DEVELOPERS AND NEIGHBORHOODS: IF YOU LIVED HERE, YOU'D BE HOME NOW

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BIOGRAPHICAL INFORMATION FOR JAMES E. COUSAR

Mr. Cousar is a 1975 graduate of Harvard College, where he received a B.A. in History and Literature magna cum laude. He received a J.D. cum laude from the University of Texas School of Law in 1978, and was a member of the Texas Law Review.

In 1979, he associated with the newly opened Austin office of the law firm of Thompson & Knight. He has been either a partner or shareholder in that firm, which is now Thompson & Knight, P.C., since 1985.

Mr. Cousar's experience in municipal land use law includes a term on the City of Austin Planning Commission from 1986 to 1988, representation of neighborhood associations in lawsuits during the early 1980s, and many land use cases on behalf of his own neighborhood association, which covers a historic area near downtown Austin. He has represented other neighborhoods before the City, and has served on City task forces and advisory boards involved with land use, environmental, campaign finance, and ethics issues.

Mr. Cousar and his firm are currently representing the City of Austin in a number of transactions involving downtown redevelopment. His other practice areas include regulatory matters before state agencies, civil litigation, and campaign finance. He is a frequent author and speaker for the State Bar of Texas and the University of Texas CLE Programs.

3. TOP TEN TIPS TO DEVELOPERS FOR DEALING WITH NEIGHBORHOODS

1. In General

There is no formula to ensure that a developer and a neighborhood will work well together or reach an agreement on zoning or other land use approvals. However, there are missteps and common mistakes that invariably make it harder for a developer and a neighborhood to reach agreement. Discussed below are ten suggested guidelines — directed primarily to developers — that should help avoid instinctive neighborhood opposition.

While these guidelines are primarily for developers and their representatives, there could be a similar list for neighborhood associations, and some of the guidelines would be quite similar. However, there is an important difference. In land use cases, the developer rather than the neighborhood association typically is seeking a change from the status quo. Neighborhood associations are by nature conservative entities. They usually must be persuaded that a zoning change, variance, or conditional use permit will lead to an improvement on that status quo. These guidelines therefore begin with the premise that a developer pursuing a land use approval has "the burden of persuasion" to convince both the neighborhood and the city decisionmakers.

A party with the "burden of persuasion" should approach a case with a different strategy than a party protecting the status quo. A developer in Austin who starts with the attitude that zoning changes are an entitlement is asking for neighborhood problems. A developer who recognizes the importance of addressing a neighborhood's concerns is more likely to obtain its support.

2. The Guidelines

These guidelines will be discussed in turn.

3. Discussion

1. **Talk to the neighborhood early in the process and give them complete information.**

If a developer genuinely wants neighborhood support for a project, nothing is more important than early contact and complete information. In Austin, the City's Development Review and Inspection Department maintains a "registry" of neighborhood associations for each area of the City, with contact persons and telephone numbers. Those association should be contacted and briefed early in the land use approval process.

Typically, the best approach is an early phone call to the contact person shown on City records, followed by written information and a meeting. Some associations prefer that the developer discuss his plans at a regularly scheduled board meeting or membership meeting. Others assign a zoning committee or an individual to review a proposed project. In either case, the developer should take the initiative and seek out the neighborhood before residents hear about the project from rumors, the newspaper, or a notice of hearing. Few things raise neighborhood suspicions as much as learning about a project from a statutory notice letter.

At the initial neighborhood meeting, the developer should be prepared to answer the neighborhood's questions — even those that appear to be irrelevant. Most neighborhood residents are not developers, design professionals, or attorneys, so the developer should not assume that his audience understands land use terms and procedures. Visual aids, such as site plans and architectural models, are more helpful than verbal descriptions of a project.

Another reason to approach a neighborhood early is to allow adequate time for the neighborhood decisionmaking process. Some associations meet quarterly, or only as needed. Some will schedule special meetings in response to a land use case, but most ask the developer to accommodate their schedule. Associations also have different quorum requirements, and some require a membership vote rather than a board vote. Given these variations, more lead time is better than less.

Few neighborhood associations are able to schedule a meeting, investigate proposed development, report back to the membership, and take a position in less than three or four weeks. In major land use cases, developers would be well advised to approach neighborhood associations early in the process, but no later than six to eight weeks before the anticipated public hearing date.

2. **Don't buy land in an established neighborhood based on your assumption (or staff assurances) that you will get a zoning change or variance.**

In Austin, a prudent developer considering a project in or near an established neighborhood will usually contact the neighborhood association before closing the deal — particularly if the project requires a zoning change or other discretionary approval. A developer who first contacts the neighborhood after closing the deal should recognize that the neighborhood will support or oppose a zoning change without regard to the fact that the land deal has already closed. Where neighborhood support is doubtful, it is wiser to take an option and pursue zoning approval before closing.

Most neighborhoods are little impressed by a developer's remonstrance that "city staff assured me that I could get this zoning change." The role of city staff in discretionary land use decisions is important, but their predictions and recommendations do not bind neighborhoods or the City Council. Experienced developers in Austin do not assume that the staff's recommendation will prevail. They recognize that the Council does not always accept staff recommendation, particularly when there is neighborhood opposition.

3. **Neighborhoods do not necessarily agree that the price paid for property dictates a certain use or intensity.**

Some developers tell neighborhoods that they must have a certain number of residential units or a rentable square feet based on the price paid for the underlying real estate. That may be good

economics, but it is questionable land use planning and bad politics. Common neighborhood responses are as follows:

1. zoning in our neighborhood should be based on planning principles and compatibility — not a speculative land price;
2. who told you you had to buy the land in the first place?;
3. maybe you paid too much for it;
4. that's your problem, not ours; and
5. where is it written that every landowner and developer is guaranteed a certain profit?

This is really a corollary of Guideline No. 2 (don't buy land on the assumption that you will get a zoning change). It illustrates a fundamental difference of perspective between developers and neighborhoods. To a homeowner who already lives in a neighborhood, preserving quality of life is a primary concern: if a developer wants a profitable project, that is fine, so long as it does not detract from quality of life. If a new commercial structure or apartment complex is perceived as detrimental to the established character of the neighborhood, few associations will be won over by a developer's calculations about density, profit and rate of return.

4. **Don't assume that a "less intensive" zoning category is more acceptable to a neighborhood than a "more intensive" category.**

In Austin, the zoning ordinance reflects a traditional hierarchy under which the least intensive zoning districts include rural residential, single family, and low-density multi-family. These are followed by more intensive multi-family, several office categories, and various retail categories. Towards the other end of the spectrum are commercial services, warehouse and industrial districts, and two broad central City districts referred to as "downtown mixed use" and "central business district."

Some developers assume that a request for "down-zoning" will be acceptable to a neighborhood and approved as a routine matter. Down-zoning often is welcomed In other cases, the neighborhood's ideas of compatibility depart from the traditional hierarchy of zoning districts.

This issue typically arises when property adjacent to a neighborhood is zoned for office or retail use, and a developer proposes to change the zoning to multi-family residential. Many decades ago, when Austin's hierarchy of zoning categories was established, homeowners probably viewed apartments as more desirable neighbors than office buildings. Today, many upscale, single family neighborhoods prefer adjacent office development over multi-family development.

The reasons typically given are the use characteristics of offices as opposed to apartments. Offices are occupied primarily in the daytime, and often are empty at night and weekends when nearby homeowners are around. Offices tend to be business-oriented, quiet and well-maintained, while the quality, noise level, and upkeep of multi-family development varies greatly. Whether justified or not, some single-family homeowners object to living near renters.

Whatever the reason, adjacent residents sometimes do oppose down-zoning of commercial property to multi-family use. Down-zoning cases should be reviewed on their own merits, but a developer should not assume that every down-zoning will be supported by the adjacent neighborhood and approved by the City Council.

5. **To understand the neighborhood's position, step back and look at the proposed development as if you lived next door.**

For most home owning families, their house and lot are their largest financial asset. It goes without saying that a family's home has important emotional ties independent of its value as an asset.

A compatible, well-planned development in a residential neighborhood at best will enhance both property values and quality of life. At its worst, more intense development can make a neighborhood overcrowded, unattractive or unlivable. A developer who completes an unattractive project can move on, but most neighborhood residents affected by that project will continue to live with it.

This point would appear to be obvious, if not a truism. In spite of that, developers sometimes become so enamored of a project that they seem incapable of understanding the neighborhood point of view. Before matters reach an impasse, a developer facing neighborhood opposition might step back for a moment and go through the mental exercise of putting himself in the homeowner's shoes:

1. assume that this project is not going to make me any money, but may affect my quality of life and my property values for as long as I live in this neighborhood;

2. assume that the person promoting this project expects to make a profit from it, but will be finished with it and gone in one or two years;

3. assume that the project may increase traffic and noise and reduce available parking near my home;

4. the developer should then ask himself whether an affected homeowner has more incentive to support the development or to maintain the status quo.

In going through this mental exercise, the developer should assume that the homeowner is determined to protect his principal financial asset, and he should accept that most neighborhood residents live where they do because they like the neighborhood the way it is. In many cases, good planning, patience and effective presentation can still gain neighborhood support. In either case, the importance of a homeowner's concerns about his home and neighborhood should not be discounted or trivialized.

6. **Tell the truth. If the neighborhood thinks you've lied to them, they won't work with you.**

"Tell the truth" would seem to be the most obvious advice imaginable. In spite of that, dealings between developers and neighborhoods are often soured by perceived misrepresentations — many of which are unnecessary, and some of which are minor in nature. In one instance, a developer seeking a zoning change to rezone a house for office use told the neighborhood association that he was currently residing in the property. Nearby neighbors knew that he was not, and it was easily

ascertainable that he lived elsewhere and already used the house as an office. The fact that the developer was not really living in the house was relatively unimportant; the fact that the neighborhood no longer believed him probably contributed to the defeat of the zoning case.

An unfortunate tactic of some developers is the empty threat: "If you don't grant me this variance (or zoning change), I will build something worse." No one likes to be bullied, but most neighborhoods have learned through experience that this type of threat is seldom carried out. Few neighborhoods will work cooperatively with a developer once "ad terrorem" tactics are tried, particularly if the threat is not credible.

Finally, a developer who first seeks support on the representation that his project requires no variance or zoning change, should be sure his claims are factual. If it is a bluff, the neighborhood will probably line up against the project when it really does need approvals. The land development process is not a poker game, and neither side is likely to win by bluffing about its hand.

7. **Don't try to fool the neighborhood. They may not be sophisticated about land use, but they're seldom stupid.**

Most individuals who are involved with neighborhood associations over a period of time develop some knowledge of the land development process. A few neighborhoods hire their own consultants and attorneys; others rely on members who are land use professionals, city planners, attorneys, or, in a few cases, developers. Even in instances in which neighborhoods lack experience in land use planning, though, it is impressive to see how quickly affected individuals can learn the rules, procedures and tactics.

A neighborhood will usually turn against a project if the developer treats the neighbors as if they were gullible or stupid people. One example that comes to mind is an applicant seeking a late hours/conditional use permit for a pool hall/cocktail lounge who argued that the adjacent neighborhood should support the permit to prevent some unnamed but "really undesirable" use from occupying the building.

Developers or consultants who claim to have such influence with the City that a variance or zoning change is a "done deal" are also asking for a fight. In the current environment of Austin, few neighborhoods will accept the notion that the City Council or Planning Commission will not give them a fair hearing.

8. **If you reach an impasse, consider mediation. Accept that the final answer sometimes is "no."**

Disputes between developers and neighborhoods often become emotional. The developer's profits are at risk, and some developers lose perspective when they become emotionally involved with their projects. The neighborhood's natural concern about their homes, property values, and quality of life was discussed in Part III.5, above.

In emotional disputes, a forum providing a neutral third-party mediator may provide a solution. While it is sometimes possible to forge a compromise from the dais of the Planning Commission or the City Council, that is a poor venue for negotiations. If mediation is to be attempted, it should begin outside the Council chambers.

In Austin, individuals from the Planning Commission and Council sometimes volunteer to mediate difficult zoning cases. The Center for Public Policy Dispute Resolution at the University of Texas has also mediated land use cases, and the City Council will sometimes hire private mediators in an effort to bring the parties in difficult cases to agreement.

When land use mediation succeeds, it is typically for the same reason that mediation resolves lawsuits: better communication, and better understanding of the other party's point of view. A mediator can help developers and neighborhoods focus on common interests and points of agreement, and can take advantage of a mutual reluctance to risk an adverse outcome.

While mediation is often worth trying, developers and neighborhoods should recognize that mediation will never be a complete substitute for the public decisionmaking function of the City Council and the City's boards and commissions. Discretionary land use decisions ultimately are public policy questions, and state law and City ordinances have created a process which — for better or worse — will result in a decision. A "stakeholder" has the right to invoke that public decisionmaking process in lieu of a private compromise.

In some instances, differences are such that the developer and neighborhood really have nothing to mediate. Although we live in age that values alternative dispute resolution, just saying "no" and letting the Council decide remains the time honored way to resolve developer-neighborhood disagreements.

9. **Don't assume you have a deal based on discussions with a few neighborhood leaders: neighborhood associations are grassroots organizations, not business corporations.**

In some land use cases, proposals acceptable to neighborhood leaders are not received favorably by the neighborhood as a whole. There is no single explanation for these episodes, but one factor may be neighborhood leaders "getting ahead" of their membership. Neighborhood association officers typically receive more exposure to contemporary planning ideas than the average homeowner does. There is more acceptance and understanding of "new urbanism" principles among neighborhood leaders who attend planning seminars than there is among homeowners who attend a couple of neighborhood meetings per year.

In many neighborhoods, a binding position to support or "not oppose" a development can be made by a vote of the board or a simple majority vote of the membership. In some associations, the board vote may be reversed by the membership if they disagree. This type of inconsistency is unfortunate, but it is understandable in a grassroots organization. Even those neighborhoods which have bylaws, minutes, and other trappings of corporate decisionmaking are not really run like business corporations.

By the time a land use case reaches the Planning Commission or City Council, a developer should know whether he actually has the support or consent of a neighborhood organization. If that issue is unresolved, the developer should be cautious about making claims of neighborhood support.

10. **Respect the process: personal lawsuits, threats and cash payments are not legitimate tools in land use planning.**

During heated land use cases, some developers and their representatives have been known to threaten legal action against neighborhood opponents. This is almost always a bad idea that will further poison the process. Disregarding the fact that "petitioning" activity is almost entirely privileged and protected by Texas law and the First Amendment, there are practical reasons to keep personal threats out of the land use planning process. Participants on either side who go too far in personalizing the dispute put their position at risk. If a neighborhood's opposition is too strident and personal, it is probably offending the councilmembers it is intended to influence. A threatened defamation lawsuit, on the other hand, is almost guaranteed to engender sympathy for the neighborhood.

Developers and neighborhoods should also think twice about any arrangement that resembles a financial *quid pro quo* in a land use case. If a developer seeking neighborhood support offers to pay for public amenities that benefit a neighborhood, such as sidewalks and improved signage, there is little reason to scrutinize the offer or acceptance. Where a transaction amounts to pecuniary benefit to the neighborhood association or its members, land use principles may be giving way to something closer to bribery.

In one instance, a restaurant owner's acquiescence to a request for a cash contribution to the "school supply fund" of a low income neighborhood nearly caused Planning Commission members to scuttle an agreed application for conditional use permits. If the neighborhood does not understand the inappropriate nature of financial *quid pro quo*, the developer should, and the ultimate decision makers probably will.

CONCLUSION

All-out fights between developers and neighborhood associations often leave both sides exhausted and embittered. These disputes can force the Council to choose sides in a matter that could be better resolved without invoking "winner takes all" ground rules. The guidelines set out above are no guarantee that neighborhoods and developers will reach an accord, but they should facilitate cooperation and help developers work more effectively with neighborhood associations.