

The Government Calls: A Municipal Zoning Simulation

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ABSTRACT

There are two areas in the study of undergraduate business education which have not been high priority teaching subjects: the first is negotiation by a business to successfully operate within the regulatory environment and second, resolving internal, inter-company and external conflicts, using the Alternative Dispute Resolution (ADR) processes. These are the focus of a course at Daniels College of Business. This simulation requires strategic negotiation in a heavily contested municipal (therefore regulatory) re-zoning hearing.

Key Words: Simulation, Negotiation, Alternative Dispute Resolution, ADR, strategy, zoning, zoning designations, municipal hearings, conflict, disputes.

INTRODUCTION FOR READERS OF THE PUBLISHED VERSION²

Ten or so years ago I started teaching an elective undergraduate/graduate business course on conflict resolution, partly focusing on the methods of ADR as promulgated by the American Arbitration Association and other primary ADR entities. The course is a management department course, therefore it was important to consider sources and resolution of conflicts *within* a business (as employee or interdepartmental conflicts), disputes *between* a business and other entities (as suppliers or customers), and business conflicts with governmental entities (or the reverse as negotiating compliance with a regulatory enforcement action). The course thus contains a fair amount of new information for undergraduate students and requires significant reading. But it was also designed to be very student interactive, so several simulations for negotiation, mediation and arbitration were added as key classroom activities. The simulations require students to prepare, role play, form effective teams and to reach defensible solutions.

What is presented here is one of the cases on structured negotiation, which adds an important component for students (as future business executives) to learn the issues of a municipal (or other governmental) hearing. In this case, the municipal body is a planning and zoning commission³. As is noted in some detail in the student introduction, a planning and zoning commission (or ultimately a city council) rules on a re-zoning request, subsequently to one or more hearings. However, there is often significant pre-negotiation by applicants with the planning staff, which may result in staff negotiation with the commission or council. And during the caucus part of a hearing, planning commission members may suggest a negotiated compromise. In addition, if there are multiple parties, negotiation and compromise among them may occur before or during (or even after) the commission hearing. Finally, at a real-world municipal hearing there are often emotional overtones—including smooth high pressure selling using beautiful slides by the applicant, and the opposite: fear, negativity, frustration, anger, or nervousness by the citizen side(s), all of which will tend to reduce the effectiveness of presentations to commissions. Much to my delight, after doing this simulation for several years, I have found when students are prepared, they actually *exhibit* some of these emotions at the simulated hearing, which offers great realism. That is often the first thing which they will discuss during the de-brief.

²See Appendix for a review of the literature on negotiation, conflict, the processes, nature and regulation of ADR, our ADR course and municipal zoning.

³ Note: there are varying terms municipalities use for this type of commission—as calling it simply the planning commission or the zoning board or design review board.

LEARNING OBJECTIVES AND USE OF THE CASE IN CLASS

Part of the objective for this simulation is for students to learn the dynamics of operating within a structured regulatory environment as it applies to multi-party business and societal conflicts. In a sense it becomes stage two of their understanding of the ADR processes to resolve common internal and external business disputes. But we have found a second value for this simulation: at the end of this course students complete a simulated arbitration hearing. By incorporating a *structured* hearing process in this zoning case, it gives students a taste of the trial character of an arbitration hearing. As a result, we find students are psychologically better prepared for the arbitration hearing.

I have occasionally videoed both the zoning simulation and the arbitration hearing which has been very educational for the students, as they actually see and hear themselves role-playing (“I can’t believe I said that...”). The downside is one year I showed the video of an earlier class to a class that had not yet played the simulation roles, and they had no idea what was going on.

THE SIMULATED ZONING CASE—THE INTRODUCTION FOR STUDENTS

This simulation is based on a municipal zoning hearing, where municipal procedure, negotiation and compromise will be important to reach a resolution and thus a favorable ruling by the planning and zoning commission. The usual “characters” are present: the planning and zoning commission members, the developer, Barrett Developers, Inc. (with a potentially hostile bank representative on its negotiating team); a negotiating team of proximate homeowners, not all of whom are in agreement; a not-for-profit called the Naturalists which has a secret conflicting interest in the property.

ZONING AS A MUNICIPAL ACTIVITY FOR PRIVATE PROPERTY GOVERNANCE

What is zoning?

Zoning is essentially a statutory restriction on property rights and in Colorado it derives from the state's constitution of 1876 and a group of enabling statutes allowing municipalities to create and enforce zoning ordinances. Zoning is underscored by the U. S. constitution and follows the concept that property ownership and its related rights are sacred in the United States, but property ownership and use must not unduly diminish or limit the rights of others. (See *The Economist* 2013 and 2015). A municipality also has the authority, under the constitution, to acquire private property for the “common good” (with “just compensation” to the land-owner), or, again with “just compensation”, to modify or limit the use of private property for the “common good”. These follow the Constitutional concepts of *eminent domain* and *takings*. [See Nollan (1987) and Dolan (1994).]

Municipalities zone property to create compatible uses that also respect the rights of proximate property owners. Zoning also creates the ability of municipalities to plan coordinated development of property for the “common good”. So, the (intended) result is harmonious subdivision of homes and commercial uses. In most instances the planning and zoning processes have worked well to achieve this; in some, however, there have been severe controversies, political fights, legislative recalls, citizen outrage and massive civil and even criminal lawsuits.

Obviously defining the “common good” or establishing the criteria for “just compensation” are difficult and each may excoriate controversies on re-zoning or property acquisition by municipalities. Another problem: does the common good include allowing a municipality to re-zone or acquire property simply if re-development provides the municipality greater property or sales taxes? Or for that matter can a municipality decide there is a different “highest and best use” for a particular property and arbitrarily change the zoning to permit a more intense commercial--or alternatively a less intense use? So, ethics, social responsibility and compliance with fundamental legal principles are all *open-season* for the re-zoning process.

There have been many zoning conflicts in virtually every major municipality throughout the United States. In Colorado [where the author lives], there have been many in Denver and other Front Range Colorado cities, as well as Vail, Breckenridge and Aspen, the posh Colorado ski resorts. In Denver, they have included the former location of the University of Colorado Hospital. Another was the re-zoning of the agricultural ground under Denver

International Airport which was hard-fought by proximate counties. Greenwood Village, a quasi-commercial suburb to the southeast of Denver, has had some major zoning fights. Ditto for suburbs Lakewood and Aurora. In Vail the re-development of Crossroads Shopping Center had citizens threatening major litigation against the city and the corporate developer, which according to many observers followed the classic NIMBY⁵ citizen anger. And to move or revise a sign in Aspen can require a municipal hearing. As a result, municipal decision bodies seldom hand down rulings that are acceptable to everyone, which adds to the value for effective negotiation among the disputing parties.

What is a planning and zoning board or commission?

Planning and zoning commissions, sometimes called planning and environmental commissions or design review boards are ubiquitous in municipalities and they often exist in counties. Generally, the members are appointed by the town council or county commissioners and serve for little or no compensation. Their job is essentially to control and monitor land use and ensure an equitable, practical relationship among uses of land—from commercial to industrial to residential. Among the items they will consider for a zoning change are pollution, noise, light pollution, traffic, safety, need, rarely economics unless the re-zoning is in a blighted area, aesthetics, social value, etc. And commissions are inherently charged with considering the fundamental legal concept that current owner use of private property is sacred as long as it is reasonable, complies with the law and doesn't conflict with proximate owners and uses. So, a zoning change request for greater residential or commercial density may often start with two strikes against it.

Planning and zoning commissions are of varying sizes, essentially operate in a legislative fashion and always have a chair that runs the meetings but generally has no greater voting power than other members. However, the chair usually does have the authority to put time limits on presentations, challenge expert witnesses, challenge repetitiveness and guide the discussion at a hearing.

What is the hearing process?

To resolve the issues described in the hypothetical rezoning example, a municipality will hold a commission hearing. Depending on the size of the municipality the hearing may be formal or informal, but generally the objective is for groups with different interests to present their respective cases, negotiate and persuade the commission that their side should prevail. A hearing is formatted so the requesting party is first, starting with an opening statement (sometimes preceded by comments by planning staff), often with architectural slides or PowerPoints showing the “beauty” of the rezoning result, then calling expert or other witnesses to verify it, and often finishing with a closing statement confirming the reasons why the re-zoning should be granted. After completion of the requesting party presentation, the commission chair will open the floor to remarks or presentations by conflicting parties, or parties with alternative interests, or perhaps concurring parties. The commission will then caucus, which may include questions of the parties (or planning staff) by commission members. The commission will then render a decision which the chair will (usually) communicate to the parties via the planning staff but will always communicate to the elected council or county commissioners. Why? Because municipal charters mostly require that the planning and zoning commission is advisor to the elected council or elected county commissioners.

In any case, the format of a commission hearing has some similarity to a trial or arbitration hearing (with limited cross examination) with the commission members resembling a panel of judges.

The Simulated Zoning Case

The facts⁶ in this simulation are entirely fictitious but roughly consider some of the zoning controversies noted above, which all required significant negotiation. Our hypothetical rezoning is the request for a property to go from an R-2 zone (relatively low density residential use) to C-4 (high density commercial use). The purpose for the request is a developer wants the higher density designation to build a mixed apartment/commercial building which is

⁵ “Not In My Back Yard”

⁶ Note: the facts are common to all students, partly because of the constraints of class time and partly because it enhances negotiation among the disputing parties. Obviously at a real zoning hearing this commonality would not exist.

(theoretically) a more efficient use of a piece of ground. The controversy starts when the local residents object to the greater density because they fear it will add traffic and pollution, cause unwanted shadows, change the character of the neighborhood, perhaps reduce the size of a proximate park, or they may question the economic or social value of higher density land use. And there may be competing known or unknown interests of other parties—which in this simulation is the “Naturalists”.

The subject property is well located within a municipality and contains a school building which is no longer used as a school and the planning commission has learned from staff that the school board considers the property superfluous and therefore for sale. However, the property has value to the neighborhood because of activities such as Scout meetings, arts and crafts activities, rehearsals and performances of a community orchestra and performances by a local thespian group. Those activities occupy about half of the school building; it has also been a good place for meetings of neighborhood home-owners associations, a veteran’s assistance organization and various non-profits.

The total size of the ground under the school is 16 acres which is about 835 linear feet squared. Building is roughly 110,000 square feet with two floors plus a basement.

Barrett Developers, Inc. (“Barrett”) the applicant, has made a high-dollar cash offer to purchase the property, with a re-zoning contingency. The school board accepted it, but with the provision that Barrett must get the re-zoning within 75 days and then immediately close the transaction. If it becomes evident Barrett cannot achieve the re-zoning within the 75 days, it can cancel the contract no later than day 74 and get its \$3 million deposit back. If the contract is not cancelled by Barrett, the \$3 million deposit becomes non-refundable at 12:01 a. m. on day 75. However, Barrett will be given an extension of 30 days to achieve re-zoning and close the transaction. So for Barrett there is risk.

What exacerbates the risk is the deposit of \$3 million is borrowed. And that is giving Barrett’s bankers heart-burn—the banks believe if the deposit becomes non-refundable it may force Barrett into bankruptcy. So, Barrett’s bankers are **aggressively** adding to the push for re-zoning and therefore **have one representative on the Barrett negotiating team**, partly as an advisor but also as a bank protection quasi-financial decision-maker.

Barrett has another financial concern: 60 days have now elapsed, and the zoning hearing is not scheduled for another 5 days, giving Barrett just 10 days thereafter to close if the re-zoning is achieved. Or Barrett must make the decision to allow the \$3 million deposit to become “hard” and hope that the re-zoning will be successful within the 30-day extension.

Barrett’s plans are to knock down what it considers the “blighted” school building and build a retail/office (so-called “mixed use”) complex which is several times the size of the existing building. Barrett obviously has no interest in the property if it can’t get the re-zoning to build the mixed-use complex.

For the project to go forward, Barrett therefore needs a major zoning change, from R-2 to C-4. The proposed change to high density commercial zoning is a relatively radical change, which is generally a difficult decision for planning departments and commissions. In this instance, planning staff and commission members have been told by several municipal council members that if they make a radical zoning change, they will be looking for jobs. Obviously, the neighborhood homeowners have **negotiated** well with the elected council.

The C-Suite negotiating team from Barrett is very nervous, partly because of the risk and partly because of a potentially hostile representative from the banks as an unwanted member of their negotiating team. Yet Barrett also expects to profit a minimum of \$21.5 million, plus receive generous developer fees when the new building is completed and occupied, so it plans to pull out all the “stops” at the re-zoning hearing.

The local homeowners strongly object to the development proposal. They object to more traffic, bright lights over the parking lot at night, the pollution and the vehicular danger to children which the additional traffic will bring. And they note that the whole area has always been zoned for low density residential use with quiet neighborhoods hosting mature landscaping. They also enjoy the convenient low-key neighborhood activities in the school building.

An environmental group, Naturalists, has presented a "friend of the court" affidavit underscoring the neighborhood value of the historic building, the quiet residential zoning, and concurring with the homeowners on the issues of excessive light, traffic, pollution, danger to small children and old people, etc.

Naturalists would, however, also like to buy the property, with the building continuing to be a meeting place for various groups including a community orchestra, the current neighborhood activities, plus a small private school teaching environmental subjects and a low-key office for the Naturalists. Then they plan to turn part of the surrounding vacant land into a nature park with a community garden,

Naturalists is a not-for-profit (501C-3) and it made a **secret** offer for the property that was less than Barrett's. The school board rejected the offer, but they said that if Barrett couldn't get its zoning, to come back and they'd negotiate. So Naturalists are clearly against the re-zoning proposal, but have a conflict of interest which no one on the planning commission or Barrett or the homeowners is aware of. Naturalists advantage as a prospective purchaser, is they don't need to change the zoning, and their use better fits the philosophy of land use for a surplus school. So if the zoning change is rejected, the school board has (at least tacitly) agreed to sell the property to Naturalists, though for less money.

The residences in the area are single family houses on small lots, with a few duplexes and a few small two-story low-rise apartment buildings; none are in particularly good repair. The preponderance of the population has changed to older citizens from families with young children, though some young children are still seen playing in the neighborhoods. The land surrounding the school building has by default become a large park-like tract, in which children are often seen playing softball.

One of the advantages of Barrett's proposed development will be proximity of commercial services to nearby residents--now the nearest pharmacy is more than two miles away which is a problem for the older neighborhood residents. Thus, there is social and economic value to a change in land use which will aid Barrett's re-zoning proposal.

The municipality also stands to benefit with significantly higher property taxes from the re-developed property⁷ as well increased sales taxes both of which it badly needs. So, the commission members (and planning staff) think the job-ending belligerency by certain members of the council is a bluff.

The municipality will, however, not benefit from ownership of the property by Naturalists. It can't charge property taxes to a not-for-profit property owner either, and though they can charge sales tax on orchestra tickets and products that the small businesses who will occupy the building sell, the amounts are projected to be only 12% of what Barrett's commercial purchasers will generate.

Finally, it should be noted that though the homeowners will probably like the plan from Naturalists⁸, several owners who are proximate to the site are aggressively against any change in use of the school building, so there is some controversy and even hostility within the homeowners group.

Student Teams:

(1) A C-Suite negotiating team representing **Barrett Developers, Inc.** That team has advised the planning and zoning commission staff that its offer to purchase the property is contingent on re-zoning to C-4. The team includes one **bank representative** who (depending on how chances of the re-zoning go) may (or may not) be hostile to the other Barrett members.

(2) A negotiation team representing the **homeowners** who live in the area, one of whom doesn't want any change at all. The no-change member may (or may not) be hostile to the rest of the homeowners' team, depending on how zoning negotiations go.

⁷ Because the property is currently owned by the school district (a quasi-governmental entity), it pays no real estate taxes to the municipality.

⁸ (if they learn of it from negotiations with the Naturalists or at the hearing)

(3) The **municipal planning and zoning commission**, who are the entity holding the hearing and will make the decision. Their **chair** (who you must **elect**) will manage the hearing.

(4) A team representing an **outside not-for-profit environmental group** (a Nature Conservancy-like entity called "**Naturalists**"). They have (as noted above) a **secret pecuniary interest** in having the commission reject Barrett's rezoning proposal. They may decide to use it as a bargaining tool during negotiations. But that has risk as Barrett may challenge it as a conflict of interest.

The Hearing and Related Negotiations

As noted above, the class is divided into 4 teams with at least 3 members each. In a larger class, multiple sets of teams are formed. Prior to the start of the hearing, teams are expected to read the simulated facts, with enough thoroughness that they can negotiate without having to do more than a quick glance at the case during the hearing.

- Prior to the start of the hearing teams meet and organize their strategies and objectives. The municipal zoning commission meets and elects a chair who then starts the hearing. *Suggested time: 7-8 minutes*
- The chair welcomes everyone at the start of the hearing and explains the objective of the hearing, and the rules and protocols which will be followed. *Suggested time: 6-7 minutes.*
- The first presentation is by the Barrett team describing their plan, why it is reasonable, valuable, beautiful, economically beneficial to the municipality, etc. The presentation should be divided among the team members. *Suggested time: 12-15 minutes.*
- Second presentation is by Naturalists (critiquing developer's proposal and maybe [or maybe **not**] offering their still secret alternative). Their presentation should also be divided among members of the group. *Suggested time: 10 minutes.*
- The Chair then opens the hearing for discussion and calls on the homeowners' team. That presentation should be a reasoned evaluation with objections/suggestions/threats/alternatives, which should also be divided among the members. *Time: 10 minutes.*
- Members of the zoning commission listen, and at the end of each presentation may ask **information specific** questions via "a question Mr. Chairman" for any of the entities presenting. Why this restriction? Because members should avoid showing bias while presentations are occurring. *Added time after each presentation: 4 minutes*
- Responding "redirect" remarks may be offered by Barrett, the Naturalists, or the residents, but must always be done via recognition by the commission Chair. Responding remarks may initiate a negotiated agreement, or they may evidence a more rigidly focused differentiation in the positions of the parties. *Time: 5 minutes per entity.*
- If there is evidence of a negotiated agreement, the Chair is allowed to briefly adjourn the hearing to let the parties negotiate among themselves. That may result in an agreement that is acceptable to the parties. It is suggested, however, that an adjournment be for not more than 5-7 minutes, as without this restriction, we have found student negotiations will meander.
- At the end of an hour and 15 minutes of class time, municipal zoning commission Chair will close the hearing, and the commission caucuses, deliberates, negotiates and then rules on the zoning controversy. Caucus negotiations are managed by the Chair of the commission. Negotiations, in this instance, are focused on reaching a majority agreement of the municipal zoning commission. We generally allow 10-12 minutes for the caucus.
- It is important to note that the ruling of any planning and zoning commission is strictly **its** decision and it is binding on the parties, regardless of evidence of an alternative negotiated agreement. Why? Because a planning and zoning commission represents the entire municipality, its regulatory ordinances and its elected officials, and it is therefore obligated to thoughtfully apply the *current* municipal zoning code.
- **In this simulation**, since no zoning code is used, the commission's ruling must be **defendable legally, ethically, be reasonable, be in good social conscience and follow reasonable land use practices**, using the assigned reading noted in APPENDIX (B).

- The final act of the planning and zoning commission, is the Chair must write a brief summary of the commission ruling and read it to the participating teams. If there is a dissent by a commissioner, it is discussed during the de-briefing.⁹
- The last 15 or so minutes of the simulation is used for a debriefing, in which everyone is expected to participate.¹⁰ The format for the debriefing varies depending on how many students are participating. For large classes with several teams, I generally have Master’s candidates help with the grading and I will ask them first for their remarks. Then I simply go around the room and ask members of each of the teams, starting with the commission chair, if they think the resolution was reasonable, ethical and implementable, and to express other observations and thoughts they may have. The debriefing is thus fairly casual, which often results in lengthy (and lively) discussions among the students which are usually fascinating—especially when there is a dissent from a planning and zoning commission member.

APPENDIX

A. Example of Simultaneous Negotiating Teams for a Class of 20 Students

Team 1: Planning and Zoning Commission	Team 2: Planning and Zoning Commission
1.	1.
2.	2.
3.	3.
 Barrett Developers, Inc.	 Barrett Developers, Inc.
1.	1.
2.	2.
3. (bank representative)	3. (bank representative)
Homeowners Negotiators	Homeowners Negotiators
1.	1.
2.	2.
3. (disagrees/any change)	3. (disagrees/any change)
Naturalists NFP	Naturalists NFP
1.	1.
2.	2.
3.	3.

B. RESOURCES (In chronological order of publication)

[Note: this part of the Appendix is suggested reading on ADR, its teaching and procedures, and the effective negotiation of business disputes. The earlier *Introduction for Readers of the Published Version* and the *Introduction for Students* are primers on municipal zoning hearings, and derive from my many years on both sides of the municipal table, first as a member of the planning and zoning commissions of two municipalities, then city council (and mayor *pro tem*) of one of them, and (in addition to three decades of teaching in higher education) a commercial arbitration practice spanning more than twenty years.]

⁹ A planning and zoning commission ruling for an actual municipality is transmitted via staff to the elected council, which is the official ruling body. Though it is rare, a dissent by a planning and zoning commission member is sometimes filed along with the majority ruling.

¹⁰ *Note for the published readers:* this roughly equals a 2 hour class, but in actuality debriefing often runs far into the following class.

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