutory standard for quasi-judicial zoning decisions explicitly references the constitutional due process right for impartiality.

Bias and Legislative Decisions

The decision involved in the problem posed at the outset is a legislative zoning decision – rezoning a parcel from residential to commercial use. The type of conflict is a lack of impartiality. We do not have any financial conflicts of interest, but we do have two council members with a bias.

Decisions on rezonings require policy judgment by elected officials. These officials' personal knowledge, positions on issues of importance to the community, and judgment about the preferred course for the community are important and valid components of the decision-making process. Expression of opinions, bias, and contacts with citizens about a matter before a rezoning hearing do not disqualify a member from voting on a legislative decision. Brown v. Town of Davidson, 113 N.C. App. 553, 556, 439 S.E.2d 206, 208 (1994).

While there is no requirement for impartiality on issues of public policy choices, there are constitutional protections from bias based on race, ethnicity, or religion. It would be impermissible, for example, to deny a rezoning for a place of worship based on which particular religion would be practiced there. Also, a person can establish a constitutional violation in those rare instances where it is established that the decision was based solely on personal animosity towards the applicant rather than any plausible public policy rationale.

With our rezoning issue, it is legally permissible for both council members to freely debate and vote on the matter even though they have announced how they intend to vote prior to the rezoning hearing. If a person is concerned with policy bias and the judgment being exercised by these elected officials, the appropriate remedy is the ballot box, not a law suit.

Bias and Quasi-Judicial Decisions

By contrast, we would have an entirely different conclusion had the council been hearing a special or conditional use permit application instead of a rezoning. Bias by a decision-maker is a serious issue with quasi-judicial zoning decisions.

When a board decides a special and conditional use permit application, those directly affected by the decision have a constitutionally protected right to an impartial decision-maker. Board members must fairly apply the standards in the ordinance to the facts presented, whether or not they agree with those standards. A board member whose opinion about the case is fixed and not susceptible to change has an impermissible bias and must not vote on the matter. Further, a member with a bias must not even participate in hearing or the deliberation of the case. This rule applies to any board making a quasi-judicial decision, be it a city council, board of county commissioners, planning board, or board of adjustment.

Determining when a person has an impermissible bias in these cases can be difficult. If, as with our rezoning example, a council member boldly announces their intended vote on a special use permit application prior to hearing the evidence, they clearly have a fixed opinion and must not participate in the case. On the other hand, simply knowing some of the parties or expressing an opinion about the general policies involved with a case is generally not impermissible bias if the member can fairly state they will make a decision based on the evidence presented and the standards in the ordinance. But exactly where the line is between impermissible bias and permissible general opinions that do not affect a vote is not always entirely clear. The statute on judicial review of quasi-judicial zoning decisions recognizes the complications in determining whether bias exists, as G.S. 160A-393(j) allows the hearing record on review to be supplemented with affidavits, testimony, or documents to determine if members of the decision-making board were sufficiently impartial.

So, was it a good idea for our two city council members to announce how they intended to vote on a rezoning prior to the public hearing? That is a question of judgment the courts leave to the council members and ultimately to the voting public. But it is clear that lack of impartiality in a legislative matter is not a legal problem. Unless the outcome of the rezoning vote will have a substantial financial impact on Mr. Burger or Ms. Street, they are not required to approach the rezoning hearing with an open and impartial mind. They are free to bring their public policy preferences to the hearing and, if they wish, to fully disclose their voting intentions in advance. But they need to be careful not to do the same next time they hear a special use permit application.

Links

- canons.sog.unc.edu/?p=6196