

Overcoming NIMBY Opposition to Affordable Housing

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Not In My Backyard Syndrome (NIMBYism), in the context of affordable housing, connotes objections to new housing development 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 the siting and permitting of 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. In Richard Rothstein's *The Color of Law*, the thread of government lending, insurance, and appraisal requirements for housing, including redlining and the security maps used by the Homeowners' Loan Corporation and Federal Housing Administration (FHA), details the intentional segregation wrought throughout the United States. 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;

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 predominately single-family only cities 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 housing look for sites that will provide desperately needed homes for lower-income households.

Land use decisions are made in a political environment that can be fueled by NIMBYism and NIMTOOism (the Not In My Term Of Office syndrome). 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 will not vote in favor of the affordable housing development if it will jeopardize their 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 overtly or disguised 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 Act” (Fla. Stat. § 760.26 (2023); the state’s substantial equivalent to the federal “Fair Housing Act”) was amended to make it unlawful for a local government to discriminate in a land use or permitting decision on the basis of a proposed development’s source of financing. 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 2022, an

affordable housing developer successfully sued the City of Apopka for prohibiting the use of a parcel of land for affordable housing (Southwick Commons Ltd. v. City of Apopka, 2022-CA-005470-O (Fla. 9th Cir. Ct. Nov. 28, 2022)). The court cited Section 760.26, Florida Statutes, as controlling; it would be a violation of the state’s fair housing act for the city to exclude an affordable housing development.

In 2009, North Carolina adopted a similar state law to add affordable housing as a protected class in its fair housing law (N.C.G.S. § 41A-4(g) (2021)).

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. The success of the law is due to housing advocates 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.

(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. This change allows duplex and triplex rental housing in what 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 (Or. Rev. Stat. § 197.758). 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 (Cal. Gov. Code. § 65852.21 (2021)). California’s AB 2011 passed in 2022 offers statewide mandates for affordable housing in defined commercial areas. The state of Maine passed LD 2003 in their 2022 Session which among other housing reforms, requires local governments to allow duplexes save for certain exceptions on all lots in the state and up to four dwelling units per lot depending on if the lot is undeveloped or served by existing infrastructure (30-A M.R.S. § 4364-A). Policies such as these at the state and/or local level 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.

Reforming other restrictive zoning policies, beyond just allowing more housing types by right, are also gaining traction at the state and local level. Enacting inclusionary housing ordinances, eliminating parking minimums, passing lot design reforms such as reducing setback and maximum lot coverages, and expedited permitting for affordable housing via administrative processes that do not require a public hearing are boons to both allow more housing and prevent opportunities for NIMBY opposition. Another land use reform could be to

require a supermajority vote to deny a housing development approval. State preemptions and state authorizations of when a local government can deny an affordable housing development can also be helpful to approving more housing.

In 2023, the Florida Legislature passed the Live Local Act – a comprehensive set of policy directives, incentives, and mandates to produce affordable housing statewide. One of the components of the Act was a new statewide mandate that allows developments that set aside 40% of its units as affordable housing on parcels zoned for commercial, industrial, and mixed-use to receive favorable use, density, height, and administrative approval standards. By requiring local governments to approve affordable housing developments that meet certain criteria, much-needed housing can be expedited by reducing the need for affordable housing developers to secure zoning approval in a public forum. This tool in particular has the potential to facilitate adaptive reuse of vacant and underutilized strip malls, encourage economically sustainable development through mixed-use and mixed-income, and reduce auto-dependence through transit-oriented 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. It is important to have simple and impactful talking points with key data that tells a story about the need for housing.

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. Whether you can meet with your elected officials regarding a future development 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. If possible, recruit a former member of the opposition to speak on behalf of your development.

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 plans 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. 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, infrastructure capacity, or project design: issues that may lead you to adjust your proposed development. The developer working in tandem with key government staff 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. One of the most common objections, albeit not expressed as openly as traffic concerns, is the concern that the affordable housing will bring down the value of neighboring properties. There are a multitude of empirical property value studies all reaching the same conclusion: affordable housing does not diminish the value of neighboring properties. A study in April 2022 by the Urban Institute reports that

“Although the impact of affordable housing on nearby property values is not the primary reason to build affordable housing, individuals often cite it as a reason to oppose such developments. This analysis adds to the current research on the topic, showing that affordable housing developments in the city of Alexandria, Virginia, not only do not reduce property values but also are associated with a small but statistically significant increase in values.” A 2023 study from Georgia Tech’s School of Public Policy found that developments funded by the Low Income Housing Tax Credit (LIHTC) program do not cause harm to the value of surrounding properties. Research like this can help make the argument that affordable housing must be viewed as essential community infrastructure.

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!