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Overcoming Objections: How and When to Go on Offense Against Land Use Objectors

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Land use projects generate opposition. The project is too tall, say critics. Or too dense. Or too out of synch with its surroundings. Even the now-celebrated craftsman bungalows were initially derided as "utterly debased" and a threat to city life. Suffice it to say, handling objections to development has been and will continue to be a fact of real estate life.

Objections create delay, uncertainty and expense, particularly when they mature into a lawsuit—and the targets of land use ire often ask whether they must endure complaints and lawsuits via defensive measures alone, or whether it is possible to go on offense. This article briefly describes the typical defensive posture and highlights the narrow class of cases in which it may be possible to take the legal fight back to land use objectors.

Responding to the Typical Land Use Challenge: Addressing Concerns and Playing Defense

Land use objections emerge in myriad scenarios, but most often, they take the form of written and oral comments to decision-making bodies, or of lawsuits seeking to overturn a land use approval. In these scenarios, the response is typically two-fold. At the first stage, developers address community concerns to the extent possible and desirable, perhaps offering concessions or otherwise agreeing to modify the proposed

project.

At the second stage—when objections take the form of a lawsuit challenging a local government's project approval—project proponents play defense, doing whatever is necessary to demonstrate that the approval is valid and should be upheld. The typical legal challenge can last years. In the meantime, costs mount, and the uncertainty over the fate of the approval can effectively halt the project. Even a successful defense rarely secures more than the approval to which the developer was originally entitled. Thus the question, "When can we go on offense?" The answer depends largely upon the First Amendment.

First Amendment Protections for Land Use Challengers

Among the U.S. Constitution's lesser-known protections is that of the "right to petition." While the First Amendment's safeguards for speech, the press, and religion are more familiar, that amendment also guarantees that "Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances."

This right offers various protections, but in the land use context, it creates substantial obstacles for offensive legal action against objectors because it protects (1) citizen comments to the government and (2) lawsuits. This first protection for comments prevents retaliation and lawsuits against citizens for voicing their opinions to the government. Thus, for example, a citizen could ask his local government to deny approval of a church because he disliked the religious denomination that would use it. If the government agreed to that request, it would violate the law, but because of his right to petition, the citizen cannot be sued for making it.

The right to petition similarly protects lawsuits. Thus, although citizen lawsuits seeking to invalidate land use approvals may cost developers substantial time and money, the First Amendment generally prevents those citizens from being sued to recover the costs of these collateral impacts.

Altogether, the First Amendment right to petition presents a high bar to most legal actions against land use objectors (and note, too, that some states add other statutory protections), but it is not always an insurmountable one.

Identifying Scenarios to Go on Offense

Although the First Amendment's protections for citizen comments are essentially ironclad, citizen lawsuits enjoy ever-so-slightly looser safeguards, and it is valuable to recognize the circumstances in which offensive action against land use objectors may be possible. Specifically, the First Amendment does not protect "sham" litigation in which citizens take advantage of the expense, delay and uncertainty that lawsuits

create to wield the judicial process itself as a weapon. When litigation is merely a sham, those pursuing it may be held liable.

When does a sham arise? At least two, and perhaps three, kinds of litigation can suffice. First, a sham arises when (1) no reasonable litigant could have expected the lawsuit to succeed and (2) the plaintiffs filed the suit for an improper purpose. (More on that improper purpose in a moment.) Second, it can also arise when a plaintiff files a series of suits without regard for their merit—perhaps, for example, challenging every available decision point in the development approval process, and losing every one of those challenges. Third, it is also possible, though uncertain, that lawsuits seeking to secure illegal results—a suit seeking a discriminatory interpretation of a zoning code, say—do not enjoy First Amendment protections. In these scenarios, the plaintiffs can potentially be held liable.

But liable for what? Look again to the suit's improper purpose. While states vary in the conduct they prohibit, federal law supplies prohibitions commonly applicable in the land use context. Federal antitrust law generally prohibits monopolistic and anticompetitive behavior, so take note if the lawsuit comes from a competitor. Similarly, federal antidiscrimination laws, such as the Fair Housing Act and Americans with Disabilities Act, also frequently factor into land use disputes, so sham litigation with a discriminatory purpose can also trigger liability. Affordable housing, group homes, and rehabilitation facilities are all likely targets of this kind of litigation.

While a good defense will remain the bedrock of most land use objection strategy, it is always worth considering whether the circumstances present an opportunity to go on the offense as well.

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