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Use of Motive Evidence in Judicial Review of Rezonings

by Michael Allen Dymersky and Jesse J. Richardson Jr.

Editors' Summary: In this Article, Michael Allen Dymersky and Jesse J. Richardson Jr. examine the widespread rule of judicial review that a court should not consider evidence of motive in reviewing legislative actions by local government. They evaluate the rule in the context of a rezoning case in Highland County, Virginia, in which a group of plaintiffs conclusively established that improper motive prompted one supervisor to vote in favor of rezoning the subject property. The Highland County Circuit Court invoked the rule against judicial review of motive evidence to foreclose any consideration of the admitted improper personal motives that had inspired that particular rezoning. The authors conclude that the rule against judicial review of motive evidence has outlived its usefulness in the context of rezonings and urge a legislative intervention.

I. Introduction

Courts recognized as early as *Fletcher v. Peck*[1] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.[2] The prevailing rule is that, in passing upon municipal ordinances that are legislative in character, as distinguished from administrative or ministerial, the courts cannot inquire into the motives of the local legislative body any more than they can question the motives of state legislators.[3] Deferring to that rationale almost 60 years ago, the Supreme Court of Virginia posited that courts "have no power to inquire into the motives which prompted [a member of the legislature's] action on a purely legislative matter."[4] The court thereby approved the common law dogma "that evidence *aliunde* is inadmissible to assail the motives [of even local supervisors that] induced the enactment of a [local zoning] ordinance, for the purpose of determining its validity."[5]

Recently, in *Blue Grass Valley Preservation Coalition v. The Board of Supervisors of Highland County, Virginia*,[6] a group of plaintiffs conclusively established that improper motive prompted one supervisor to vote in favor of rezoning the subject property.[7] The Highland County Circuit Court invoked the *Blankenship* rule to foreclose any consideration of the admitted improper personal motives that had inspired that particular rezoning. The Highland County Circuit Court in the *Blue Grass Valley* case understandably took that statement in *Blankenship v. City of Richmond*[8] to its logical conclusion, and revealed why the rule—and holding of *Blankenship*—must be legislatively repealed.

This Article examines the widespread rule of judicial review that a court should not consider evidence of motive in

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1. 6 U.S. (1 Cranch) 87, 130-31 (1810).
2. *See* Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting) (discussing conceptual difficulties with analyzing legislator's motives); *cf.* Paris v. U.S. Dep't of Hous. and Urban Dev., 988 F.2d 236 (1st Cir. 1993) (one case in which a federal court explicitly undertook to review the motives of a co-equal legislative body in order to determine whether litigation served as a catalyst to passage of legislation that mooted a pending claim).
3. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, presumably precludes all such inquiries as impracticable and futile. Soon *Hing v. Crowley*, 113 U.S. 703, 711 (1885) (ignoring proof that ordinance was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against Chinese immigrants).
4. Blankenship v. City of Richmond, 49 S.E.2d 321, 323 (Va. 1948).
5. *Id.* at 325 (citation omitted) (internal quotation marks omitted). But again, *Blankenship* also holds, without citation to any authority, that in Virginia "such evidence *is* admissible to sustain the validity of the ordinance, and often has decisive force." *Id.* (citations omitted).
6. The authors represented some of those who appealed to the local Virginia Circuit Court a rezoning decision made by the Board of Supervisors, the local governing body in Highland County, in a case styled *Blue Grass Valley Preservation Coalition v. The Board of Supervisors of Highland County, Virginia*, Equity No. CH03000004-00 (filed Apr. 8, 2003) [hereinafter zoning appeal or *Blue Grass Valley* case]. It was tried before the Honorable Thomas H. Wood, Chief Judge, 25th Judicial Circuit of Virginia, on April 29, 2004. Chief Judge Wood issued a final Order and Decree on November 3, 2004, declining to disturb the rezoning decision.
7. The Board of Supervisors on a 2-to-1 vote approved an ordinance rezoning what was then known as the McNulty Farm, making way for intensive residential development on a steep mountain tract that had long been designated agricultural and conservation land.
8. 49 S.E.2d 321 (Va. 1948).

reviewing legislative actions by local government. The rule is evaluated in the context of a rezoning case in Highland County, Virginia. The Article concludes that the rule has outlived its usefulness in the context of rezonings and urges a legislative intervention.

II. The Rule: Courts Should Not Consider Legislative Motive

A. Introduction

The general rule in the United States,[9] adhered to by 37 states, holds that courts may not review legislative motive, even in the local government setting. However, valid grounds exist for not applying this rule in the context of a local government rezoning. First, one may distinguish between the acts of state legislature and local government. Second, the nature of rezonings raises the question of whether the act is best characterized as legislative or quasi-judicial.

B. State Legislatures Versus Local Government Bodies

A clear distinction exists between acts of a state legislature and of a local government body. Local government bodies

9. Believing that comity among governmental organs and the separation of powers support abstention when a coordinate branch of government is involved, 37 states generally adhere to the doctrine that courts may not review legislative motive even in a municipal setting. *See* James v. Todd, 103 So. 2d 19, 28 (Ala. 1958) ("It is of course a well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the legislature or the members thereof. The judicial department cannot control legislative discretion, nor inquire into the motives of legislators." (quoting Morgan County v. Edmonson, 192 So. 274, 276 (Ala. 1939))); Department of Natural Resources v. Tongass Conservation Soc'y, 931 P.2d 1016, 1019 (Alaska 1997) (approving notion that "judicial inquiries into the motives of those enacting or rejecting proposed legislation are to be avoided") (citations omitted); Schuster v. Schuster, 73 P.2d 1345, 1348 (Ariz. 1937) ("if the act was within the power of the Legislature to adopt, the fact that it was done from wrong motives would not affect its validity, no matter how much we and every other good citizen might reprobate the conduct of the individual legislators").

> It is equally clear that we cannot inquire into the motives of the Legislature in passing the act nor into the means by which they were induced to enact it. The allegation in the complaint that the passage of the act was obtained in a fraudulent and surreptitious manner cannot be considered, for we have no right to inquire into or consider such matters.

Little Rock v. North Little Rock, 79 S.W. 785, 786 (Ark. 1904); County of Los Angeles v. Superior Court of Los Angeles County, 532 P.2d 495, 498 (Cal. 1975) (discussing "fundamental, historically enshrined legal principle that precludes any judicially authorized inquiry into the subjective motives or mental processes of legislators").; *see also* Sunny Slope Water Co. v. Pasadena, 33 P.2d 672 (Cal. 1934) (in passing on the validity of a zoning ordinance, the court invoked rule that the purpose or motive of city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance). Courts are concerned with the existence or nonexistence of the power of a legislative body to pass a law. The motives that actuate the legislators, the wisdom or not of the law and the incidental effects of it, if there is power to enact it, are not matters with which the judicial branch of the government may properly concern itself. Johnson v. McDonald, 49 P.2d 1017 (Colo. 1935); Larrabee v. Bell, 10 F.2d 986, 988 (D.C. 1926) ("The court will not inquire into the motive which prompted the [zoning] commission in initiating this proceeding"); In re Craig, 20 Haw. 483, 493 (Haw. 1911) ("the motive that prompted the legislature to act is beyond the reach of the courts"); Rowe v. City of Pocatello, 218 P.2d 695, 699 (Idaho 1950) ("The subject matter of the ordinance, being within the police power, and properly belonging to the legislative department of government, the courts will not interfere with the discretion, nor inquire into the motives or wisdom, of the legislators."); Moore v. Village of Ashton, 211 P. 1082 (Idaho 1922) (same). Champaign v. Roseman, 155 N.E.2d 34, 37 (Ill. 1958) ("It is not within our province to examine the motives which prompted the legislative action [city zoning ordinance] so long as they are not arbitrary."). *But see* People ex rel. Burton v. Corn Prods. Ref. Co., 121 N.E. 574 (Ill. 1918) (stating in dictum that a court will not explore what motivated a legislature to exercise its discretion in a particular case unless the effect of an ordinance indicates "such an abuse of that discretion that it may be said to be no exercise of discretion at all"). *See* Munn v. Independent Sch. Dist., 176 N.W. 811, 817 (Iowa 1920) ("The enactment of the statute was clearly within the power of the general assembly, and the motives of the legislators and the reasons or arguments leading them to such action are not a matter into which we can properly inquire"). *But see* Midwest Inv. Co. v. Chariton, 80 N.W.2d 906, 911 (Iowa 1957) (while "it is well settled that the motives of a city council in passing an ordinance will not, as a rule, be inquired into by the courts," the court was willing to "assume, without deciding, the motives of the council in en[acting the] ordinance may be inquired into," but observed there had been adduced "no evidence of malice or ill will that would entitle plaintiff to injunctive relief"). *See* Ash v. Thorp, 68 P. 1067, 1067-68 (Kan. 1902) ("Such facts might have been made a basis of appeal to the discretion and judgment of the [ ] legislature, but we cannot inquire into the motives of that body, nor question the policy or wisdom of its acts."); Taylor v. Beckham, 56 S.W. 177 (Ky. 1900) (the motives of the legislators cannot be inquired into by the judiciary); *see also* Louisville v. Bryan S. McCoy, Inc., 286 S.W.2d 546, 549 (Ky. 1955) ("it is well settled that the courts will not inquire into the motives that impel legislative action"); Kel-Kan Inv. Corp. v. Greenwood, 428 So. 2d 401, 405 (La. 1983) ("When an ordinance is challenged which is enacted by virtue of the discretionary power of the municipal legislative body, the judiciary will not inquire into the motives of the legislators in determining the reasonableness of the provision"); Town of Skowhegan v. Heselton, 102 A. 772, 773 (Me. 1917) (The law is well established that "evidence as to the motive of the framers of the law or the influences under which they are enacted is not admissible for the purpose of nullifying an ordinance."); *see also* Dobbs v. Maine Sch. Admin. Dist. No. 50, 419 A.2d 1024, 1029 (Me. 1980) (courts will not inquire into motives of municipal legislative body nor influences under which it acts, and the same cannot be shown to nullify ordinance duly passed in legal form and within scope of legislative body's powers); Sugarloaf Citizens Assoc., Inc. v. Gudis, 573 A.2d 1325, 1335 (Md. 1990) ("there is ordinarily no common law remedy that permits invalidation of legislative action because of a legislator's improper motivation. Courts usually do not inquire into legislative motivation as a basis for setting aside legislation"); *see also* County Council for Montgomery County v. District Land Corp., 337 A.2d 712, 720 (Md. 1975) ("It is well settled that the judicial branch of government cannot institute an inquiry into the motives of the legislature in the enactment of laws, lest the legislature be subordinated to the courts."); Workers' Compensation Comm'n v. Driver, 647 A.2d 96, 103 (Md. 1994) ("it is well-settled that when the judiciary reviews a statute or other governmental enactment, either for validity or to determine the legal effect of the enactment in a particular situation, the judiciary is ordinarily not concerned with whatever may have motivated the legislative body or other governmental actor"); Morgan v. Banas, 122 N.E.2d 369, 371 (Mass. 1954) ("courts cannot, for the purpose of determining the validity of legislation, receive evidence of the inducements and motives of the legislators in enacting it").

> The general rule is well established that courts will not inquire into the motives of legislators where they possess the power to do the act, and it has been exercised as prescribed by the organic law. In such case the doctrine is that the legislators are responsible alone to the people who elect them. And this principle is generally applied to purely legislative acts of municipal corporations.

People v. Gardner, 106 N.W. 541, 542 (Mich. 1906).

> The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason and expediency with the lawmaking power, nor can it consider the motive which in-

function "legislatively" only occasionally in making local land use decisions, deriving their limited power from the state legislature pursuant to the state constitution.[10] In a revision of his seminal treatise, Judge John F. Dillon of Iowa, the progenitor of "Dillon's Rule,"[11] said:

> It is well settled that the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in the enactment of laws. Such an inquiry would not only be impracticable in most cases, but the assumption and exercise of such a power would result in subordinating the legislature to the courts. In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of the council in passing ordinances. But it would be disastrous, as we think, to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud actually consummated at the instance of the municipality defrauded and perhaps at the instance of persons injured thereby.[12]

> spired the passage of a statute in determining the question of its validity.

Mississippi State Tax Comm'n v. Flora Drug Co., 148 So. 373, 376 (Miss. 1933).

> [U]nder the doctrine of separation of powers, courts should not inquire into the motives of legislators if an adopted ordinance is legislative in character. Furthermore, in determining whether the exercise of legislative authority by a city council is within its statutorily granted powers, a reviewing court is not concerned with motives, purposes, or personal beliefs of any individual council member.

State ex rel. People for Responsible Omaha Urban Dev. v. Conley, 459 N.W.2d 222, 225 (Neb. 1990) (citations omitted); Stone v. Cray, 200 A. 517, 522 (N.H. 1938) ("The argument that the ordinance was passed for the sole reason of preventing the defendants from erecting and operating their proposed structure is not maintainable. The motives of a legislative body are not subject to judicial inquiry in passing on the validity of its action."); *see also* Piper v. Meredith, 266 A.2d 103, 107 (N.H. 1970) ("Nor are the motives of the legislative body determinative of the validity of the ordinance."); State v. Graham, 259 P. 623 (N.M. 1927) ("We do not wish to be understood as suggesting that this court may inquire into the particular motives which may have induced individual legislators to vote for or against a proposed measure. We merely illustrate the fallacy of the reasoning."); Carter v. Stanly County, 482 S.E.2d 9, 13 (N.C. Ct. App. 1997) ("We are not empowered to look behind the motives of the duly elected members of the County Commission, so long as they act in compliance with the [zoning] law."); State ex rel. City of Bismarck v. District Court, 253 N.W. 744, 748 (N.D. 1934) ("It must be presumed that the ordinance was enacted from proper motives until the contrary is established" and acknowledging "the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them.").

> We reemphasize, it is well settled in this state that zoning amendment proceedings call for legislative determinations and the doctrine of separation of powers protects legislative process from encroachment by the judicial branch. Not only do we believe that judicial examination of legislative motive, conduct, and compromise would work as an unwholesome influence in a society that cherishes democratic values, but as our analysis makes clear, the courts are simply without power to extend judicial review into this forbidden realm. Any restriction of legislative power, legislative process, and legislative discretion of the Board of County Commissioners should devolve from the General Assembly.

City of Moraine v. Board of County Comm'rs, 1980 Ohio App. LEXIS 10754 *19 (Ohio App. June 24, 1980); Atchison, T. & S. F. R. Co. v. State, 113 P. 921, 923 (Okla. 1911) (adopting the "rule everywhere recognized, that no law can be impeached for fraudulent motives actuating the legislators, nor on account of corrupt influences brought to bear upon them" (citation omitted) (internal quotation marks omitted)); Robertson v. City of Salem, 191 F. Supp. 604, 610 (D. Or. 1961) (where it was "conceded that the motives of a legislative municipal zoning authority such as Salem's Council is not subject to a judicial inquiry in adjudicating the validity of a zoning ordinance restricting land uses" (citing E.H. Schopler, Annotation, *Motive of Members of Municipal Authority Approving or Adopting Zoning Ordinance or Regulation as Affecting Its Validity*, 71 A.L.R.2d 568 (1960))).

> There can be little doubt that a valid exercise of legislative power, whether on the federal or the state level, will not be invalidated because certain legislators may have had invalid motives when the legislation in question was enacted. Legislators with evil motives can be part of a group that passes sound legislation, whereas legislators who have been motivated by the purest of intentions have been known to adopt legislation that has failed to pass constitutional muster.

Holmes v. Farmer, 475 A.2d 976, 988-89 (R.I. 1984); Siegl v. Zoning Bd. of N. Kingston, 67 A.2d 369 (R.I. 1949) (reclassification from one established zone to another of lower rating held to be an act of legislative discretion, not quasi-judicial); Douglas v. City Council of Greenville, 75 S.E. 687, 688 (S.C. 1912) (adopting doctrine that courts "could not inquire into the motives of the board of supervisors in adopting the ordinance"); Norbeck & Nicholson Co. v. State, 142 N.W. 847, 853 (S.D. 1913) ("we can n[ot] inquire into the motives of the legislator"); White v. Henry, 285 S.W.2d 353, 358 (Tenn. 1955) (courts cannot inquire into the motives or methods of the local legislative body in rezoning matters); City of Corpus Christi v. Bayfront Assocs., 814 S.W.2d 98, 105 (Tex. Ct. App. 1991) ("an individual city council member's mental process, subjective knowledge, or motive is irrelevant to a legislative act of the city, such as the passage of an ordinance"); Blankenship v. City of Richmond, 49 S.E.2d 321 (Va. 1948); State v. Harden, 58 S.E. 715, 717 (W. Va. 1907) ("Nor is this court at liberty to inquire into the motives of the legislators in voting for a law or to impeach the law on the ground of fraud or corruption, either at the suit of a private person or the state."); State ex rel. People's Land & Mfg. Co. v. Holt, 111 N.W. 1106, 1107 (Wis. 1907) ("nor can we inquire into the motives which actuate legislators in the performance of their functions as such"); *see also* State ex rel. Rose v. Superior Court, 81 N.W. 1046, 1054 (Wis. 1900) ("the court is limited to the question of power, and its inquiry does not extend to matters of expediency, the motives of the legislators, or the reasons given for their action"); Territory of Wyoming v. Nelson, 2 Wyo. 346, 365 (Wyo. 1880) ("Of course we have nothing to do with the motives of the legislature, but as no motives of this kind, or any other, can cause us to negative and set aside a law.").

10. Under current doctrine, at least in federal courts, the state's police power is defined by explicit constitutional prohibitions, not by implied limits on the scope of government power. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239, 14 ELR 20549 (1984) ("Subject to specific constitutional limits, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.") (citations omitted). Municipalities, on the other hand, are limited to certain delegated legitimate purposes—the quartet of health, safety, morals, and the general welfare—and when the local governing body's goal is not a legitimate police power purpose, one would suppose substantive due process would be violated, even in *Virginia Board of Supervisors v. Rowe*, 216 S.E.2d 199, 210 (Va. 1975) (land use restriction not substantially related to public health, safety, or welfare constitutes denial of equal protection of laws).

11. See discussion of Dillon's Rule, *infra* note 17.

12. 2 John F. Dillon, Municipal Corporations §580, at 914-15 (5th ed. 1911). We note, however, that even the courts in Iowa are ambivalent. *See, e.g.*, Midwest Inv. Co. v. Chariton, 80 N.W.2d 906 (Iowa 1957) (while "it is well settled that the motives of a city council in passing an ordinance will not, as a rule, be inquired into by the courts," the court was willing to "assume, without deciding, the motives of the council in en[acting the] ordinance may be inquired into," but observed there had been adduced "no evidence of malice or ill will that would entitle plaintiff to injunctive relief").

Even though that highly respected commentator said the analogy should not be applied to its fullest extent to municipal corporations when powers are misused, only a scattering of cases share this aspect of Judge Dillon's view.[13] And although Virginia has otherwise adopted Dillon's Rule,[14] there presently is no such distinction applicable to municipalities in Virginia law.

13. The courts in nine states are inclined to review municipal motives when reviewing local land use decisions. *See* Josephson v. Planning Bd. of Stamford, 199 A.2d 690, 692 (Conn. 1964). The court considered legislative motive and reaffirmed that

> the principle that public policy requires that members of . . . public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty. The evil against which the policy is directed "lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of the zoning power. It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."

Id. (citations omitted) (internal quotation marks omitted). In that state, statute:

> forbids a member of a zoning commission or board of appeals from participating in any matter in which he has a personal interest in the outcome. A personal interest is either an interest in the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. A personal interest can take the form of favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in [Connecticut] is required to possess.

Anderson v. Zoning Comm'n of Norwalk, 253 A.2d 16, 20 (Conn. 1968) (citations omitted). *But see* Sims v. New London, 738 F. Supp. 638, 645 (D. Conn. 1990) ("allegations concerning the motives of the Council in beginning the investigation are irrelevant. As the [United States] Supreme Court has noted, 'in times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies.'" (citing Tenney v. Brandhove, 341 U.S. 367, 378 (1951))). Piekarski v. Smith, 153 A.2d 587, 591 (Del. 1959) (acknowledging that bad faith is:

> an exception to the general rule that courts will not inquire into the motives of or inducements to legislators that may influence them in the passage of acts or resolutions. The exception is that the validity of municipal ordinances or resolutions may be attacked if fraud or bad faith is proved. This rule is recognized in Delaware.

(citations omitted)); Fossey v. Dade County, 123 So. 2d 755, 757-58 (Fla. 1960) (distinguishing Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla.1959), *see infra* note 35, by applying a statute to void ordinance based on voting commissioner's personal interest). *But see* Coral Gables v. Coral Gables, Inc., 160 So. 476, 478 (Fla. 1935), which stated that

> [i]t is settled that the courts will not inquire into the motives of the Legislature in enacting laws. And by analogy to this rule it is very generally held that the courts cannot inquire into the motives of members of a municipal council for the purpose of determining the validity of ordinances enacted by them.

Id. Olley Valley Estates, Inc. v. Fussell, 208 S.E.2d 801, 804 (Ga. 1974) ("Conceding that the difficulty of inquiring into the motives of municipal legislators may lead courts to follow the general rule of nonreview, 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."); Equicor Dev. Inc. v. Westfield-Washington Twp. Plan Comm'n, 758 N.E.2d 34, 37 (Ind. 2001) ("an inquiry into the 'motive' . . . may be proper in some circumstances, notably where there is a claimed violation of rights protected under the Fourteenth Amendment" of the U.S. Constitution). *But see* Medical Licensing Bd. of Ind. v. Provisor, 669 N.E.2d 406, 410 (Ind. 1996) (when reviewing legislative actions, the trial court may not admit evidence outside of the administrative record because the trial court is not allowed to inquire into the motives of the legislator). *See* Sanderson v. City of Willmar, 162 N.W.2d 494 (Minn. 1968) (zoning amendment which reclassifies land for the purpose of limiting the value of such land against the possibility of future condemnation is invalid). *But see* Oscar P. Gustafson Co. v. City of Minneapolis, 42 N.W.2d 809, 812 (Minn. 1953). There the court stated that

> [t]he motives of members of a council in the enactment of an ordinance of a strictly legislative nature cannot be judicially inquired into for the purpose of affecting the validity of such ordinance, except as the motive of the council may be disclosed on the face of the particular act in question or by reference to general existing conditions or other legislative acts.

Id. See State ex rel. Quintin v. Edwards, 106 P. 695, 700, 701 (Mont. 1910) (acknowledging that while "rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the Acts, or inferable from their operation," the courts nonetheless "will look to the facts and determine whether the particular ordinance, or the act of the board or commission, carries out the spirit and intent of the legislation, or tends directly or indirectly to nullify it"); Alper v. State, 603 P.2d 1085, 1088 (Nev. 1979) (so "long as the local zoning authority has acted within its statutory authority and there is no allegation of improper motive, its classification of an area as 'commercial' or 'industrial' does not violate the purposes" of the zoning law); Riggs v. Long Beach Township, 538 A.2d 808, 810 (N.J. 1988) (allowing proof of improper ulterior motives of municipal officials in passage of local zoning ordinance to vindicate claim of property owner that ordinance was invalid); *see also* Aldom v. Roseland, 127 A.2d 190, 193 (N.J. Super. Ct. App. Div. 1956) ("A quasi-judicial action of a municipal body is rendered voidable by the voting participation of a member thereof who is at the time subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty."); Zell v. Borough of Roseland, 125 A.2d 890 (N.J. Super. Ct. App. Div. 1956) (the "long maintained" distinction between legislative and quasi-judicial functions of municipal councils in matters of disqualifying interests was not applicable); DeSena v. Gulde, 265 N.Y.S.2d 239, 245 (N.Y. App. Div. 1965) (while motives of legislative body may not be subject of inquiry in determining validity of legislation, there is well-recognized exception to the rule where motivation is disclosed on face of act, assimilable to declaration of legislative intent, or as part of legislative proceeding); *cf.* Homefield Ass'n of Yonkers, N.Y. v. Frank, 75 N.Y.S.2d 384, *aff'd without op.*, 80 N.E.2d 664 (N.Y. 1947) ("The council is a local legislative body, clothed with the general, delegated power to enact amendments to the Zone Ordinance. Under such a situation its motives, promptings, and procedures in making the enactment are not subject to review by the court."). Another court applied a statute reflecting:

> well and wisely established principle of public policy in Pennsylvania that a public official may not use his official power to further his own interests . . . . The reasons for this must be obvious—a man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a direct pecuniary or personal or private interest which is or may be in conflict with the public interest.

Genkinger v. City of New Castle, 84 A.2d 303, 305-06 (Pa. 1951) (citations omitted). *But see* Commonwealth v. Keary, 48 A. 472, 475 (Pa. 1901) (nor are the motives of the legislators in passing the act open to judicial consideration).

In a few other states, courts have held out the possibility of change based upon a judicial calculation of public policy. For example, as stated by one court:

> The courts of this state have not yet held that there is an overriding public policy which requires them to scrutinize purely legislative action and to set aside resultant ordinances or statutes because of financial or personal interests of members of

It has been observed that "[t]he basic assumption that policy decisions should be made by legislators responsible [only] to the people is not entirely applicable" in the case of local governing bodies. This is because "[c]ity [and county] legislators are responsible not only to city [or county] residents but to the state" as well.[15] The ability to regulate land use is part of the police power vested in the state legislature that can be delegated to local governing bodies. If allowed by statute, local governing bodies may further delegate the exercise of these powers to subordinate bodies, officers, or employees.[16]

In Virginia, the zoning power has been conferred upon local governments by legislative enactment of the general assembly. Local supervisors' power to regulate land use is fixed by a detailed enabling statute that allows local governments to zone real property and sets out how they may zone and rezone it. That delegated local power is limited to what has been conferred by the legislature expressly or by necessary implication.[17] In other words, a locality's legislative authority to control land use through zoning, conditional use permits,[18] or special variances[19] stems not from its own inherent police power, but from whatever limited power has been specifically granted to localities by state law.

Also in Virginia, an ordinance that "regulates or restricts conduct with respect to . . . property . . . is purely legislative."[20] As it relates to zoning, it is settled law in Virginia that legislative acts by local supervisors must bear a substantial relation to the public health, safety, or general welfare to be reasonable.[21] The local zoning power, as limited by the statutory grant, must also operate in relation to the use of land and not for the accomplishment of purposes extraneous to that relationship.[22] Therefore, it seems clear that Virginia's legislature intended to restrict the powers of municipal government to effectively accomplish only these limited purposes.

That conclusion is bolstered by the fact that:

> Where the courts are called upon to review the acts of officials, agencies, and boards exercising delegated legislative powers, the inquiry must ordinarily be whether the official, agency, or board has acted arbitrarily or capri-

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> the legislative body participating in their enactment. . . . These facts before us do not present a situation where this court can say that it is clearly in the public interest for the court to examine the personal interest, financial interest or motives of the members of the legislative body of the City in exercising its legislative function in enacting the amendment to the Comprehensive Zoning Ordinance of the City.

Coffin v. City of Lee's Summit, 357 S.W.2d 211, 217 (Mo. Ct. App. 1962).

Courts have also suggested that if sufficient evidence of bad motive were adduced, the ordinance might be invalidated. *See* Patterson v. American Fork City, 67 P.3d 466, 474 (Utah 2003) (observing that although complaint alleged "the motive of American Fork City was to retaliate," the facts "f[ell] short of providing any specific explanation of the source of this malevolence," and "[b]are assertions of differential treatment . . . even if true, are insufficient to show a spiteful effort to 'get' the plaintiff" (citation omitted) (internal quotation marks omitted)); Midwest Inv. Co. v. Chariton, 80 N.W.2d 906, 911 (Iowa 1957) (while "it is well settled that the motives of a city council in passing an ordinance will not, as a rule, be inquired into by the courts," court was willing to "assume, without deciding, the motives of the council in en[acting the] ordinance may be inquired into," but observed there had been adduced "no evidence of malice or ill will that would entitle plaintiff to injunctive relief"). *But see* Munn v. Independent Sch. Dist., 176 N.W. 811, 817 (Iowa 1920) ("The enactment of the statute was clearly within the power of the general assembly, and the motives of the legislators and the reasons or arguments leading them to such action are not a matter into which we can properly inquire.").

Other courts have even implied that unspecified legislative motives were considered without actually saying so. *See* In re Kisiel, 772 A.2d 135, 144 (Vt. 2000) (rationale of majority appears to be rooted in unspecified suspicions about the town's motives: "For whatever reasons, the Town is attempting, through Act 250, to undo its own regulatory decisions, without attempting to reopen them in the Town processes. The only explanation in the record lies in the testimony of the chairman of the planning commission."). And in one state, where the general rule was changed by subsequent court ruling, the legislature stepped in to alter a decisional rule broadening judicial review of local legislating by statute. *See* Fleming v. Tacoma, 502 P.2d 327 (Wash. 1972) (holding that consideration of legislative motive under rubric of appearance of fairness doctrine applied to *all* hearings which either amended existing zoning codes or reclassified particular land under the code), *overruling* Lillions v. Gibbs, 289 P.2d 203 (Wash. 1955); *see also* Raynes v. City of Leavenworth, 821 P.2d 1204 (Wash. 1992) (overruling *Fleming v. Tacoma* in part, by applying statute (WASH. REV. CODE §42.36.010) providing that for purposes of appearance of fairness doctrine, quasi judicial actions do not include legislative actions adopting, amending, or revising comprehensive plans or adopting areawide zoning ordinances or amendments of areawide significance).

14. *See* JESSE J. RICHARDSON JR. ET AL., THE BROOKINGS INSTITUTION CENTER ON URBAN AND METROPOLITAN POLICY, IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT (2003).

15. *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1604 (1965). Moreover, landowners in the locality might not be domiciled there, and would therefore not have the right to vote in local elections; an obvious cleavage, especially in rural communities, between the so called "been heres" and the "come heres" reflected in the popular folk song by Chuck Brodsky.

16. Helmick v. Town of Warrenton, 492 S.E.2d 113 (Va. 1997).

17. This rule takes its name from John F. Dillon, a federal circuit judge, chief justice of the Iowa Supreme Court, and noted law professor, and is derived from *Clark v. City of Des Moines*, 19 Iowa 199 (1865) (Dillon, J.). *But see* Stetson v. Kempton, 13 Mass. 272 (Mass. 1816) (towns are "creatures of the legislation" and may exercise "only the powers [ ] expressly granted to them"). The Virginia Supreme Court first recognized the rule in *Winchester v. Redmond*, 25 S.E. 1001 (Va. 1896). Under the so-called Dillon's Rule that prevails in Virginia, local governments possess only those powers specifically delegated to them by state law, or those fairly implied from expressly granted powers. Dillon's Rule resembles and relates to the ultra vires doctrine—literally, "beyond the power"—which states that political subdivisions hold only those powers expressly conferred by charter or law and no other powers. Dillon's Rule is a guideline that Virginia judges use in interpreting Virginia law that significantly restricts the authority of local governments in land use regulation and otherwise. *See* RICHARDSON JR. ET AL., *supra* note 16.

18. Helmick v. Town of Warrenton, 492 S.E.2d at 115 ("In so far as the nature of the power exercised is concerned, we see no difference between granting or denying a special use permit, which we have classified as a legislative act, and consenting to the vacation of a subdivision plat." (citations omitted)). Earlier in *Byrum v. Board of Supervisors of Orange County*, 225 S.E.2d 369 (Va. 1976), the Virginia Supreme Court overruled the holding in *City of Winchester v. Glover*, 97 S.E.2d 661, 663 (Va. 1957), that the grant or denial of a special use permit by the city council was an administrative act. *See Byrum*, 225 S.E.2d at 372.

19. A zoning variance is ordinarily considered an administrative function, and the body granting one must make certain findings of fact required by statute. Cochran v. Fairfax County Bd. of Zoning Appeals, 594 S.E.2d 571, 576-77 (Va. 2004). If it does not do so, "the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal." Packer v. Hornsby, 267 S.E.2d 140, 142 (Va. 1980). "Those prerequisite findings are, in variance cases, crucial to the exercise of the power of judicial review which the General Assembly has vested in the courts." Ames v. Painter, 389 S.E.2d 702, 704 (Va. 1990).

20. Blankenship v. City of Richmond, 49 S.E.2d 321, 324 (Va. 1948).

21. VA. CODE ANN. §§15.2-2283, 15.2-2200 (Michie 2003).

22. *Id.* §15.2-2284 (Michie 2003).

> ciously, or rather, whether it has acted in accordance with the policies and standards specified in the legislative delegation of power.[23]

That is so because it falls to the courts reviewing local ordinances to police the boundaries that have been placed around legislative action.

As the Virginia Supreme Court observed in *Ames v. Painter*,[24] "[t]hat inquiry becomes necessary because delegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power. Delegations of legislative power [that] lack such policies and standards are unconstitutional and void."[25]

C. Individual Rezonings: Legislative or Quasi-Judicial?

Most states treat all zoning changes as legislative acts, whether the change applies to one parcel or many.[26] Because legislative actions receive a presumption of validity, a challenging party must make out a prima facie case that the action is arbitrary and capricious.[27] The burden then shifts to the local government to show that the action is fairly debatable.[28] Under this test, it is extremely difficult for plaintiffs to prevail.[29]

Judicial skepticism has led some courts to subject individual rezonings to increased scrutiny, essentially treating the rezonings as more quasi-judicial than legislative.[30] *Fasano v. Board of County Commissioners*[31] represents the strongest statement by a court that individual rezoning actions should not receive the judicial deference accorded legislative acts. In that case, the local government created a floating zone for mobile home parks. Seven years later, a landowner applied to have his land so designated. The county commissioners granted the rezoning and the neighbors objected. The Supreme Court of Oregon found that the rezoning constituted the application of policy, not the creation of policy. Finding that the action was the exercise of judicial authority, the court placed the burden of proof on the party seeking the change: the county.

Other state courts use the "change or mistake" rule, which eliminates deference and changes the burden of proof.[32] Under this rule, the local government must show a change in circumstances or a mistake in the original ordinance to justify the change. Essentially, the courts give deference to the original ordinance. Other courts subject rezonings to increased scrutiny.[33]

The skepticism concerning treating local legislative decisions on individual rezonings with deference as legislative acts arises, at least in part, from doubts about local government legitimacy. First expressed in *Federalist Paper No. 10* by James Madison, the notion seems particularly apropos when dealing with local government's treatment of individual rezoning requests.[34]

III. The Doctrine in Virginia: *Blankenship, Blue Grass Valley*, and a Cry for Change

A. Blankenship

The facts of *Blankenship* are as follows. A local ordinance changing the classification of an area from a residential to a business district was passed at the solicitation and for the personal gain of a sitting member of the municipal council. This council member was thus able to erect a filling station in an area in which it would not have been possible prior to the adoption of the ordinance. Every public official should perform official duties impartially, uninfluenced by thoughts of personal gain or loss. As a trustee for the people, who have a right to require that the official exercise best judgment in everything that pertains to their welfare, a public official should be unaffected and unprejudiced by anything that might benefit his own interest as an individual.[35] *Blankenship* acknowledges this but does not disturb the tainted rezoning ordinance, stating that:

> where a member of the legislative branch of the government offends in these particulars in performance of a purely legislative duty, he is answerable to the electors from whom he derived his official position and not to the courts, which have no power to inquire into the motives [that] prompted his action on a purely legislative matter.[36]

Evidentiary rules exist to aid the search for truth, not to promote a kind of judicial laissez-faire. The *Blankenship* rule converts circuit court judges into mere rubber stamps when land use decisions made by local governments are appealed.[37] However, local government has limited delegated discretion in making land use decisions. This limited discre-

23. Ames v. Painter, 389 S.E.2d at 705.
24. 389 S.E.2d 702 (Va. 1990).
25. *Id.* at 705.
26. Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law §5.9 (2003).
27. Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
28. *Id.*
29. Juergensmeyer & Roberts, *supra* note 26.
30. *See, e.g.*, Daniel R. Mandelker & A. Daniel Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urban Law. 1 (1992); Robert J. Hopperton, *The Presumption of Validity in American Land Use Law: A Substitute for Analysis, a Source of Significant Confusion*, 23 B.C. Envtl. Aff. L. Rev. 301 (1996).
31. 507 P.2d 23 (Or. 1973).
32. Juergensmeyer & Roberts, *supra* note 26.
33. *Id.*
34. *See* James Madison, The Federalist No. 10, at 77 (Clinton Rossiter ed., 1961); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837, 853-57 (1983).
35. Blankenship v. City of Richmond, 49 S.E.2d 321, 323 (Va. 1948); *cf.* Josephson v. Planning Bd. of Stamford, 199 A.2d 690, 692 (Conn. 1964) (reaffirming:

    > the principle that public policy requires that members of . . . public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty. The evil against which the policy is directed "lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of the zoning power. It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."

    (citations omitted) (internal quotation marks omitted)).
36. *Blankenship*, 49 S.E.2d at 323.
37. *See, e.g.*, Wolf v. People of State of Colo., 338 U.S. 25, 28 (1949) (Frankfurter, J.) ("To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process.").

tion fails to justify the deference given to local governments in rezoning decisions.

B. The Blue Grass Valley *Case*

It was significant in the *Blue Grass Valley* zoning appeal that uncontested evidence before the circuit court proved conclusively that the rezoning of the McNulty Farm had been allowed merely "because when it came down to it," the Board of Supervisors' then vice chairman "just didn't like being threatened" by a lawyer who, on behalf of her client, had sent a letter stating she would appeal any rezoning decision related to that property on behalf of a local cattleman's association. That uncontested evidence of spiteful, personal motivation was in the form of official admissions of record[38] in the *Blue Grass Valley* case made knowingly, intentionally, and in writing by the county attorney on behalf of her client, the Board of Supervisors.[39]

It cannot be a proper function of a zoning ordinance to change a prior zoning classification of real property to deter "threats."[40] The effect of the rezoning proceedings, as a whole, "has been to annul the [enabling] statute and defeat the purpose for which it was enacted, by the very body to which has been [e]ntrusted the power to administer it."[41] The circuit court felt constrained by *Blankenship* to close its eyes to the obvious and admitted impropriety infecting a supervisor's reasoning:

> Although the court acknowledges that the motives of the Board Members are relevant and material, the court finds that the statements made by [the two supervisors voting in favor of the enactment] are covered by the rule in *Blankenship* and that both instances exhibited the type of personal motivation that a Court ought not consider.[42]

C. Judicial Tinkering With the Blankenship *Rule Has Been Ineffectual*

As it is a judicially promulgated doctrine, one might suppose that courts would have the burden and the duty of amending the *Blankenship* rule to reflect social and economic changes.[43] And to some extent, there seems to be a very limited evolution in Virginia since *Blankenship* was decided in 1948.

For example, in 1967, the Virginia Supreme Court in *Wilhelm v. Morgan*[44] specifically authorized judicial inquiry into "the purpose of a zoning ordinance" in instances where "illegal spot zoning" is alleged.[45] In the course of doing so, the *Wilhelm* court examined a local supervisor's "remarks" for "an improper motive," acknowledging anomalies in earlier post-*Blankenship* cases "involving zoning ordinances that were prompted by improper motives" and that had been judicially annulled for that reason.[46] Virginia courts have also begun to accept "extrinsic evidence [that] clearly establishes . . . unreasonableness" to rebut the presumption of legislative validity that attaches to local land use decisions.[47]

Given these judicial adjustments at the margins of the doctrine, *Blankenship* appears to have lost some of its original force.[48] Nonetheless, Virginia courts have not

38. *See* Va. Sup. Ct. R. 4:11(b) ("Any matter admitted under this Rule is conclusively established.").

39. The Board of Supervisors admitted for purposes of the litigation that the supervisor cast the decisive second "vote to rezone the McNulty farm because when it came down to it, he just didn't like being threatened." *Cf.* West Side Women's Servs., Inc. v. City of Cleveland, 573 F. Supp. 504, 523 (N.D. Ohio 1983) (defendant's response to requests for admission established that regulation was motivated by hostility). No less authority than common sense suggests that a three-person Board of Supervisors voting 2-1 to rezone real property ought properly be deemed to have acted ultra vires of the enabling statute if it is proved, as it was in the *Blue Grass Valley* case, that one member in the majority applied improper reasoning or considered an improper factor. Had that supervisor not voted "yes" to second the motion to rezone the property, and had he not cast the decisive second vote required to pass the ordinance, the zoning amendment would necessarily have failed. *Cf.* Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 870 (8th Cir. 1977) ("The ordinance passed by a 5-to-2 vote; thus a switch of two votes could completely change the attitude of the city council and the municipality in regard to the issues presented in this litigation.").

40. *See* DeSena v. Gulde, 24 A.D.2d 165, 171 (N.Y. App. Div. 1965) (invalidating zoning ordinance passed due to threat); *cf.* Va. Code Ann. §§15.2-2283 (identifying appropriate purposes), 15.2-2284 (identifying appropriate considerations) (Michie 2003).

41. State ex rel. Quintin v. Edwards, 106 P. 695, 702 (Mont. 1910).

42. Order and Decree of Nov. 3, 2004 issued by the Honorable Thomas H. Wood, Chief Judge, 25th Judicial Circuit of Virginia, in the *Blue Grass Valley* case, Equity No. CH03000004-00 8, at 3. *See supra* note 6. The circuit court did consider the minutes adduced by the Board to sustain its rezoning action.

43. *Cf.* Coffin v. City of Lee's Summit, 357 S.W.2d 211, 217 (Mo. Ct. App.1962).

> The courts of this state [Missouri] have not yet held that there is an overriding public policy which requires them to scrutinize purely legislative action and to set aside resultant ordinances or statutes because of financial or personal interests of members of the legislative body participating in their enactment. . . . These facts before us do not present a situation where this court can say that it is clearly in the public interest for the court to examine the personal interest, financial interest or motives of the members of the legislative body of the City in exercising its legislative function in enacting the amendment to the Comprehensive Zoning Ordinance of the City.

Id.

44. 157 S.E.2d 920 (Va. 1967).

45. *Id.* at 923-24; *cf.* Barrick v. Board of Supervisors of Mathews County, 391 S.E.2d 318, 320 (Va. 1990) ("Legislative purpose" is "a critical element in the test for illegal spot zoning.").

46. *Wilhelm*, 157 S.E.2d at 923-24, n.3 (citing Board of Supervisors v. Carper, 107 S.E.2d 390 (Va. 1959) and Board of County Supervisors v. Davis, 106 S.E.2d 152, 157 (Va. 1958)).

47. Mountain View Ltd. Partnership v. City of Clifton Forge, 504 S.E.2d 371, 377 (Va. 1998) (quoting Twietmeyer v. City of Hampton, 497 S.E.2d 858, 860 (Va. 1998)); *see also* Town of Narrows v. Clear-View Cable TV, Inc., 315 S.E.2d 835, 839-40 (Va. 1984); National Linen Serv. v. Norfolk, 83 S.E.2d 401, 403 (Va. 1954).

48. It has been aptly observed: "If the present judicial attitude is that all acts of a municipal council should be examined for conflict of interest, express disapproval of the distinction would be preferable to verbal preservation but practical extinction." Recent Case, *Municipal Corporations—Judicial Control—Court Will Review and Invalidate Municipal Ordinance When Voting Councilman Has Personal Interest in Its Enactment*, 75 Harv. L. Rev. 423 (1961). The blanket exclusion of legislative motive appears to be eroding in federal common law as well. In *Palmer v. Thompson*, 403 U.S. 217 (1971), a deeply divided Supreme Court upheld a municipality's decision to close all public pools against a challenge that the municipality closed the pools in order to avoid having blacks and whites swim together. The Court held there that a discriminatory motivation does not invalidate a facially neutral law, and thus that the pool closing, which on its face impacted on whites equally with blacks, did not violate the blacks' equal protection rights irrespective of the legislature's intent. *Id.* at 224-25. The next year, perhaps taking a que from *Palmer*, the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, ad-

been released from the old-fashioned, judge-made, evidentiary shackles that prohibit inquiry into whether the exercise of legislative discretion vested in a local governmental body has been abused by improperly motivated municipal decisionmakers.

The exclusionary rule of *Blankenship* persists to this day and continues to lurk in judicial precedent as a categorical impediment to probing personal motivation when land use decisions are challenged as arbitrary and capricious.[49] That blanket exclusionary rule continues to be invoked to insulate local public officials from judicial accountability. The rule continues to apply to even those who flagrantly "exhibited the type of personal motivation that," although found to be "relevant and material" in the *Blue Grass Valley* case,[50] courts still believe they simply "ought not consider" because of the *Blakenship* rule.

D. Argument for Legislative Abrogation of Blankenship

1. Courts Should Not Attempt to Distinguish Between Legislative and Quasi-Judicial Functions of Municipal-Level Governing Bodies

Because little effort is made to allocate powers at the municipal level, local governing bodies sometimes legislate and often adjudicate individual rights. The convergence of these two functions has resulted in a rather vague line drawn between legislative and quasi-judicial (or administrative) activities. A legislative act is generally thought to prescribe a general rule of conduct. A quasi-judicial or administrative act is performed when burdens are imposed or privileges conferred in a specific case based on a finding that facts exist warranting the application of the general rule.[51]

Although the U.S. Supreme Court has specifically noted that it is not the function of the courts to probe the motives of even quasi-judicial decisionmaking,[52] state courts nevertheless engage in classifying the character of the decision made by the local governing body or municipality to in fact examine decisionmakers' motives.[53]

To avoid the rule that the motives of those involved in legislative action will not be inquired into, it was argued in *Blankenship* that although the comprehensive zoning ordinance represented legislative action by the city, a subsequent ordinance passed for the purpose of changing or amending the original zoning ordinance would be considered quasi-judicial action.[54] Rejecting the contention that

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dressed the issue of judicial inquiry into legislative motive in *Holt v. City of Richmond*, 459 F.2d 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. 931 (1972). There, the plaintiffs challenged an annexation agreement between the city of Richmond and a neighboring county claiming that it was motivated by a desire to deny blacks within the city a racial majority and the opportunity to gain additional representation on city council. The court stated: "when the legislative purpose is not both obvious and constitutionally impermissible, however, the cases uniformly hold that facially constitutional legislation may not be stricken because of suspect legislative motivation." *Id.* at 1098. The Supreme Court has never expressly overturned *Palmer*, but it has all but done so. Time and again over the past three decades, for example, the Supreme Court has held that facially neutral laws may run afoul of the Equal Protection Clause if they are enacted or enforced with a discriminatory intent. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 244 n.11 (1976) ("To the extent that *Palmer* suggests a generally applicable proposition that legislative purposes is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary."); Rogers v. Lodge, 458 U.S. 613 (1982) (invalidating at-large election system for a rural county's board of commissioners where shown to have been maintained for the purposes of diluting the voting strength of blacks).

49. *See, e.g.*, W.S. Carnes, Inc. v. Board of Supervisors, 478 S.E.2d 295, 300-01 (Va. 1996) ("We conclude that the trial court properly excluded the proffered evidence of the Board's minutes [because] evidence of the Board's intent or motive in enacting ordinances is irrelevant to our consideration whether they are valid laws."). Yet local governing bodies routinely adduce minutes of their proceedings in an effort to sustain their decisions as "fairly debatable," because *Blankenship* states, while motive evidence "is inadmissible to assail the motives which induced the enactment of an ordinance, for the purpose of determining its validity . . . *such evidence is admissible to sustain the validity of the ordinance, and often has decisive force*." *Id.* at 325 (citations omitted).

50. In considering whether a legislative act is reasonable, however, generally the motives of the governing body in undertaking the act are deemed immaterial, *Ames v. Painter*, 389 S.E.2d 702, 705 (Va. 1990), though under *Blankenship v. City of Richmond*, 49 S.E.2d 321, 324 (Va. 1948), they sometimes are, depending on whether motive is offered to "sustain" or "assail" the validity of the ordinance.

51. *See Blankenship*, 49 S.E.2d at 324 (an ordinance that "regulates or restricts conduct with respect to . . . property . . . is purely legislative"); Helmick v. Town of Warrenton, 492 S.E.2d 113, 114 (Va. 1997).

> [T]here are no bright-line rules for the determination of whether an act is administrative or legislative, we have said that administrative acts generally implement existing laws while legislative acts create new ones. A legislative act involves the balancing of the consequences of private conduct against the interests of public welfare, health, and safety.

Id. (citations omitted) (internal quotation marks omitted); City of Bowie v. County Comm'r for Prince George's County, 267 A.2d 172, 177 (Md. 1970).

> The test to determine whether action is legislative or administrative is whether the action is one making new law, i.e., an enactment of general application prescribing a new plan or policy, or is one which merely looks to or facilitates the administration, execution or implementation of a law already in force; in the latter case, inquiry into motive is allowable.

Id.

52. United States v. Morgan, 313 U.S. 409, 422 (1941).

> Just as a judge cannot be subjected to such a scrutiny, *compare* Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904), so the integrity of the administrative process must be equally respected. *See* Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907). It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

Id.

53. *See, e.g.*, Cochran v. Fairfax County Bd. of Zoning Appeals, 594 S.E.2d 571, 576-77 (Va. 2004) ("Under fundamental constitutional principles, administrative officials and agencies are empowered to act only in accordance with standards prescribed by the legislative branch of government. To hold otherwise would be to substitute the will of individuals for the rule of law."); Aldom v. Roseland, 127 A.2d 190, 193 (N.J. Super. Ct. App. Div. 1956) (holding in a zoning context, which would be labeled "legislative" in Virginia, "[a] quasi-judicial action of a municipal body is rendered voidable by the voting participation of a member thereof who is at the time subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty"); Zell v. Borough of Roseland, 125 A.2d 890 (N.J. Super. Ct. App. Div. 1956) (the "long maintained" distinction between legislative and quasi-judicial functions of municipal councils in matters of disqualifying interests was not applicable).

54. Eleven years after *Blankenship* this same argument, though ultimately not successful in Florida, at least persuaded one Florida justice. *See* Schauer v. City of Miami Beach, 112 So. 2d 838, 842-43 (Fla. 1959) (Roberts, J, dissenting) (observing voting municipal official "is not only guilty of a breach of faith in the exercise of the quasi-legislative and quasi-judicial powers entrusted to him" but:

> To give judicial approval to conduct [admitted self and financial interest] so obviously opposed to the traditional stan-

the adoption of a zoning ordinance is quasi-judicial in character and hence the personal interest of a member of the adopting body is a proper subject for judicial inquiry, the *Blankenship* court offered its view that it would be flagrantly inconsistent to hold that the adoption of a comprehensive zoning law is legislative in character and that the amendment to such a law is a quasi-judicial act.[55] Yet an important contrary view was announced in the early 1970s by the Washington Supreme Court in *Fleming v. Tacoma*.[56]

In considering a Tacoma city council rezoning of four parcels of property to allow the construction of a high-rise condominium, the Washington Supreme Court held that the "appearance of fairness" doctrine applied to all hearings that either amended existing zoning codes or reclassified particular land under the zoning code. The court first determined that the doctrine applied to local legislative bodies as well as administrative officers.[57] The court then reasoned that whenever a legislative body decides to alter the status quo, it adjudicates between the rights of the proponents and the opponents of the change.[58] Thus, it implied that if any hearing was held aimed at altering either a zoning code or the classification for a specific site, the actions were to be considered quasi-judicial, regardless of any other circumstances.[59] The appearance of fairness doctrine has since been modified by the Wisconsin legislature to exclude certain local land use decisions.[60]

Moreover, it has been forcefully argued that courts should not engage in this artificial distinction between legislative and quasi-judicial functions of local governing bodies at all when considering the effect of an improperly motivated local supervisor or council member's vote in a zoning action; rather the courts should simply invalidate the ordinance in either case.[61]

> 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. Thirdly, like municipal contracts, 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. It may be contended that the election process provides a sufficient check on a councilman's self-interested action. 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. The argument often made, that judicial review of a councilman's motives in legislative action would interfere with a co-ordinate branch of government, 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 counsel acts in a quasi-judicial capacity, courts have not hesitated to apply a rule of disqualification for self interest in th[o]se cases [so classified]. Although the courts have generally refrained from stating that the rule of non-review of motives in legislative action should be abandoned, such a result has in effect been reached by various techniques which include invalidating action where "fraud" is involved, or classifying an action as quasi-judicial when in other circumstances it has been treated as legislative.[62]

Each of those reasons is as valid today as when first articulated in 1959.[63] It seems self-evident when performing either legislative or quasi-judicial functions, that "[u]nder fundamental constitutional principles," local governing bodies "are empowered to act only in accordance with standards prescribed by the legislative branch of government. To [allow] otherwise would be to substitute the will of individuals for the rule of law."[64]

2. The Contradiction That Motive Evidence Is Inadmissible to "Assail" a Local Land Use Ordinance, But Admissible to "Sustain" It Is Difficult to Reconcile and a Foolish Inconsistency

The Virginia Supreme Court stated in *Blankenship* that:

dards of morals and ethics required of our public officials is to admit a failure in our judicial system; and I, for one am unwilling to concede that an ordinance enacted under such circumstances is beyond the reach of the judicial process … The strict disinterestedness that should be required of municipal councilmen is particularly important in zoning cases, since this court is committed to the rule that if the zoning determination made by the City Council is "fairly debatable," it should not be disturbed by a court.)

55. It has been said that "a legislative act generally predetermines what the rules shall be for the regulation of future cases falling under its provisions, while an adjudicatory act applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing." Joint Council of Interns & Residents v. Board of Supervisors, 258 Cal. Rptr. 762, 766 (Cal. Ct. App. 1989) (noting that while "the rules of judicial review applicable to administrative actions are well-defined, the distinction between legislative and adjudicatory determinations is anything but clear. . . . At bottom, 'the distinction between the quasi-legislative and quasi-judicial decision contemplates the function performed rather than the area of performance.'" (citation omitted)).

56. 502 P.2d 327, 331 (Wash. 1972); *see also* the discussion of Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973), *supra* note 31.

57. *Fleming*, 502 P.2d at 331.

58. *Id.*

59. *Id.*

60. *See* WASH. REV. CODE. §42.36.010 (1982) ("Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance."). The statute also provides: "No legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine," thus legislatively overruling *Fleming*, at least in part.

61. *See* Joel N. Simon, *Municipal Corporations—Zoning—Disqualification of Councilman for Personal Interest*, 57 MICH. L. REV. 423 (1959) in which it was pointed out that courts should not attempt to distinguish between legislative and quasi-judicial functions of a municipal council when considering the effect of motive in a zoning action.

62. *Id.* at 425-26.

63. Zell v. Borough of Roseland, 125 A.2d 890 (N.J. Super. Ct. App. Div. 1956) (the "long maintained" distinction between legislative and quasi-judicial functions of municipal councils in matters of disqualifying interests was not applicable).

64. Cochran v. Fairfax County Bd. of Zoning Appeals, 594 S.E.2d 571, 576-77 (Va. 2004) (so holding *only* as to "administrative officials and agencies").

> courts are not concerned with the motives which actuate members of a legislative body in enacting a law, but in the results of their action. Bad motives might inspire a law [that] appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives.[65]

Yet the court also declared that motive "evidence is admissible to sustain the validity of the ordinance, and often has decisive force."[66] Two relatively recent cases—*Barrick v. Board of Supervisors of Mathews County*[67] and *W.S. Carnes, Inc. v. Board of Supervisors County*[68]—illustrate quite well the contradictory nature of *Blankenship* where motive may be admitted "to sustain the validity of the ordinance, and often [with] decisive force," but may not be considered by a court if employed to attack a rezoning decision.[69]

In 1990, the Virginia Supreme Court asked, "How may the power of judicial review be exercised where the record is silent with respect to the Board's adherence to a legislatively-prescribed standard?"[70] The answer is, it cannot.

> We hold that the "fairly debatable" standard cannot be established by a silent record. Unless the Board makes appropriate findings, supported by the record, or states appropriate conclusions supported by the record, or unless the record itself, taken as a whole, suffices to render the issue fairly debatable, probative evidence of unreasonableness adduced by a litigant attacking the Board's action will be deemed unrefuted.[71]

That same year, in *Barrick*, the Virginia Supreme Court undertook an inquiry into whether the challenged board had "produced sufficient evidence of reasonableness to make the propriety of the rezonings fairly debatable."[72] Among the evidence the board developed and adduced to show the reasonableness of its actions and to sustain them, was "the minutes of the [b]oard meeting at which the rezonings were adopted."[73]

Six years later, in *W.S. Carnes, Inc.*,[74] the local board filed a motion in limine in the circuit court seeking to exclude from evidence all minutes of the board's meetings. The trial court granted the motion and excluded the minutes; the Virginia Supreme Court upheld the trial court's ruling citing and selectively quoted *Blankenship*.

Perhaps anticipating Judge Dillon's own misgivings about "[m]unicipal bodies . . . hav[ing] too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others,"[75] James Madison feared the threat of local tyranny, stating:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[76]

Today, on judicial review, local governing bodies are vested with a presumption of reasonableness,[77] and held to the lowest conceivable fairly debatable standard.[78] For *Blankenship* to have emphasized that motive may always be admitted "to sustain the validity of the ordinance, and often [with] decisive force," but never to "assail" it, is to move from a neutral factor to a contradictory one. This is because on this spectrum, unicameral local governing bodies[79] are accorded far too much deference to be consonant with notions of good government.

E. The Virginia General Assembly Should Intervene

State government holds authority over legally subordinate local governments, and it ought to be alarmed that local supervisors purposefully subvert state-delegated land use prerogatives for blatantly personal reasons. Regardless of the legislative/quasi-judicial characterization debate prevailing in the courts, Virginia's legislature could and should correct its course regarding whether and when the judiciary may inquire into motivations of local "legislators" that inspire their myriad land use decisions.

There is an urgent legislative duty to abolish the *Blankenship* rule because the doctrine is demonstrably being misused to protect even those local government officials who admit for the record, as happened in the *Blue Grass Valley* case, that they take forbidden considerations into account when making land use decisions. These considerations, by their very nature, are necessarily ultra vires of the enabling stat-

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65. *Id.*; Blankenship v. City of Richmond, 49 S.E.2d 321, 325 (Va. 1948) ("evidence *aliunde* is inadmissible to assail the motives [of even local supervisors] which induced the enactment of a [local zoning] ordinance, for the purpose of determining its validity." (citations omitted)).
66. *Blankenship*, 49 S.E.2d at 325 (citations omitted).
67. 391 S.E.2d 318 (Va. 1990).
68. 478 S.E.2d 295 (Va. 1996).
69. *Blankenship*, 49 S.E.2d at 325.
70. Ames v. Painter, 389 S.E.2d 702, 705 (Va. 1990).
71. *Id.* at 706.

    > Some or all of the members of the Board, in reaching their individual decisions, may have considered those factors in good faith, but with the exception of the statements of the member who moved a denial of the application on those grounds, there is no basis in the record for an objective conclusion by the reviewing court that the legislative standards had been given any consideration.

    Id.
72. *Id.*; Barrick v. Board of Supervisors of Mathews County, 391 S.E.2d 318, 321 (Va. 1990).
73. *Barrick*, 391 S.E.2d at 321. After reviewing the board's proffered minutes, the court concluded "the [b]oard produced sufficient evidence to establish that the purpose of rezoning the subject parcels was not 'solely to serve the interests' of private landowners." *Id.* at 322.
74. W.S. Carnes, Inc. v. Board of Supervisors, 478 S.E.2d 295, 300-01 (Va. 1996). The plaintiffs in that case had offered the local board's minutes as evidence on the theory that the minutes would provide an "understanding of the purpose and the intent" of the ordinances they had challenged. *Id.*
75. Dillon, *supra* note 12.
76. Madison, *supra* note 34, at 83.
77. Board of Supervisors of Fairfax County v. Southland Corp., 297 S.E.2d 718, 722 (Va. 1982).
78. Fairfax Co. v. Snell Corp., 202 S.E.2d 889 (Va. 1974) (once the burden has shifted to show reasonableness, a governing body has the burden of showing only that the issue was "fairly debatable").
79. Virginia's localities are obviously unlike federal or state governments with their series of checks and balances, such as bicameral action—the requirement of concurrence by two houses—and the provision of an executive veto.

ute.[80] There is no principled reason for judicial deference to legislative judgments made by local authorities at the local level that proved to have been motivated by spite, ill-will, hate, malice, or by any other illicit or malignant purpose.

The public is interested in what motivates the passage of local land use ordinances and how those laws are shaped. Citizens are deeply dismayed by what they perceive as persistent abuse by local governing bodies of the state's land use laws. If improper considerations have been taken into account by local governing bodies, citizens are increasingly incredulous that courts would nonetheless approve land use ordinances produced by those improper motives. Allowing local supervisors carte blanche to abuse their limited, delegated authority in the manner described in the *Blue Grass Valley* case, as *Blankenship* currently authorizes courts to do, cannot help but promote a thorough disrespect for the laws and the legal institutions of the commonwealth.[81]

IV. Conclusion

Blankenship's asymmetrical exclusionary doctrine in the local land use context is incoherent, disingenuous, intellectually muddled, and morally confused. The dictum that courts in Virginia should be barred from considering proof (established by judicial admissions of supervisors or otherwise) that zoning ordinances were infected by improper motives is a relic of earlier times. Other than perhaps benighted *stare decisis*, there is no sound and valid reason today for courts in Virginia to close their eyes to obvious impropriety animating a local supervisor's reasoning, or to ignore that which is plainly unreasonable, arbitrary and capricious legislative action at the local level. The *Blankenship* rule no longer has a proper place in our law, and it should be changed by curative legislation.

80. As the Supreme Court put it in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. In our context, the *Yick Wo* standard, to the extent the case articulates one, would require a showing of malice in changing the zoning ordinance.

81. It is ironic that the local government invested by statute with a strict obligation to protect the public interest in relation to land use decisions, so arrogantly sought to undermine it in the *Blue Grass Valley* case, and did so successfully because of the *Blankenship* exclusionary rule. Highland County's local government authority is alleged in pending litigation to have misused its finite legislative powers once again, this time in the process of granting a conditional use permit to allow industrial wind utilities to be erected in the Commonwealth, at the expense of private property rights of neighbors and all those other than the applicant, and against the wishes of a majority of land owners and their own Highland County constituents. Highland's Board of Supervisors might possibly have been emboldened by learning of the rule in Virginia that *Blankenship* long ago established. A newspaper account of the July 14, 2005 decision reports, for instance, that one of two supervisors who voted to approve the "wind farm" proposal had "implied that he's received threats, verbal abuse and even 'what I perceive to be a bribe.'" Mason Adams, *Highland Co. Oks Wind Farm Project*, The Roanoke Times, July 15, 2005. It surely is coincidental, but worthy of further note, that Dillon's Rule, *see supra* note 17, itself was created to curb widespread municipal corruption related to promotion of the railroad industry, where local governments often disregarded private property rights in pursuing revenue from railroad facilities, stations, and lines in an early display of competition for economic development. *See* Richardson Jr. et al., *supra* note 14, at 7.