

Overcoming NIMBY Opposition to Affordable Housing

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The Not In My Backyard Syndrome (NIMBYism), in the context of affordable housing, connotes objections made for reasons such as fear and prejudice. This is in contrast, for example, to objections over the real threat of an incompatible neighboring use, such as a hazardous waste facility near a residential area.

NIMBYism presents a particularly pernicious obstacle to producing affordable housing. Local elected officials are too often barraged by the outcry of constituents over siting and permitting affordable housing. Consequences of NIMBYism include lengthy and hostile public proceedings, frustration of consolidated plan implementation, increased costs of development, property rights disputes, and inability to meet local housing needs.

Fortunately, there are tools advocates can use to avoid or overcome these objections, usually to the eventual satisfaction of all parties.

ISSUE SUMMARY

Local zoning and land use decisions have historically resulted in racially and economically segregated communities. Richard Rothstein's *The Color of Law* details the intentional segregation wrought throughout the United States by means of government lending, insurance, and appraisal requirements for housing, including through practices like redlining and the security maps used by the Homeowners' Loan Corporation and Federal Housing Administration (FHA). A parallel argument can be made that government planning and zoning discrimination used to entrench NIMBY opposition is the perpetuation of modern-day segregation. NIMBYism is often a proxy for intentional segregation as it keeps people confined to pre-existing demographic patterns that often

reflect the overt, intentional segregation of the past.

Local zoning codes that segregate uses by housing type and require subjective standards of "compatibility" with existing surroundings set the stage for NIMBYism and for segregation. Exclusionary zoning laws that create single-family-only districts and use a subjective test of "compatibility" and consistency with the "character" or "neighborhood scale" perpetuate homogenous neighborhoods of low-density, single-family homes. These policies create an uphill battle when developers of affordable rental housing look for sites that will provide desperately needed homes for lower-income households.

Land use decisions are made in an ever-increasingly political environment fueled by NIMBYism and NIMTOOism (the Not In My Term Of Office syndrome). The NIMBYs are residents determined to maintain homogeneous neighborhoods, "preserve" their property values, and vehemently oppose the development of affordable housing. The NIMTOOs are the local elected officials who may or may not agree with the NIMBYs but are not about to vote in favor of the affordable housing development if it will jeopardize re-election.

Best Practices for Housing Advocates to Overcome NIMBYism.

The best defense to NIMBYism is a good offense. And a good offense means:

1. Know your legal rights.

When discrimination against an affordable housing development is really discrimination against a race, color, national origin, religion, disability, sex, or familial status, it violates the federal Fair Housing Act. State and local fair housing protections may include additional characteristics protected from discrimination. Litigation is usually not a meaningful remedy because housing funding cycles are on a tight time

clock and court actions can take years to resolve. But knowing your legal rights and making local government lawyers and elected officials aware of what you know about your rights is often all you need to benefit from fair housing protections. In cases where discrimination is clear and local elected officials act in disregard of that fact, consider reporting the incident to the U.S. Department of Housing and Urban Development (HUD) or your state or local fair housing centers. If HUD or the U.S. Department of Justice (DOJ) takes the case, it is a little like standing up to a schoolyard bully - it could make your future dealings with your local government much easier.

A non-profit developer may be hesitant to challenge a local government over land use issues if the local government provides funds to the non-profit. Establishing a good relationship with a local legal services office or other local advocates for the public interest is an effective way around the need for the affordable housing developer to cry foul when local government succumbs to neighborhood opposition. Local advocates can make these arguments on behalf of future tenants or residents directly impacted by the land use decision.

2. Expand legal protections for affordable housing.

(a) Fair Housing & Due Process

Advocate for state or local laws that make it harder for NIMBYism to prevail. For example, in 2000, the Florida Fair Housing Act¹ (the state's substantial equivalent to the federal Fair Housing Act) was amended to include affordable housing as a protected class. This expansion of the Florida Fair Housing Act has provided the Florida Housing Coalition and other housing professionals a useful tool for advocating for local government lawyers and commissions to approve affordable housing units or face legal challenges. In 2009, North Carolina adopted a similar state law to add affordable housing as a protected class in its fair housing law.²

1 Fla. Stat. § 760.26 (2021).

2 N.C.G.S. § 41A-4(g) (2021).

One of the reasons the Florida statute is so effective is that enforcement does not require going to court. If a local governing body violates this state fair housing statute, the affordable housing developer can immediately file a petition under the Florida Land Use and Environmental Dispute Resolution Act³ to have a special magistrate appointed who will review the denial in the context of the private property rights and fair housing rights of the affordable housing developer. This set of state statutes has been used to reverse land use denials of affordable housing, causing elected officials to reverse denials that were made in response to NIMBY-fueled public outcry. Using a special magistrate process is particularly beneficial because even if a party prevails in a court case using a substantive due process claim under the 14th Amendment or an anti-discrimination claim under an applicable Civil Rights law, the time it would take could thwart development as funding opportunities disappear due to delay.

(b) Zoning & Land Use

Regulations that unduly restrict flexibility in housing types and densities enable NIMBYism to thrive and allow existing patterns of segregation to continue. For communities that do not look all that different from the days of redlining, NIMBYism in the form of local land development regulations requiring a subjective test of neighborhood compatibility is a way for the government to perpetuate the overt, intentional segregation of the past. Housing advocates can study their local land development processes and push for reforms that facilitate more integrated communities.

Restrictive zoning, particularly single-family zoning, creates a high hurdle for affordable housing. In December 2018, Minneapolis, Minnesota, became the first major city in the United States to adopt a plan to allow up to three dwelling units on a single-family lot in areas zoned for single-family only housing.⁴ This change allows duplex and triplex rental housing in what

3 Fla. Stat. § 70.51 (2021).

4 The Minneapolis 2040 Plan is available at <https://minneapolis2040.com/>.

would otherwise be an exclusively single-family homeownership area. In 2019, Oregon passed a law requiring cities with populations of 25,000 or more to allow duplexes, triplexes, townhomes, and other “missing middle” housing types in single-family districts. Cities of 10,000-25,000 in population are required to allow duplexes in single-family zones.⁵ In 2021, California passed Senate Bill 9 which, among other policies, provides that a proposed duplex within a single-family zone be “considered ministerially, without a discretionary review or a hearing” if the proposal meets statutory requirements.⁶ Up-zoning policies such as these remove the obligation for an affordable housing developer to seek land use changes on a case-by-case basis and thereby avoid forums that invite NIMBYism.

In 2020, the Florida Legislature passed a law permitting all local governments to approve affordable housing developments without zoning or land use changes on land zoned for residential, commercial, or industrial uses.⁷ This state permission for local governments to override its own zoning requirements may prove to be a powerful tool in avoiding NIMBYism by reducing the need for developers to secure zoning approval in a public forum. It could be particularly useful for incorporating small-scale rental developments in single-family zoning districts and for adaptive reuse of commercial properties for affordable residential development. Of course, advocates will need to ensure that this zoning override is never used to site affordable housing near toxic uses.

Laws, whether federal, state, or local, that are helpful to your cause are only helpful if decision-makers and their staff are aware of those laws. The expansion of the state fair housing act to include affordable housing in Florida, for example, has been successful in keeping local elected officials from succumbing to NIMBY opposition. But the law has been successful only because housing advocates have

been conscientious about ensuring that local government lawyers know about the statute. It is now commonplace in Florida for a city or county attorney to inform the elected body during a heated public hearing that they run afoul of the state’s fair housing law if they deny the affordable housing developer’s application. Legal protections for affordable housing provide political cover to elected officials who are sometimes facing an electorate threatening to unseat those officials who vote in favor of affordable development.

3. Educate elected officials.

Once a NIMBY battle ensues, it is often too late to educate. Local elected officials need to understand the importance of affordable housing in general. Advocates should have an education campaign about affordable housing and its importance to the health of the entire community without regard to a particular development. Getting good media coverage is also helpful. Whenever possible, education should include bringing elected officials to see completed developments and sharing the credit with them at ribbon cuttings and in news stories. Regarding a pending development, whether you can meet with your elected officials depends upon the *ex parte* rules in your jurisdiction. However, if you discover that the community opposition is meeting with elected officials about your development, you certainly should do the same.

4. Garner allies for affordable housing from a broad range of interests.

Too often, the only proponents of an affordable housing development are the developers themselves. Whenever possible, have members of the business community, clergy, and like-minded social service agencies stand up for your development to demonstrate the community value of new affordable housing construction. The potential beneficiaries of the development (future residents) can also be effective advocates. And, if possible, recruit a former member of the opposition to speak on behalf of your development.

5 Or. Rev. Stat. § 197.758.

6 Cal. Gov. Code. § 65852.21 (2021).

7 Fla. Stat. § 125.01055(6) (2021); Fla. Stat. § 166.04151(6) (2021).

The media can be an important ally throughout the process of development approval. Whenever you foresee a potential NIMBY problem, it is best to contact the media first so that they understand your development plan and its beneficial public purpose. In this way, the neighborhood opposition will have to justify to the media why it makes sense to stop a development that the media already considers an asset for the community. Again, the best defense is a good offense.

5. Address all legitimate opposition.

Key to overcoming NIMBYism is to address all legitimate concerns expressed by the opposition. Those concerns may be, for example, traffic, available infrastructure, or project design - issues that may lead you to adjust your proposed development. The developer should come prepared with professional traffic studies, infrastructure impact reports, and other important planning documents so that what may be a legitimate concern is addressed.

If you address all legitimate concerns and the opposition persists, you are now in the enviable position of being able to state with certainty that the opposition is *illegitimate* - it is, therefore, opposition that would be inappropriate, arbitrary, capricious, or unlawful for the local government to consider in making its land use decision. In other words, you win!