

Site Fights

Land use site fights are growing more challenging in a politically savvy world.

ONCE UPON A TIME IN AMERICA, developers who wanted to get sites permitted went to city hall with their filing fees. If they met the zoning and dimensional requirements, they got their permits. If not, they had an audience-free hearing before a board of local municipal officials who dithered over mitigation, but eventually granted the rezoning.

In those days, there was little opposition to development, because growth was perceived by many to be good for the community, fueled the economy, paid taxes, and provided jobs for working people.

Gone are the halcyon days of yesteryear.

The modern American's well-developed sense of entitlement and empowerment has rewritten the rules. Americans want to live in a quiet, private, sylvan paradise on their little piece of earth, free of anything that makes noise, creates traffic, generates dust, annoys the dog, or ruins their view. Anyone who tries to tinker with their lifestyle will unleash a firestorm of political wrath that few politicians can withstand.

All across the United States, land use permitting and zoning processes are no longer straightforward administrative procedures; they have been transmogrified into political campaigns that require all the strategy and tactical maneuvering of a hard-fought election. As desirable land grows scarcer, site fights grow more shrill and vituperative, and compromise is replaced by take-no-prisoners, win-at-all-costs determination.

No matter where in America business seeks to develop or expand, proponents face not only angry neighbors, but also determined, politically sophisticated activists who know when and how to flex their political muscle.

NIMBY (not-in-my-backyard) opposition is nothing new. But something new has emerged: sophisticated political campaign strategy that forces public officials to risk their offices at every vote, and that pushes back no matter how reasonable a development proposal might be.

Apply for rezoning, and opponents will oppose the project, file recall petitions against elected officials who support it, and appeal the zoning change in court. Try to put up a strip mall, and neighbors will call it inappropriate, intrusive, dangerous, and likely to attract noisy and destructive teenagers (their own). Try to develop a big box, and opponents will rewrite the town's comprehensive plan, amend the zoning bylaws, rezone the site, and establish dimension requirements, minimum lot sizes, and building caps that make the project impossible, or impossibly expensive.

Even when developers have all their ducks aligned, astute opponents know they can impose a commercial building moratorium for a year or two, giving them time to change the rules while the developer's debt service and opportunity costs continue to rise, and the hoped-for anchor tenant gets tired of waiting. New dimensional requirements, setbacks, height limits, minimum lot size, lot coverage restrictions, and building size caps are sometimes the ticket. Or, the town might simply decide the locus is perfect for a new library and take the land by eminent domain.

And, now that the U.S. Supreme Court has decided in *Kelo v. City of New London* that "public" means "private," municipal governments are free to seize a property and give it to a competing developer simply because they like one plan better than another.

Clearly, land use politics these days are not for the weak of heart.

Developers who step into this maelstrom without a campaign plan are likely to find themselves in a lengthy and expensive political and legal battle they are increasingly likely to lose.

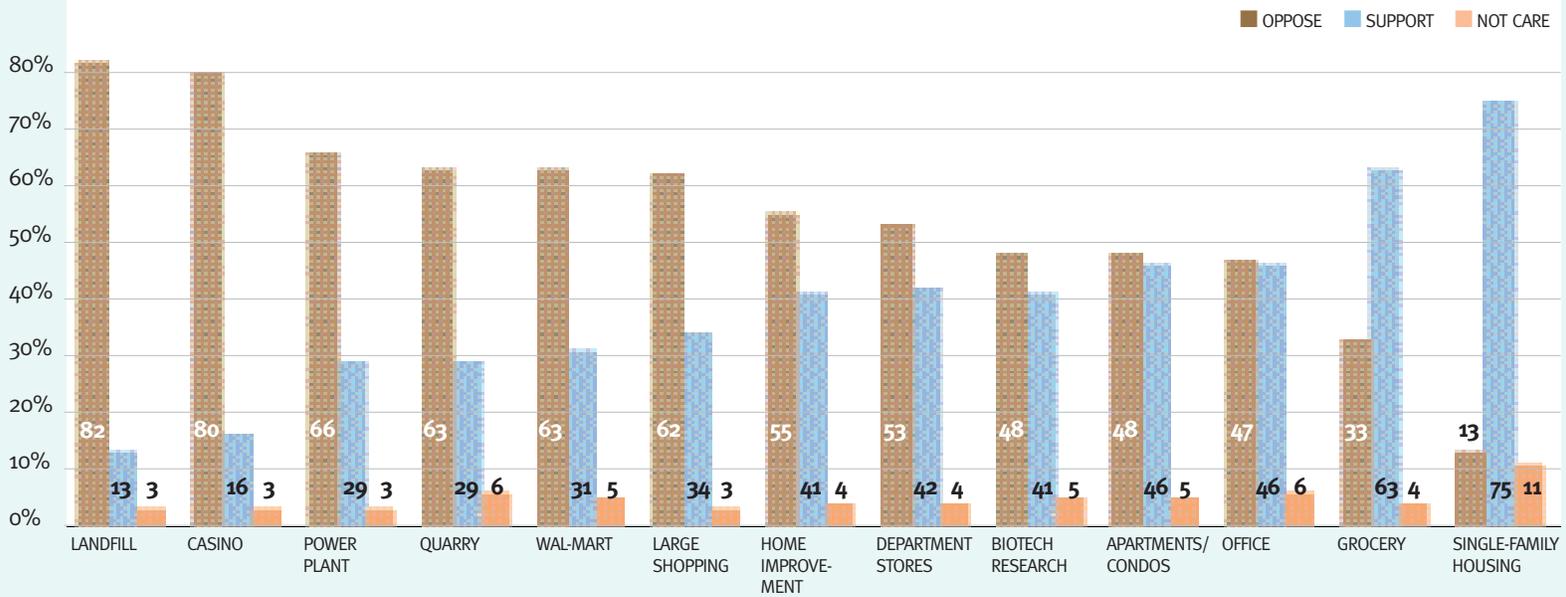
Citizens who once accepted the decisions of their community leaders now challenge them at every turn. They organize, pass out fliers, launch petition drives, and pack public meetings. But they do more than that: they don't give up.

It's no longer merely citizen activism that stops projects; today's citizen opponent is politically sophisticated, well organized, well funded, and committed to his or her cause. He or she is a warrior, and public officials and developers who don't listen when the citizen speaks will face the consequences. Even developers who are seemingly well prepared for opposition—who stand ready to cooperate, mitigate, and welcome input from neighbors—may find their dreams turn to ashes when politicians hear their angry constituents speak.

In South Carolina, for example, a planning commission turned down a big-box store, bowing to community pressure after more than 900 people showed up at the public hearing and staged four hours of public comment from more than 80 speakers. The developer's full-page ads and offers of added mitigation could not overcome the quality-of-life and environmental issues.

In Ohio, residents who opposed public financing of infrastructure for a \$186 million shopping center and entertainment complex painted their index fingers purple to show that—unlike people in Baghdad, where a purple finger shows that the bearer has exercised his or her right to vote—these Americans had been denied the vote when municipal officials deemed their 2,311-signa-

FIGURE 1: SUPPORT OF OPPOSITION TO VARIOUS DEVELOPMENT OPTIONS



ture petition invalid for the technical failure to attach a certified copy of the tax increment financing (TIF) and cooperative economic development agreement (CEDA) ordinances. Next steps for furious citizens: issue press statements, recall the city councilors “who approved this atrocity,” retain a lawyer, and raise money for a court fight. Residents compared developers to “locusts.”

In Florida, 250 people turned out to oppose a 150-acre (60.7-ha) mixed-use mall, hotel, and office complex in a hearing that “descended into a free-for-all,” according to a newspaper account. The developer’s efforts to explain the project benefits were “drowned out by shouted questions and caustic retorts” from adults, as children waved hand-drawn signs opposing the project. This was the case, although the developers had repeatedly gone door to door and had sent out several rounds of brochures promoting the project.

In a corner of Montana, a Florida developer’s plan to build 57 upscale homes on the 41-acre (16.6-ha) site of a lakeside lodge upset local residents, and more than 300 of them organized to oppose the project. A

plan to pipe sewage from the development past lakefront homes brought acrimonious lawn signs advising the developer to “go poop in your own backyard.” Unhappy with the county’s subdivision approval process, 60 neighbors sued for judicial intervention.

In Georgia, 450 people jammed the county commission auditorium to denounce a whole series of projects under consideration—all in one night. When 100 residents opposed a town-house plan, the commissioners turned it down. When 40 opponents demanded rejection of a Baptist Church plan to build soccer and baseball fields for the YMCA, commissioners postponed a vote. When 100 opposed a drugstore, a restaurant, offices, and a daycare center, the developer withdrew his zoning requests. When 80 homeowners living near a 1,500-acre (607-ha) business park waited until 11 p.m. to oppose a request to rezone five parcels for homes and a retail center, commissioners backed off a vote. At the end of the night, the score was: residents 2, developers 0.

Land use politics also include turf defense. Opposition is not always

inspired by citizen concerns. Business competitors once defended their turf by buying up all the best sites in town as a way to deny space to opponents.

But today’s competitors, intent on protecting market share and avoiding the inevitable price war with opponents, will quietly fund the opposition to their rivals’ projects. They know from experience that the development battlefield is often littered with the remains of those who responded weakly to a challenger’s threat.

Although some still recoil from using turf defense, competitive pressures are now a fight for survival in many development sectors, including retail. Moreover, courts across the United States have upheld citizens’ right to oppose projects, regardless of who funds their efforts. Indeed, the Noerr-Pennington line of decisions by the Supreme Court holds that the constitutional rights to petition the government, to assemble, and to engage in free speech trump the Sherman Anti-Trust Act. Thus, efforts to influence the exercise of government power (such as rejecting a rival’s rezoning

Concerns over real estate values, traffic, community character, public safety, and sprawl—among myriad other factors—are motivating more Americans to actively oppose new development. Of 13 various development options presented to survey respondents, 11 were opposed and two (a grocery store and single-family housing) were supported.

application)—even to gain a competitive advantage—do not create liability under the antitrust laws.

Such efforts usually are conducted quietly, since the funding party does not want to undermine the opposition by injecting credibility issues into the fray, nor suffer a public relations hit when the local newspaper decides its involvement is news.

But there are increasingly numerous examples of retailers and mall developers who step right up and announce that they oppose their competitors’ projects, and exercise their right to do so. Whether they can successfully argue traffic and environmental concerns once their competitive status is disclosed is debatable. But clearly, their credibility cannot match that of citizens whose arguments for the public good are

untainted by commercialism—at least on the surface.

Consider the following:

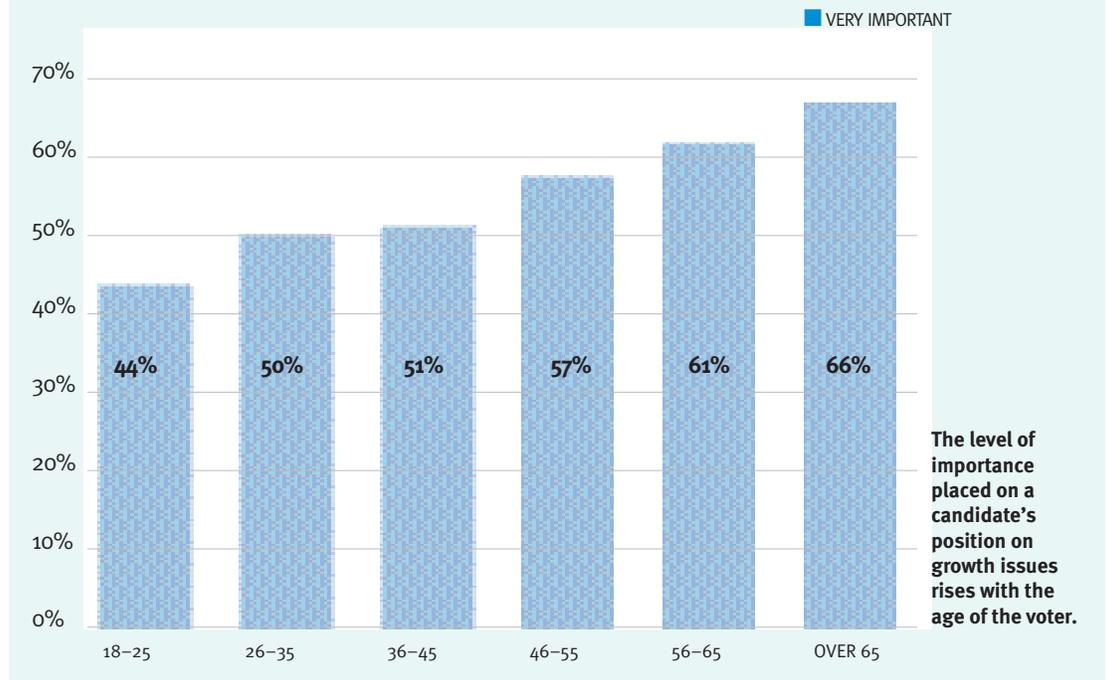
▷ In one contentious battle over a big-box retailer, town officials all favored the project, and said so publicly. They fast-tracked the project through town boards and urged the town meeting to grant the requested rezoning. The competitor, another retailer that already had a big box in the same town, engaged consultants who organized townspeople opposed to the project, tutored them on political tactics, and made sure they attended the town meeting to vote “no.” The rezoning failed.

▷ In another fight, the project proponent organized senior citizens to attend the public hearing and speak in favor of the project. The competitor’s consultant organized a barbecue and band concert for the seniors on the same night as the hearing and provided a bus to and from the festivities. No seniors attended the hearing, and the project’s opponents won.

▷ In a third campaign, a project’s engineers reported that there were no endangered species on the site, but the competitor’s consultant engaged a lepidopterist who found rare and endangered moths whose habitat included the site. Leaving no stone unturned, the competitor hired a botanist who found rare turtles on the site, despite the engineers’ earlier report finding none. The engineers had searched the site in April when the turtles were hibernating underground. By June, however, the turtles had emerged to mate—and this stopped the project.

Sometimes, of course, developers can be their own worst enemies. When this occurs, opponents can just relax and watch the project self-destruct. Developers overreach, either in their requests for ordinance relief or in demands for community concessions, infrastructure improvements, and tax increment financings (TIFs) that infuriate citizens—and

FIGURE 2: IMPORTANCE OF CANDIDATE’S FAVORABLE STANCE ON NEW DEVELOPMENT/GROWTH BY VOTER AGE GROUPS

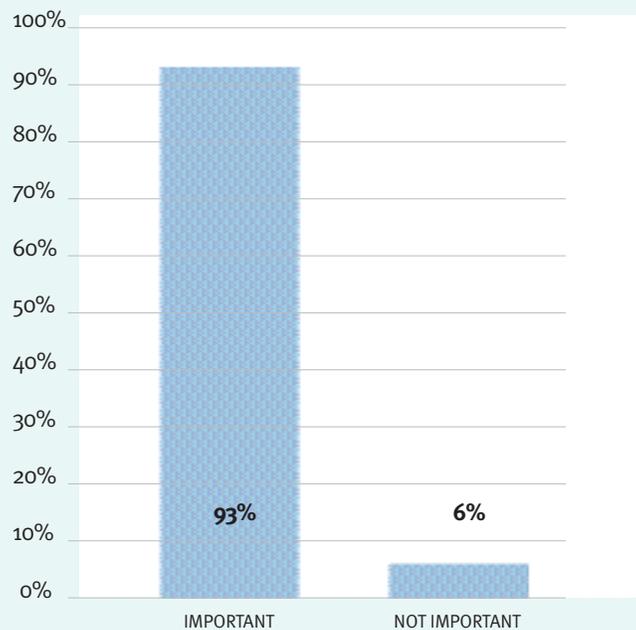


make support untenable even for public officials who might otherwise lean in favor.

Newspapers are replete with stories of unrealistic developers who ask for too much, and turn the community against their plans and themselves—like asking a rural town to waive its 45,000-square-foot (4,186-sq-m) building size limit to allow a 170,000-square-foot (15,813-sq-m) big box, or expecting a beach community to disregard its four-story height requirement to allow a 17-story hotel or a 22-story condo building.

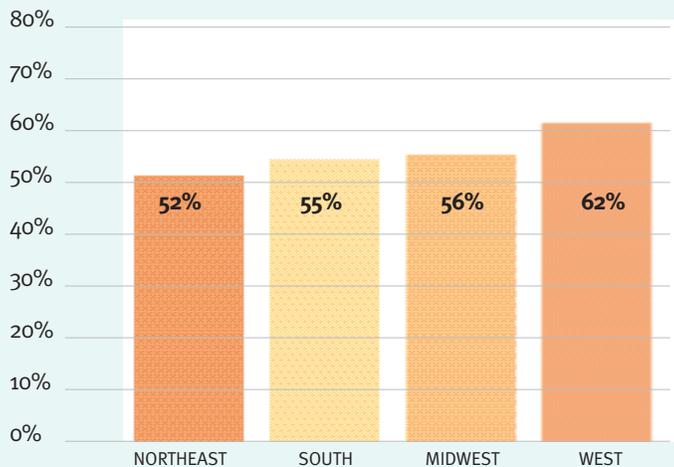
In the old days, developers confronted by citizen opposition often intimidated the neighbors into silence by filing lawsuits: torts for defamation of character, or interference with contractual relations. These SLAPP (strategic litigation against public participation) suits generally had the desired effect. Faced with the prospect of huge legal bills and the threat of losing their homes, neighborhood opponents were cowed into silence.

FIGURE 3: IMPORTANCE GIVEN TO CANDIDATE’S STAND ON DEVELOPMENT ISSUES



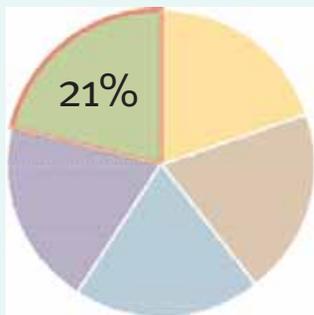
It would appear that, in the future, elections can be won or lost based on growth and development issues.

FIGURE 4: LEVELS OF OPPOSITION TO DEVELOPMENT/GROWTH ISSUES BY VOTERS IN REGIONS OF THE COUNTRY



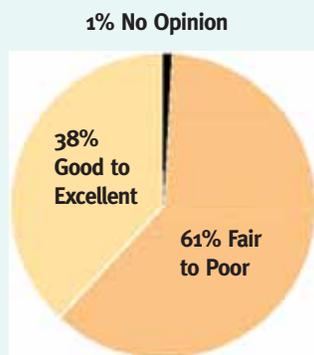
Voters in the western part of the country register higher levels of opposition to development/growth issues than other regions.

FIGURE 5: PERCENTAGE OF OPPOSITION TO NEW DEVELOPMENT AMONG SURVEY RESPONDENTS



The majority of opposition to development comes from residents who believe that new development projects will negatively affect the long-term value of their homes. Opposition activities include forming neighborhood groups, calling and writing elected officials, signing or gathering petitions, attending and speaking out at local hearings, fundraising, and hiring attorneys and experts such as traffic engineers and environmental consultants.

FIGURE 6: RATING LOCAL GOVERNMENTS ON PLANNING AND ZONING ISSUES



Over 60 percent of survey respondents believe their local government does a fair to poor job on planning and zoning issues. This dissatisfaction fuels opposition to real estate projects.

Not so today, now that many states have passed anti-SLAPP legislation protecting project opponents' constitutional rights to petition, free speech, and assembly. Under anti-SLAPP legislation, a citizen's right to oppose a project trumps the developer's right to sue those who oppose it. Such a lawsuit will be dismissed, and the developer ordered to pay the citizens' attorneys' fees and costs. These days, of course, a developer who brings a SLAPP action will also find himself or herself vilified in the press as a monster unworthy to develop anything.

But there are ways to counter the opposition:

▷ **Research.** Understand the political climate in and around your project before you go public with a proposal. Who are the likely opponents? Supporters? What groups can be rallied to support your development? What are the political views on land use of the politicians who must approve the project? What is the history of the site? Have controversial developments been proposed for the location (or a nearby parcel) in the past? Some sites are too "hot" and will never get change of use permits. Walk away before investing time and money.

▷ **Time and target your outreach.** Make sure you tell the politicians and neighbors before they read about it in the press. This means reaching out during a fairly narrow window of time that will occur between the time when you first mention the project to someone and when rumors reach the local news media.

▷ **Persuade.** Go door to door among residential neighbors. Explain the proposal and attempt to determine who will support it, who will stay neutral, and who will oppose. Never hold a public meeting to accomplish this; a public forum gives opponents the chance to recruit allies at your expense.

▷ **Understand that the process is political.** You must identify, recruit, organize, and deliver real citizens to express their support to the local government officials. You need to find and organize supporters, and then get them to attend meetings, sign petitions, call officials, write letters to the editor, and demonstrate public support equal to or greater than the numbers your opponents will turn out.

▷ **Negotiate when possible.** In some cases, you can offer mitigation, or some other carrot, to get opponents to drop their positions. In other cases, the opponents or their backers have an economic interest in defeating your project that will never be overcome by an attempt at compromise. In those cases, you must marshal sufficient political support to overcome the opposition.

Since the 1960s, landownership in America has led to growing feelings of entitlement and empowerment. What began as a sense of community has morphed into a need for control. As desirable land grows scarcer, the trend toward noisy grass-roots political opposition that ignores property owners' rights and kills projects—regardless of their benefits to the community and its people—will accelerate. **U**

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