

COVER PAGE AND EXECUTIVE SUMMARY

City of Asheville / Buncombe County Water System Mediation: An Evaluation

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Executive Summary

On April 26, 2005, John Stephens, director of the Public Disputes Program at the School of Government at UNC-Chapel Hill, conducted the City of Asheville / Buncombe County water system mediation. After fifteen hours of discussions, Stephens declared an impasse. Why didn't mediation help the parties reach an agreement? What was Stephen's role in the failure of the mediation? This research was an attempt to answer these questions and evaluate the conduct and effectiveness of the mediator.

While it appears that Stephens may have made some errors in tactical judgment, all things considered, Stephens' strategies, tactics and behavior did not prevent the parties from settling. To the contrary, many other factors overwhelmed the mediation including constraints placed on the structure of the mediation, local politics, and perhaps most importantly, the existence of the proposed bills, Sullivan II and III, which effectively made the key issues of growth control and differential rates non-negotiable. This research concludes that the combination of these external events and influences had the cumulative effect of diminishing the viable bargaining range between the two parties to the point that consensus may never have been possible.

Background

The City of Asheville and Buncombe County have a long history of working together to extend and operate the city's water system in parts of the county. However, their situation is somewhat unique due to the existence of the Sullivan Act, a piece of legislation which prevents Asheville from charging higher rates to water districts outside the city limits.

Under the 1981 Water Agreement, the city agreed not to challenge the Sullivan Act by charging rate differentials and the county transferred its water lines to the city and undertook the expense of maintaining various city-owned facilities that serve county residents. In May 2004 the City Council voted unanimously to pull out of the Water Agreement in order to have the ability to charge differential rates and be able to use water to control their growth. After a year of negotiations between various configurations of the two boards and staff, the two sides agreed to try mediation.

Research Hypotheses

This research examines the failure of the City of Asheville / Buncombe County water system mediation from the perspective of three alternative hypotheses. These are namely, (1) the mediator chose the wrong mediation strategy or made tactical errors during the mediation; (2) external events and influences overwhelmed the mediation; and (3) there was no viable bargaining range between the two parties.

The first hypothesis states that the mediator chose the wrong mediation strategy or made tactical errors during the mediation. This analysis finds that Stephens followed, more or less, mediator best practices in his preparation and planning for the mediation as well as while in session with the negotiators. If Stephens can be faulted for breaching best practice protocol, it would be

because instead of engaging the parties in a structured process of sharing interests and examining assumptions, the negotiators began where they had left off in previous negotiations and he was unsuccessful in moving them beyond earlier established positions. If the parties were willing and able to engage in unencumbered brainstorming, he may have been able to get the parties to see the problem from a fresh perspective.

Another area where Stephens was faulted by many participants on both sides was for not being tough enough. This criticism goes directly to mediation style. Stephens clearly is a facilitative mediator, serving as a channel of communication among disputing parties and focusing on ensuring that the discussion is centered on communicating interests and generating options. Other facilitative styles allow the mediator to use position and leverage to influence the negotiations. Yet for a more directive approach to succeed the mediator must be endowed with sufficient authority or resources to influence the parties. Stephens lacked this authority as there was no court order or legislative mandate for the parties to settle.

The second hypothesis states that the mediation did not succeed because of events external to the mediation and outside the control of the mediator and the negotiators. All together, the external influences examined here played an important role in setting the stage for an eventual impasse in the mediated negotiation session.

Satisfying the requirements of the NC Open Meetings Law compromised the mediation process to some degree. Because of the Open Meetings Law does not allow governing bodies to meet in closed session except for in limited circumstances, the parties had to be represented by a subset of each governing body and it's appointed legal advisors. The negotiators had to take each set of proposals and counter proposals back to their full boards for review and discussion. This significantly reduced the ability of the parties to engage in more spontaneous and creative process of generating options. In addition, it can be argued that because Stephens was unable to meet with the full boards during the mediation, some information coming out of the negotiations might have been lost in translation. Had the boards been able to meet face to face and speak freely and openly, the outcome of the mediation may have been quite different.

Timing and local politics were also significant outside influences on the mediation. The mediation occurred during an election year for the city and although there is little evidence that municipal elections had much of an effect on the outcome of the mediation, the fact that candidates were running for office tended to politicize the issue more than it otherwise would have been. In addition, both sides were wed to their positions due to the highly publicized nature of the dispute. It can be argued that had the parties agreed to mediation prior to May 2004 when the city voted to pull out of the water agreement and the parties were still flexible on the key issues, it is likely that an agreement could have been reached.

However, the most difficult external barrier to a negotiated outcome came from the local legislative delegation. The existence of the proposed bills, Sullivan II and III during the mediation profoundly changed the dynamics of the negotiations. As written in the House bills, Sullivan II would prohibit Asheville from charging differential rates, and Sullivan III would ensure equal access to water inside and outside Asheville city limits and bar the city from forcing annexation of properties for water service. The key issues of growth control and differential

pricing suddenly became non-negotiable. This change in negotiation dynamics leads directly to the third hypothesis, that there was no viable bargaining range between the two parties.

The final hypothesis of why the mediation failed addresses the nature of the negotiations and the behavior of the negotiators. In any bargaining situation, the negotiators are exploring whether they can do better through negotiating than by acting on their best alternatives outside of the negotiation. The area of overlap is called the Zone of Possible Agreement (ZOPA), and consists of all possible outcomes that would allow each party to achieve or surpass its respective “bottom lines.”

As the water system negotiations became highly publicized, the central issue coalesced around growth control. The city had made it clear that they wanted to gain control of growth by disengaging from the existing water agreement. City Council assessed its alternative to a negotiated agreement to be a lawsuit to overturn the Sullivan Act and they entered the mediation session clearly focused on achieving their growth control objectives. Meanwhile, the county had been working closely with the local legislative delegation to draft Sullivan Acts II and III which strongly favored their primary positions of no rate differentials and no annexation for water. This created a rather strong alternative to a negotiated agreement for the county and made it so that they did not have to concede on the two issues that were most critical to the city. In effect, the balance of power in the negotiation was tilted toward the county and the ZOPA was reduced to the point that an agreement was highly unlikely.

Conclusion

Our conclusion is that there was very little that Stephens could have done to get the two governing bodies to consensus. Rather, other factors overwhelmed the mediation. Factors external to the mediation such as the effects of the Open Meeting Law on the mediation design, the timing of the mediation and the effects of local politics were all significant outside influences on the mediation. Removing any one of these influences would have significantly changed the dynamics of the mediation session.

The most difficult external barrier to a negotiated outcome came from the local legislative delegation. The existence of the proposed bills, Sullivan II and III, during the mediation profoundly changed the dynamics of the negotiations. Had there been no legislative intervention whatsoever, the issues that were so important to the city likely would have been perceived as negotiable items by the county negotiators. This could have allowed the parties to explore options around these issues that could have yielded satisfactory results. Taken altogether, the cumulative impact of external influences and the change in negotiation dynamics due to the existence of the proposed bills created a situation in which there was virtually no viable bargaining range between the two parties.

ⁱ Weller and Smutko submitted the report in June 2007. Due to the pending legal action, including the August 2008 court decision, final release of the report was deferred. In December 2008, Weller and Smutko agreed to John Stephens’ suggestions for updates on the legal situation, additional citations, and other minor changes. Thanks to Alex Hess for guidance on proper legislative and court citations in these endnotes.