

# **Facility Siting and Public Opposition**

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## 5 Compensation and Strategy

We have argued generally that the defects of the existing siting process, and the failures to be expected from conventional reforms, are due to misunderstandings or oversimplifications of the interests and likely behavior of the parties to siting conflicts. Accordingly, a close look at the people and organizations that make decisions in such conflicts will have two useful consequences: (1) ill-conceived strategies can be identified as such and abandoned and, (2) more importantly, such a description will lead to workable and effective reforms for the siting process.

In the remainder of this chapter, we will discuss the decisions facing certain of these participants—especially the decision to commit resources on one side or another of a siting dispute—and the incentives that face these participants as they decide. We will be concerned at first with the local opposition, and will see that an efficient siting process demands a program of compensation to fundamentally change the alternatives they face. The importance of this compensation is one of the central insights of the present study. Our primary argument is that such compensation is important on efficiency grounds, both as a means of making it possible to build worthwhile projects and also as a way to reveal the undesirability of many that should not be built.

We will then turn our attention to diffuse opposition. Such groups are strategically situated differently from local opponents, and a compensation program will only occasionally serve the same purpose in the face of diffuse opposition as it will for overcoming local opposition. (We will see in Chapter 7 that the management of information and the use that can be made of it by the diffuse opposition can be much improved.)

But compensation, of course, has an equity side as well, and we will also discuss the issues involved in compensation on grounds of fair-

ness. The last section of this chapter will focus on different mechanisms for determining the amount and type of compensation. We conclude that compensation is best determined through negotiation among the parties to a dispute; the next chapter discusses why and when negotiation is a useful tool.

## COMPENSATION AND FACILITY NEIGHBORS

### Local Opposition and the Importance of Side Payments

Our central proposition here is that compensation payments of some sort are essential to a strategic alignment in siting disputes that favor desirable outcomes. A theoretical analysis is presented in the article, “Not on My Block, You Don’t: Facility Siting and the Strategic Importance of Compensation.”<sup>1</sup> Here we present the argument discursively.

If a powerful government agency could know all the benefits and costs of locating a facility in various locations and could choose the optimal location on the basis of a comprehensive benefit-cost analysis, resource allocation would be efficient. Unfortunately, there is no such agency, no such knowledge, and no such simple choice. Siting decisions are influenced by political pressures of many kinds exerted by many different groups, and these pressures are not proportional to the total benefits each group would gain from alternative social choices.

In particular, the *per capita* costs that a facility threatens to impose on a small number of people—especially the social costs imposed on people who live near the site—tend to be large for groups that are numerically small. For example, in the case of a hazardous waste facility, it is the neighbors who bear the risk of accidents; it is the neighbors who will have to live with disruption during construction; it is the neighbors who will have to listen to the traffic generated by the facility; and it is the neighbors who bear the risk of any diminution in property values that may result from construction of the facility.

Because they have so much at stake, each of these neighbors is likely to be willing to invest substantial resources to see that the facility is defeated. The neighbors will attend meetings, lobby regulatory officials, form opposition groups and hire lawyers if necessary to stop the project. In contrast, each of the many beneficiaries of a project—

customers, company stockholders, and so on—has only a very small stake in the decision. These people are far less likely to invest resources to defend the proposal than are facility opponents. And although the total benefits at stake may be larger for the diffuse beneficiaries, local opponents will be more motivated to take action because of their higher *per capita* stake in the outcome.

As we observed in Chapter 3, groups are not people; Mancur Olson has shown why many groups do not act as individuals would if faced with the same alternatives the group as a whole confronts. The actions of individual members of a group are predictable and we know that the likelihood of individuals taking action decreases as (1) the size of their group increases and (2) the amount at stake for each individual decreases.<sup>2</sup> This means that the neighbors for whom a project is costly on net are likely to invest significant effort in opposing it, while the more diffuse group of beneficiaries is likely to remain inert, reflecting the rational expectation of each member that his own action will not affect the result.

Two results are to be expected. First, each proposed site will be in danger of defeat by local opposition even if local costs are exceeded by diffuse benefits. Second, and consequently, decision-makers will apply an indeterminate devaluation to local opposition: if projects that are good (all things considered) are as vigorously attacked as the bad, a responsible government agency is correct in discounting such opposition as a discriminant among locations, and it will respond only to those groups that have the power to force acquiescence. Projects will wind up in the right place only in those cases in which might is proportional to right; in our case, only two alternatives will produce this result: (1) the political process must be altered to give government agencies the will to act so as to maximize total welfare, the power to override any political opposition, and (much the hardest part) the wisdom to perceive correctly a wide variety of economic, social, and environmental costs; or (2) we must begin to compensate the local victims of public and quasipublic investments so as to alter their strategic incentives. The former is impossible and the latter merely difficult, so we propose to compensate victims of localized nuisance costs, just as we already compensate those who suffer tangible costs when their property is physically invaded or taken by eminent domain.

Why is compensation a useful way to respond to local opposition? It's central importance is that compensation payments of various

kinds, reduce the difference in welfare that neighbors expect to experience with and without the project, and thereby reduce their motivation to oppose the project. People who think a new facility will leave them much worse off than they would be without it are strongly induced to take action against it; people who each have a little bit to gain from its completion are only weakly motivated to support it. When the losers are few in number and known to each other, they also have the ability to act, while a large number of beneficiaries cannot easily organize themselves to take action. As we have seen in our examples, many of the tactics open to opponents cannot be countered by government action (picketing, litigation, political opposition), while the project developer—the only high-stakes, well-organized project supporter—is limited by law and public pressure as to the force he can bring to bear.

In many cases, therefore, organized local opposition can be expected to prevail independent of the value of the project. The only practical response to this structural “tilt” in favor of local opposition power is to change local motivation to oppose. Compensation does this by reducing the costs each neighbor expects to suffer should the facility be built. In many cases, compensation is also important on grounds of equity; this issue is somewhat complicated (we discuss the equity considerations below), but most people would agree that if people are damaged by a new development, they should be made whole if possible. Compensation also has an efficiency importance that is not as widely appreciated; if developers are obliged to actually compensate those they injure, they will be more likely to take account of those injuries in their planning than if they are merely instructed to “consider” social costs. Indeed, if a private developer doesn’t plan for compensation that he must eventually pay, he could go bankrupt, just as if he had ignored construction or material costs. Thus, a program of requiring compensation payments will make facility planning more efficient, in the sense that all costs and benefits will be better accounted for.<sup>1</sup> Such payments may not always be worth their administrative costs on grounds of fairness alone, but if their omission means that a valuable project is cancelled entirely for want of a community willing to accept it, a strong efficiency argument is applicable. We think compensation for costs incurred by a new facility’s unwilling neighbors is essential to the existence of a strategic situation conducive to good, as well as just, public decisions. Furthermore, the assump-

tion that “costs average out in the long run”<sup>\*</sup> does not apply to the strategic issue.

The case for compensating the neighbors of noxious facilities is buttressed by noting some important qualitative reasons why neighbors are likely to exert power out of proportion to their numbers of aggregate risk, and should therefore be compensated.

1. The prospective neighbors of a new facility are easy for an organizer to identify, if only because they live in a known location. Most of the facility beneficiaries are dispersed throughout the region and united only by characteristics, such as occupation or wealth, that are hard to infer from visible evidence. The people who will suffer from the new plant are all lined up behind their front doors, waiting to be canvassed.

2. The members of the group are known to each other by sight: in socially coherent neighborhoods, they often know one another very well indeed. This acquaintanceship network encourages peer-group pressures, if only implicit, that discourage “cheating” or slacking in the common effort.

3. Without compensation, neighbors face costs that would take them below their original asset positions, while project beneficiaries face only opportunity costs (the failure to advance beyond their original positions). As economists say, “utility curves are typically concave downwards”; each unit of cost to losers can be expected to loom larger than a unit of foregone gain to the winners.

4. Any suspicion or resentment of government on the part of the public at large is readily turned to the advantage of opponents; public intervenors are easy to characterize in the popular media as the actions of a faceless, insensitive bureaucracy riding roughshod over the “little people.”<sup>4</sup>

### Types of Compensation

Since the strategic effect of compensation rests on reducing net costs that neighbors expect to feel from a new development, anything that has this effect is *compensation* in the sense we mean. In some cases, money payments will work; in other such payments are ill-advised, while other kinds of benefits work well. We will see several types of

compensation in later chapters, especially in the case studies in Chapter 8, but some examples can be offered here.

**Money.** A developer can offer payments of money to local governments—i.e., tax rates for citizens might be reduced, or services increased—or he can offer to pay residents directly. Money compensates for many kinds of costs in other contexts: the publishers of this book happily accept money compensation for their costs of printing and distributing it, and the authors were compensated for their time in writing it at least partly with money. Even injury and loss of life are compensated with money, though in such cases it is usually not a willing exchange but merely the best we can do after an accident.

**Conditional Compensation.** Some costs of development are feared but not certain; property value losses are an example. A developer might, accordingly, guarantee property values, or offer other kinds of insurance, as forms of compensation.

**In-Kind Compensation.** Some kinds of costs can be balanced by compensation in kind; if a project is built on land used for hunting or picnics, the developer might acquire other land and develop it for outdoor recreation to balance the loss.

**Protection.** Health and safety impacts of development are sometimes compensated by providing specific protections; a hazardous waste incinerator operator might find that a host community would be reassured by a new fire engine or special training for the fire department for handling chemical fires. Similarly, a project might be monitored especially closely to identify risks while they can be corrected, and the developer might pay for this monitoring.

**Impact Mitigation.** Finally, some negative impacts of a development might be reduced or eliminated directly, as when a developer replaces once-through water cooling for a power plant with a cooling tower, increases a stack height to disperse pollutants, or adds stack-gas scrubbers to a coal-fired boiler.

Particularly because simple money payments are often inappropriate (recall the economist's fallacy from Chapter 3), the variety of compensation alternatives is important to consider. A formalism



will help to organize the possibilities. The expected net cost of a new facility to a neighbor can be portrayed as

$$ENC = \sum_i L P_i C_i - \sum_j L P_j B_j - M$$

where

ENC = expected net costs

$P_i$  = the (neighbor's) probability that cost  $i$  will be imposed on him

$C_i$  = the cost of impact  $i$

$P_j$  = the (neighbor's) probability that benefit  $j$  will be provided to him

$B_j$  = the value to him of benefit  $j$   $M$  = money payments he will receive

The developer's purpose for compensation is to reduce ENC; different kinds of compensation act on different elements in the equation above.  $P_i$  is reduced by some kinds of mitigation and by protection; other kinds of mitigation reduce  $C_i$ ; conditional payments like insurance make  $P_j$  larger, while in-kind compensation increases  $B_j$  for non-money kinds of benefits.

## COMPENSATION AND DIFFUSE INTEREST GROUPS

What about geographically diffuse opposition? Many facility siting disputes—Seabrook is an example—have pivoted on the opposition of non-residents of the site community, and such opposition has not infrequently prevailed over strong local support. When such opponents can organize themselves, the strategic situation would seem to call for compensation of some sort, based upon an argument similar to that presented in the preceding pages. Unfortunately, we have less sanguine expectations for compensation in this context.

Certainly diffuse opposition, especially "environmental" or what we may call "ideological," such as nuclear power opponents, is unlikely to be moved by offers of money. In the first place, such offers suggest selling a principle, and acceptance may hopelessly compromise the groups' leaders. In the second place, it is impractical to

deliver money compensation to the groups' members or to condition it on their cooperation.

However, certain specific kinds of compensation can still be useful. In-kind compensation, which replaces what the project destroys with similar—not just equally valuable—benefits can be a practical device; recreation land might be offered (by purchase of development rights, for example) in return for the occupancy of countryside by the project. Also, the impacts of a project might be directly ameliorated. For example, one company successfully dealt with opposition to a dam in Wyoming by assuring that low river flows threatening a whooping crane refuge would be prevented by purchasing water rights sufficient to assure unchanged net flows at the critical downstream location (see Chapter 8). Other examples of what has come to be called “environmental mediation” have recently been coming to light, and each exemplifies a compensation agreement of some sort.<sup>4</sup>

The relatively straightforward exchange of benefits for amenity that can be offered to local opponents of a project will not translate directly into a strategy for dealing with environmental opposition. But a conceptually similar approach, where the opposition's fundamental principles are not challenged by a project, can be taken. Chapter 6 discusses such strategies.

## COMPENSATION AND COOPERATION

An explicit program of compensation for neighborhood impacts has a further value in promoting negotiation, as opposed to confrontation, in the resolution of siting disputes. In simplest terms, it provides a middle ground between the positions of the opposing parties. In Figure 5.1, we illustrate the decision facing an opponent of a project that he feels will injure him. He can oppose it vigorously from the start; if he does so, the project will fail with probability  $p_x$  leaving him where he was when he started, while with probability  $(1 - p_x)$  the project will go ahead despite his opposition and he will suffer a loss of, say, 10 units. If he negotiates with the project's proponents, when compensation is impossible, the same two outcomes are available. Obviously, in this case, whether he negotiates or opposes depends on whether  $p_x$  is equal to  $p_2$ . Commonly, a participant will reasonably assume that a willingness to negotiate will make  $p_2$  smaller than  $p_x$ , by

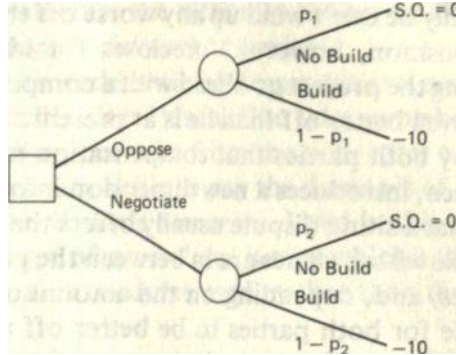


Fig. 5.1 Decision tree for a neighbor of a proposed unattractive new facility. The facility promises costs to him of 10; unless  $p_2$  is larger than  $p_1$ , —an unlikely state of affairs—he is likely to oppose the new project.

indicating weakness, so he has nothing to lose and something to gain by adopting a strategy of intransigent opposition.

If the same participant is faced with a situation in which some compensation might be paid, the situation changes significantly (Figure 5.2). Suppose, for example, that while negotiation might lead to one of the two polar outcomes already discussed, it might also lead to a compensation payment of 13. He then faces a decision in which, depending on the value of (the probability that a negotiation strategy will lead to this outcome), the negotiation path might seem much more

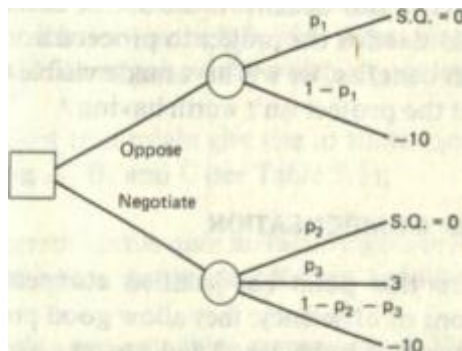


Fig. 5.2 Decision tree for decision-maker (of Figure 5.1) with the possibility of compensation that might provide payments worth 13 if the facility is built. The “oppose” branch of the tree is no longer certain to be the most attractive one.

attractive; certainly he can't wind up any worse off than if he opposes vigorously. Opposition, however, forecloses for him the attractive outcome of having the project go ahead with a compensation payment that leaves him even better off than he is at present.

Recognition by both parties that compensation might be paid for local impacts, then, introduces a new dimension into the "lumpy\*" set of alternatives that a siting dispute usually offers the parties: it makes outcomes possible whose values are in between the polar "build" and "no-build" cases, and, depending on the amount of compensation, makes it possible for both parties to be better off at the end of the negotiation, rather than allowing only one to gain at the expense of the other.

We have seen that a compensation program for local impacts will correct the strategic situation, allowing local opposition to be transformed into support (note again that we have not assumed that any traditional avenues of opposition open to potential neighbors will be foreclosed—or that their wishes should be overcome by authority; it is of the essence of compensation that local opposition is dealt with by making people more willing to have the project go ahead, rather than by forcing them to accept it against their will). It will also induce at least some of the parties in a dispute to negotiate, rather than to dig in their heels. Both of these results bear on the efficiency of the process; a third efficiency consequence of compensation is that it makes more of the social costs of the project in question visible, and, in fact, measures them in units that are probably comparable with usual measures of project cost and benefit. If the social costs that have to be compensated in order for the project to proceed are so high that the project shows net benefits, we will have made visible the very valuable information that the project isn't worth having.<sup>5</sup>

## FAIRNESS AND COMPENSATION

The argument to this point has justified compensation payments mainly for reasons of efficiency: they allow good projects to proceed (by correcting strategic imbalances) and prevent bad ones from happening (by revealing their full costs). It might appear that compensation ought to be paid when practical for the simpler reason that it's morally proper to do so, but in fact, this justification is weaker than

## 6 Negotiation

In the previous chapter, we showed that compensation for social costs is desirable, primarily for reasons of efficiency and strategy: both developers and opposition groups have something to gain from negotiating compensation agreements. Developers of net-beneficial facilities stand to cut project delay and legal expenses,<sup>1</sup> and if the compensation payments are large enough to more than offset social costs, local opponents may actually become *desirous* of the facility.

Notwithstanding these opportunities for mutually beneficial exchange, we do not observe developers and opposition groups rushing to negotiate compensation agreements in practice. While such agreements do exist (some are described in Chapter 8), they are still the exception rather than the rule. This state of affairs is curious: usually when two people each have something that the other wants, they are seized by an irresistible \* ‘urge to make a deal. ’ ’ Indeed, the inclination to trade is so powerful that the government is often hard put to prevent people from engaging in mutually beneficial exchanges that are illicit (e.g., the markets for heroin, prostitution, insider stock market information, etc.)

In this chapter, we review the theory of bargaining to better understand the practical obstacles to negotiation of compensation agreements.<sup>1</sup> This discussion will also illuminate the case material presented in Chapter 8, and improve our policy recommendations.

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<sup>1</sup> If the project is net-costly, the developer, by definition, will not be able to offer adequate compensation to offset the social costs imposed by the facility. In such cases, a compensation requirement will help defeat an ill-conceived project.

\* Schelling notes that the inability to act may actually strengthen the bargaining position of a

## CONDITIONS NECESSARY FOR EXCHANGE

Four conditions must be present before two parties (or two organizations) will voluntarily engage in exchange. First, each party must possess something to trade. Second, there must be some possible “deals” that leave each party better off than non-exchange. Third, each party must be confident that the other will honor its promises and commitments. And fourth, each party must believe all of the above conditions to be true. Failure of any of these conditions may thwart exchange.

The first condition appears easy to satisfy; it is not. In theory, all but the completely powerless have assets that can be offered in trade. In practice, however, for an asset to be “tradeable” the offeror must be willing and able to part with it, and the offeree must value it. Occasionally, these two subconditions are in conflict. For example, the potential support of a charismatic opposition group leader may be highly valued by a developer, but the power of the opposition leader may be asymmetrical: he may be capable of directing the energies of his following against the developer but incapable of delivering the support of the group.<sup>2</sup> Many leaders of modern protest movements have found that they cannot rein in their aroused groups. Similarly, a public utility financially capable of paying compensation as an inducement for facility opponents to support a project may be legally barred from doing so. In general, for an item to be tradeable it must be both valued by the opposition and alienable by the party offering it in trade.

The second condition might be thought of as an efficiency condition. The essence of exchange is that it leave the trading partners better off: a developer is unlikely to offer compensation unless he believes that the benefits it will bring, such as avoided project delay, will outweigh the costs of the compensation agreement. Similarly, facility opponents will not trade with the developer unless they believe that the package of compensation and other amenities offered by the developer more than outweigh the residual costs imposed by the facility.

Thus, the prospects for a deal may be improved either by increasing

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<sup>2</sup> “weak” party.<sup>2</sup> In the example above, the opposition leader who is incapable of delivering the support of his group is less able to compromise than the leader who is capable of delivering support. Once the developer recognizes such “weakness,” agreement can only come through moderation of the developer’s position.

the costs of non-agreement to either party or both parties or decreasing the costs of agreement. A developer can make non-agreement look costlier to opponents by convincing the opposition that he is capable of building the facility notwithstanding their opposition. He can make agreement look less costly by sweetening the settlement that is offered. Similarly, opponents can increase the cost of non-agreement to a developer through tactics that demonstrate that they can, and will, delay construction forever if necessary; they can decrease the cost of agreement by moderating their settlement position.

The third condition only matters if the exchange cannot be consummated simultaneously or in separable phases. In general, one is reluctant to enter into a transaction unless he believes that his negotiating partner will carry out the other end of the deal. If the exchange can be consummated simultaneously, then performance rarely becomes an issue. For example, the custom of paying for retail goods on delivery reasonably guarantees to both the merchant and the customer that which each party has bargained for. If the purchase price is not tendered or if the goods are not up to specification, then either party may void the exchange. In those instances where simultaneous exchange is not possible, society has created a number of institutions that either guarantee future performance, or render the parties indifferent to performance. These include contractual remedies for damages or specific performance, performance bonds, sureties, escrow accounts, guarantees, and insurance.

The last condition is extraordinarily important in understanding the dynamics of bargaining. The positions taken by negotiating opponents are influenced less by reality than by their *perception* of reality. Even if an objective observer should find that exchange would leave both parties better off, a deal will not be forthcoming if one party believes that it will work to his disadvantage.

## WHY WE DON'T OBSERVE MORE COMPENSATION AGREEMENTS IN PRACTICE

### Condition 1: Possession of Something to Trade

The first condition often is not met in practice for a number of reasons. First, developers who fall prey to the lawyer's fallacy (Chapter 3) fail to recognize what they have to gain from negotiation. They systematically underestimate the power of the opposition by

assuming that potential opponents can only exercise rights granted to them by law. Thus, a developer may assiduously court the local zoning board, while ignoring the concerns of what may appear to be a powerless community group. To get the attention of the developer, the community group is often forced to flex political muscle by applying pressure to the zoning board itself, by urging the legislature to impose new regulatory requirements on the developer, or by pursuing extra-legal tactics such as “lying down in front of bulldozers” in order to delay the project. In general, facility opponents usually possess a much larger arsenal of delaying tactics than most developers recognize. Consequently, developers often underestimate the returns from negotiating with what appear at first glance to be relatively powerless opponents.

Second, even a developer who recognizes the power possessed by opposition groups may not recognize that this power may be turned to his advantage. Facility opponents often appear to be irrational, inflexible, and unyielding. Only the shrewd developer can distinguish between positions taken out of ideological fervor and commitment— from which retreat is unlikely—and the posturing and hyperbole that merely precede serious negotiation and bargaining. If a developer is seriously interested in testing the willingness of his opponents to trade, then he must package alternatives in a way that encourages compromise. As we noted in Chapter 5, if opponents perceive that only two alternatives are under consideration—the status quo and the project as envisioned by the developer—they will have little incentive for anything but obstruction. Unless a developer has something to trade (compensation) opposition groups will have little incentive to negotiate. And similarly, unless opposition groups make it clear that under the right circumstances they would be willing to drop their opposition (or throw their support to the developer) a developer will have little incentive to negotiate.

Third, the developer who recognizes the gains to be had from negotiating with the opposition still faces an interesting strategic problem: with whom does he negotiate? In theory, the developer should invest in compensation to the point where the last dollar expended on compensation yields exactly one dollar in reduced project expenses, the reduction in expenses coming from foregone project delay. Having stated the obvious, we still have not helped the developer very much. He still does not know whom he should compensate First or last. One



is tempted to suggest that he allocate his compensation expenditures by compensating the individuals (or institutions) in question in order of the ratio of benefits to costs. In other words, the first person compensated should be the one who will most reduce project delay per dollar of compensation. But this approach is not particularly useful unless the developer has very good knowledge of the shape of both the marginal benefit and cost curves for each possible investment in compensation. In practice, this knowledge is extremely difficult to obtain, if only because the shapes of the curves vary as a function of the developer's actions.

Expenditures for compensation are intended to neutralize the potential opposition of those compensated. Unfortunately for the developer, however, such expenditures often also influence the preferences of the groups that have not received compensation in a rather perverse way. To the extent that compensation rewards individuals or groups that are obstructionist, it may actually encourage other groups or individuals to exercise legal or political leverage over the developer in the hope of receiving similar rewards.<sup>3</sup> Thus, the mere act of entering the marketplace bids up the price of avoiding delay.

In effect, the developer faces a rather unusual "commons" problem. To potential project opponents, profits that might be redistributed through compensation represent a "common property resource"; it is impossible to prevent each potential opponent from acting in an obstructionist manner so as to lay claim to a portion of the money available for compensation. Not surprisingly, people will exaggerate the degree to which they oppose the project, and thus quickly exhaust the common. Thus, a developer may rationally decide not to compensate because every method he has at his disposal for identifying the shape of the marginal cost and benefit curves for investments in compensation may render compensation non-economic.

Finally, even when trading partners can be identified (for example, when the opposition consists of a well-organized environmental group or a city or town) the developer may find that their support is not for sale. Many environmentalists, for example, will refuse to exchange en-

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<sup>3</sup> A developer willing to compensate individuals to obtain their support is in a similar position to a developer trying to assemble a large parcel of land from a group of landowners; public knowledge of his actions may drive the price of the land up to a point where the project is no longer economic. Unlike the real estate developer, the developer interested in compensating to avoid project delay cannot easily hide his intentions.

vironmental degradation for other amenities, because such an exchange conflicts with firmly held ideological beliefs. Some people believe that natural objects such as trees, animals, rivers, and mountains have value independent of the value placed on them by mankind.<sup>3</sup> According to this philosophical position, man is a guardian or steward for natural objects; his superior intelligence imposes a duty on him to protect the right of these objects to exist, even if he does not value them himself. It is inconsistent for an environmentalist who sees himself as an agent of nature to willingly exchange damage to the environment for compensation or other amenities directed at humans. If the environmentalist truly believes the agency theory of intervention, he will consider the offer of compensation akin to a bribe that would induce him to abandon the interests of his principal. Only if the compensation is directed at the environment itself (e.g., the developer offers to reforest the land, or restock a stream, or create a wildlife preserve) will the environmentalist go along.

Environmentalists are not the only people who may characterize compensation as bribery. In almost every non-economic discussion of compensation for development impacts we have witnessed, someone has proclaimed such a strategy to be a thinly veiled effort to “buy off the opposition” and hence, immoral. (Interestingly, when opponents of a facility suggest that they might be willing to live with it if the developer sweetened the pot a bit, the developer often characterizes the request for compensation as “extortion.”)

It is difficult to explain why offers or requests for compensation are greeted with moral outrage. The characterization of compensation as a “bribe” is flatly incorrect: a bribe is a *secret* payment to an individual that influences a decision that is supposed to be made according to criteria other than the personal utility of the decision-maker without revealing the influence. Since we expect the public’s participation in the political and legal process to be motivated by concern for individual utility, efforts to influence this utility cannot be characterized as bribes. Moreover, reluctance to entertain trades of one type of amenity (e.g., quiet, uncongested streets, clean air, etc.) for another (e.g., money, a park, a wildlife preserve) is particularly puzzling in light of the fact that people appear to make such tradeoffs all the time. For example, the family that chooses to buy a large house on a noisy street typically does so because it values space more than it values quiet. Nonetheless, people may be willing to make some kinds of trade implicitly even though they find the same deals repugnant when of-

ferred explicitly. For example, heavy cigarette smokers are thought to lose five to seven years of life on average because of their habit. Most such smokers would refuse any amount of money for the loss of five years of life. Yet these same individuals often admit that they would willingly give up smoking if someone offered them enough money, say \$100,000. When confronted with the inconsistency between the finite value they place on the benefits of smoking, and the infinite value they place on its costs, most smokers just shrug and go on smoking. The general point is worth emphasizing: in many cases environmental amenities, especially those associated with human health, many not be tradeable because the process of placing an explicit valuation on them is morally offensive to those involved.

### Condition 2: Exchange Leaves Both Parties Better Off Than Non-Exchange

The efficiency condition can be violated in at least two ways. The first is a trivial restatement of the condition itself; sometimes no option exists that would leave both parties better off than non-exchange. The second way this condition may be violated is more subtle; if many different groups or individuals must agree on what it means to be “better off,” consensus can be thwarted if each group or person has a different marginal rate of substitution between the disamenities to be visited upon them and the compensation offered in their stead. For example, some members of a group may prefer to receive cash, while other members may prefer a recreational facility donated by the developer. Unless the group can achieve consensus, a deal is not likely to be forthcoming. This problem does not arise if the developer is capable of recreating the status quo. For example, if the only adverse impact of the proposed facility is to increase the demand for fire services in the community, the developer could recreate the status quo by endowing the purchase and operation of additional firefighting equipment. In effect, the status quo is a focal point from which any departure requiring consensus is difficult.<sup>4</sup>

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<sup>4</sup> The importance of the status quo as a focal point is illustrated by an apocryphal anecdote from Germany. When a strip mining project approaches a town underlain by lignite, the law requires that the town be moved and reconstructed. Notwithstanding the fact that such a move provides an opportunity to correct several centuries of accumulated city planning mistakes, the towns are usually reconstructed as they originally appeared. The explanation is that residents can never agree on a single way to modify the town plan, even though each finds the existing plan defective in one way or another.

## Condition 3: Agreement Will Be Honored

In practice, contracts are the primary vehicle used by developers and facility opponents to guarantee future performance. Thus, in return for compensation, a developer would seek a contractual pledge from facility opponents to forbear from pursuing litigation or political opposition to the facility. If potential opponents are very numerous, it may be impractical for the developer to negotiate individual contracts with each opponent. Instead, he may be forced to negotiate with an organization that represents the interests of the many opponents—an environmental group, for example. A contract negotiated by such a group, however, is not binding on the individual members of the group unless they actually signed the agreement themselves. It is only binding on the group in its organizational capacity. Consequently, a disgruntled member who dislikes the deal struck with the developer may always resign his membership and pursue legal or political opposition against the facility in his own name.

The legal principles just described may frustrate the negotiation of some compensation agreements. Recall our behavioral principle, “Groups are not people” (Chapter 3). The preferences of diffuse groups are not homogeneous; people adhere to beliefs with varying degrees of conviction. When a group takes a position opposed by a significant minority, it may encourage the minority to leave the main group and form a new interest group to champion the minority position. For example, Friends of the Earth split off from the Sierra Club in 1969 due to ideological differences over nuclear plant siting. Similarly, when the Massachusetts Wildlife Federation struck a deal with the developer of the Pilgrim II nuclear plant to abandon its opposition for a wildlife monitoring program funded by the developer, two subgroups threatened to withdraw from the Federation, one because it believed the original opposition to be unwarranted and the other because it found the settlement unacceptable.<sup>4</sup> Consequently, if a developer wishes to insulate himself from lawsuits by negotiating a compensation agreement, the agreement must be acceptable to all coalitions within the negotiation group that have the financial, legal, and organizational resources necessary to maintain a suit.<sup>5</sup>

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<sup>5</sup> Not everyone can bring a lawsuit. A plaintiff must first demonstrate that he has legal standing to sue. That is, he must be able to demonstrate that a legally recognized injury has been suffered and that he is among the injured. In recent years, however, the courts have relaxed the barrier posed by standing requirements to suits based on claims that an environmental impact statement was deficient or that the relevant regulatory authority followed improper procedures in approving the facility.<sup>5</sup>

When developers negotiate with cities and towns, a similar problem arises. Many states have common law rules that limit the capacity of local governments to enter into contracts in which they agree to confer regulatory approval (a zoning variance, for example) in return for compensation offered to the contracting government. The rationale for this rule is that the government should be free to act in the public interest at all times and that private contracts which constrain the government's future choices are against public policy. It is this rule that continues to frustrate contract zoning in many jurisdictions. In practice, the rule may leave a developer uncertain as to whether a government may actually fulfill its promises even if the developer lives up to his part of the bargain. For example, a new mayor unhappy with the deal struck by his predecessor may rely upon this rule to withhold the agreed regulatory approval, thus unraveling the prior agreement. If the uncertainty introduced by this "no contract" rule is sufficient, it will discourage developers from entering into agreements with local governments.<sup>6</sup>

#### Condition 4: The Parties Perceive the Above Conditions to Be True

As the discussion at the beginning of this chapter suggested, the bargaining position of any party will be shaped by his or her perception of reality, not by reality itself (whatever that is) or an expert's perception of them. Consequently, in practice we may observe people opposing a hazardous waste processing facility because they fear the facility may someday spontaneously explode even though any engineer will agree that such an explosion is chemically impossible given the properties of the materials being processed. Developers love to swap stories about how irrational fears often constitute the basis of facility opposition. Usually such stories are immediately followed by the refrain, "if only people understood the impacts as well as I, they would not oppose us."

We find this situation perplexing. Notwithstanding efforts by the government to inform the public through public meetings and impact statements, and notwithstanding efforts by developers to educate the uninformed, people still complain that they lack the information

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needed to intelligently evaluate the consequences of a new facility. In fact, it often appears that efforts by the government and developers to close the information gap often make matters worse, not better. Public meetings are divisive, impact statements are unreliable, and information proffered by a developer is characterized as self-serving and not to be believed. If people cannot determine to their own satisfaction how a new facility will affect their lives, they are unlikely to voluntarily enter into compensation agreements. In such situations, the parties are more likely to argue endlessly over the extent of the impacts than they are to bargain intelligently over the level of compensation to be paid for those impacts. In the chapter that follows, we explore the role of information in the bargaining process in more depth.

### SUMMARY

Parties to a siting dispute have good reasons to negotiate a deal, but important obstacles must be overcome before they can do so. These obstacles can be removed, in many cases, by actions on the part of one or another party, or by government in setting the rules of the game. The rarity of negotiated settlements in current practice is both cautionary—reminding us that compensation will not just happen because someone points out how useful it is—and instructive—allowing us to identify the specific reforms that would encourage it. These reforms will be detailed in Chapters 9 and 10.

### FOOTNOTES

1. For an extensive discussion of negotiation, see R. Fisher and W. Ury, *Getting to Yes*, Houghton Mifflin, Boston, 1981, and H. Raiffa, *The Art and Science of Negotiation*, Harvard University Press, Cambridge, 1981.
2. T. C. Schelling, *The Strategy of Conflict*, Oxford University Press, New York, 1960.
3. C. Stone, "Should Trees have Standing?—Towards Legal Rights For Natural Objects," *Southern California Law Review*, vol. 45 (1972), p. 450.
4. "The Pilgrim 11 Nuclear Power Plant," in L. Bacow and D. Sanderson, *Facility Siting and Compensation: A Handbook for Communities and Developers*. M. I. T. Energy Laboratory, August 1980.
5. For a full discussion, see R. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review*, vol. 88 (1975), p. 1699.
6. This problem is reviewed at length in D. Kretzmer, "Legal Problem of Binding Communities to Compensation Agreements for Adverse Effects of Energy Facilities," Laboratory of Architecture and Planning, M.I.T., 1979.