



# GreenLaw

Giving Georgia's Environment Its Day In Court

September 24, 2010

Hon. Philip Jay, Chairman  
Ben Hill County Board of Commissioners  
225 S. Lee Street  
Fitzgerald, Ga. 31750

Hon. O.D. Netter, Vice-Chairman  
Ben Hill County Board of Commissioners  
225 S. Lee Street  
Fitzgerald, Ga. 31750

Hon. Kathy Davis, Commissioner  
Ben Hill County Board of Commissioners  
401 Preston Drive  
Fitzgerald, Ga. 31750

Hon. Scott Downing, Commissioner  
Ben Hill County Board of Commissioners  
289 Perry House Road  
Fitzgerald, Ga. 31750

Hon. Richard Goodman, Commissioner  
Ben Hill County Board of Commissioners  
212 Evergreen Road  
Fitzgerald, Ga. 31750

Dear Ben Hill County Board of Commissioners:

We represent the Wireless Energy Network ("WEN") in connection with the proposed construction of an 850 megawatt coal-fired power plant in Ben Hill County. WEN is a group of concerned citizens committed to protecting the environment, public health, and the economic well-being of Ben Hill County. We understand that you have been provided an opinion letter by the county attorney, Toni Sawyer, on August 25, 2010 relating to the possible rezoning of County property for purposes of building the proposed plant. The letter makes an incorrect blanket assertion that we feel compelled to respond to: namely, that, as members of the Ben Hill County Board of Commissioners, you do not have any authority, discretion, or responsibility with regard to the proposed plant.

We believe that this letter inaccurately states the powers and responsibilities that the Board, and the Board alone, possesses over such zoning issues. We are writing this letter to correct any misunderstanding you may have been given in this regard. As further described below, the Board unquestionably has the discretion, based upon careful weighing and consideration of the factors set forth in the Ben Hill County Zoning Ordinance, not to grant a rezoning request to build the proposed coal-fired power plant. Indeed, under the circumstances present in this case, where the property proposed for the plant is an agricultural property surrounded by like properties, any such rezoning would constitute illegal spot zoning that would be subject to a challenge in court.

Contrary to Ms. Sawyer's letter, as the governing authority for Ben Hill County, you have not only the right but the duty to exercise your independent discretion when it comes to zoning decisions within your jurisdiction. Johnson v. Evangelical Lutheran Church, 79 Ga. App. 671 (1949) (commissioners have "broad discretion"). See also Pindar's Georgia Real Estate Law and Procedure, §§ 3-12, (6th ed . 2004). Under Georgia law, this zoning discretion, "while very broad, and not easily lending itself to an all-inclusive definition, is that inherent power which enables a governing authority to prohibit things hurtful to the comfort and welfare of society, to protect persons and property, and to secure the public against some danger, to limit the activities of some individual or group, if necessary, in order that the welfare, health, or prosperity of the body politic may be protected." Crummy v. State, 83 Ga. App. 459 (1951).

The Ben Hill Zoning Ordinance prescribes a number of factors that guide the Board in the exercise of its zoning authority. These factors include: the existing land use pattern; the creation of an isolated district unrelated to nearby districts; the potential impact on the environment; and, importantly, "whether the proposed change will constitute a grant of special privilege to the individual owner as contrasted with the adjacent or nearby neighborhood or with the general public." Taken together, the consideration against creating "isolated districts" – like the island of heavy industry that would need to be created to accommodate Plant Ben Hill – and the consideration against conveying special privileges to individuals at the expense of the general public refer to the problem of "spot zoning," which is illegal in Georgia.

The Georgia cases make clear that where a commission rezones property in a way that is inconsistent with a comprehensive development plan and which benefits a single owner, the zoning decision is illegal "spot" zoning. In East Lands, Inc. v. Floyd County, 244 Ga. 761, 763 (1979), the court discussed spot zoning and stated that it "is perhaps most commonly defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for benefit of the owner of such property and to the detriment of other owners," adding that "spot zoning is the very antithesis of planned zoning." The court noted that such spot zoning is illegal and will be struck down. This is particularly true where a spot zoning decision is inconsistent with a county's comprehensive development plan.

Although spot zoning commonly occurs, as the court noted, with respect to small parcels, it is equally indefensible when it involves a single large parcel, like the property being proposed for the coal plant. The point is that one property, owned by a single individual or entity, is being singled out for special treatment, not in accordance with sound planning, but instead to confer a benefit upon that property owner at the public's expense.


Thus, it is apparent that although the Board has considerable discretion, it is not permissible to rezone a particular piece of property in a way that is inconsistent with the surrounding area just to satisfy one property owner. Some of you may be concerned that the proposed developer might challenge a refusal to rezone the property to its benefit, but the law is

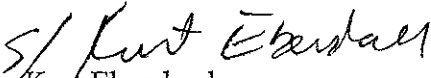
clear that when it comes to the rezoning of property, no party has a right to rezoning merely because such rezoning would make his property more valuable. Newton v. Fidelco Growth Indus., 142 Ga. App. 300 (1977). This is particularly true when due consideration of the proposal in light of the factors set forth in the Zoning Ordinance strongly weighs against granting the rezoning. While a properly considered denial may not be sufficient to ward off litigation from the property owner, the Board must be prepared, when the public welfare demands it, to defend its decisions in court. Moreover, the Board should be aware that in this instance the greater likelihood of a successful challenge would come if the commission engages in spot zoning in contravention of the Comprehensive Plan.

We believe that there are compelling reasons for you to deny any attempt to rezone this property for use as a coal-fired power plant. In addition to the reasons mentioned above, the factors for you to consider in zoning include the public interest of the citizens of Ben Hill County. We do not believe that it is in the public interest of this County to build an 850 megawatt coal-fired power plant. Not only is the proposed location totally inconsistent with the agricultural nature of the surrounding area, but the plant will certainly be damaging to the natural resources of the County. Coal-fired power plants are known to emit extensive and dangerous air pollution as well as water pollution. Additionally, the plant would likely consume extensive amounts of the County's water resources while depressing nearby property values. Because these plants, once built, have a useful life of 50 years or more, a mistaken decision to rezone the land for the plant now would be a mistake that would impact the children and grandchildren of the citizens of Ben Hill County. A coal-fired power plant would be notably inconsistent with the vision for the future that the County and its citizens are currently setting forth in the 2031 Comprehensive Plan – a vision that includes protecting the County's significant natural resources, maximizing its appeal to outdoor enthusiasts, and recruiting new businesses in the biomass and alternative fuels industry, along with their potential to provide high-paying, skilled employment for current and future County residents.

In short, we urge you to utilize your power and discretion when considering any attempt to rezone the subject property. Should you have any questions or concerns, please feel free to contact us at the (404) 659-3122. Thank you for your attention to this important matter.

Sincerely,

  
Hutton Brown  
Senior Attorney

  
Kurt Ebersbach  
Senior Attorney

cc: Honorable Gerald Thompson, Mayor  
Toni Sawyer, Esq.  
Ken Anderson  
John T. Croley, Jr.  
Hon. Albert Webb, City Council of Fitzgerald  
Hon. Ric Jones, City Council of Fitzgerald  
Hon. Charles Coney, City Council of Fitzgerald  
Hon. Jason Holt, City Council of Fitzgerald  
Hon. I. B. Harmon, City Council of Fitzgerald  
Hon. Dennis C. Jefferson, Jr., City Council of Fitzgerald  
Hon. James Stepherson, City Council of Fitzgerald  
Hon. Mark H Masee, City Council of Fitzgerald  
Hon. John Hageman, City Council of Fitzgerald  
John H. Flythe, Fitzgerald-Ben Hill County Development Authority