

Painful Lessons From Piney Mountain: A Framework For Development Dispute Resolution

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Can the problems and positions encountered in certain development disputes effectively prevent any meaningful negotiation? Are there situations where a win-win outcome is not achievable? The analysis presented in this case study suggests approaches that can be utilized by municipalities to avoid no-win situations.

Introduction

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The siting of locally unwanted land uses, termed "LULU's," exposes shortcomings in the traditional limited-participation development review process. Decision making with respect to LULU's is complicated because benefits typically are dispersed widely within a community while costs are borne by a minority concentrated near the offending project. The typical decide-announce-defend process—where a developer unilaterally decides to undertake a project, announces project details in an application for approval, then defends the project against opponents in a public hearing—may result in less than optimal outcomes.¹

This conflict-ridden process becomes a win-lose confrontation for both proponents and opponents. Project approval or disapproval may ultimately hinge on political clout, economic staying power of the participants or judicially decided procedural issues unrelated to the merits of the project. If project approval is secured, as in the case described here, opponents may find little mitigation to show for their efforts and expense, while proponents obtain approval only after an expensive, time-consuming process. With any outcome, uncertainty, expense and delay are likely. Ill will is often engendered among participants, who may find themselves involved in future disputes because of past antagonism.

This article addresses conflict surrounding the development of a public housing project in Chapel Hill, NC. The project and the traditional development review process it underwent are summarized. The process and outcome are critiqued according to the tenets of "principled negotiation."² Barriers to and opportunities for a negotiated settlement are outlined. A framework for an amended development review process to include opportunities for dispute resolution and enhanced public participation is proposed.

The Piney Mountain Project

In March, 1986, residents began moving into 16 duplexes (32 units) of public housing on a 5.5 acre site on Piney Mountain Road, seven years after the Chapel Hill Housing Authority was first notified of the availability of funds and six years after the first site selection process began. In the interim, the Housing Authority survived challenges to the project in the development review process, allegations of illegal deal-making, allegations of conflict of interest on the part of the mayor, a court case and an attempt by neighborhood residents to purchase the site. Neighborhood residents were subjected to post-decision disclosure of plans and meager attempts at public participation on the part of the Authority which left a legacy of distrust and anger toward Town decision makers.

The project began with notification to the Housing Authority from the Department of Housing and Urban Development (HUD) of the availability of federal funds in March, 1979. Like many mission agencies, the Authority tended to define its objectives narrowly: provide housing for some of the 380 families on its waiting list, take advantage of what the Authority perceived as the last opportunity for federal funds, and follow a "scattered sites" policy—avoiding concentrations of public housing.

After receiving HUD funding approval in July, 1979, a site selection committee composed of Authority board members and the Town mayor was formed. The committee conducted a site search through local realtors in February, 1980, one month after the Town of Chapel Hill annexed the Piney Mountain Road area. The committee encountered difficulty finding suitably sized sites that met its cost and location criteria.

Acquisition discussions with the owner of the Piney Mountain Road site began in February, 1980. It was only after the Housing Authority was well on its way to receiving purchase price and site approval from HUD that neighborhood residents first learned of the project—by questioning surveyors working at the site. Aside from a design presentation late in the process and apparently some unsuccessful attempts to meet with neighbors following submittal of the development application to the Town, the Authority did not have discussions with neighbors or other interested parties.

Some area residents formed the Piney Mountain Neighborhood Association in opposition to the proposed multi-family project locating in their single-family area. The interests of the Association were divided, with one estimate that approximately 50 percent opposed any public housing in the area, 40 percent opposed the highly visible site chosen and 10 percent opposed the design. Neighbors favoring the project may not have joined the Association.

The Association first tried unsuccessfully to purchase the site, then failed in an effort to defeat provisions of a new development ordinance (adopted by the Town in May, 1981) which allowed higher densities throughout the Town—and would permit the project in their neighborhood. Association members and their attorney petitioned the Town and HUD, expressing opposition to the project and questioning whether Housing Authority and Town decision criteria were being followed. While the Authority's application was winding its way through the Town approval process, the Association alleged a deal had



Piney Mountain

been made to provide public housing for a relative of the site's owner and charged the mayor, an architect, with a conflict of interest.

The Authority's application underwent the Town's standard development review procedure involving Planning Department analysis and recommendation (for the project), Planning Board recommendation (against the project), public hearing, Council vote (7-2 for the project in September, 1981) and review by the Appearance Commission. Because the type of development proposed required a special permit under the 1981 Development Ordinance, the Planning Board and subsequently the Town Council were required to make four affirmative findings in order to approve the project. These were: (1) the project was located and designed so as to enhance general safety and public welfare, (2) the project complied with all regulations and standards, (3) the project was located, designed and operated so as to enhance the value of contiguous properties and (4) the project conformed to the Town's General Plan.

The Association advocated denial on the grounds of traffic congestion, negative impact on property values and an excessive concentration of public housing in their neighborhood. The Planning Board's recommendation against approval was based on the first and fourth findings above; it concluded that the site was not the most appropriate

site selection

neighborhood notification

and that some goals of the General Plan were in conflict.

Following Council approval, the Association sued; the decision in favor of the project was announced in February, 1982.

Principled Negotiation and the Siting Problem

Roger Fisher and William Ury describe in their book *Getting to Yes*, a four part method they term "principled negotiation." Essentially, principled negotiation involves:

- (1) separating people from the problem — not letting personalities and egos overshadow the problem to be solved,
- (2) focusing on interests, not positions — looking beyond the stated positions to their underlying interests,
- (3) insisting on using objective criteria — having participants agree on standards by which decisions will be made,
- (4) inventing options for mutual gain — generating several possible packages of options before making a decision.

A review of the Piney Mountain dispute reveals that the three main parties — the Housing Authority, the Neighborhood Association and the Town — violated the four tenets of principled negotiation.

Discussions with participants revealed that proponents tended to regard project opponents as elitist and perhaps racist, opposing the project out of selfishness and ignorance. Project opponents tended to regard proponents as arrogant and self-righteous, unilaterally forcing unwanted development in their neighborhood and unconcerned as to its impacts. Observers on both sides noted that some proponents and opponents adopted abrasive, confrontational approaches, further polarizing the conflict. With these strongly held images of the people involved, neither side ascribed much validity to the other's stated concerns.

The Authority's strategy of selecting a site and a development plan, then defending its position, and the Association's strategy of attacking the site and plan, precluded the parties from focusing on the underlying interests — the Authority's desire to provide low-income housing and the Association's desire to minimize adverse change to the neighborhood.

The one instance where the dispute came closest to principled negotiation — the use of objective criteria for granting a special permit — failed due to a lack of definition and a lack of options. The Authority's

scattered site policy, legitimized in the Town's Housing Assistance Plan, specified acceptable concentrations of public housing in each of the Town's Planning Areas. Disagreement as to whether the large Planning Areas were the suitable level of analysis and whether existing or estimated future population should serve as the basis for comparison were never satisfactorily resolved. In essence, the parties tried to bend the criteria to support their arguments for or against the only option under consideration, rather than using criteria to generate options.

The decide-announce-defend strategy precluded the generation of alternatives; the funds were available, the site approved by HUD and the design well under way. Without a political or judicial defeat there would be no fundamental changes in the Authority's plan.

Larry Susskind³ identified four types of participants in a siting decision. "Boosters" will favor the project and "preservationists" will oppose it without regard to specifics of the proposal or the approval process. "Non-participants" will not get involved. A significant portion of local residents (up to 50 percent) will be "guardians;" their support for or opposition to a project may depend on their perception of the fairness of the decision-making process. Public agencies need to be careful to maintain their support. An enhanced public participation or negotiation framework may be an appropriate vehicle to garner the support of both local government officials and citizen "guardians."

Raiffa⁴ and Sullivan⁵ discuss factors that tend to help or hinder the use of negotiation in a given dispute. It is critical to analyze each situation to estimate the effectiveness of using a negotiation framework. Several factors indicate negotiation may have been productive in the Piney Mountain case.

First, each party could receive gains from negotiations without sacrificing its best alternative to a negotiated agreement (BATNA): pursuing its interests through the traditional development review process. Because plan review through a public hearing mechanism would occur anyway, none of the parties must abandon strategies they would otherwise use. In addition, willingness to negotiate would signal to decision-makers that a party was pursuing constructive means in the dispute. The review process provides two other incentives to bargaining: it imposes a deadline and it ensures that none of the parties can act unilaterally to attain its goals. A noted exception would be if one party were certain that

process failure

participant types

situation analysis

the Town's interests were identical to its own, thus ensuring its desired outcome in the absence of negotiation. Some might argue this was true for the Authority in this case, but it is a risky assumption to make in the political arena.

Public and quasi-public projects often lend themselves to bargaining. Because they are designed to fulfill public interests and usually involve the expenditure of public funds, the property rights of the "developer" are often regarded as weaker than in a private development.

Another factor favoring negotiation is the existence of common areas of interest that are not of a zero-sum nature. Early input into which objective criteria should be used to evaluate alternatives and how much weight various criteria should be assigned are examples of expanded participation that need not involve a relinquishment of power. Another example is joint involvement in the design process, where neighborhood concerns might also benefit future project residents. Design elements may be of secondary concern to the Authority as long as cost and scale impacts are minimal.

Given the animosity displayed during the dispute, formal negotiations may have improved basic communication among participants and helped develop less biased analysis of technical considerations. Neutral observers would likely conclude that all parties had legitimate interests and acted in an expected manner to further those interests. In particular, planners need to acknowledge that the "not in my back yard" (NIMBY) response is a rational and legitimate expression of residents' interests.

Finally, negotiations could preclude conflict related to lack of involvement, thereby shifting the focus to the merits of the plan.

There are some factors that might tend to hinder negotiations. Foremost among these involves final site selection. Regardless of the process or the design, the neighborhood in which the project is sited is likely to resist. This results in the "reservation price" of the neighborhood (no project at the site) and that of the Authority (some project at the site) being mutually exclusive. This single issue agenda would not be conducive to negotiation since one party must prevail at the other's expense.

In the Piney Mountain case, expense and delay considerations may not have played as large a role as they might in a dispute over a for-profit development. Carrying costs and the need to satisfy investors can be a strong incentive to bargain.

There are also "structural" impediments to negotiation. Among these are: (1) deeply held beliefs which can preclude productive discussion, (2) the inability of an interest group to reach consensus or represent all its member's interests, (3) the unlikelihood of future negotiations on a similar project and (4) fear that bargaining may imply legitimacy of others' interests, lessening the probability of a "victory."

It is also important to recognize that any new approach to established procedures may be opposed, largely out of apprehension to forsake something familiar for something unknown, with perhaps unforeseen consequences. New approaches also tend to invite legal challenge until they become established. In addition, constitutional or other legal restrictions may affect the ability to employ negotiation strategies in some states.

Enhanced Participation/Negotiation Process

What we term an enhanced participation/negotiation process must consider several elements: what interests are represented, who represents them, at what point(s) in the process negotiation occurs, what is and is not negotiable; and what role(s) the planner may assume in the bargaining process.

Four broad classes of interests could be represented in a typical local development dispute: the project applicant, the affected neighborhoods, the local government and other public service providers, and the direct beneficiaries of the project. State and federal agencies, among others, may also have interests, but for simplicity they are not addressed in this analysis.

How interests are represented is more problematic. The applicant and the local government tend to have adequate means to coherently express their interests, but ad hoc neighborhood groups raise questions of adequate representation. Whether such groups will form and to what degree they represent the neighborhood is uncertain. Negotiations may be assisted by providing a mechanism for neighborhood representation recognized by all participants. A similar problem arises with regard to project beneficiaries. In cases where beneficiaries are identifiable, such as where a waiting list for public housing exists, representatives should be included, perhaps using a mechanism similar to that for the neighborhoods.

The local government's role needs to be carefully circumscribed. Because the town council will assume

interest expression

impediments to negotiation

bargaining positions



A treeless cul de sac

criteria selection

a quasi-judicial role in the development review process, constitutional considerations suggest that the council not become involved in negotiations.

A negotiation framework would appear to offer several roles for planners, however. Planners may represent town interests as reflected in plans and policies, with the understanding that the planner can suggest likely concerns, but cannot assure approval or denial of any proposal. In this role, the planner becomes one of the parties to negotiate along with the applicant and neighborhood groups. Other duties of a planner in this role include serving as a liaison to neighborhood groups, either as an information broker—ensuring that all interested groups are kept apprised of project developments—or as a technical assistant or advocate for a certain group or groups; preparing estimates of a project proposal's impacts, suggesting mitigation measures that balance various parties' interests and responding to comments on the project submitted by the public. A planner may also serve as a mediator, helping parties to define objective criteria and identify possible mitigation measures. As a mediator, the planner may enhance prospects for principled negotiations as parties may not wish to appear uncooperative before someone with access to decision-makers. For

example, the planner may suggest side payments or mitigation measures under town purview that could further prospects for agreement.

Many of these roles would need to be assumed by different members of the staff as they contain conflicts of interest. If parties to a negotiation are not confident that different members of the same staff can serve possibly conflicting roles, an outside mediator may be required.⁶

Perhaps the most difficult consideration is the point at which various participants should engage in negotiation. Based on the case study, it appears that bargaining needs to occur between different participants at different times. This results in inherent dangers that negotiations will fail since some critical issues would be largely non-negotiable. The incentive for the project applicant to bargain would be too small, and the incentive for project opponents to use unprincipled tactics too great, for the final selection of the preferred site to be negotiable. This conclusion is based on the earlier assessment that site selection constitutes a zero-sum issue which will result in opposition independent of the criteria employed to select the site. Negotiations can help determine what criteria should be used, appropriate mitigation for adverse impacts and site design-

negotiation steps

related details once a site is chosen, but not the actual choice of the site.

A three step "negotiation on a higher plane" is envisioned: negotiation to determine objective criteria and how they will be used, site selection without negotiation, and negotiation over mitigation measures and site design elements. Implementation recommendations include both steps to encourage bargaining and changes to the development review process to better embrace a negotiation framework. The recommendations are designed to implement the three-part "negotiations on a higher plane" described above. Recommendations include:

1. *Inclusion of an "Interests of Particular Concern" section in the General Plan.* This section lists types of projects in which the town perceives an overriding public interest. Each locality generates its own list, based on its needs, and may periodically amend it as needed. Types of projects listed might include shelters, utilities, halfway houses, public housing and major public facilities such as hospitals, airports and waste disposal facilities, among others. The listing does not supercede the normal review process. It signals to all parties that minor to moderate impacts of a project may not necessarily be sufficient to deny approval, but must be balanced against the value of the project to the public welfare. This mechanism enhances the legitimacy of proponents for listed projects and opponents for unlisted projects. It clarifies the public interest prior to any specific development proposals and may forestall accusations of due process abuse (such a provision would need to be carefully crafted to avoid a due process challenge out of hand). If passed, this section would alert proponents and opponents alike of those projects for which some form of negotiation is expected by the locality.

2. *Establishment of a recognized network of neighborhood groups.* The network may improve communication between project applicants, local government and the public, and minimize concerns about power and legitimacy associated with ad hoc groups. The town role could include approval of organizations' bylaws to ensure adequate representation, with the following elements required: (a) notification to all potential members about the organization's existence and purpose, (b) a periodic process for the democratic selection of leaders, (c) explicit solicitation of input to, and notification of, all public stances of the organization together with notification of all communications received by the organization.

The town could appoint a staff member as liaison to the neighborhood groups, with responsibility for providing them with information.

3. *Early communication with neighborhoods for projects listed under the "Interests of Particular Concern".* The quid pro quo for listing as an "interest"—which tends to enhance the project's legitimacy—requires communication between the applicant and affected parties prior to site selection or detailed planning. This enables the full spectrum of community interests to be raised. The procedure could be as limited as notification through the media or mass mailings inviting comment. On a higher plane, notification could be followed by a public meeting to gather further input. If a network of neighborhood groups is established, a first round of negotiations could be conducted. Negotiations, mediated by the planner if requested, could identify interests, determine possible site selection and review criteria and inform participants of the development review process. Thoughtful planning and careful attention to the development of precise, unambiguous objective criteria by which potential sites will be evaluated at this step can set the stage for a successful principled negotiation.

4. *Appointment of a task force to provide advice during the site selection process.* The task force could be a standing committee which convenes for any major project siting or a committee whose membership is appointed on a project-by-project basis. Its role would largely be determined by the applicant, who would not be required to use task force services. It is unlikely that the applicant would wish to appear uncooperative because of the local government's development review role. The task force would act as a surrogate for neighborhood interests during site selection. Operating in an advisory role, the task force could ensure that site-specific concerns are communicated to the applicant, while safeguarding the confidentiality of the applicant's actions. The long-term success of the task force would depend on its ability to uphold confidentiality. Task force suggestions, like those of the planner/mediator, would not imply town sanction of any outcome.

5. *Neighborhood involvement in preliminary site design and development of mitigation measures.* Analogous to the development of conditions often accompanying the issuance of a special permit, this step could involve substantial negotiations. At this point, the most affected neighborhood may oppose the project and may propose alternatives that can

balancing interests

group network



then be evaluated by the previously determined criteria. Eventually, opponents will face the decision to provide input to minimize adverse impacts while opposing the project during the review process, or opposing the project without providing input. Although opponents may argue that its concerns were not fully mitigated, it cannot charge that it was denied involvement in the process. The local government could thus judge the project on its merits.

6. A written, public analysis/comment/response procedure for all projects listed as "interests of particular concern." This final procedure, occurring during the development review process, ensures that all concerns are raised, and responded to, prior to the final decision on the project application. It would include the Planning Department's written analysis and recommendation for the project, available to the public prior to the public hearing. The public would have the opportunity to submit oral and written comments on the project at the public hearing. The Department would then supply written responses for each comment to the town council and public prior to the council's decision.

Conclusion

The enhanced participation/negotiation process described increases public input relative to the traditional development review process. Where lawsuits or other delays are avoided, the recommended process could also save participants time and money and improve community relations. The negotiation process would take longer and cost more than the traditional process if both ran smoothly. Bargaining would tend to focus discussion on

legitimate criteria and establish more useful precedents by minimizing conflict over process issues. By expanding the debate, negotiation would arguably increase the probability that the solution most in the public interest will be selected. □

NOTES

1. Lawrence Susskind, *The Siting Puzzle: Balancing Economic and Environmental Gain & Losses*, Harvard Program on Negotiation Working Paper Series 85-5, January 1985.
2. Roger Fisher, and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York, NY: Penguin Books, 1983).
3. Susskind p. 12.
4. Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982).
5. Timothy Sullivan, *Resolving Development Disputes Through Negotiation* (New York, NY: Plenum Press, 1984).
6. Working as a mediator, advocate or information broker requires the planner to communicate effectively and to act to correct the distorted communication of other parties. Jurgen Habermas' work on communicative competence for planners has been interpreted by several planning authors; see John Forester, "Planning In the Face of Power," *Journal of the American Planning Association*, Issue 48 p. 67-80, Winter 1982 and Harvey Goldstein, "Planning As Argumentation," *Environment and Planning* 13, 1984, vol. 11 p. 1-16.
7. Frank Popper recommends that "Local land use regulations... have sections devoted to the LULU, showing where specific kinds might not be located and explaining why." He suggests this will help planners deal with the five types of arguments used to oppose LULU's. These arguments against LULU's include that they are: not needed, do not belong in a particular region, are sited in the wrong place, had poor siting procedures, and will have harmful effects. See Frank Popper, "The Environment and the LULU," *Environment* Vol. 27, No. 2, p. 40.

advisory capacity

sense of participation