

Municipal Perspective on NIMBYism

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I. INTRODUCTION

Serving on a city council or planning and zoning commission tasked with oversight of land development issues is never an easy job. It is particularly difficult when a proposed development is controversial and the citizens in the community mobilize to oppose the development. From the governing body's perspective the citizens represent neighbors and voters while the developer's project ideally represents economic development, added sales tax, and an increase in property values. For the most part, local officials take their charge seriously. Within the oath of office is a sworn duty to uphold the Constitution, the laws of Texas and the laws and regulations of the city. However, when confronted with passionate citizens, a developer may find itself in an uphill battle even when the development meets the letter of the law. This paper provides some insight into the decision-making process and explores some strategies for citizens and developers to consider. Nimbyism can be addressed and successfully managed with benefits realized by citizens and developers alike.

II. THE LINES OF DEFENSE/OFFENSE

A. Comprehensive Plan and Zoning Regulations

Cities have both discretion and responsibility when it comes to land use law. Every city is required to have a comprehensive plan before it can adopt zoning regulations.¹ The

¹ Tex Local Gov't Code, Sec. 211.004. COMPLIANCE WITH COMPREHENSIVE PLAN. (a) Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to:

- (1) lessen congestion in the streets;
- (2) secure safety from fire, panic, and other dangers;
- (3) promote health and the general welfare;
- (4) provide adequate light and air;
- (5) prevent the overcrowding of land;
- (6) avoid undue concentration of population; or
- (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

comprehensive plan is often created with significant public input and is not just a road map for future land use. It is also a description of quality of life objectives which seek to define the community's vision and capture the citizens' desire for their city and their neighborhoods.²

When a controversial project comes to town, the developer comes to city hall armed with the zoning ordinances, while the citizens come armed with the comprehensive plan. Unlike zoning regulations, the comprehensive plan does not carry any zoning authority or land use enforcement, and this distinction is often lost on the general public. Likewise, it is not uncommon for a developer to totally overlook the city's comprehensive plan in preparing his or her zoning application. Both of these failures contribute to the Nimby response, so that a smart developer will be well-served to study the comprehensive plan and incorporate as many of its objectives as possible into the proposed project. Not only will the project take on a more local identity but the developer will also provide members of the governing body with an argument to support the project. At the end of the day, a governing body will vote for a project, even a controversial project, when the arguments for the project exceed the arguments against the project.

After the developer has studied the comprehensive plan and determined that the project—even a franchise type project—can be embodied with local flare and community identity and purpose, consideration must be given to compliance with the city's zoning regulations.³ Zoning applications that seek variances, waivers, planned development zoning, development agreements, or zoning changes are the types of projects most likely to attract the public's attention and garner a Nimby response. Governing bodies do not like zoning applications that contain numerous requests for variances and other special treatment, and those are the types of applications over which governing bodies have substantial discretion to approve or disapprove.⁴

When a developer requests a variance, most zoning regulations require the developer to establish that the variance is needed because of a hardship that is unique to the property, that the hardship is not self-imposed and that the need for the variance is not related solely to financial burdens. If the city utilizes a board of adjustment to decide variance issues, then the board must make specific findings regarding the variance and the associated hardship and the vote in favor of the variance must be carried by three-fourths of the members of the board.⁵ The three-fourths requirement is a substantial hurdle in the best of situations, and an impossible hurdle for a project

² Texas Local Gov't Code, Sec. 213.002. COMPREHENSIVE PLAN.

(a) The governing body of a municipality may adopt a comprehensive plan for the long-range development of the municipality. A municipality may define the content and design of a comprehensive plan.

(b) A comprehensive plan may:

- (1) include but is not limited to provisions on land use, transportation, and public facilities;
- (2) consist of a single plan or a coordinated set of plans organized by subject and geographic area; and
- (3) be used to coordinate and guide the establishment of development regulations.

(c) A municipality may define, in its charter or by ordinance, the relationship between a comprehensive plan and development regulations and may provide standards for determining the consistency required between a plan and development regulations.

³ Obviously, projects that are simply being constructed according to the zoning already in place on a particular tract and which require no variances or waivers are not the focus of this discussion. For the most part, those type projects are not generally controversial and do not generate a lot of Nimby response.

⁴ *Weatherford v. City of San Marcus*, 157 S.W.3rd 473 (Tex. App.-Austin 2004, pet. denied)

⁵ Tex. Local Gov't Code Sec. 211.008.

that has attracted significant public opposition. By statute, a board of adjustment is only authorized to approve a variance if it will not adversely affect the public interest and to see that substantial justice is done. Boards have a great deal of difficulty getting past the public interest threshold when the hearing room is packed with angry citizens.

Because of the difficulty associated with the variance process, many developers propose an alternative zoning ordinance that is most commonly known as planned development district (“PDD”) zoning, or sometimes planned urban development (“PUD”) ordinances. Such ordinances allow flexibility in meeting zoning standards without a showing of hardship by handling the development as its own unique zoning district. Unfortunately for developers, these types of ordinances have been abused in recent years and have been used by governing bodies and developers alike to circumvent the variance requirements. In some cities, seeking a PDD or PUD ordinance has become a red flag for citizen groups and is guaranteed to solicit a strong Nimby response.

In addition, a PDD ordinance can so diverge from compliance with the city’s zoning procedures that it renders the ordinance invalid and causes a city to fail to follow its own procedures. Failure of the city to follow its own procedures is one of the tests used by the courts to identify spot zoning.⁶ The Texas Supreme Court in the *Tippitt* case stated “[t]he duty to obey the existing law forbids municipal actions that disregard not only the pre-established zoning ordinance, but also long-range master plans and maps that have been adopted by ordinance.”⁷

Properly utilized however, a PDD or PUD ordinance can be one of the strongest protections against a Nimby response and the public’s best hope for development standards that furthers the goals of the comprehensive plan. Typical PDD or PUD ordinances are intended to produce developments that utilize creativity within the development, accentuate and preserve cultural and historical aspects of the community, provide for parks and open space, pedestrian connectivity, mixed use and master planned type developments. When utilized properly, they include a “live, work, and play” objective which produces environmental benefits and reduces traffic impacts. Such ordinances can, when designed and implemented carefully, reduce and mitigate adverse impacts of commercial development on neighborhoods. This is so because developers are allowed to vary the zoning rules applicable in a standard zoning district and make the development better than it would be under the standard zoning regulations.

B. Circling the Wagons.

There is often a common theme associated with public opposition to a particular development. The adjoining neighbors don’t want to see the development, hear the development, smell the development, or be inconvenienced by the development. Inconvenience can be many things but is often translated as an increase in traffic. The traffic card is a powerful argument that will resonate with the governing body because it plays right into the city’s responsibility related to public health and safety. It also translates into a higher cost burden for the city. More traffic means more wear and tear on the streets, need for more streets and bypass roads, and greater

⁶ See *City of Pharr v. Tippitt*, 616 S.W.2d 173(Tex. 1981)

⁷ *Id.* at 176,177.

need for traffic control and police officers. While a development over the long term may produce sales tax, property tax or community jobs in excess of the burden that it adds to a community, over the short term it will not.

A developer who does nothing in the way of anticipating and addressing the common concerns associated with new development will substantially reduce the likelihood that his or her project will be approved. Couple that circumstance with a failure to understand the community's vision that is described in the city's comprehensive plan, and the governing body is left with nothing on the plus side of the equation.

Many of the issues that are raised by citizens in opposition to development are not that difficult or expensive to mitigate. The use of walls, fences, landscaping, setbacks, buffers, and architectural enhancements are just a few of the ways that a development can be designed to minimize the potential adverse impact on adjoining land uses and neighborhoods. Throw in a few community enhancements favored by the comprehensive plan and instead of a negative project, the project will take on positive aspects. The governing body may begin to see reasons why the project should not merely be allowed, but to be supported.

Of course a developer is unlikely to design mitigation measures into the project if the developer has not made an effort to contact adjoining property owners or adjacent neighborhood associations to solicit input regarding the project. Some developers choose to "circle the wagons" instead. They ignore the adjoining landowners and do not take into account any of the opposition's views or consider their perspective, believing that so long as they follow the law the project must be approved. This sort of attitude can produce several negative results. When the developer comes before the planning and zoning commission or city council to present their application they will not be adequately prepared to respond to the opposition. Second, if the citizens are not educated about the project in advance they will inevitably invent problems about it because there is no information to show the problems don't exist. Third, a developer who circles the wagons will miss the opportunity to improve the project and to garner support. Fourth, governing bodies absolutely hate it when developers don't engage adjoining landowners and attempt to work through the issues. Finally, developers should keep in mind that it only takes twenty percent of adjoining landowners who protest a zoning application in writing to trigger a three-fourths vote by the city council in order to approve a project.⁸

III. Conclusion

Not all citizen opposition is Nimbyism and not all Nimbyism is a bad thing. While it is true that some citizens are "CAVE" people (Citizens Against Virtually Everything) who have an agenda, fear change, and basically oppose any development, there are other citizens that have legitimate concerns about a particular project. For the latter, a little bit of negotiation and discussion can move a project forward in a positive direction. The trick is to seek out the adjoining neighbors who have an interest in managing and mitigating the development and to try and compromise some of the issues with them. The project will be a better project and the

⁸ Tex. Local Gov't Code Sec. 211.006(d)

developer will be able to assure the governing body that an effort was made to address issues raised by the adjoining landowners. Even if the parties don't reach complete agreement, any changes that the developer designs into the project as a result of the discussions will be looked on favorably by the governing bodies. Remember the comprehensive plan and use it as a tool to make the project more acceptable to the community. Anticipate potential adverse impacts and look for ways to mitigate such impacts.

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