

## Sprawl and the Coercive Force of Zoning Law: Fear & Loathing

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Although local zoning laws are written to protect the health, safety, and general welfare of community residents, these laws—and the state enabling legislation supporting them—have, in practice, severely limited public participation. Due in part to a general lack of public participation, many local ordinances place homeowners at a distinct disadvantage. For this reason, most citizen groups that have gone through the legal process in “sprawl battles” will describe their relationship to the law as one of “fear and loathing.”

Local community groups fighting sprawling development at the grassroots level find themselves on an uneven playing field. Citizens seeking to exercise their constitutional right to petition the government quickly discover that the legal system is tilted in favor of developers in three primary ways: (1) the cost of litigation is used as a weapon to intimidate public officials; (2) the resource inequalities between citizens and developers discourage citizens from appealing unfavorable decisions; and (3) the legal standing prerequisites unduly restrict plaintiff appeals.

### I. LITIGATION AS A WEAPON TO INTIMIDATE

The following dialogue between Beverley Billiris, the Mayor of Tarpon Springs, Florida, and Channel 10 News in Florida, details many of the concerns expressed by opponents to siting Wal-Mart superstores in their hometowns.

**MAYOR BEVERLEY BILLIRIS:** So there is no limit to what this would have cost the City of Tarpon Springs if we lost the lawsuit. At what price do I say no?

**CHANNEL 10 NEWS:** But if the city had to approve this anyway, why go through all of the effort of that long marathon [of] public comment?

**MAYOR BILLIRIS:** Because that's our process. Everyone has the opportunity to speak on anything that comes before this commission.

**CHANNEL 10 NEWS:** City Commissioner Peter Nehr says the city should have fought in court.

**CITY COMMISSIONER PETER NEHR:** If it costs us thirty

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or forty thousand dollars, I think it's a fight that would have been worth it for the city to pay to save the heritage, the culture that we in Tarpon Springs are known for.<sup>1</sup>

The concerns expressed by Mayor Billiris epitomize one of the major problems facing environmentalists and land use activists across the country: public officials think all developments, everywhere, are “as of right.” They believe that developers bring progress and tax revenue. Moreover, many believe that if you oppose them, they will take you to court and beat you.

The subsequent Tarpon Springs hearing on Wal-Mart ran for 12 straight hours into the early morning. Sixty people spoke out against the plan, while eight were in favor. Nevertheless, the Commissioners approved the superstore by a vote of 3-2. Although the Commissioners are bound to protect the health, safety, and welfare of the residents of Tarpon Springs, they chose to protect the profit of developers instead. In this case, the law was used to intimidate these officials into believing that if they rejected Wal-Mart, they would pay the price.

## II. RESOURCE BARRIERS TO CITIZEN APPEALS

When the residents of Tarpon Springs went looking for an attorney, they found one who insisted on \$25,000 in advance, and insisted that all members of the citizen group become members of an “unincorporated association;” establishing a contractual relationship between individual members of the organization.

In the land use context, the law denies citizen taxpayers the right to legal representation, as well as the right to cross-examine developers, their traffic engineers, or their wetland specialists. Grassroots organizations have scant budgets with which they may retain private counsel; they hold bake sales to fight the world's largest retailer. Last year, Wal-Mart had profits of \$9 billion. They maintain a large staff of in-house attorneys and retain local law firms to guide them through every step of the local zoning and appeals process. When faced with a legal challenge, Wal-Mart comes to the table with a land use attorney, a traffic engineer, a hydrologist, civil engineers, and other specialists for the site plan.

Compared to Wal-Mart, homeowners have insufficient funds to hire a wetland specialist to delineate where the wetland sits, an attorney to tell them how the Clean Water Act can be used in their favor, and a traffic engineer to submit expert traffic counts into the administrative record. Very few zoning codes even require that traffic impact statements or other

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1. *Channel 10 News* (Florida Local Channel 10 television broadcast, Jan. 18, 2005).

professional studies be conducted by independent analysts hired by the city or town. On the contrary, most of these studies are paid for by the developers. Requiring the development process to incorporate independent analysts would revolutionize the land use planning process.

Today, a traffic study produced by a developer will look like it was written by Garrison Keillor in Lake Wobegon—where all traffic flows are good-looking and all intersections above average. Yet, many of the traffic jams we have all experienced exist because some traffic engineer underestimated the impact of developments.

Given that the competition to protect open space is unfair and extremely pro-development, why is it that we restrict similar bias in other areas, such as auto insurance and utility regulation? In state-administered utility rate cases, for example, one would expect to find the Attorney General's office—or the equivalent state representative—arguing on behalf of ratepayers. Auto rates are regulated by the state Division of Insurance. But in zoning cases, state law considers zoning to be largely a matter of local police powers, leaving citizens mismatched in their fight against powerful corporate interests.

### III. STANDING IS NARROWLY CONSTRUED TO LIMIT PLAINTIFF APPEALS

In Massachusetts, my home state, before a concerned citizen is permitted to challenge a developer, they are required to satisfy a threshold standing requirement. They must meet the definition of a “party in interest,” which is defined as: “abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list . . . .”<sup>2</sup>

In Greenfield, Massachusetts, the town's planning board allowed the construction of the largest retail building in the history of the community to happen without a “Major Development Review” process. Town officials argued that the new building was, in fact, a simple expansion of an old building—even though the old building was razed—and did not require the special economic and environmental reviews called for in the town's zoning ordinance. When residents of Greenfield tried to raise the procedural defect in the planning board's approval of the Home Depot store, they were unable to find any plaintiffs who could satisfy the state's standing requirements because no one lived close enough to the store to meet the definition of “abutters . . . or abutters to the abutters within three hundred feet.” Such

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2. MASS. GEN. LAWS ch. 40A, § 11 (2005).

narrow standing laws are clearly biased in favor of developers.

In a similar case from Hickory, North Carolina, a nonprofit preservation group, Northeast Concerned Citizens, sought standing to challenge a big box developer, but was denied because not all of its members were adversely affected by the proposed superstore. The community group argued:

Many of the supporters and the people whose interest it represents are people who own property in the immediate vicinity of the proposed shopping center that is the subject of this litigation. Accordingly, the use and enjoyment of the properties owned by such people would be diminished and their property values would be lowered if the proposed shopping center were to be constructed, and therefore, such persons would suffer special damages that are different in degree and kind from any adverse affects [sic] that may be suffered generally by other residents of the City of Hickory . . . .<sup>3</sup>

The trial court ruled against the citizens, holding that “only twelve of [the] plaintiff’s one hundred and fourteen members/shareholders had [a specific legal interest directly and adversely affected by the rezoning ordinance].”<sup>4</sup> According to the court, the record did not contain any evidence that the plaintiff possessed an identifiable interest; therefore, the plaintiffs had standing only if all of its members/shareholders had the required interest.<sup>5</sup>

The court of appeal ruled that the corporation did not have any legal interest in property affected by a zoning ordinance despite the fact that “the members/shareholders of the corporation have standing as individuals to challenge the zoning ordinance.”<sup>6</sup>

The court of appeal ruled that “standing exists to challenge a zoning ordinance . . . when the plaintiff has a ‘specific personal and legal interest’ in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby.”<sup>7</sup> Similarly, standing exists to challenge a zoning ordinance by writ of certiorari when the plaintiff is an “aggrieved party.”<sup>8</sup> Following the North Carolina statute, the court held that the plaintiff must show damages “distinct from the rest of the community” as a

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3. Northeast Concerned Citizens, Inc. v. City of Hickory, Tricor Development Corporation, 545 S.E.2d 768, 770 (N.C. Ct. App. 2001).

4. *Id.* at 772.

5. *Id.*

6. *Id.*

7. *Id.* (citing Taylor v. City of Raleigh, 227 S.E.2d 576, 583 (N.C. Ct. App. 1976)).

8. N.C. GEN. STAT. §160A—388(e) (2005); *see also* Northeast Concerned Citizens., 545 S.E.2d at 772.

result of the zoning ordinance.<sup>9</sup>

The concurring judge wrote, “I disagree with the conclusion that a corporation has standing to challenge a zoning action only if ‘*all* of the members/shareholders of the corporation’ would have individual standing to bring the action . . . .”<sup>10</sup> The judge further noted that “[he] has been able to find no case in any jurisdiction which mandates that every single one of the individual members of an association must have standing on their own before an association itself may have standing to bring a zoning action.”<sup>11</sup>

It should be readily apparent that a person desiring relaxation of zoning restrictions, such as a change from residential to business, has little to lose and much to gain if he can prevail. Such a person is not reluctant to spend money to retain special counsel and real estate appraisers if it will bring him the desired result. On the other hand, the individual owner of land in the neighborhood may not realize the impact the proposed change of zoning will have on his property, or may not possess the financial resources to oppose the proposed change. By granting neighborhood and civic associations standing in such situations, the expense can be spread out over a number of property owners, thereby putting them on an economic parity with the developer.

#### IV. PLANNING AND ZONING BOARDS ARE PACKED WITH 'SPECIAL INTERESTS' THAT ARE PRO-SPRAWL

The lack of a level legal playing field is, in large measure, responsible for millions of square-feet of development. Most members of local planning and zoning boards are insulated from public accountability because they are appointed, not elected. As a result, planning boards consider themselves accountable to the mayor or the city council—whoever appointed them.

One of the greatest impediments to community-based grassroots action is the overwhelming feeling that the land use process is a “done deal,”

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9. *Id.*; see also *Northeast Concerned Citizens*, 545 S.E.2d at 771.

10. *Id.*

11. *Id.* at 773 (citing *Simons v. City of Los Angeles*, 161 Cal. Rptr. 67, 69 (Cal. Ct. App., 1979) (standing found when “many” of association’s members owned property in close proximity to the site proposed to be rezoned); *Life of the Land v. Land Use Com’n*, 594 P.2d 1079, 1082 (Haw. Ct. App. 1979) (three of organization’s members lived in immediate vicinity of land proposed to be rezoned; other members used land for recreation); *Ecology Action v. Van Cort*, 417 N.Y.S.2d 165, 169 (N.Y. Sup. Ct. 1979) (association given standing had over forty active members, several of whom lived near the proposed development); *1000 Friends of Oregon v. Multnomah County, Etc.*, 593 P.2d 1171, 1175 (Or. Ct. App. 1978) (organization had standing where one of its members had individual standing); *Save a Valuable Environment v. Bothell*, 576 P.2d 401, 404 (Wash. 1978) (a non-profit association has standing if “one or more of its members are specifically injured.”)).

because that is what planning boards often communicate to their constituents. In their book, David Porter and Chester Mirsky describe the local planning boards in upstate New York:

It was an entrenched group of insiders, an established urban regime, who, based on social, political, and economic interrelationships, controlled and dominated local government as if it [was] a family business. It was no coincidence that only lawyers predisposed to development were selected to represent public bodies. Such lawyers depended for their livelihood on local governments facilitating private interests that were consonant with maintaining the local power structure and development of local and outside capital.... This group of insiders is not easily penetrable, and resists those aspects of state law which it perceives as contrary to its interests.<sup>12</sup>

In my own practice, I always counsel local groups to never retain land use lawyers from their own town to make sure their hired attorneys are not going to cave in at the end to satisfy the good-old-boy network that feeds their future practice.

When placed in the wrong hands, even good zoning ordinances can be polluted. My city of Greenfield, Massachusetts, has an excellent “Major Development Review” ordinance, enacted in 1991, that requires an economic impact study to be conducted for any large-scale development projects; however, no meaningful economic impact study has ever been done. The local boards do not have the expertise to review such studies, and their rabidly “pro-growth” bias makes such ordinances an inconvenience rather than a tool for evaluating impacts. In effect, Greenfield has no Major Development Review ordinance because no one pays it any mind.

## V. CONCLUSION

Local city councils and commissions determine land use decisions based on local zoning ordinances and, more broadly, on the “public health, safety and welfare” of its citizens.<sup>13</sup> The Supreme Court has ruled that such decisions are best handled at the local level.<sup>14</sup> However, this process of local self-determination is not without its flaws. Local citizens remain powerless against developers, who exert their money and influence to hire top-notch lawyers, scientists and traffic engineers to tailor arguments and studies in support of the proposed development.

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12. DAVID PORTER & CHESTER MIRSKY, *MEGAMALL ON THE HUDSON* (Trafford, 2003).

13. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

14. *Id.*

Moreover, local citizens and community groups do not possess enough resources to obtain the same competent representation in law or science. In fact, state standing requirements are often so narrow that many citizens adversely affected by a proposed development do not have a right to challenge the development, either individually or through an unincorporated community association. Therefore, citizen groups' membership is stifled, lacking the funding that broader membership would provide and allowing them to pay for litigation and expert studies. Until the standing law is changed and local governments begin to rely on independent expert studies (instead of the applicant's studies), developers will continue to exert their financial power in small towns throughout the country. Until these changes are made, local governments will continue to make land use decisions based on the financial coerciveness of big box developers such as Wal-Mart.