

NIMBY Suits: The Crutch Of The Unskilled Environmental Advocate

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I. INTRODUCTION

A common issue faced in the field of environmental law is the ability to distinguish between bona fide battles to protect the environment and battles to protect one's back yard. The latter is commonly known as the "NIMBY" suit or "not in my backyard" syndrome.[1] Generally, these actions are initiated by a cohesive, identifiable group of citizens, concerned about the placement of certain facilities in their neighborhoods.[2] These groups are generally politically active, influential, and have only the slightest concern about the environmental impact of a particular project.[3] This tendency in turn shifts much of the burden inherent in locating undesirable facilities to neighborhoods with little or no ability to fight in the political arena.[4] Further, the use of environmental statutes and regulations in furtherance of NIMBY objectives is a plague on the effective and purposeful use of environmental laws to fulfill their true objectives.[5] Rather than abusing the judicial system, environmental advocates and attorneys need to identify clients with serious environmental grievances and advise those with NIMBY type suits to seek redress through other avenues.

II. NIMBY: HOW BACKYARD PROTECTION HELPED SPAWN THE ENVIRONMENTAL JUSTICE MOVEMENT

Environmental Justice is defined as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." [6] There are six factors that are said to contribute to environmental injustices: (1) relative lack of political power; (2) economics; (3) lack of participation in the environmental movement; (4) racism; (5) NIMBY; and (6) segregated housing and immobility.[7] NIMBY suits are a factor in the creation of environmental injustice mainly because of the first three factors. Typically those who do have substantial political power, sufficient monetary resources, and a familiarity with environmental law will be successful in winning NIMBY suits. The problem arises after the initial success of the suit. The facility that could not be placed in one person's backyard will inevitably need to go in another's. The alternative selection is the neighborhood with little political power, not enough resources to seek redress in the legal system, and unfamiliarity with environmental issues.[8] As a result lower income and minority communities are subjected to the burdens of a disproportionate number of environmentally hazardous facilities. Meanwhile those communities who were successful in their NIMBY suits reap only the benefits.

III. NIMBY: GOING AGAINST THE SPIRIT OF ENVIRONMENTAL STATUTES AND REGULATIONS

In today's society, the NIMBY mentality is the way of life responsible for the standard of living many American's enjoy on a daily basis.[9] Individuals and communities know that they can litigate against placing facilities in their neighborhood and have a solid chance that the developer will try to find a different location or abandon the project altogether. Regardless of whether they would have operated in an efficient manner and within regulatory guidelines, facilities that carry the stigma of undesirability never get developed because of the substantial resistance that NIMBY suits generate. As a result, society's need to have environmentally efficient facilities is often frustrated. [10] The NIMBY mindset, by moving more and more polluting activity into a limited number of neighborhoods, compounds the net effects of pollution in areas where development is centered.

In other situations, the federal government has attempted to limit the effectiveness of NIMBY challenges by limiting the discretion of state and local governments in the locating of facilities.[11] NIMBY suits so frequently impede the progress of facilities needed in society and place a disproportionate burden on particular communities. This forces Congress to limit the traditional powers afforded to state and local governments under the federalist system.[12] At the very least this shows the adverse effects of NIMBY suits.

IV. NIMBY: THE CRUTCH OF THE POOR ADVOCATE

The blame for the detrimental effects that NIMBY suits have on both the environmental justice movement and the spirit of environmental laws cannot be placed solely on the members of the community. Anyone can understand the desire to not want to live next to a hazardous waste facility site. Rather, the blame should be focused on those environmental advocates who pursue NIMBY suits through the statutory and regulatory process. It is the environmental advocate who must inform a client wishing to pursue a NIMBY action of the societal woes and counter-productivity of filing such an action. There are more effective avenues other than the traditional NIMBY suit and it is irresponsible for environmental attorneys to adhere to this old method.[13]

Environmental mediators are one such method of avoiding the traditional NIMBY suit.[14] Mediation recognizes that litigation over NIMBY issues can take years, wasting judicial resources and preventing a beneficial resolution of the matter at stake.[15] Mediation also brings numerous parties to the table, including governmental entities, along with citizen groups, and project developers.[16]

A structured negotiation process is another possible solution for the effective resolution of NIMBY suits.[17] Many states have enacted environmental regulations that require the parties in NIMBY suits to enter into negotiation with each in order to avoid the normal political firestorm associated with these suits. These negotiations focus on the needs of the community for certain facilities while also addressing the concerns of the local citizens being asked to shoulder the burden.[18] The negotiation approach is criticized by some because it can become "chaotic and quickly break down without an impartial third party structuring the process." [19]

V. CONCLUSION

The NIMBY suit is the traditional tool used by citizen groups who wish to maintain the status quo in their neighborhood. They traditionally have the means and influence to assure that NIMBY suits have the desired effect of placing facilities in someone else's backyard. The result of this legal phenomenon is the continuance of inequities in the locating of facilities, circumvention of the true purposes of environmental laws, and waste of valuable judicial time. The environmental advocates who pursue such ventures for their clients should feel the guilt of hindering the progress of the environmental legal movement and realize that there are other considerations besides maintaining the status quo. Whatever method an attorney chooses to use for their client, they are duty bound to uphold the integrity of the legal system. In order to fulfill this duty, a responsible advocate must know when to drop old practices and move on with more progressive tactics. The time to drop the use of NIMBY suits has come. Attorneys who choose to recognize this will further the integrity of the profession.

[1]Barak D. Richman, *Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response*, 20 UCLA J. Envtl. L. & Pol'y 223, 223 (2001-2002).

[2] The term "facilities" encompasses such things as hazardous waste disposal sites, power generating facilities, landfills, telecommunication towers, or any other structure or operation that could be considered undesirable.

[3] *Id.* at 226. Although NIMBY suits often involve concerns over environmental hazards, they are more often than not politically palatable fronts for concerns such as decline in property value or a desire to shift the project away from neighborhoods with political influence.

[4] See Chrissie Angeletti, *What is Environmental Justice and Where Did It Come From?*, at http://seedspublisher.org/PDFs/4_2_p4-8.pdf (last visited Nov. 4, 2003)(indicating that the environmental justice movement came from people who were unable to shout out NIMBY in order to contest the citing of hazardous waste facilities).

[5] Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 Yale L. & Pol'y Rev. 67, 105-06 (1996). NIMBY suits often result in the loss of facilities that would have had a positive benefit for the community and the environment because of the expense of going through a judicial proceeding. *Id.*

[6] EPA- Environmental Justice Homepage, at www.epa.gov/compliance/environmentaljustice/index.html (last visited Nov. 4, 2003).

[7] R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 Am. U. L. Rev. 229, 249 n.111 (1998)(quoting Major Willie A. Gunn).

[8] *Id.*

[9] Suzanne Smith, Note, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. Pub. Int. L.J. 223, 223 (2002).

[10] Swire, *supra* note 5 at 105.

[11] *See* The Telecommunications Act, 47 U.S.C. § 332(c)(7)(B) (2003)(limiting local zoning authority on placement of cell towers; disallowing consideration of environmental effects of radio frequency in denial; allowing judicial action against towns for denial of permits unless they are based on substantial evidence on the written record).

[12] *See* Cellco Partnership v. Town of Douglas, 81 F. Supp. 2d 170 (D. Mass 1999)(ordering the town to allow for variance and permit because of violation of NIMBY provision in Telecommunications Act); *see also* Domel v. City of Georgetown, 6 S.W. 3d 349, 361 (1999)(dismissing claim that treated water released by city constituted a taking and finding that the suit was a classic NIMBY suit lacking any merit).

[13] *See e.g.* NEGEF: News, Summer 2002, at www.grassrootsfund.org/archive/news_summer2002.html (last visited Nov. 4, 2003)(advising grassroots citizen groups to avoid the label of NIMBY by invoking the three "E's" in their cause; the environment, the economy, and equity).

[14] Ga. ADR prac. & Proc. § 6-27 (2nd ed. 1997).

[15] *Id.*

[16] *Id.*

[17] Richman, *supra* note 1, at 224.

[18] *Id.*

[19] *Supra* note 14.