

Chapter 37: Negotiate with the Applicant

No other strategy option offers the benefits or challenges of negotiation. For all the parties involved - you, the applicant and government officials - it is the least expensive in terms of hours, dollars and emotional strain. The key to successful negotiation is two part.

First, the more successful you are in finding a truly win-win solution, the more likely a satisfactory agreement.

Second, the applicant and/or government officials must view a negotiated settlement as more desirable than continued conflict.

The challenging part is that usually the applicant and other decision-makers have far more negotiating experience than you. However, with the suggestions contained in this section you can level the playing field.

FINDING A WIN-WIN SOLUTION

A win-win solution is one which genuinely resolves your concerns while allowing the applicant to achieve their goals. This will usually be a solution which requires project modifications but not to the point where the project is no longer viable. However, if you feel a project is so fatally flawed impacts cannot be designed away, then the win-win solution could be buying the applicant out by convincing government agencies and/or private parties to acquire the site for preservation in total or in part.

In previous sections of this book many possible win-win solutions were offered. For example, in the section on traffic mention was made of how one deals with a proposal to increase traffic volume on residential streets. Some win-win solutions could be:

- allow a reasonable increase if speed humps or other calming measures are used to slow traffic so safety, air pollution and noise are all improved;
- if current traffic volume is at 900 vehicles per day (vpd) then the applicant might be allowed to build 10 new homes which would bring volume up to the residential street threshold of 1,000 vpd; or
- the applicant could be required to purchase additional land so access may be gained to some other road where an increase in traffic volume will not be as harmful.

As these three examples illustrate, it is rare that a solution is totally win-win for all parties involved. The traffic calming approach is a win for the folks currently living along the street since it improves their quality of life, but traffic volume also increases. Whoever ends up paying for the traffic calming measures - the applicant or the tax-payers - may not view this as a complete win-win solution. Forcing the applicant to find another access point is a complete win for the citizens but

is probably not a perfect solution from the applicant's perspective. The point is that you may not find an ideal solution which is truly a win-win for everyone. But, the closer you come, the better.

Before you can find a win-win solution you need to understand what the other parties want. The first place to begin is with your parties - your neighbors and the other folks who are actively supporting your effort.

Engage them in a process where collectively you determine what you want to achieve. In other words, what is it about the development project that is of greatest concern to you and your supporters?

Of these issues of greatest concern, which are the most important as opposed to those you could live with?

It is not uncommon for citizens to give me a call about a project and begin with a long list of concerns. Some of these concerns are very important *core issues* while others are on the list because they seem to increase the likelihood of victory. After running through the long list of issues, the caller will usually conclude with:

“...and these are the reasons why we want to stop the project.”

I then say

“Well, I can see why you want to stop the project. If I lived in your neighborhood and faced a project posing all those impacts I'd want to stop it too. But it'll probably take hundreds of hours and thousands of dollars to kill the project. And you'll probably face other development proposals for the same tract of land every few years. Of course if you were primarily concerned about the environmental impact there's probably a way that can be fixed without stopping the project.”

It's at this point where the caller and I begin focusing in on their core issues. You and the folks who share your concerns need to go through a similar process and determine what is it you are really concerned about.

While there are projects so flawed they should be stopped, this is not true for the vast majority of development proposals. In other words, you should assume that there probably is something approaching a win-win solution for most of your core issues.

Even if a project is fatally flawed and stopping it is imperative, a win-win solution is still possible. The site could be purchased for some more benign limited development venture with the applicant fairly compensated for their time and expense. However, a community should not feel compelled to find a win-win solution if an applicant proposes something quite inappropriate or takes greed to the extreme.

Begin looking for ways to modify the project once you and your allies identify the core issues. The Part of this book on *Identifying Project Impacts & Technical Solutions* provides guidance on possible fixes for a variety of development impacts. Government officials will likely have thoughts on possible solutions as well. Other sources of advice would include citizen groups, university faculty, and, of course, CEDS. It seems like we have researched virtually all the potential development impacts conceivable and there few for which we cannot offer possible win-win solutions.

Of utmost importance is to focus on the result; not the solution. Does it truly matter to you how an impact is resolved? Of course not. The only thing of importance is that a solution works. So avoid the trap of becoming wedded to a specific solution.

Once you succeed in finding at least one potential win-win solution for each of your core issues, then you are ready to begin the negotiation.

THE NEGOTIATION

You may be wondering why an applicant would want to negotiate with you? Principally because there's a chance you could cause them substantial delay, which equals money. Also, in many localities decision-makers take a dim view of developers who cavalierly ignore citizen concerns, especially when those concerns are presented in a reasonable, constructive manner. The decision-maker may have myriad ways to tie up an unreasonable applicant's project. But, this does not mean you can ask for the moon and expect to get it. In most situations it will all boil down to the following very simple question:

Does it cost the applicant more to fight you then to accept your win-win solution?

Following are the factors the applicant will be considering when forming their answer to this question:

- Do you come across as credible and reasonable? If not then it is unlikely final decision-makers will take you seriously. In other words, you are not much of a threat.
- Are the decision-makers key to approving the applicant's project likely to be responsive to your concerns?
- Do these decision-makers have a history of ignoring or championing citizen concerns?
- Do you have issues that are so strong final decisions-makers will feel compelled to act on them?
- How committed are you to achieving your goals? If the applicant gets the impression you will go away easily, then it is unlikely they will agree to your win-win solution. On the other hand, if you have already hired a lawyer and begun mobilizing support then your commitment is obviously more than passing.
- Is your solution truly a win for the applicant?
- What will the applicant lose by agreeing to your solution?
- Are you the only opposition to the project?
- Will settling with you encourage others to begin making demands?

Even if the answers to these questions all favor settling with you, do not expect to reach a satisfactory agreement quickly. In fact, your first meeting with the applicant will probably be nothing more than a get acquainted session. It is not uncommon for an applicant to refuse to seriously negotiate until citizens have demonstrated their commitment by filing the first appeal of a project approval. But it is very important to accomplish several objectives early in the process.

- Find out as much as you can about the applicant's goals and constraints, which will allow you to modify your solutions so they come closer to a win-win. If the applicant is proposing 100 houses then don't expect to learn how many they can lose before having to walk away from the project. Instead, look for where there may be flexibility. For instance, try to learn which lots might be reduced in size to save more open space. Or why particular access points were selected and any obstacles to shifting access so they no longer need to connect to your dead-end street. As you go through each of your solutions the applicant will likely explain why each will or will not work. Carefully note each reason then suggest any obvious alternatives that might resolve the applicant's concerns.
- Make it clear to the applicant that your goal is not to stop the project, but to find a solution which works for them and you.

Prior to meeting with the applicant, get together with your allies to reach consensus on the following points. It is crucial that you agree on these points *prior* to meeting with the applicant. You do not want to get into a debate among yourselves during the meeting.

1. Who will attend the meeting from your side? Two or three people are best; but no more than six.
2. Who will act as spokesperson for your group?
3. Who will be responsible for taking detailed notes of what is said during the meeting? Generally, it is not okay to tape a meeting.
4. What issues will be raised with the applicant, who will present each issue, and what justification will be offered for why you believe the issue to be real?
5. Everyone must agree to listen while the applicant gives you their take on the validity of each issue.
6. What solutions will be offered and who will present the solution (usually the same person who presents the issue)?

7. If the applicant offers alternative solutions then get all your folks to agree to ask for time to fully consider the alternative. A solution which sounds good at first, may not seem so great a day later. Never be pressured into making a quick decision.
8. Make certain everyone understands that the first meeting probably will not result in a satisfactory agreement; it's just a first step.
9. Encourage folks not to take a maybe as a no. Instead, view it as an opening to continue discussions in hopes of turning it into a yes.
10. Make certain everyone understands that you have good viable alternatives if the applicant refuses to negotiate in good faith. The alternatives will usually be the other strategy options presented in this Part of the book - working with regulatory staff, lobbying final decision-makers, legal action, etc. In other words, when everyone walks into the meeting with the applicant, they should not feel compelled to settle at any cost; they know they have other options. This reduces the pressure on you and your folks to reach a settlement at the first meeting.
11. Everyone in your group must keep their temper and do not threaten. Definitely no one utters threats such as announcing they will delay the project, drive up costs, or use laws for purposes other than they were intended. All three of these threats may be grounds for a lawsuit against you.
12. Everyone also agrees to end the meeting if the applicant threatens or uses other intimidation tactics.

Your request to meet with the applicant can be made by phone or letter. A phone call is best since it moves the process along more quickly and allows you to get an initial sense of the applicant's willingness to negotiate. Regardless of whether you make the initial contact by phone or letter stress that you want to find a win-win solution, that you have several in mind, and you would like to meet.

Press for a meeting with the applicant since they have decision-making authority. But do not refuse to meet with the applicant's representative, even their attorney. Again, the goal of the first meeting is to demonstrate your interest in a win-win solution and to learn as much as you can about the applicant's goals and constraints.

If the applicant refuses to meet, rejects your solutions without offering specific reasons, or does not offer alternative win-win solutions, then you can let other decision-makers know you tried to work with the applicant but were unsuccessful. Your position will be strengthened if you can say you tried to initiate win-win negotiations but the applicant refused to participate or the negotiations failed to reach resolution. But make certain you give it your best try. Your goal must be a successful negotiation; not merely the appearance.

Where to hold the meeting? A neutral location is nice, but not crucial. If the applicant (and you) are committed to the process then it does not matter where meetings are held. The initial meeting could be in your home, the applicant's office, or any other convenient, quiet location.

Begin the meeting with introductions. Thank the applicant for taking the time to meet with you. Next, describe each of your core issues and why you believe the project will cause each impact. Listen very carefully to the applicant's response. If they feel the impact is not likely to occur then ask why and listen with an open mind. Ask for further detail if this is necessary for a complete understanding of the applicant's perspective. After the meeting you will want to review the details to determine if the applicant is correct or if they have missed something. After the applicant gives their perspective on an issue, offer any information you have which might prompt them to rethink their position.

If the applicant disagrees on the validity of an issue then look for ways around the impasse. Are you missing some information crucial to confirming the validity of an issue? If so, then suggest tabling the issue until the missing information can be acquired and you can meet again. If other issues remain then move on to the next.

If you and the applicant agree that an impact will or *may* occur then offer any solutions you have identified. If the applicant feels a solution is not the most desirable then ask for their thoughts on alternatives. Again, make certain someone in your group is taking detailed notes.

Most meetings will last one to two hours. Whenever possible, try to end the meeting on a positive note. If an impasse resulted from a lack of information, then seek agreement with the applicant on how to obtain the missing data, then set another time to meet so you can continue the discussions. If all else fails then simply agree to disagree. Thank the applicant for taking the time to meet with you and express your hope that you can find a win-win solution in the future.

If you reach agreement on implementing a solution then explore options for guaranteeing that it will work on a long term basis. Consult with a qualified attorney on the value of drafting an agreement between you and the applicant to further guarantee full implementation. Additionally, most solutions will require changes in project plans. For example, if the applicant agrees to drop a proposal to connect to a dead-end road or to use more effective BMPs then development plans must be revised to reflect these changes.

Ask the applicant when the plan revisions will be completed. Ask the applicant to send you a copy of the revised plans. After you have reviewed the revised plans and you are satisfied your concerns have been fully addressed then ask the applicant when the revisions will be submitted to permitting-approval agencies. Follow-up by checking with agency staff to verify that the revised plans were submitted and approved as the binding documents. The next section offers advice on how to work with regulatory staff to ensure that solutions become part of project permits and other approvals.