

Dealing With Locally Unwanted Land Uses (LULUs): A Municipal Perspective



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Many tools are available, but in the long run the best thing to do is to build a consensus.

ALTHOUGH DISPUTES OVER locally undesirable land uses (LULUs) may often arise as disputes between neighboring property owners, those disputes frequently land on the doorsteps of the local zoning authorities. Knowing who are the parties involved in such disputes is always important, but local officials and disputants alike need to understand the tools available to the local zoning authority, as well as how the use of those tools may vary depending on the circumstances under which a LULU arises. In addition, the competing interests and legal constraints facing a locality also are important in evaluating what might be the outcome in a dispute over a LULU. This article will consider these various matters.

WHAT IS A LULU? • To many, hearing “Lulu” conjures up memories of the smitten-schoolgirl love song to Sidney Poitier in *To Sir, with Love*. But there is little love lost when LULUs arise in the land use context.

Since LULUs are by definition unwanted (sometimes the acronym is spelled out to mean “locally undesirable land uses”), they are closely related to NIMBY (not in my backyard) uses that confront local governments with regularity. Although there are many examples of LULUs, there is no definitive list of LULUs, as LULUs are always contextually defined. In other words, a land use that might be

perfectly acceptable in one context could engender harsh reactions from neighbors in another context. While this is hardly news in the zoning world (the United States Supreme Court acknowledged as much in the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)), the vitriol with which LULUs are addressed may be more pronounced (or at least more widely broadcast and reported) in today's council chambers than in times past.

Some Examples

Examples of LULUs are many. Some are well-known and a source of frequent objections, such as adult use establishments. Other LULUs may include uses that are widely used and needed and are often well-established in their locations, but whose well-known emissions of odor or noise — such as airports, landfills, or asphalt plants — become problematic as new neighbors move toward these uses. See *Permit Denied, Asphalt Plant Sues Gray-slake*, Chicago Tribune, May 11, 1992 available at <http://www.maria.trombly.com/clip-pages/chicagotribune.htm>; see also *Keystone Sanitation Co., Inc. v. Union Twp.*, 1984 WL 2250 (Pa. Ct. Com. Pl. Nov. 6, 1984). LULUs may be based on aesthetic concerns, such as avant-garde statuary. See *Sand Sculpture Makes Waves*, Daily Herald, November 20, 1991 available at http://www.newspaperarchive.com/newspapers1/na0031/6399880/22304460_clean.html. They may relate to pets and exacerbated by interpersonal relationships. Susan Kuczka, *3 Big Piggies Must Leave Lake Forest, Walgreen Gets Almost 5 Years to Move Pets*, Chicago Tribune, September 6, 2006 <http://archives.chicagotribune.com/2006/sep/06/news/chi-0609060343sep06>. Some LULUs arise because of fear or stereotypes, such as certain types of group homes. *Neighbors Oppose Group Home*, April 15, 2008 <http://www.wowt.com/news/headlines/17774814.html>. And still others arise from traditional uses, such as places of worship, that are oversized or in non-traditional locations. See *Vision Church v. Village of Long Grove*, 468

F.3d 975 (7th Cir. 2006), *cert. denied*, 552 U.S. 940 (2007) (proposed church twice the size allowed by local zoning); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 914 (2008) (church located in industrial zone not permitted).

What Gives Rise To A LULU?

Although any use could potentially be or become a LULU, from an analytical perspective, the question of what is a LULU is less important than the question of what gives rise to a LULU. Clearly, changes in use of a property can give rise to a LULU, such as an office building that becomes the home of an abortion clinic. *Brighton Residents Against Violence to Children, Inc. v. MW Properties, LLC*, 757 N.Y.S. 2d 399 (App. Div. 2003). Changes in the way a use is conducted on a property can also give rise to a LULU, whether it involves an industrial use implementing a new manufacturing process, or even a residential use catering to new residents through an adult foster care program. *Baldwin v. Nature's Hideaway, Phase I-B Homeowners Ass'n, Inc.*, 613 So. 2d 1376 (Fla. Dist. Ct. App. 1993). Changes in the governing policy of a community can also transform venerable uses into the pariah LULU. *Victory Auto Wreckers, Inc. v. Village of Bensenville*, 832 N.E.2d 506 (Ill. App. Ct. 2005) (municipality's attempt to zone 50-plus year old auto recycler out of existence rejected). And, of course, changes in the neighbors of a use can transform existing uses into LULUs.

When the issue of a LULU arises, a municipality ordinarily has to deal with it whether it wants to or not. The manner in which a LULU arises, however, can affect not only who is involved in the process of addressing a LULU, but may also determine what tools are available to a municipality in addressing the LULU. But as with any issue involving governance, it is essential to appreciate with whom one might be dealing.

DISPUTES OVER LULUs: WHO IS INVOLVED? • When an issue arises over a LULU, there are ordinarily several different interest groups who will be involved.

The Owners

Always involved are the owners or users of the property on which the LULU is proposed. Their interest is obvious and ordinarily financial. Their interest is also at least constitutionally tinged, if not fully bloomed. For a municipality, this is an important concern.

The Opponents

On the other hand are those who oppose the LULU. While these persons are frequently owners of nearby property (which could give rise to a second set of constitutional rights), they may also be persons who make use of property near a LULU, or persons who have an objection to a use on principle. *Brighton Residents* supra (opponents to an abortion clinic).

The Allies

There may also be a second ring of stakeholders on both sides of the dispute. These may include persons who use or desire to use the LULU, as well as persons who are supportive of neighbors opposing a LULU. Unlike NIMBY-ism where the objection may simply be the immediacy of a use, LULUs may trigger a more elemental opposition to the use wherever it is located. In such instances, LULUs may encourage opponents to seek fundamental legal changes that go beyond the immediate proposal.

The Municipalities And Courts

At the vortex of these disputes is usually a municipality or other local zoning authority. Although municipalities sometimes instigate disputes over LULUs, more often than not municipalities have such disputes dropped on their doorsteps to arbitrate. Of course, the municipalities are not always

the last stop, as a disappointed owner or opponent of a LULU always has the opportunity to seek judicial relief. When such matters go to court after a local zoning process, the municipalities are ordinarily swept into the dispute, whether willingly or not. (There are some “private attorney general” statutes that allow interested parties to bring a zoning enforcement action without drawing in the local zoning authority. *See, e.g.*, 65 Ill. Comp. Stat. 5/11-13-15 (Illinois 2006) (property owners within 1200 feet may bring zoning enforcement action after notice to municipality).)

CIRCUMSTANCES GIVING RISE TO LULUs AND AVAILABLE REGULATORY TOOLS

• As noted above, LULUs may arise under a variety of circumstances. Those circumstances may determine to a significant degree how a municipality or other local zoning authority might get involved in the dispute and the role it plays.

LULUs Resulting From New Uses Of Property

When the use of a property changes, that change could give rise to a LULU. For a municipality, if the new use is one that is already permitted in the applicable zoning district, the legal issue may be relatively straightforward: the use is allowed. In some instances, even uses that are generally permitted may only be allowed in accordance with certain performance standards, so an examination of those performance standards and an evaluation of how the changed use “measures up” is required. If the use does measure up, then there may be little that a municipality can do in response to the objections of disappointed neighbors. But when a new use of property does not meet the standards, then a municipality may be required either to deny the use or undertake public hearings to consider variations or other zoning relief.