Michigan Law Review

Volume 57 | Issue 3

1959

Municipal Corporations - Zoning - Disqualification of Councilman for Personal Interest

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Recommended Citation

Joel N. Simon, *Municipal Corporations - Zoning - Disqualification of Councilman for Personal Interest*, 57 MICH. L. REV. 423 (1959).
Available at: https://repository.law.umich.edu/mlr/vol57/iss3/12

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MUNICIPAL CORPORATIONS—ZONING—DISQUALIFICATION OF COUNCILMAN FOR PERSONAL INTEREST—An amendatory zoning ordinance was enacted[1] by the city council of Miami Beach for the purpose of changing the zoning of an extensive area fronting on the Atlantic Ocean from a private residential to a hotel district. The amendment received the required affirmative votes of five of the seven members of the council, including the vote of one councilman who owned land in the area affected by the amendment which would be increased in value by $500,000 because of the zoning change. Plaintiffs, owners of near-by property, filed suit in the circuit court to have the amendatory ordinance declared invalid and to enjoin its enforcement. The chancellor granted the injunction.[2] On appeal, *held,* reversed. The enactment by a city council of an amendatory zoning ordinance is a legislative function and cannot be invalidated on the ground that a councilman whose vote was essential to the passage of the ordinance had a substantial financial interest in land affected by the zoning change. *City of Miami Beach v. Schauer,* (Fla. App. 1958) 104 S. (2d) 129.

Courts[3] and secondary authorities[4] subscribe to the general rule that when a municipal council exercises legislative power delegated to it by the state, the courts will not consider the motives or self-interest[5] of the members in passing upon the validity of the action. A government body acts in a legislative capacity when it prescribes a general course of conduct applicable to persons or property within its jurisdiction.[6] Action in a quasi-judicial capacity occurs when the body grants or denies a privilege based upon a finding of fact that circumstances exist which require the application of a general rule.[7] Viewed as a difference in the degree of

1 Under authority of Fla. Stat. Ann. (1943) §176.02. For a discussion of the Florida enabling act, see BENTLEY AND BAYER, MUNICIPAL ZONING: FLORIDA LAW AND PRACTICE (1950).

2 The chancellor ruled that the councilman's interest compelled the court to assign a fraudulent motive to him. On appeal the evidence was held to not indicate any fraudulent action on his part. Principal case at 131.

3 Soon Hing v. Crowley, 113 U.S. 703 (1885); Blankenship v. Richmond, 188 Va. 97, 49 S.E. (2d) 321 (1948); Moore v. Village of Ashton, 36 Idaho 485, 211 P. 1082 (1922); People v. Gardner, 143 Mich. 104, 106 N.W. 541 (1906).

4 1 ANTIEAU, MUNICIPAL CORPORATION LAW §4.10 (1955); 5 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §16.90 (1949).

5 Statements will be found to the effect that a public officer will be disqualified from voting on any matter in which he has a direct pecuniary interest, but these are usually dicta, for the cases were concerned with quasi-judicial or administrative action. See, e.g., Genkinger v. New Castle, 368 Pa. 547, 84 A. (2d) 303 (1951) (councilmen voted themselves pensions). See generally Low v. Town of Madison, 135 Conn. 1, 60 A. (2d) 774 (1948), and 133 A.L.R. 1258 (1941).

6 Story v. Macon, 205 Ga. 590, 54 S.E. (2d) 396 (1949) (ordinance providing for street paving); Blankenship v. Richmond, note 3 supra, at 104: "An ordinance that regulates or restricts the use of property regulates or restricts conduct with respect to that property and is purely legislative."

7 West Jersey Traction Co. v. Board of Public Works of the City of Camden, 56

allowable discretion, a quasi-judicial body exercises a discretion which operates only within an area defined by the grant of the legislative body and is governed by the standards which the latter imposes.[8] The recent case of *Aldom v. Borough of Roseland*[9] held an amendment to a zoning ordinance to be a quasi-judicial act because of the deliberative function involved in the council's taking testimony and weighing conflicting public considerations in reaching its decision to amend. However, the nature of the legislative function should not be altered because evidence is received upon which a decision to legislate is predicated.[10] The reasoning of the *Aldom* case seems to confuse an amendatory zoning ordinance with the granting of a variance.[11] A variance qualifies as a quasi-judicial act[12] as it is granted by a board[13] exercising discretion to vary the application[14] of a zoning ordinance to specific property without affecting other property,[15] and permits only the particular use for which it is requested.[16] An amendment to a zoning ordinance alters the district's size and shape and reclassifies the use permitted of all property in the area affected.[17] The principal

N.J.L. 431, 29 A. 163 (1894), affd. sub nom. Camden Horse Railroad Co. v. West Jersey Traction Co., 57 N.J.L. 710, 34 A. 1134 (1895).

8 Siegl v. Zoning Board of North Kingston, 75 R.I. 502, 67 A. (2d) 369 (1949) (reclassification from one established zone to another of lower rating held to be an act of legislative discretion, not quasi-judicial); Matter of Larkin Co. v. Schwab, 242 N.Y. 330, 151 N.E. 637 (1926).

9 42 N.J. Super. 495, 127 A. (2d) 190 (1956). Cf. Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 89 A. (2d) 1 (1952).

10 Frank v. Balog, 189 Misc. 1016, 73 N.Y.S. (2d) 285, affd. 272 App. Div. 941, 72 N.Y.S. (2d) 75 (1947). Cf. 4 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §13.05 (1949).

11 See also Aliainello v. Town Council of East Providence, 83 R.I. 395, 117 A. (2d) 233 (1955).

12 1 METZENBAUM, LAW OF ZONING, 2d ed., 675 (1955); 8 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §25.230 (1957); Piggott v. Borough of Hopewell, 22 N.J. Super. 106, 91 A. (2d) 667 (1952).

13 Variances have also been granted by ordinances enacted by the council upon recommendation of the board of adjustment. See Downey v. Grimshaw, 410 Ill. 21, 101 N.E. (2d) 275 (1951).

14 The granting of a variance is based on the hardship which results from strict application of the zoning ordinance to particular property. Oklahoma City v. Harris, 191 Okla. 125, 126 P. (2d) 988 (1941); Matter of Otto v. Steinhilber, 282 N.Y. 71, 24 N.E. (2d) 851 (1939).

15 People ex rel. Miller v. Gill, 389 Ill. 394, 59 N.E. (2d) 671 (1945). A board of adjustment cannot under the guise of a variance effect an amendment to a zoning ordinance. Allan v. Zoning Board of Warwick, 79 R.I. 413, 89 A. (2d) 364 (1952); Walton v. Tracy Loan and Trust Co., 97 Utah 249, 92 P. (2d) 724 (1939) (gas station in residential area improper). The board of adjustment is precluded from altering the boundaries of the use districts delimited by the ordinance. Kindergan v. Board of Adjustment of River Edge, 137 N.J.L. 296, 59 A. (2d) 857 (1948). But see McMahon v. Board of Zoning Appeals, 140 Conn. 433, 101 A. (2d) 284 (1953). See generally 168 A.L.R. 51 (1947).

16 But the variance must be in harmony with the general purpose and in the spirit of the zoning regulations. Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E. (2d) 128 (1946).

17 People ex rel. Miller v. Gill, note 15 supra.

case, despite the rationale of *Aldom* case, appears correct in its classification of the amendatory zoning ordinance as a legislative action.[18]

It can be argued, however, that courts should not attempt to distinguish between legislative and quasi-judicial functions of the municipal council when considering the effect of an interested councilman's vote in zoning action, and should disqualify self-interested voting in either case. Initially there is the difficulty inherent in classifying the nature of the power exercised by the governmental body. Secondly, the typical municipal council is composed of relatively few members whose personal interests are more easily discovered than might be the self-interests of members of a larger state or federal legislative body.[19] Thirdly, like municipal contracts,[20] zoning seems to be particularly susceptible to self-interested action by councilmen, and its important effect on the free use and enjoyment of property justifies closer scrutiny by the courts.[21] It may be contended that the election process provides a sufficient check on a councilman's self-interested action.[22] But the interested councilman could realize the benefits of his action before a subsequently elected council would be able to enact corrective measures, and such corrective measures might not be effective against property owners who had relied on the prior action.[23] The argument often made, that judicial review of a councilman's motives in legislative action would interfere with a co-ordinate branch of the government,[24] seems to call for only a statement of the conclusion of the court that it will not review the council's action in this case, since courts occasionally do review actions of other government branches. In addition, while this argument should also apply when the council acts in a quasi-judicial capacity, courts have not hesitated to apply a rule of disqualification for self-interest in these cases.[25] Although the courts have generally refrained from stating that the rule of non-review of motives in legislative

[18] Blankenship v. Richmond, note 3 supra.

[19] The diverse and perhaps unascertainable interests of the members of any legislative body of substantial size would seem to render impractical a judicial invalidation of the legislative action on grounds of self-interested voting.

[20] See 10 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §29.97 (1949).

[21] Two situations where an exception to a rule of disqualification may be appropriate are (1) where so many councilmen are interested that the council could not act [See Gardiner v. City of Bluffton, 173 Ind. 454, 89 N.E. 853 (1909)], and (2) where the vote of the interested councilman is in accord with the mandate of his constituents. A possible solution to the first situation is the use of a referendum [See 8 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §25.246 (1957).]. The difficulty of proving the existence of a mandate from constituents may well dictate that courts ignore the second exception.

[22] E.g., Moore v. Village of Ashton, note 3 supra.

[23] A subsequent zoning ordinance cannot deprive an owner of a right, acquired under a prior ordinance, to use his property in a certain manner, unless the use constitutes a nuisance. 8 McQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §25.181 (1957). But see Matter of Harbison v. Buffalo, 4 N.Y. (2d) 553, 152 N.E. (2d) 42 (1958).

[24] E.g., Moore v. Village of Ashton, note 3 supra.

[25] See 32 A.L.R. 1519 (1924); 133 A.L.R. 1258 (1941).

action should be abandoned,[26] such a result has in effect been reached by various techniques which include invalidating legislative action where "fraud"[27] is involved, or classifying an action as quasi-judicial when in other circumstances it has been treated as legislative.[28] Conceding that the difficulty of inquiring into the motives of municipal legislators may lead courts to follow the general rule of non-review, it would appear that in zoning actions policy arguments urge that the general rule not be applied, and that action involving self-interested votes be invalidated.

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[26] But see Zell v. Borough of Roseland, 42 N.J. Super. 75, 125 A. (2d) 890 (1956), where the court in dictum indicated that the "long maintained" distinction between legislative and quasi-judicial functions of municipal councils in matters of disqualifying interests was not applicable.

[27] Kansas City v. Hyde, 196 Mo. 498, 96 S.W. 201 (1906). Cf. 5 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §16.91 (1949). Dictum in Zell v. Borough of Roseland, note 26 supra, suggests that though an interested councilman may in fact be free from improper motives this will be immaterial if he has what in law amounts to an interest in the matter, suggesting that mere self-interest will be sufficient to disqualify a vote as a type of "constructive fraud."

[28] See Aldom v. Borough of Roseland, note 9 supra. Enactment of an ordinance providing for vacation of a street is one example. Pyatt v. Mayor and Council of Dunellen, note 9 supra, classified this type of action to be quasi-judicial, whereas Murphy v. Chicago, R. I. & P. Ry. Co., 247 Ill. 614, 93 N.E. 381 (1910), considered it to be legislative.