

VII. Public Impediments: NIMBY and Land Use Control

Attitudes of the General Public: NIMBY

NIMBY, an acronym for “not in my back yard,” refers to organized opposition to proposed land uses proximate to existing residential communities. Although NIMBYism can arise in the context of almost every type of proposed development, from upscale shopping malls to educational facilities, it usually refers to citizen-directed actions aimed at preventing the development of subsidized housing in or near an existing residential community. Virtually every community includes residents who will object to locating subsidized housing in areas that are in or near their neighborhoods. NIMBYism can be reflected in zoning ordinances implemented by large urban jurisdictions. However, developers of subsidized housing in rural areas also encounter community opposition. In fact, minimum density requirements and lot and unit size requirements, which exclude affordable housing development, can be more prevalent in rural areas than in the metropolitan areas in and around major cities.

NIMBYism is an effective barrier to the construction of new developments based, in large measure, on the longstanding tradition of local control of land use. Local zoning authorities, usually appointed by elected officials, have broad discretion to regulate land use. The construction of low and moderate income housing in a specific location will often require the approval of a zoning change. After learning about the proposed project, residents in the affected area will organize campaigns to oppose the construction. Their objections are usually expressed as concerns about overcrowded schools, increased traffic, property values, and the like. After a flood of angry letters and phone calls and a few emotionally charged public hearings, the zoning boards will yield to the demands of residents and elected officials opposing the development.

NIMBYism is often rooted in fear and suspicion of people who will occupy subsidized housing; people who are different from the neighborhood’s current residents. The differences that typically trigger NIMBYism include race, income, source of income, national origin, ethnicity and family status. Myths about the effects of low-income and special-use housing are prevalent. The most common, that the placement of low-income or special-use housing adversely affects property values, has been disproved by numerous studies (Marco Martinez, *The Effects of Subsidized and Affordable Housing on Property Values: A Survey of Research* 1988, p.i; Michael Dear, *Gaining Community Acceptance*. 1991, p. 14).

NIMBYism is a predominate influence on Delaware’s landscape. It was identified as a significant impediment to fair housing choice by each of the three focus groups. It was mentioned in every other interview that the research team conducted. Neighborhood associations foster NIMBYism. The strength and proliferation of neighborhood associations in Delaware has a significant impact on county and municipal elections. These groups have access to and influence on local elected officials. This makes approvals of subsidized housing developments difficult since the developments invoke an extremely negative connotation in the minds of many middle and upper income property owners. Concerns about traffic, overcrowding schools, and imposing undue burdens on other community

resources are often pretexts for discriminatory animus. References to “crime” and “those people” are thinly veiled code words for racial and ethnic minorities.

DSHA’s policy of encouraging developers to notify neighborhood groups prior to the construction of subsidized projects facilitates NIMBYism, a major impediment to fair housing choice in Delaware. Advance notification provides those residents that are inclined to oppose the development an opportunity to organize community opposition. DSHA is only required by law to notify elected officials in whose districts developments will be located. Advance notice to neighborhood organizations goes much further than the law requires. DSHA has had considerable experience with NIMBYism. During our meetings with DSHA staff, several examples were cited of proposed developments that were thwarted by opposition mounted by residents in the affected areas. Given the effect of NIMBYism on fair housing choice in Delaware, DSHA should reconsider its notification policy.

Zoning and Land Use Regulations

The authority to regulate land use in the United States has long been deemed to be the province of localities (*Euclid v. Ambler Realty Co.*, 1926). The State of Delaware is not an exception. It has delegated the primary authority to regulate land use to counties and municipalities. In the case of municipalities, the relevant statute provides that:

[f]or the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes (22 Del. C. § 301 (2002)).

A similar grant of authority has been delegated to each of Delaware’s three counties:

The County Council may... regulate the location, height, bulk and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density and distribution of population, the location and uses of buildings and structures for trade, industry, residence, recreation, public activities or other purposes and the uses of land for trade, industry, residence, recreation, public activities, water supply conservation, soil conservation or other similar purposes, in any portion or portions of [the] County which lie outside of incorporated municipalities (9 Del. C. § 2601 (2002)).

The authority granted to localities in Delaware is broad. Challenges to decisions of zoning boards acting within their prescribed legislative powers will prevail only where the actions were arbitrary and unreasonable (*Daniel D. Rappa, Inc. v. Hanson*, 209 A.2d 163 (1965)).

Exclusionary Zoning

Reacting to rapid industrialization of the nation’s cities and towns during the mid- to late-19th century, land use planners concluded that the health, safety and welfare of individuals would be promoted by separating commercial and industrial uses from residential areas. By the

early 20th century, land use controls extended the separation principle to residential communities. Single-family and multi-family residential units were separated into different zones. This had the effect of excluding many middle- to low- and moderate-income families from areas that were designated as single-family districts. Multi-family zones were often limited to older neighborhoods.

One result of this approach was that renters and lower-income families were locked into urban cores. Exclusionary zoning practices limited the access of African American and other minorities to suburban communities since the majority of these groups resided in lower cost housing and multi-family dwellings. During the mid-20th century, many suburban municipalities refined their exclusionary zoning practices by establishing single-family zones with minimum lot sizes ranging from 5,000 to 40,000 square feet or more. Since land price is a major contributor to housing affordability, this practice expanded areas of exclusion, especially in suburban communities.

Exclusionary zoning practices have been successfully challenged in court. In *Huntington Branch NAACP v. Town of Huntington*, the U.S. Court of Appeals for the Second Circuit found that a municipality perpetuated segregation in violation of the Fair Housing Act through a zoning ordinance that restricted construction of government-subsidized multi-family housing to an urban renewal area populated predominantly by minority residents. The Court found that the town's actions violated the Fair Housing Act because the ordinance, although facially neutral, had an adverse impact on minority residents.

Exclusionary practices have also been successfully challenged under state laws. In 1975, the New Jersey Supreme Court issued a landmark ruling in *Southern Burlington County NAACP v. Township of Mount Laurel*. In *Mount Laurel*, the Court held that every developing community had an obligation under the New Jersey state constitution to provide a "fair-share" of the affordable housing needs of the region in which it was located.

Delaware's Quality of Life Act was signed into law on February 3, 1988. The law was enacted to encourage effective land use planning and regulation. It requires Delaware Counties to develop and implement comprehensive planning programs which will guide and control future development. The Act required each of Delaware's three counties to adopt an updated comprehensive plan by December 31, 1995. The Quality of Life Act prohibits zoning regimes that would completely exclude low- and moderate-income housing. Under this law Kent, Sussex and New Castle counties are required to promulgate plans, which include provisions for "adequate sites for future housing, including housing for low-income and moderate-income families" (9 Del. C. §§ 2661, 4956, and 6956 (2002)). The comprehensive planning requirement extends to Delaware municipalities that are obligated to adopt comprehensive development plans, with provisions for low- and moderate-income housing, before they can annex new land.

Zoning that operates to exclude a class protected under the Fair Housing law may be illegal. Purposeful exclusionary zoning based on a prohibited basis is illegal under the Act. Also, zoning could violate the Fair Housing Act if it is shown that it had a disparate impact on a protected class or when it perpetuates segregation. Despite state laws that require comprehensive planning, including mandatory provisions for low- and moderate income housing, it has been reported that some counties and municipalities are merely stating that provisions will be made for such housing in their comprehensive plans without actually following through. Furthermore, there is no effective means of enforcing this requirement. Discussions with focus groups and others indicated that some Delaware counties and

municipalities engage in exclusionary zoning practices. There is very little subsidized or multifamily housing in Sussex County compared to Kent and New Castle Counties. The County's rural character (outside of the rapidly expanding beach communities) cannot entirely account for the disparity. Some of it appears to be attributable to the County's zoning scheme.