

THE DILEMMA OF PUBLIC PARTICIPATION IN FACILITY SITING DECISIONS AND THE MEDIATION ALTERNATIVE

by James E. McGuire*

New Jersey is facing a hazardous and solid waste crisis. This crisis concerns the location of the sites, and the process by which the sites are chosen. Few public officials in New Jersey who have been involved in the attempt to site waste facilities have escaped the wrath of the public whose message is: "not in my backyard." As a result, fewer sites have actually been chosen, and litigation over the location of such sites has erupted. William Ruckleshaus, former Administrator of the United States Environmental Protection Agency, summed up the frustration encountered in siting facilities in an address to the Conservation Foundation: "conducting environmental business through attack and counter-attack, suit and countersuit, is wasteful, expensive, and ultimately exhausting. It is a crazy way to do business. But, people will continue to do crazy things until they have a rational alternative."¹

This feeling of frustration was evidenced by several speakers at the November 1984 Seton Hall Legislative Bureau Symposium, "Hazardous and Solid Waste Siting: New Jersey's Dilemma." The speakers, among whom were Frank Dodd, Chairman of the New Jersey Hazardous Waste Siting Commission, Mercer County Executive William Mathesius, Hamilton Township Mayor Jack Rafferty, and Essex County Executive Peter Shapiro, all identified public opposition to the siting of waste facilities and lack of constructive public participation as their biggest obstacles.

Indeed, exasperation in dealing with the public has prompted some public officials to suggest that the time has come

* A. B., Lafayette College; M.P.A., Rutgers University. Mr. McGuire has been employed by the Department of the Public Advocate since its inception in 1974. He has served as Deputy Director of the Division of Citizen Complaints and Dispute Settlements and is currently the Director of the Center for Public Dispute Resolution.

¹ W. Ruckleshaus, *Remarks at the Meeting of the Conservation Foundation* (Oct. 1, 1984).

for government to act unilaterally, without the benefit of public input or consent. This approach is unwise for several reasons. First, it is contrary to the express policy of the State. The New Jersey Hazardous Waste Facilities Siting Act declares that the "informed participation of the public and of elected and appointed officials at all levels of government is essential."² The New Jersey Solid Waste Management Act declares that "it is the policy of this State to . . . provide citizens and municipalities with opportunities to contribute to the development and implementation of solid waste management plans . . ."³

From a political standpoint, unilateral action, which forecloses the opportunity for public participation would yield only short-term gains. Although the result may be the siting of a facility, the resultant antagonism of the electorate would have an adverse impact on the next election. More importantly, such an approach is unlikely to accomplish anything constructive. If the public finds participation in the decision-making process foreclosed, it would simply pursue other avenues, most likely litigation.

Public participation in and of itself is not the actual problem. Rather, the difficulty lies in the way the process is applied by officials and perceived by the public. The public hearing is the most frequently utilized forum for public participation,⁴ but it is the least effective. Communication at these hearings is often one-sided. Participants find themselves talking *at* each other rather than engaging in constructive dialogue. At some public hearings, government officials or their consultants make a presentation without responding to legitimate questions or concerns of the public. When this happens, emotional bias and soapbox oratory often become the order of the day.⁵

² N.J. STAT. ANN. § 13:1E-50 (West 1985).

³ N.J. STAT. ANN. § 13:1E-2(b)(3) (West 1979). The full text of this subsection states:

Provide citizens and municipalities with opportunities to contribute to the development and implementation of solid waste management plans by requiring public hearings prior to their adoption and by the creation of advisory solid waste councils.

⁴ *Id.*

⁵ See United States Environmental Protection Agency, Office of Water and Waste Management, *Siting of Hazardous Waste Management Facilities and Public Opposition*, SW-809 (1979) [hereinafter cited *1979 EPA Report*]. This report states:

Another factor contributing to the ineffectiveness of the public participation process has been that it is often too little, too late. In these cases, a decision is made prior to the public hearing, turning the hearing into a meaningless procedural requirement. Under this approach, a decision is made, announced and defended with no public input.

To prevent this, virtually all observers of the siting process agree that the public must be involved in the initial stages of the siting decision. Indeed, this participation must be actual and substantial.

Gail Bingham and Daniel Miller of the Conservation Foundation agree that public participation is important. They believe that "[t]here is widespread agreement that public participation must begin early and continue throughout the siting process . . . [and that] most public participation is limited to providing the public with information concerning the proposed facility and providing opportunities for citizens to express their concerns at public hearings."⁶ The Keystone Center, a non-profit environmental organization located in Colorado, has also found public participation vital to the siting process. In their study of problems encountered in siting facilities in Texas, the Center found that one of the major problems in the current permitting process was a lack of *early* public input.⁷

An additional problem is that the public often has an unequal ability to participate because it lacks the resources to hire its own technical consultants to conduct studies on all relevant concerns. Many states have provisions in their waste laws which provide money to allow concerned members of the public to hire consultants. While there is such a provision in New Jersey's haz-

"[w]ith rare exceptions, public meetings or hearings were held during each of the siting attempts studied . . . Presentations at these meetings by facility sponsors and state regulators were the most common attempts to explain or defend the facility applications . . . These public meetings and hearings provided for only the most limited substantive discussions."

Id. at 17-18.

⁶ Bingham & Miller, *Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW. 473, 478 (1984).

⁷ Texas Department of Water Resources, *The Keystone Siting Process Handbook — A New Approach to Siting Hazardous Waste Management Facilities*, LP-194 (1984). See also R. FISHER & W. URY, *GETTING TO YES* (1981).

ardous waste laws, the solid waste laws lack a similar provision.⁸

Finally, the members of the public represented at a public hearing tend to favor or oppose the proposal. Opponents are usually from a concentrated area in close proximity to the site. These people have the most at stake and consequently the greatest incentive to participate. Absent are significant numbers of people who are willing to listen objectively and reach a rational conclusion.⁹

Since public participation has not been effectively utilized, the introduction of mediation into the siting process is a better means of reaching siting decisions. Mediation is not only a means of dispute resolution, but it also enhances public participation. This was the recommendation of the New Jersey Public Advocate in its "White Paper on Resource Recovery Siting."¹⁰

Mediation, or mediated negotiation,¹¹ is a voluntary process in which parties negotiate face-to-face in order to resolve issues and reach a mutually acceptable and workable agreement. The negotiations are facilitated by an independent third party or mediator, who has no stake in the outcome or an ongoing relationship with the parties. The mediator does not impose a solution nor decide the case. Rather, the mediator assists the parties in jointly developing a solution which satisfies their individual and collective interests. A mediator helps the parties defeat the problem—not each other.

The direct result of mediated negotiation is an outcome satisfactory to all parties. Typically, the settlement is a series of agreements combined in a way that none of the parties previ-

⁸ See N.J. STAT. ANN. § 13:1E-59.d. (West Supp. 1985) (The Hazardous Waste Siting Commission may make grants to municipalities for conducting site suitability studies); compare N.J. STAT. ANN. §§ 13:1E-1 to -48 (West 1979 and Supp. 1985) (The Solid Waste Management Act has no such provision).

⁹ See 1979 EPA Report, *supra* note 5. This report states "[Public meetings and hearings] primarily serve as forums for expounding positions for or against proposed . . . facilities." *Id.* at 18. See also Bingham & Miller, *supra* note 6, who say, "In practice, experience has shown that negotiation must involve representatives of all affected interest." *Id.* at 486.

¹⁰ Remis, *White Paper of the Department of the Public Advocate, Division of Public Interest Advocacy, on the Selection of a Resource Recovery Plant Site* (July 1984) [hereinafter cited as *White Paper*].

¹¹ See United States Environmental Protection Agency, Office of Solid Waste & Emergency Response, *Using Mediation When Siting Hazardous Waste Management Facilities*, SW-944 (1982).

ously foresaw. This result also leaves the parties better able to resolve future differences.

Mediated negotiation has several advantages over the existing public process. First, mediation directly addresses the one-way communication problem by bringing parties together to negotiate on all issues of concern. Other forums, such as public hearings, often become highly charged emotional exchanges about technical issues, while administrative and judicial forums deal only with legal and factual issues. In contrast, mediated negotiation is much more flexible and can deal with the very substance of the issues. Mediation can also address issues which a court is unlikely to confront: the fear of exposure to air pollutants, the impact on property values, and the effect on the quality of life and aesthetics of the community.

Of course, it would be naive to think that these negotiations will be easy. While it can be an effective process to ensure an outcome that will satisfy the interests of all parties involved, there are specific procedures that should be considered in order to make the mediation as successful as possible.

One step would be to begin mediated negotiation as early as possible. Ideally, there would be public participation in an effort to reach a consensus on siting criteria. Next, several sites which satisfied the criteria would be selected. Then, the developer or government agency responsible for siting would negotiate with each of the two or three proposed municipalities to determine the terms and conditions acceptable to each host community. These terms and conditions would be embodied in a siting agreement.

Thus, the people most directly affected by the siting decision would have input into siting a facility in their community before the final decision is made. Likewise, public officials making the final decision would have the benefit of reviewing several preliminary siting agreements and could base their decision on the best alternative.¹²

Unequal resources between the various groups is another problem that must be resolved if all interested parties are to participate in mediated negotiation in a meaningful way. Outright grants to citizen groups, an arranged method of shared resources

¹² *White Paper, supra* note 10.

or a roving independent technical team are all possible solutions to this problem. Such efforts, however, have been criticized by some as unnecessarily aiding adversaries. Yet, if the sharing of resources is carefully structured and properly implemented, the result can be a more thorough review, allaying fears that information is being withheld to influence the decision.

Mediated negotiations must involve a truly representative group which excludes no legitimate interest. Parties to the negotiations should include not only the advocates and opponents of the dispute, but also those parties who can be objective.

Several other procedural and substantive benefits can be realized through mediated negotiation. Specifically, these are:

1. the public opportunity to participate in a process that is fair and open and is perceived as being so;
2. a forum where both public officials and citizens can address all legitimate concerns;
3. the opportunity for both public officials and citizens to jointly explore creative solutions;
4. informed public input from which public officials can get a better understanding of citizens' concerns and how they may be constructively satisfied; and
5. an agreement that satisfies the parties' legitimate interests can be achieved through a combination of agreements that might not have been foreseen if the current process had been utilized.

It would be a mistake, however, to think that the mediated decision will not be challenged. Clearly, there are opponents who will not be swayed, regardless of the process. It is thus critical to translate the benefits which accrue from the mediated negotiation into a decision by public officials that is based solidly on the merits. Even if the process is open and fair, if the ultimate decision is not based on the merits, it may not withstand political and legal challenges.

Clear evidence shows mediated negotiation will work in siting hazardous and solid waste facilities. Wisconsin has successfully sited seven solid waste landfills under their Solid Waste, Hazardous Waste and Refuse Act.¹³ This act specifically provides for structured negotiation between the proposed host municipality and a developer with an option to utilize mediation.¹⁴ In each of the seven

¹³ WIS. STAT. ANN. § 144.43 (West 1984).

¹⁴ WIS. STAT. ANN. § 144.445(9)(c) (West 1984).

cases, a siting agreement was successfully negotiated delineating the terms and conditions for locating a landfill within the municipality. In addition, Rhode Island has successfully sited a new hazardous waste treatment and storage facility which was the result of a negotiated siting agreement.¹⁵

Public participation is essential. It is the express policy of this State.¹⁶ People who live near proposed waste facilities have a right to have their concerns addressed, as do public officials who have the obligation to site such facilities for the good of the general public.

Mediated negotiation among local citizens, public officials and other interested parties is an effective way of enhancing meaningful public participation that is so necessary in making sound siting decisions. Given the track record of the current approach, mediated negotiation is not only a viable alternative, but an idea whose time has come.

¹⁵ R.I. GEN. LAWS § 23-19.7-8 (1984).

¹⁶ *See, supra* notes 2 and 3.