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

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December 2008[i]

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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.

City of Asheville / Buncombe County
Water System Mediation Evaluation

Introduction

Since the 1930s, the City of Asheville and Buncombe County have worked together to extend and operate the city's water system in parts of the county. The arrangement was guided by a state law requiring a uniform rate system for all customers (the Sullivan Act). Over recent years, other service and financial arrangements – operation of parks, compensation for certain law enforcement services, etc. – were added to the "Water Agreement."

In May 2004, Asheville gave the required one-year notice to end the Water Agreement, and to gain full control of the drinking water system that served the city and several areas of Buncombe County. Formal and informal negotiations ensued in the hopes of finding some way to continue the agreement and avoid steps that could harm the relationship between the governing bodies of the two local governments.

After a public forum in April 2005 highlighted that the two parties were not making much headway in negotiations on the Water Agreement, the City Council and Board of County Commissioners decided they would try mediation. On April 26, 2005, John Stephens of the University of North Carolina – Chapel Hill mediated the dispute over the pending changes in water services and related arrangements between the Buncombe County Commissioners and the Asheville City Council. After more than 15 hours, the mediation ended when an impasse was declared.[ii]

Objectives

Why didn't the mediation help the parties reach agreement? This research is an attempt to answer this question and to evaluate the conduct and effectiveness of the mediator. We also sought to learn about the effects of the "failed mediation" on the participants and the larger conflict.

We examine 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. Using data gathered through interviews with members of the Buncombe County Board of Commissioners, the Asheville City Council, and attorneys on both sides who were present during the mediation, we draw conclusions about the failure of the mediation from each hypothetical perspective.

After interviewing the involved parties and researching the issues surrounding the dispute, it became clear that this subject needed to be approached as a negotiation that happened not in one day, but over many years. As a result, this evaluation of the mediation on April 26, 2005 is set in the context of a long history of discussion and negotiations and makes conclusions based on this larger picture.

Background

The conflict between the City of Asheville and Buncombe County involves much more than water and includes a long history of give and take between the two local governments. The center of the current controversy, the 1981 Water Agreement between the city and county, was arrived at after decades of disagreement on water issues and tax inequities.

The history between the city and county ultimately traces back to the 1920s when Buncombe County was booming and several water districts around Asheville issued bonds to pay for installing a system of water mains to distribute water purchased from the city. During the Great Depression, those water districts defaulted on their bonds and Buncombe County assumed the debt for those lines and the water-line maintenance. At the time, Asheville was charging residents of those districts twice as much for water as city residents. (Barnard, March 23, 2005b) Since Asheville did not build or maintain those lines, the county appealed to the state legislature to prohibit rate differentials.

In 1933, the state legislature sided with the county, passing the Sullivan Act[iii], forbidding Asheville from charging higher rates to those water districts (Barnard, March 23, 2005b). Asheville is the only municipality in North Carolina that, by law, is unable to charge differential rates outside of city limits.

At various times in the mid-1900s, Asheville mounted legal challenges to the Sullivan Act or tried to persuade the county to allow rate differentials in exchange for the city's taking over the maintenance of county water lines (Burda and Barnard, October 2, 2002). In 1955, Asheville attempted to overturn the Sullivan Act legislation by issuing an ordinance that raised rates for non-city residents. The North Carolina Supreme Court upheld the Sullivan Act and forced the city to repeal the ordinance. (Wilson, 2005)

Over the course of time, disputes between Asheville and Buncombe County also arose over various tax inequities between city and county residents. The city was funding the cost of many countywide services with no financial participation from the county. The city and county made progress throughout the 1970's on these "tax fairness" issues.

Without a differential rate, Asheville had little incentive to extend water lines beyond its borders. Limiting water line extensions had the effect of constraining growth outside of Asheville. As development pressures began to increase in the late 1970s and early 1980s, county leaders wanted a stronger voice in the development of the water system. The city, meanwhile, wanted to

address what it saw as tax inequities between what city and county residents paid for the same services. After heated talks about the water system and a number of tax issues, the City Council and County Commissioners approved the 1981 Water Agreement. (Ball, 2005)

Under this agreement the city would not challenge the Sullivan Act by charging rate differentials. In return, the county transferred its water lines to the city and undertook the expense of maintaining various city-owned facilities that serve county residents. The agreement also allocated 5% of water revenues to the city for unrestricted use and 2.5% to the county to fund economic-development. This practice eventually became controversial as the water system faced a crisis in funding system maintenance and repairs. (Barnard, March 23,2005b)

Although the city retained ownership of the water infrastructure and the city's Water Resources Department administered and maintained the system, a new entity - the Asheville-Buncombe Regional Water Authority - was created, giving the county a voice in the policies of the water system. The Regional Water Authority was made up of both city and county representatives and they drew up the annual budget, and made decisions about water policy and line extensions.

The Water Authority was technically a "joint agency" rather than a true regional authority (Barnard, July 30, 2003). Over the years, there have been questions about the role the Regional Water Authority plays in decisions about the water system. Some claimed the Water Authority was merely an advisory board and that its structure prohibited it from functioning as a true authority (Ball, 2005). A case in point was the split between city and county leaders in 2003 over a fee increase to pay for badly needed water system repairs. Asheville was pushing strongly for the increase but Buncombe County would not go along with the fee. This lack of control of the system contributed to the city's frustration over the Water Agreement, which was set to expire on June 30, 2005. In 2004, they proved they were prepared to walk away from it.

In May, 2004, the Asheville City Council unanimously passed a resolution that allowed city staff to renegotiate the Water Agreement and authorized the mayor to give the county a one-year notice of termination of the agreement.[iv] In addition to gaining full control of the water system, the city wanted to charge differential rates to county users. City Council argued that the Sullivan Act covered only those served by the original water lines paid for by the water district bonds of the 1920s. One rationale for severing the agreement was to reduce the high water rates paid by Asheville city residents. The city also wanted to couple rate differentials with the extension of city water as an enticement to developers to voluntarily annex their properties and thus give the city some control over land development on the city's borders.

The county did not formally respond to the city's action for several months. By early spring 2005, various formal and informal exchanges between Council members and Commissioners occurred in an attempt to find a way to continue the agreement and avoid harming the relationship between the two boards. While some compromises were offered, each side had its sticking points. The city wanted the ability to set differential rates and guide growth on its perimeter. The county wanted a true, independent water authority that controlled the water system, would charge all residential customers the same, and put all water revenue back into the system.

Matters between the two sides were further complicated in early 2005 when the local legislative delegation announced its opposition to Asheville's withdrawal from the Water Agreement and the Water Authority (Barnard, March 23, 2005b). Rep. Wilma Sherrill and Sen. Martin Nesbitt introduced a blank bill titled "Asheville Water Authority." Such blank bills give state legislators a slot in the legislative docket in case they want to craft a bill later in the session.

In early April 2005, a public forum on regional water issues featured a panel of local officials and concerned area residents. Questions for the mayor and county board chairman focused on the negotiation process itself, and it was clear that the city and county were not making much headway in negotiations on the Water Agreement. A week later, the two sides agreed to involve a mediator, Dr. John Stephens of the Public Dispute Resolution Program at the University of North Carolina at Chapel Hill's School of Government. After a conference call on April 13 with a few members of both boards, Stephens agreed to mediate the negotiations. The parties and Stephens scheduled a one-day mediation session for April 26.

In the short time available, Stephens researched the history of the conflict and conducted confidential interviews with members of both boards. Stephens consulted with city and county attorneys to design the mediation process which was governed by the need to meet the provisions of the North Carolina Open Meetings Law. Because the Open Meetings Law requires an open meeting when a quorum of members of a public body is present, the mediation was designed so that the full boards would meet in closed session under "attorney-client privilege."[v] Negotiation teams consisting of one board/council member and their respective attorneys would meet with the mediator in private sessions.

The local news media believed the mediation violated the North Carolina Open Meetings Law. On the day of the mediation, the Asheville Citizen Times and WLOS-TV filed a lawsuit in Superior Court against the city and county, claiming their meeting illegally excluded the public and requested a temporary restraining order and preliminary injunction to stop the two bodies from meeting illegally again. However, the mediation concluded before the court heard the case the following day.

The mediation began at 8:25 a.m. on April 26th at a local hotel and continued for nearly 16 hours with scheduled breaks for meals. The two governing bodies met in separate hotel conference rooms while the mediation was conducted by the negotiating teams who met with Stephens in a third room. At various points throughout the day, the negotiating teams reported to their respective boards. Television crews and newspaper reporters were in the hallway most of the day.

The negotiations focused on alternatives for structuring and financing an independent water authority, mechanisms to compensate the city for revenue losses due to the transfer of the water system, and methods to meet the city's planning and growth interests. Major sticking points were rate differentials, how the city could use water for annexation and the formation of a regional water authority. By late evening, the negotiating teams had not created options that allowed them to go past their stated positions on annexation and differential water rates. Although there was considerable movement by both parties on compensation packages and the

structure and terms of a water authority, annexation and differential pricing proved too difficult for the parties to move past and eventually settle.

At 11:30 pm, Stephens declared an impasse and the mediation session ended. Soon after, television cameras and reporters moved into the mediation room and a press conference was held. Representatives of both boards gave brief statements indicating both sides felt that little progress was made. The leaders said that a public meeting would be held in the following weeks.

In the weeks following the failed mediation, each side offered conflicting versions of what happened and accused the other side of not compromising on key issues. With the Water Agreement expiration deadline of June 30 coming quickly, Asheville and Buncombe County continued to exchange options for moving forward. At a special May 24 meeting held to discuss the water issue, Buncombe County restated their preference for an independent water authority but indicated a willingness to support a prior proposal by a City Council member that would allow the city to retain ownership of the system. Their position on rate differentials remained unchanged. At the Asheville City Council's formal meeting that evening, the Council rejected this plan however, instead stressing the importance of rate differentials to offset the higher cost of service in lower density areas outside the city and to provide some relief for city residents. The city urged the commissioners to extend the negotiating period by asking state legislators to delay action of the Sullivan Acts which were slated for a vote the next day. The commissioners would not agree to this however. After more than an hour of discussing water issues with no common ground, the two boards then left for separate meetings to pass their respective budgets (Barnard, July 30, 2005).

The next day, the North Carolina General Assembly, at Buncombe County's request, passed Sullivan Acts II and III.[vi] These two bills ultimately took away the city's trump card in negotiations with the county – the ability to stop supplying customers outside the city with water. The bills prevent Asheville from charging non-city residents more for water and stipulate that the city must supply water to county residents if it has excess capacity. As rewritten, the laws also specifically prohibit the city from using water hookups as an annexation tool. In effect, this legislation negated a lot of what the city had hoped to gain by pulling out of the Water Agreement. In response, the city filed a lawsuit in Wake County Superior Court in August 2005 challenging the constitutionality of all three Sullivan Acts, including the original 1933 edition which bars rate differentials for the original water districts (Barnard, February 8, 2006).

The November 2005 municipal election brought change with Mayor Worley losing in the primaries – most likely attributable to the growing polarization between the left and right in Asheville rather than dissatisfaction over the water issues. Asheville's new mayor, the city council, and the city manager continued to discuss water matters into 2006. Despite the new line-up on the city's side, little progress, to date, has been made on the water debate since the failed mediation. And while the city had anticipated losing several million dollars in tax equity payments from the county that were part of the agreement, Sullivan II and III put Asheville into an even deeper financial hole by prohibiting the practice of diverting five percent of total water revenue into the general fund (Barnard, February 8, 2006).

In August 2008, the city's case to overturn the Sullivan Acts was denied by the North Carolina Court of Appeals.[vii] The appeals court affirmed a lower court's 2007 ruling (Schrader and Burgess, 2008).

Research Methods

The goal of the study was to try to understand why the mediation failed. Since it was believed that the mediator, John Stephens, was integral to the success or failure of the mediation, his involvement was one of the major factors in the analysis. As a subject in this study, Stephens' primary participation was to give direction on finding public documents and website resources about the conflict, the activities of the parties and others, and the current status of the dispute. The research was conducted by Lynn Weller, a research assistant at the UNC Environmental Finance Center and Dr. Steve Smutko at North Carolina State University. Weller conducted documentary research on the water agreement and interviewed mediation participants. Smutko supervised the research and conducted the analysis. Stephens was interviewed as a participant in the mediation to gain his perspective on the mediation and learn about his role in the process.

Researchers produced a timeline of events and became familiar with the issues, legal framework and current status of relations/tensions between county and city leaders. An interview protocol was formulated and Stephens' role was to review and comment, but not to decide on the protocol. Interview questions were formulated to provide insights on the context of external influences such as timing of the mediation, the effect of the Open Meetings Law and the effect of potential legislative actions. Questions also probed internal process conditions such as the structure of the mediation, the dynamics of the elected boards, and the effects of overlapping issues. Questions were also formulated to gather feedback from mediation participants about the conduct and skill of Stephens as a mediator.

Interviews were conducted during a relatively "quiet period" in the aftermath of the mediation. Subjects were approached following the 2005 city elections (which resulted in new members of the city council and a new mayor) and when lawsuits were not in the forefront of participants' attention. Four of the five county commissioners, the county manager and the county attorney were interviewed. Four of the six city council members, the mayor, the city manager and the city attorney were interviewed.

Interviews were conducted by telephone. Each interview took about thirty minutes. No voice recording device was used; interview responses were recorded by hand. Responses were recorded individually, but reported without attribution to any particular person. The interview used both open-ended narrative questions, and questions with answers on a Likert scale. A base of common questions was asked of all subjects. Those participating in the private negotiations were asked additional questions. Three city respondents and two county respondents participated in the private negotiation sessions.

All twenty-nine interview questions are listed in Appendix A as well as answers to the scaled questions. Answers to open-ended questions are not included to avoid attributing responses to particular interview respondents.

The data collected from the interviews were analyzed to identify shared and divergent perspectives among the subjects on the research questions. Answers to the questions using a numerical scale were recorded and the mean response was calculated. Content analysis of narrative information from interviews was used to identify factors, assess strength of factors, and the relationship among factors according to interviewees' perceptions.

All subjects, including Stephens, had the opportunity to comment on a draft report, but researchers retained authorship of the analysis and the final, public report.

Research Hypotheses

Analysis of the interview responses was centered on three hypotheses of why the mediation failed to achieve a settlement by the two parties on issues related to the structure and substance of a new water agreement. The hypotheses led our analysis into three areas: events and circumstances related to the strategies and behavior of the mediator; events and circumstances external to the mediation; and events and circumstances related to the negotiations themselves. We examine the data with respect to substantiating or refuting each hypothesis.

Hypothesis 1 – the mediator chose the wrong mediation strategy or made tactical errors during the mediation. This hypothesis states that a potential settlement was possible and that the actions of the mediator alone led to the impasse. The analysis explores Stephens' pre-negotiation activities and his behavior during the negotiation setting in order to determine if he adhered to mediation "best practices."

Hypothesis 2 – external events and influences overwhelmed the mediation process. In exploring this hypothesis, we wanted to determine if circumstances and events outside the control of the mediator and negotiators could have prevented the mediation from succeeding. External influences include the constraints imposed by the provisions of the Open Meetings Law on the mediation process, the timing of the mediation in relation to pertinent events, and the intercession of the legislative delegation on the issues.

Hypothesis 3 – no viable bargaining range existed between parties. This third hypothesis recognizes that the parties' own statements and public stands on the issues prior to the mediation led to an ever shrinking choice of options during the mediation. Rather than focus on the mediator or on the influence of external events and actors, this line of analysis looks at the behavior of the negotiating parties during the months leading up to the mediation.

The remainder of this report is an examination of each hypothesis in turn. However, before turning to the first hypothesis, we present a model mediation process in which the roles of the mediator and negotiators during mediation are carefully described. We use this model as context for the Asheville-Buncombe mediation, and to which we can compare the mediation session and the behaviors of the mediator and the negotiators.

The Mediation Process

Christopher Moore, in his book, *The Mediation Process* (1986) details a twelve-stage process of mediator moves and critical situations to be handled. Moore divides his twelve stages into two broad categories: work that the mediator performs prior to joining the parties in mediation, and moves made once the mediator has entered formal negotiations. Some authors identify a third category, actions taken by the mediator after an agreement is reached to ensure that the parties follow through on their agreements (Susskind and Cruikshank, 1997). Post-negotiation participation by a mediator is not common.

Moore's twelve stages are listed below. The first five stages are pre-negotiation activities, while the remaining seven stages occur while the mediator is working with the parties in the negotiation setting.

1. Initial contacts with the disputing parties
2. Selecting a strategy to resolve the conflict
3. Collecting and analyzing background information
4. Designing a detailed plan for mediation
5. Building trust and cooperation
6. Beginning the mediation session
7. Defining issues and setting an agenda
8. Uncovering hidden interests of the disputing parties
9. Generating options for settlement
10. Assessing options for settlement
11. Final bargaining
12. Achieving a formal settlement

For brevity, we have combined stages 1-5 under the heading 'Prior to Mediation" and 6 through 12 under the heading, "The Mediation Session."

Prior to Mediation

Establishing Initial Contact and Selecting a Conflict Resolution Strategy. The mediator's objectives at this stage should be to build personal, institutional, and procedural credibility, establish rapport with the disputants, educate the participants about various conflict resolution strategies including mediation, and gain commitments to begin mediating (Moore, 1986). The mediator may assist the parties to assess various approaches to conflict management and resolution to determine if mediation is indeed the most effective approach. In doing so, the mediator may identify the interests or goals that must be satisfied in a potential settlement, consider the range of possible and acceptable dispute outcomes, identify the conflict approaches that may assist disputants in reaching individual, subgroup, or organizational goals, and guide the parties toward the most effective approach (from Moore, 1986).

Collecting and Analyzing Background Information. After initial contact has been made, and mediation is identified as a potential means for resolving the conflict, the mediator begins to collect information about the issues, the parties, and the forum for resolution. This usually

involves interviewing the parties involved or potentially involved in the dispute as well as gathering background information from published sources and secondary parties. The mediator uses this information to generate a conflict assessment. A conflict assessment enables the mediator to understand the issues and interests that are important to the parties, and the relationships and dynamics that exist between them. Mediators can share the assessment with the disputing parties to prepare them for the mediation process.

Designing a Plan to Guide Mediation. Based on the results of the conflict assessment, the mediator designs a mediation plan. A mediation plan is a sequence of procedural steps initiated by the mediator that will help disputing parties reach agreement. The plan's detail depends on the type and complexity of the conflict, how much the mediator knows about the dispute, and how much control over the process the disputants have delegated to the mediator.

The Mediation Session

The mediation session spans the time between the mediator's opening remarks until the parties achieve a formal settlement. This can occur in one meeting or several. During this time, the disputants are engaged in active discussion and the mediator is there to guide and coach the parties toward settlement.

Beginning the Mediation Session. To begin the mediation session, the mediator typically works to establish a tone of trust and common purpose and assists the parties in developing a structure for full, open, truthful exchange of information about the issues under discussion. He does this by welcoming the parties and commending them for their willingness to cooperate and seek a solution to the problem at hand. Before turning the discussion over to the parties, he defines his role as an impartial third party, and describes the mediation procedures to be followed. He then defines and gets agreement on behavioral guidelines that will facilitate an orderly discussion. At this point he directs the parties to an opening strategy that he thinks will be most fruitful based on information he has gathered prior to the mediation session. Typical opening strategies include (1) each party describing the issues to be resolved; (2) each party describing his or her interests that need to be satisfied; and (3) the parties defining and agreeing on procedures to be used to resolve the dispute.

Defining Issues and Setting an Agenda. Once the parties have opened discussions, the next task is to define the content of the negotiations and establish an order in which the issues are to be discussed. Three critical tasks at this stage are (1) identification of broad topic areas of concern to the parties, (2) agreement on the subtopics or issues that should be discussed, and (3) determination of the sequence for discussion. The mediator is focused on guiding the parties toward the delineation of a concrete list of issues and items that, if negotiated to the satisfaction of all parties, will lead to final settlement. The mediator does this by helping to frame and/or reframe the issues in language that leads to a jointly perceived problem that the parties are willing to solve. The mediator's use of facilitative language or syntax is of critical importance at this stage as he seeks to restate positional statements made by either party into words that invite critical thinking and problem solving, eventually moving the parties to the development of an agreed-upon list of issues to be settled.

Uncovering Hidden Interests. Once the parties have defined the issues and established a negotiation agenda, the next stage of the mediation is focused on uncovering hidden interests of the disputing parties. Interests, not conflicting positions, define the problem the parties are attempting to solve (Fisher and Ury 1991). Successful negotiation requires the discovery and application of options that satisfy the interests of both parties. The mediator assists the parties to reveal their interests, enabling them to create value in the negotiation. The mediator can use direct or indirect methods to induce the parties to reveal their interests. The most common direct methods are brainstorming and direct questioning. Indirect methods include active listening techniques such as paraphrasing, summarizing, and reframing.

Generating Options for Settlement. After interests have been clearly and exhaustively identified, the parties can then move toward finding ways to satisfy their own interests and those of the other parties. When they reach this stage the parties have defined the parameters of the dispute, clarified issues, developed an agenda, and through full and open communication, identified common and conflicting interests. The central task of the negotiators is to develop mutually acceptable settlement options or proposals. The mediator's role is to assist them to become aware of the need for generating options, present strategies for generating options, and assist the parties during the option generation process. A key activity for the mediator is to keep the parties from prematurely evaluating and eliminating options. The metaphor most often used to describe this stage is that of making the pie larger before dividing it.

Assessing Options for Settlement. Once the parties are satisfied that they have enlarged the pie, the next task is to assess options for settlement. In effect, decide how to divide the pie. The primary task for the parties at this stage is to assess how well their interests will be satisfied by any one or a combination of options that they generated. The mediator's role is to help the parties evaluate those options and assist them to assess the consequences of accepting or rejecting various settlement proposals. If options are within the zone of possible agreement or ZOPA, i.e., the range of potential solutions between what each party will minimally accept and what each aspires to, then an agreement is possible. The mediator may work with the parties to help them individually identify their acceptable limits of settlement. Through public and private discussions with the parties, the mediator often has the most accurate perception of the settlement range for all the parties. The key task for the mediator is to communicate to the parties when they may have reached the ZOPA without unduly influencing the precise outcome.

Final Bargaining. As the parties narrow the bargaining range within the ZOPA, they engage in a search for an agreeable distribution of the joint gains generated through the negotiation and work out the details for implementation. This is the objective of the final bargaining phase. The mediator may assist the parties to increase their joint gains, that is, not settle prematurely, if he feels that additional value can be gained by continuing to negotiate. In some cases, the parties may have found the ZOPA, but considerable differences remain in potential gains and losses to each party creating difficulties in reaching agreement. Each party may be reluctant to make subsequent offers out of fear of conceding too much, revealing their bottom line, or being perceived as being weak or overly compliant. The mediator may assist the parties in this case by creating a negotiation climate that allows the parties to explore offers without committing, framing offers so that they are seen as initiatives rather than concessions, or free the parties from public pressure or repercussions by serving as the negotiators' scapegoat.

Not all negotiations lead to an agreement. If the mediator believes that the parties have exhausted their search for possible options and still cannot reach a ZOPA, then the mediator may suggest that the parties act on their alternatives to negotiation and declare an impasse.

Achieving a Formal Settlement. In the final stage of mediation the parties agree on implementation and monitoring arrangements to ensure that the agreement is carried out. Factors that must be considered when crafting such arrangements include the specific steps and responsible parties necessary to carry out the agreement, methods and criteria used to measure compliance, organizational incentives and controls that affect compliance, and provisions for future talks if necessary. The mediator's role in fashioning formal settlements is largely one of keeping the parties focused on the implementation phase and thinking about contingencies once negotiations are over. The mediator may also be responsible for fashioning a written agreement to be signed by the parties that describes the substantive agreement and subsequent implementation, monitoring, and re-opening procedures.

Hypothesis 1 – The Mediator Chose the Wrong Mediation Strategy or Made Tactical Errors during the Mediation

Prior to Mediation

A member of the Buncombe Board of County Commissioners contacted Stephens to enquire about the potential for mediation. Following this initial call, Stephens arranged a conference call with two county commissioners, the Asheville mayor and two city council members to gather background information and discuss the potential for mediating the dispute among other conflict resolution approaches. Other issues under discussion were how the mediation could proceed under the provisions of the North Carolina Open Meetings Law, timing and location of mediation sessions, communication about the mediation, and costs and compensation.

From this discussion, Stephens drafted a mediation procedure memo that outlined the key features of the planned mediation session, further measures to be undertaken by Stephens and the parties in preparation for the session, and details about Stephens' compensation. The memo was sent to the respective attorneys representing the parties for distribution to the members of each governing body. The memo generally described the mediation process as agreed to by the parties in the initial telephone conference call. Stephens also noted that he would contact all the elected officials, managers, and attorneys by telephone to gather additional information about the issues under discussion.

Collection of Background Material. Members of both bodies and their managers sent Stephens documents about the conflict so that he could make the mediation as productive as possible. Stephens also read background materials and consulted with other School of Government colleagues to familiarize himself with the situation and history (Stephens, John B. 2006. Personal interview, August 17).

Stephens conducted telephone interviews with all elected officials, the city and county managers and respective attorneys. During the interviews, Stephens sought information about the goals and priorities of each party and what the parties stood to gain or lose if the issue were to be resolved one way or another. He asked each party to consider what the other side needed to successfully resolve the issue and ways they could help the other party meet their interests. He also probed for each party's bottom line – the minimum needed for agreement, and possible areas of compromise. Following the telephone interviews, Stephens issued a second document to both parties providing additional details about the planned mediation session. This document was devoted strictly to process, revealing nothing about either party's positions about the substantive issues. Four days later the mediation was convened.

During the post-mediation survey, respondents were asked to reflect on how well prepared they felt that Stephens was prior to the time the mediation began. Nearly all respondents (80 percent) felt that he was well prepared. This view was equally spread among city and county respondents. However, when asked whether Stephens' level of knowledge about the substantive issues helped or hindered the mediation process, the respondents were less unified. Most (54 percent) felt that his knowledge neither helped nor hindered the process, while 18 percent believed that his understanding of the issues helped the process and 18 percent felt that his understanding hindered the process. County respondents were less generous than their city counterparts regarding Stephens' comprehension of the issues. Said one survey respondent, "The mediator didn't have a clue about what he was getting into. In hindsight he would probably do things a lot differently; it was one of the tougher things to mediate."

Selecting a Plan to Guide the Mediation. Based on his interviews with members of the city council and county commission, as well as additional discussion with the attorneys on both sides, Stephens drafted a document (Asheville-Buncombe County Mediation Procedures, April 26, 2005) that outlined a general process of the proposed mediation. Stephens outlined a multi-phase negotiation plan that described his proposed first steps, listed an approximate timeframe to discuss and compare ideas and share proposals, and a set time for representatives reporting back to their respective boards. He proposed to both parties a choice of three negotiation configurations: (1) the mediator meets with one team and then the other; (2) teams meet and negotiate without the mediator; or (3) the mediator and both teams meet together. Both parties subsequently chose the third option. It was agreed that the mediation session would be limited to one day, and if an agreement could not be reached at the end of that day, the parties would declare an impasse.

The principal factor governing the design of the mediation process was the need to meet the provisions of the North Carolina Open Meetings Law. The process was to be structured so that negotiating teams consisting of a subset of board/council members and their attorneys could meet and discuss various options in detail. Periodically throughout the day, the negotiating teams would report back to their respective boards to gather feedback on offers and receive guidance, new ideas, and new proposals. The negotiating teams would then reconvene to continue negotiations. The process would cycle between the active negotiation phase and debriefing phase several times during the day.

A mediation plan spells out who should be at the table as well as how the mediation should proceed. Survey respondents were generally satisfied that the roles of the parties involved in the mediation (mediator, attorneys, board representatives) were clear and appropriate to the situation. Nearly 80 percent felt that they were very appropriate. However, they were less positive with respect to whether all the parties that needed to be included in the talks had indeed participated. Responses were 58 percent positive that all participants that were needed were part of the process, and 42 percent negative. One City Council representative refused to take part because the mediation was going to be closed to the public. Some respondents felt he should have been part of the process. Others cited the lack of representation by members of the local legislative delegation, since they had some control over the outcome of the discussion.

Although most (55 percent) county and city board members and attorneys surveyed felt that the mediation plan (we referred to the mediation plan as "ground rules" in the survey instrument) used to guide the mediation process was appropriate, some respondents were quite critical about the way the process was structured. Most criticism was aimed at the lack of mediator support during the time that the negotiators were briefing their board representatives – a direct consequence of the constraints imposed by the Open Meetings Law. The effect of the Open Meetings Law on the mediation and its outcome is discussed more fully under Hypothesis 2.

The Mediation Session

The following description of the events that occurred during the mediation session was pieced together from statements made by the interview respondents, news reports leading up to and following the mediation session, and public documents outlining the parties' positions and offers over the course of the three years that this issue was being negotiated. Neither Stephens nor the parties' attorneys violated confidentiality requirements or professional codes of ethics by divulging confidential information.

The mediation session was held at the Radisson Hotel in Asheville. Three rooms were reserved, one each for the two governing bodies and the third for the negotiators and mediator, appropriately located between the other two rooms. Members of the media stationed themselves in the hallway.

Prior to the start of the mediation, Stephens met separately with each governing body in open session to brief them on procedures and answer questions. Stephens had originally proposed one kick-off meeting with members of both boards together, but this idea was rejected by the parties. Following the briefings, both bodies voted to go into closed session.

At 9:00 a.m. the negotiators for both parties met with Stephens in the mediation room. The city's negotiation team included one council representative and two attorneys, while the county's team included one board representative and three county attorneys. The city changed its council representative in the afternoon. The attorneys were present for the duration.

To begin the mediation session, Stephens welcomed the parties and quickly briefed them on protocols for the day. In most situations when negotiations are just getting underway, the mediator will engage the parties in a structured process of mutual education in an attempt to

uncover hidden interests. According to Stephens, because the parties had been negotiating prior to the mediation session, the negotiators were eager to resume their discussions where they left off and continue to discuss offers already on the table. Stephens did not ask them to discontinue their ongoing line of discussion, and instead, talk about interests (Stephens, August 17, 2006). Rather, Stephens encouraged them to continue their previous talks, and as the day progressed, offered general frameworks and ideas for trade-offs, requested negotiating teams to consult with their boards on particular points, proposed specific steps, and summarized offers.

Stephens reported the morning session as a time of little forward progress. Most of the morning was spent reviewing and clarifying the issues and parameters of the dispute, with only one new option proposed. (Stephens, August 17, 2006). According to information provided by the interview respondents, the key issues under discussion were centered on the latest proposals offered by both parties in February and March. According to public documents and newspaper accounts leading up to and following the mediation, the county had proposed establishing a fully independent regional authority to which the city would transfer the water infrastructure. All water-generated revenues would go toward operation and maintenance; none would be diverted to either city or county general fund. There would be no rate differential between city and county residents. The county offered to compensate the city for the loss of water revenues by establishing a recreation authority and relieving the city of its obligations to fund the Civic Center, Pack Square and Memorial Stadium.

The city's preferred position was to retain control of the water system, however, it would consider a regional water authority if a majority of appointments were made by the city. The city would continue to claim five percent of water revenues for general fund purposes. The county would gain permanent title to facilities included in the current water agreement (the Swananoa Nature Center, Recreation Park, McCormick Field, and the Golf Course.) The city would have the right to annex portions of the county tying in to the water system. Differential rates would be charged to city and county residents.

The negotiators took a short break in the morning to brief their respective boards on current discussions. The negotiators reconvened after twenty minutes with a continued focus on past proposals. Only one new proposal was brought forward before lunch. Negotiators spent approximately one hour with their respective boards at the lunch break.

After the lunch break the negotiators engaged in a discussion of new proposals with earnest back-and-forth deliberation. The proposals remained focused on alternatives for structuring and financing an independent water authority, mechanisms to compensate the city for revenue losses due to the transfer of the water system, and methods to meet the city's planning and growth interests. This latter point proved to be the most difficult issue for the parties to work with. Neither was willing to cede its position on annexation for water or city/county rate differentials. Stephens' role during this stage of the negotiation was to promote active option generation and keep the parties from slipping into positional bargaining or prematurely evaluating and eliminating options.

By late afternoon the city and county negotiators were still negotiating the terms and structure of an independent water authority and revenue compensation schemes for transfer of the city's

control of the water infrastructure. Compensation schemes revolved around ownership of certain recreation and civic facilities as well as direct revenue generation from water fees. To assist the negotiating teams in considering offers and formulating positive responses, Stephens caucused with each team in the afternoon.

At 5:00 p.m. the City Council had to leave the hotel for a regularly scheduled City Council meeting at City Hall. During this ninety minute break, negotiations were halted with both sides committed to continuing talks when the City Council returned. Members of the Board of Commissioners remained at the hotel for dinner.

Negotiations resumed at 7:30 p.m. when the City Council returned to the hotel. The parties were concerned about how long the mediation would go and whether the governing boards would keep enough members at the hotel to consider proposals and eventually vote on an agreement. Also at this time, a substitution was made on the city council negotiation team. City Council member Newman replaced Mayor Worley as the city's negotiator. During the evening session the negotiators clarified and adjusted proposals made earlier that day, and continued to discuss proposals and counterproposals around four main issues – administration of the water system (city versus independent), compensation schemes for revenue loss, rate differentiation, and annexation rights. Several breaks and debriefings were taken during this time for quick consultations or to check on ideas for new proposal or clarifications /refinements of existing proposals.

Stephen's role during the later stages of the mediation was to help the parties evaluate options and assist them to assess the consequences of accepting or rejecting various settlement proposals. As the day progressed, Stephens continually reminded the parties of the probable consequences of not reaching an agreement, and urged them to continue to seek options that met the interests of both parties (Stephens, August 17, 2006). Stephens' approach to helping the parties find a zone of possible agreement was to keep them focused on the process of option generation and evaluation. He refrained from pressuring either party to expand its possible limits of settlement to accept offers on the table.

By late evening, the negotiators were unable to create options that allowed them to work past their stated positions on annexation and differential water rates. Although there was considerable movement by both parties on the structure and terms of an independent water authority and compensation packages, annexation and differential pricing proved too difficult for the parties to engage in final bargaining and eventually settle. At 11:30 Stephens declared an impasse and the mediation session ended.

A press conference was held between 11:30 and midnight, where both sides made public statements about the mediation outcome. There were television cameras and print reporters on hand. After the statements, it was announced that the city and county would be holding a joint meeting in the coming weeks to continue the negotiations and this meeting would be open to the public.

Analysis and Discussion

The fact that the parties were unable to reach agreement at the end of the day was, in retrospect, unexpected by members of both sides. When asked in the post-mediation survey about their expectations that their objectives could be met using the mediation process, only one respondent felt negatively going into the mediation (he declined to participate in the process). Half of the respondents were highly confident that they could meet their objectives through mediation. The rest were generally positive but more tempered in their expectations. All but one respondent agreed or strongly agreed to the statements that, "the results of the mediation would better serve the interests of the participants, and "the participants would be more likely to be able to work together in the future on matters related to this case or project." It is interesting to note that the county respondents were slightly more hopeful about the outcomes of the mediation than were the city respondents.

When asked to reflect on the Stephens' performance in conducting the mediation, the survey respondents had mixed assessments. Generally speaking, the city participants ranked Stephens' performance more favorably than did the county participants. Given that the county participants had slightly more positive expectations going into the mediation, their disappointment at not getting an agreement may be reflected in their assessment of Stephens' efforts.

Respondents were confident that, going into the process, Stephens was the appropriate mediator to guide the process. On a 10-point scale with 1 being "very skeptical" and 10 being "highly confident" that Stephens was the appropriate mediator, the composite rating was 8.3. Stephens' association with the UNC School of Government was cited by all participants as a positive factor. City respondents were more confident of Stephens' ability than their county counterparts. This may be due to familiarity. Nearly all the city respondents knew of Stephens prior to his involvement in the water dispute, whereas two-thirds of the county respondents did not.

Survey participants were asked to rate Stephens' performance on several mediator qualities using a 1-10 scale, with a score of 1 being highly negative, and a score of 10 as being highly positive. These qualities included: ability to deal with strong emotions, ability to promote full participation, ability to be fair and unbiased, and ability to promote balanced discussion. They were also asked to gauge the extent to which his mediation style was either light (he exerted little pressure on the parties to settle) or heavy (he exerted significant pressure on the parties to settle). It must be noted that while only four of the 12 board members and attorneys responding to the survey were actually involved in the mediation, in all cases more than four participants responded to the questions about his performance.

Most of the participants believed that strong emotions negatively affected the mediation to some degree, although one felt that this was not at all the case. Using the ten-point rating scale, the average score that respondents gave Stephens on his ability to move the discussions forward when tensions mounted was 4.6 (min=2, max=7, mode=5). Three of the seven participants responding to this question were not present during the mediation sessions. Hence, the low scores could be more of a reflection of the respondents' frustration at not being able to reach an agreement than Stephens' ability to handle tensions at the negotiation table.

Participants' views were evenly spread from low to high with respect to Stephens' ability to ensure that the views and perspectives of all participants were heard and addressed. Ten participants responded to this question. His score on this measure of mediator quality averaged 6.0 with responses ranging across the board from 1 to 10. Fuller responses from some participants reveal that some were frustrated by the fact that Stephens could not participate in the negotiator debriefing sessions. Said one participant, "The mediator never came with the other side to hear what they brought back to the boards. Evidently the other side didn't hear what the county offered. It would have helped if he listened to what was being reported back."

Most participants felt that Stephens dealt with them in a fair and unbiased manner whether they were present in the negotiations or not. Stephens' score on this measure averaged 8.3 (min=4, max=10, mode=10) with all survey respondents answering this question. With respect to his ability to keep negotiators from dominating the process, he rated a score of 7.6 (min=5, max=10, mode=5 and 10).

Even though the participants felt that Stephens was fair and unbiased, most wanted him to apply more pressure to get the parties to settle. On a 10-point scale where 1 means that the mediator's interventions were too light, and 10 means that they were too heavy, the participants gave Stephens a 2.7 (n=12, min=1, max=5, mode=1). It may be implied from this score that each party felt that the other needed some pressure to concede on their positions. Both parties would have had to concede to some degree for this strategy to work. Whether the second party would have reacted positively to the first party's concession and granted its own concessions is not certain. Said one respondent, "[Stephens was] way too light. This was the main problem. He did not force them to a solution. Maybe that is mediation. If he had said, 'you guys can't leave it like this, someone make it happen today,' we would have gotten an agreement." Said another, "[we] needed someone to try to break patterns that developed during mediation, prod people, try different ways."

According to the City Council members, County Commissioners, city and county managers and attorneys surveyed, Stephens was prepared, fair and unbiased, made sure that no one dominated, was moderately helpful when things got tense, had mixed success in ensuring that all parties' views were heard and addressed, and did not apply pressure for the parties to settle. This latter quality was considered by most respondents to be the key quality in which Stephens failed.

From the negotiators' own accounts of the mediation session, and the little that Stephens could relay without violating confidentiality, it is clear that Stephens followed, more or less, mediator best practices while in session with the negotiators. He worked to establish trust early in the discussions. He assisted the parties in identifying the broad topics and subtopics to be discussed and established a sequence for discussion. He worked with the parties to uncover hidden interests as a way to help them broaden their thinking about potential options. And, he spent considerable time, but without success, in working with the parties to create value in the negotiation by generating new options that could satisfy both sides.

Stephens was unsuccessful in moving the parties beyond earlier established positions. In hindsight, Stephens could have done more to prevent the parties from anchoring so quickly on options and issues that had been discussed in prior negotiations. Stephens stated that he did not

engage the parties in a structured process of sharing interests and examining assumptions. Instead, the negotiators began where they had left off in previous negotiations. This was done presumably because of the intense pressure of the negotiators not to 'dither' and get right down to business. They had, after all, given themselves only one day to settle the dispute. If Stephens can be faulted for breaching best practice protocol, this would be where it occurred.

Rather than allowing the parties to focus immediately on past proposals and positions, he could have led them through an exercise to force them to reevaluate their assumptions about their own positions and the needs and motives of the other parties. Questions like "why is a differential rate structure good/bad?", "why is annexation important/a threat?" could have been explored prior to discussion of options, offers and proposals. If the parties were willing and able to engage in unencumbered brainstorming (and there are a number of reasons why they weren't – more on this under Hypothesis 3), he may have been able to get the parties to see the problem from a fresh perspective.

Stephens was faulted by many participants on both sides for not being tough enough. As one respondent put it, "I was hoping there would be more crackin' heads on each side. I felt like we were giving people a lot of room to move and didn't get anything back." This criticism goes directly to mediation style. There are three mediation styles generally described and accepted in the mediation and negotiation literature (Beardsley, et al., 2006). The first is *facilitative mediation*. Facilitative mediation is closely associated with principled negotiation or mutual gains negotiation as described by Fisher and Ury (1991) and Susskind and Cruikshank (1996). The facilitative mediator serves as a channel of communication among disputing parties, focusing on ensuring that the discussion is centered on communicating interests, and generating options that that are mutually satisfactory (Keashly and Fisher 1996). The facilitative mediator ensures that negotiating parties have access to necessary information and procedures in place to discover, evaluate, and select mutually preferable outcomes.

The second commonly identified mediation style is *mediation as formulation*. Unlike facilitation, formulation involves substantive contributions to negotiations by the mediator. Formulation is also employed in mutual gains negotiation. When mediators act as formulators, they conceive and propose new solutions, new procedures, or new models from which the parties can understand and evaluate the issues (Hopmann 1996). When negotiators are at an impasse, mediators often will adopt the role of formulator by redefining the issues at hand and/or proposing specific alternatives (Carnevale 1986).

Directive mediation is the third style. Here, the mediator uses position and leverage to influence the negotiations. The mediator must be endowed with sufficient authority or resources in order to influence the parties. The directive mediator may offer compensation or some other positive incentive, or inflict sanctions or other negative consequence to move intransigent parties toward agreement. A clear – although extreme – example of directive mediation, cited by Beardsley, et al. (2006) occurred during a 1972 crisis between North and South Yemen. The mediator—Colonel Qaddhafi of Libya— reportedly threatened to hold captive the delegation leaders of both sides if they did not reach an agreement. He also offered both sides close to $50 million in annual aid if they did reach an agreement.

Stephens' mediation style was chiefly facilitative mediation. He went so far as to ask the parties to comment on proposals, questioned if they could offer amendments to "the other side's" proposals, and focused on ramifications of a lack of agreement – none of which could be construed as formulation moves. Facilitative mediation, while employed successfully in most cases where the parties are willing and able to engage in full and open communication, did not work to help the city and county break the impasse.

Stephens' ability to influence the city and county negotiators through directive mediation was limited by his lack of authoritative position and access to compensatory resources. There was no court order or legislative mandate for the parties to settle, or suffer undesirable consequences if they did not. Outside of threatening to use the media to shame the parties if they did not reach agreement, Stephens had no power to force them to come to a resolution. Stephens stated that he did not use such tactics, and instead attempted to persuade the parties to settle by reminding them of the possible consequences, mostly political, of not reaching agreement. (Stephens, August 17, 2006). So although many of the participants wished that he had been able to 'crack heads' and force the negotiators to concede, Stephens lacked the authority to do so.

When asked to reflect on the mediation and its outcomes, the interview respondents were significantly less generous regarding whether Stephens was the appropriate mediator to guide the process. Going into the process, participants rated him at 8.25 out of 10 as the appropriate mediator. After the mediation, the respondents rated him at 4.55.

In summarizing the outcome of the mediation, one respondent reported that "[Stephens] did an outstanding job on process. But, it took too long to get serious on negotiation. When they got half way close, the mediator was too tied up with process and should have pushed more for an agreement. At some point in time he should have tried to use a little strong arm. Maybe he didn't feel like that was his role."

Hypothesis 2 – External Events and Influences Overwhelmed the Mediation

This 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. External events and influences that could have affected the outcome of the mediation were constraints of the North Carolina Open Meetings Law, upcoming municipal elections, lack of unity on the part of the Asheville City Council, timing of the mediation, and pending legislation introduced by the local delegation in the North Carolina General Assembly.

Open Meetings Law

Meeting the spirit and purpose of the North Carolina Open Meetings Law resulted in significant limitations on the structure of the process and the conduct of the mediator. Both governing boards were present at the mediation site, a local hotel. The City Council occupied one meeting room, the County Commission occupied a second meeting room, and the mediated negotiations

met in a room between the two governing bodies. Each body voted independently to meet in closed session during the length of the mediation.

The Open Meetings Law allows governing bodies to meet in closed session only in limited circumstances and bars members of the public other than employees – in this case city or county employees – from meeting with them while in closed session.[viii] The parties had to be represented by a subset of each governing body and its appointed legal advisors. In effect, each body was represented by negotiating "agents." The City Council's original negotiators were Mayor Worley and two city attorneys. Councilman Newman substituted for Mayor Worley as the negotiations wore on. The County Commission's negotiators were Vice Chairman David Gantt and three county attorneys. The negotiators were not authorized to make on-the-spot decisions which meant that each set of proposals and counter proposals had to be brought back to the 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.

Interview participants were asked their opinion whether the structure of the process helped or hindered the mediation. Using a ten-point scale where 1 = 'completely hindered' and 10 = 'significantly helped', the respondents gave it a composite score of 5.2 (min=1, max=9, mode=8). One respondent summed up his view of the process this way:

> "It was an awkward set up in large part dictated by the Open Meetings Law. …with the recognition that you can't successfully mediate in a public forum. The very nature of mediation dictates that it be private. When you are a public body with press clamoring at you, it makes mediation awkward."

Stephens could not be present with either board in closed session when negotiators reported back the offers made by the other party. While most (55 percent) county and city board members, managers and attorneys surveyed felt that the mediation plan was appropriate, many reported that Stephens' absence from the report-back sessions hurt the process. Members of both boards expressed the belief that the other side's negotiation representatives did not fully describe the key points discussed in the mediation and were therefore less positive to offers and counter-offers. Reported one respondent:

> "I would take an entirely different approach if I had it to do again. Just having representatives to the boards negotiating was detrimental to the process. Some of the things said in the private meetings and offers made didn't go back to one of the boards. This was not because of the mediator, but was due to the players. We probably didn't think about structure well, it didn't work well."

Several respondents commented on this point. In fact, some faulted Stephens for not being present during the debriefings, unaware or having forgotten that state statute prohibited him from doing so. In hindsight, Stephens could have required that pre-settlement offers be made in writing for presentation to the full boards for consideration.

Upcoming Municipal Elections

The mediation occurred during an election year for the city, with the mayor's seat and three City Council seats up for reelection that November. One interview respondent reported that the municipal elections were a factor in the mediation, stating the belief that with the upcoming election, a number of the members of the city's team did not want to see the issues settled. The incumbents whose seats were involved were Mayor Charles Worley and Council members Joe Dunn, Holly Jones and Vice Mayor Carl Mumpower (who did not attend the mediation).

It is possible that the elections could have been an external factor that affected the decisions of some city officials, but most evidence does not point this way. Throughout the mediation, city representatives remained committed to their stated positions on the need for differential rates to control growth and to ease the burden on city water users who pay some of the highest rates in the state. This could have been in part because of upcoming elections and the desire to court voters who favor a slow-growth platform. However, since the city was being widely criticized for pulling out of the water agreement without enough discussion with the county, it seems the most politically prudent move for city politicians would have been to move to a compromise with the county and be able to campaign on their efforts at regional cooperation. This was not a priority of the city in the mediation.

As the city election campaigns unfolded, the water negotiations did not turn out to be a campaign issue (Barnard, 2007). Candidates did not spend a lot of time trying to score points on the water issues or how water affects the city's growth (Barnard, 2007). With the exception of Dunn, most of the City Council candidates had similar statements on the water issues: the city is right to end the water agreement and should not give in too easily to county demands, but should remain open to negotiations.

While the water mediation failure made it difficult for Worley to run on a platform of regional cooperation for the 2005 election as he had in the past, it probably was not the main reason he lost in the primaries. This was probably more a function of the general growing polarization between the left and right in Asheville than dissatisfaction over water issues. As a moderate Democrat, Worley was in the center and with more left-leaning voters moving to Asheville, the left-leaning candidate, Terry Bellamy, won the primary election and ultimately was elected mayor.

Politics, however, may have played a larger role with the state legislators and county commissioners. These elected officials were firmly unified in promoting the interests of county residents. In particular, they were steadfast against letting the city charge differential rates or use water as an annexation tool. While the county commissioners and local state legislators also represent city residents, these elected officials would not likely be rewarded for making concessions to the city on water issues. Instead, City Council members would most likely be credited for city gains, and county residents would blame legislators and county commissioners for giving ground to the city.

City-county electoral politics on the water issue were further aroused by a county public-relations campaign in the spring of 2005 prior to the mediation. County leaders scheduled a public forum on the future of the water system in March and ruffled the feathers of city leaders

by sending postcard invitations only to water-system customers outside Asheville. City officials criticized the county for failing to involve city residents and the City Council in the public information session (Barnard, March 23, 2005a). Not surprisingly, most of the speakers at the Forum supported the county's call for a regional water authority and voiced opposition to higher rates for water customers outside the Asheville city limits. (Barnard, March 23, 2005a)

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. Both sides were wed to their positions for various political reasons. This made it more difficult for either side to away from its positions during the mediation.

City Council Unity

The Asheville City Council operated with varying degrees of unity throughout the Water Agreement negotiations. Some interview respondents reported that City Council members were not unified in their objectives going into the mediation, which could have made it difficult for the city to react to new proposals or concessions made by the county. As one city respondent reported:

> "The City Council was not of one mind going into the meeting as to what they wanted. Also the mayor and the city manager did not make sure that we had a clear bottom line on our position. The county was clearer on their position, but they were not willing to move away from that at all. If we (the city) were clearer, the meeting would have gone better."

Another member of the city's team said that while the city had unanimity on the direction they were going, they had different views about how to get there as well as varying degrees of commitment as to what it would take to reach the end result. While the entire City Council was against the proposed Sullivan Act legislation and was committed to charging differential rates, there were differing views on annexation and on the formation an independent water authority. A minority of Council members expressed openness to the creation of an independent regional water authority throughout the negotiations, while the majority was firmly against the idea. On the subject of annexation, two council members were opposed in principle to annexation, while other council members strongly advocated for this right. These internal disagreements may have made it cumbersome for the city to negotiate with flexibility during the mediation.

In contrast, the county was consistently disciplined in showing a united front. If the Board of County Commissioners was having disagreements among its members, they worked it out in private and publicly presented unified statements and offers. This may have been an easier task for the county board which was a smaller, tightly knit group of five members. City Council was a larger group of seven, who seemed to have a wider range of interests and ideas about the disputed issues.

Still, looking at the water negotiations as something that took place over several years, it can be argued that the events leading up to the mediation were actually unifying for the City Council. While the Council was less united in the early years of the dispute, with two members often

agreeing with the Board of County Commissioners, a number of factors caused them to become more unified as a group during 2004.

A significant event was the unanimous vote by City Council in May 2004 to give the required one-year notice to terminate the water agreement and take back the water system from the Regional Water Authority in order to increase city revenues and control the water system. As one member of the city's team put it, "Once we decided to come out of the Water Authority, the City Council congealed."

With the public announcement of the city's intent to withdraw from the Water Authority, City Council became the target of public criticism. The announcement caught both the county and the public by surprise, especially since there was little previous discussion with the county and the public was not invited to the Council retreat. (Barnard, February 8, 2006) Following the city's announcement, local press and county residents accused the city of being hardheaded and arrogant, and many felt that their actions would be damaging to regional cooperation. (Editorial. Asheville Citizen-Times, June 20, 2004).

Some City Council members stated their concern that the county was releasing inflammatory information to create public sympathy. For instance, the county website posed the question "Have you heard that your water rates could triple after July 1, 2005?" City leaders accused the county of trying to confuse the water issue and upset citizens. (Cantley-Falk, February, 2005) While the city did not anticipate the intensity of the response to their announcement, it did compel them to clarify their positions. One city interview respondent suggested that the negative press was unifying for City Council as they worked to defend themselves and explain their positions to the press and citizens.

But probably the most significant unifying factor for City Council was their internal agreement that the city must gain control of its growth. The city was in the situation of being in a county with no zoning or comprehensive land-use planning. The county had a large degree of control over the city's growth decisions through their votes on the Water Authority Board. By gaining control of the water system, the city would gain more control of its growth and development.

In a series of Council retreats in 2004, City Council produced a Strategic Operating Plan which called for the city to "gain control of growth by disengaging from the existing Water Agreement." (Sarzynski, June, 2004) As one Council member described the negotiations leading up to the mediation:

> "The issue was about control. The city's view was that they needed to gain control of water system because growth was uncontrolled, the county wasn't zoned and they weren't willing to zone. The Water Authority had become more anti-city and was openly criticizing the city for land use decisions in meetings. …The [city and county] managers had things worked out to a point that it would be financially neutral, so this was not the big point. Control of the future was the big issue."

Said another:

> "Under the old agreement with a Water Authority and the Water Authority being anti-city, it resulted in the county controlling growth. If someone wanted to build, they got

> authority from the Water Authority. Unless the city did involuntary annexation, the county had complete control. The City Council felt like they weren't in control of their growth and they were getting complaints."

So even though City Council did disagree on some issues and members were discussing different options amongst themselves, they all had the same bottom line – regaining control of their water system, and through that their growth. This deep agreement was likely enough of a unifying force to allow City Council to create and respond to proposals. However, it also made it difficult for them to negotiate with enough flexibility to come to an agreement with the county.

Timing of the Mediation

The mediation session that took place in April 2005 was just one attempt by the parties to resolve a very long and protracted dispute. The timing of the mediation within the three years that the most recent version of this dispute was extant is worth considering. It is conceivable that had the parties agreed to mediation one or two years before, they might have been able to reach an amicable agreement.

As described in the background to this report, the parties had been in conflict off and on over the utility infrastructure since the 1930s, when the NC General Assembly passed the Sullivan Act and established the existing management arrangement between the city and county. The current dispute had its beginnings in 2001 when Henderson County filed a lawsuit against Asheville, the Water Authority, and Buncombe County over restrictions the city had placed on the deed to a 139-acre parcel that was to be transferred to Henderson County under an earlier agreement. Henderson County became involved in Buncombe-Asheville water issues in 1995 when it enabled the Water Authority to build an intake and treatment plant in northern Henderson County in exchange for land and voting membership. The agreement required all parties to "work in good faith" toward finding "mutually acceptable" terms for transferring the water system from Asheville to the Regional Water Authority (Barnard, July 30, 2003).

The bigger issue was whether the city and the two counties could agree to restructure the existing management agreement to create an autonomous Regional Water Authority that owns and manages the water infrastructure. Asheville, at that time, was leaning against it, not wanting to lose its assets and control over its infrastructure along with the revenues that it generates (Burda and Barnard, October 2, 2002). The County Commission Board Chair, Nathan Ramsey, noted at that time that some rate differential could probably be worked out in exchange for a restructured water authority.

In May 2003, the Buncombe Board of Commissioners blocked the Regional Water Authority's 2003-04 budget by refusing to approve it. At issue was a proposed capital improvements charge intended to fund repairs. The County Commission chair followed this vote with a restructuring proposal that met some of the city's important interests. However, negotiations were dropped until a year later in May 2004 when the Asheville City Council passed a resolution allowing city staff to renegotiate a new water agreement and authorized the mayor to give Buncombe County a one-year notice that it would terminate the water agreement. Included in the resolution to

terminate the agreement was the provision that negotiations would proceed with Buncombe County.

The city council's action to vote to terminate the water agreement had grown out of the visioning process undertaken during a series of Council retreats held the previous winter (Sarzynski, 2004). The Strategic Operating Plan, adopted through the visioning process calls for the city to, among other things, "gain control of growth by disengaging from the existing Water Agreement." (Sarzynski, 2004). Tasks identified in the plan relative to the water agreement included formulating a strategy to eliminate non-water issues from the water agreement, revising the structure to encourage voluntary annexation, and to complete restructuring prior to any annexation law revision.

The Council's action to annul the water agreement was unifying for the council – they voted 7-0 to pass the motion – but was counter to the direction that Buncombe County was headed with the water authority. The county voted in June to include a capital improvement fee in the water authority budget, with the Commission Chair, Nathan Ramsey, stating, "I have had discussions with Council members and have been assured that they will be fair with us. By acting on this capital fee this year, we are assuring the city that we want to help." (Bothwell, 2004).

From this point on, talks proceeded slowly at first then picked up steadily as the termination deadline approached. By February 2005 negotiation positions and offers were being made public by both the city and the county. The county began to harden its position against rate differentials while the city's position was somewhat more complex, incorporating a number of expense-relief options, including rate differentials, while maintaining control of the infrastructure. Another point of conflict was the annexation of property that received water extensions. The city wanted the right to annex for water while the county opposed it. See Table 1 for a listing of positions and offers from October 2002 through June 2005.

Table 1. Water Infrastructure Negotiation Positions and Offers, City of Asheville and Buncombe County

Date	Asheville's Positions & Offers	Buncombe's Positions & Offers
October '02		(Nathan Ramsey) "My personal view?" We would be willing to say a differential rate would be OK ... that water customers outside the city could be charged a 20-percent differential. You know, something that's reasonable. There's some that probably want the rate to be double. But as long as there's a reasonable differential – if it's part of a regional approach – then it would be my vote on the board to support something like that."
May 04	• Withdraw from Water Authority • Take back control of rate structure and water infrastructure	
Jan 13, 05	Newman memo proposes several scenarios involving: • Meaningful rate differentials. • Provision prohibiting using water revenues in general fund.	

Feb. 3 '05		• Establish a fully independent regional authority to which Asheville would transfer the water infrastructure; • No rate differentials • All water revenues go toward the maintenance and operation of water system • Establish a separate parks-and-recreation commission to which both the city and the county would cede many of their recreational facilities
Feb 23-25 '05	(Mayor Worley proposal - Newman does not agree with letter in entirety) • Considered concessions in several areas, including "a cap on outside-the-city rates," as well as provisions "that assure that water needs for economic growth in the county will not be arbitrarily denied" and "that limit transfers from the water fund to the city's general fund." • Expressed a willingness "to discuss placing the Mills River Water Treatment Plant into a regional water authority with a commitment to provide water at wholesale rates to other government entities engaged in distributing water." • The city would have full control over the older plants at the North Fork and Bee Tree reservoirs, which are much less expensive to operate.	• No rate differentials • No use of water to force annexation • "It is clear ... that the city is fixed on only one solution – to use water as a tool to force annexation on our citizens," A system where the city exercises complete control over who outside the city may receive water and in which the city can charge whatever rate for water to non-city residents it chooses, is not fair and is not something we will accept."
Mar 8, 05	(Newman Proposal) • Water system administered by the city or establish an independent authority. If independent authority is chosen, a majority of the appointments should be made by City Council. • Right to annex for water, but agree to strictly limit the use of the water system to coerce satellite annexations. • No diversion of water revenues to city's general fund beyond the 5 percent it receives under current agreement • County gains permanent title to facilities included in current water agreement (baseball stadium, Nature Center, Recreation Park). County assumes responsibility for Civic Center. • Differential water rates. Permanent caps established.	
Apr 26 '05 **Mediation**	• Withdraw from Water Authority • Willing to accept a Water Authority with a board of elected officials	• No rate differentials • Regional water authority • No use of water to force annexation

	• Take back control of rate structure and water infrastructure • Differential rates for city and county customers • Unrestricted annexation within 1 mile of city limits	• Offer to purchase Civic Center for $7.5 M
May '05	(Newman Proposal) • Retain ownership of water assets • Create a revamped water board with 4 city appointees and 3 county appointees • Differential water rates • Annexation off the table • County to provide $750K for Civic Center improvements, city to pay $500K annual operating costs	• Purchase Asheville's water assets • Merge water authority with the Metro Sewerage District • Adopt differential tap fees that would fund water- and sewer-line extensions during annexation (tap fees apply only if property is not annexed)
June 10 '05	(Dunn proposal, not supported by other council members) • No differential rates for at least 1 year • Annexation off the table • County to retain responsibility for maintaining recreational facilities • County to repeal state legislation	• Allow city to retain ownership (no regional authority) • No rate differentials • No use of water to force annexation • No tax equity payments to city
June 28 '05	(Sternberg compromise) • City withdraws notification to withdraw from the water authority • GA delegates withdraw Sullivan II and III • County make annual payment of $3M tax equity payment to city for 10 years	
June 28 '05	Open Meeting - Joint session discussing water issues before both boards passed respective 05-06 budgets: • No City Council support for Dunn's proposal. • Rate differentials important to offset high cost of service in low density areas outside city.	• Prefer Independent water authority but indicate willingness to support Dunn's proposal.

Sources: Asheville Citizen-Times, 2005; Asheville City Council, 2006; Barnard, 2002, 2003, 2004, 2005a, 2005b, 2005c, 2005d; Burda and Barnard, 2002; Buncombe County Board of Commissioners, 2006.

By the time the mediation took place in April 2005, the city and county had exchanged at least three major proposals. Offers were anchored around the parties' primary positions and small concessions were traded around less important issues. No significant overtures were made by either party that created value for both sides. The parties had reached impasse.

Interview respondents were nearly evenly split regarding whether the timing of the mediation was appropriate. Most (52 percent) believed the timing was just right, and 44 percent felt that the mediation was too late in the negotiations. One respondent believed that the mediation took place too soon. The few respondents who offered comments on this point felt that the issue should have been mediated before the legislative delegation became involved. Said one

respondent, "[i]n hindsight, it would have been ideal a month or a month-and-a-half earlier, due to legislative efforts."

Looking back at the record of positions and offers put on the table by city and county negotiators over the course of the current debate, 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 authority and the parties were still flexible on the key issues, it is likely that an agreement could have been reached. Prior to May 2004, emotions around this issue were somewhat more subdued, positions had not been staked out publicly, and scrutiny by the press was not as glaring. This could have enabled a mediation to occur within a public venue among members of both governing bodies and other key stakeholders, without the pressure for the parties to reach agreement in one meeting. With time, the parties could have engaged in more meaningful and creative solution-building, giving both sides more freedom to create value.

Legislative Intervention

In the interval between May 2004 when the city set the timetable to terminate the water agreement within the year, and June 2005 when it was set to expire, the local state legislative delegation entered the picture. After Asheville gave notice of its intention to dissolve the agreement, both County Commission Chairman Nathan Ramsey, and Mayor Worley approached legislators about the potential need for legislative action. The city was considering lobbying the legislature to repeal the Sullivan Act, and the county was interested in strengthening it. In late February 2005, Rep. Wilma Sherrill and Sen. Martin Nesbitt introduced a blank bill in the NC General Assembly titled "Asheville Water Authority." Blank bills place the issue on the legislative docket enabling legislators to craft a bill later in the session. In a message to city and county elected officials, Sherrill wrote that she hoped that the city and county leaders would be able to compromise and come to a fair and equitable agreement. "If not," she added, "then it is my belief that we have no choice but to step in" (Barnard, March 23, 2005).

Barely meeting the March 30 deadline for submitting bills in the NC House, representatives Bruce Goforth, Wilma Sherrill and Susan Fisher introduced two bills titled Sullivan Act II and Sullivan Act III. 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. Senator Nesbitt, while voicing support for their introduction, stated that they were not yet law and could be revised (Barnard, April 6, 2005).

Asheville Mayor Charles Worley said he was "surprised and disappointed" by the state legislators' decision to introduce the bills. City council members stated to the local media that that they felt the bills would hinder, rather than help, the chances of Asheville and Buncombe County reaching an agreement (Barnard, April 6, 2005).

When interview participants were asked whether any factors beyond the control of the participants in this mediation hindered their ability to reach agreement, all of the city respondents stated that the involvement of the legislative delegation was the primary external factor. Moreover, many city respondents felt that the county had acted in bad faith in this regard,

working behind the scenes to secure the legislation. Said one respondent, "the delegation had potentially promised the county a certain outcome and the county had no incentive to participate in mediation." From the county perspective, another respondent reported that "It was helpful to the process. Those local bills brought the city to the table and encouraged them to negotiate. It would have been like standing in front of the steamrollers if [we] hadn't had these laws."

It is clear that legislative intervention had a significant effect on the outcome of the mediation. The introduction of Sullivan Acts II and III, although not yet law, shifted the balance of power in the negotiation. The mere fact of the presence of these bills gave the county a fail safe option if negotiations with the city were not successful. There was no counterbalancing bill in the legislature in the city's favor that would repeal the Sullivan Act. Hence, just as the parties were attempting to settle the dispute through mediation, the negotiation context changed. The county had little incentive to concede on the issues that were potentially secured through legislative action. From their perspective, rate differentials and annexation requirements were no longer negotiable. Without an ally in the legislature, the city was negotiating from a weak position and was unable to persuade the county to concede on these issues. This negotiation dynamic is further explored under Hypothesis 3.

Discussion

In total, external influences – the provisions of the Open Meetings Law, the timing of the mediation, local politics, and legislative intervention – played an important role in setting the stage for an eventual impasse in the mediated negotiation session. Satisfying the requirements of the Open Meetings Law compromised the mediation process to some degree. The timing of the mediation with respect to parties' prior public statements and related actions placed a significant burden on the negotiators and the mediator as they went into mediation. Politics may have also influenced the outcome as well. These three factors, together with the intervention by the local legislative delegation, created significant challenges for a successful outcome to the mediated session. Removing any one of these influences would have significantly changed the dynamics of the mediation session.

Had Stephens been free to meet with the parties during the mediation he may have been able to avoid any misinterpretation of offers proposed by the other parties. More to the point, had all the council members and commissioners been able to meet face to face and speak freely and openly, to contemplate options and offers without concern for their what would be reported to their political supporters, the potential for success would certainly have improved.

Mediation is often thought of as a last resort as negotiators see the prospects for agreement slipping away. This notion of 'mediation as salvation' was certainly evident in the events leading up to this particular mediation session. However, Stephens, or any other mediator, might have been more successful had he been able to work with the parties prior to the city's announcement to withdraw from the water agreement. From that point onward, the issue became increasingly politicized, and fruitful negotiations became more difficult. Had Stephens intervened prior to May 2004, it is likely that the parties would have been willing to focus on interests and not their stated positions.

Timing is everything, and the fact that this issue was being discussed during the local election season also created a wrinkle in the negotiation fabric. Although local politics may have played a minor role, the effect of local political elections did come into play on this issue. Mainly, the water agreement became one more political issue in a political season, adding one more straw to the already heavy load.

Finally, the intervention by the local legislative delegation was the most significant of all external influences. The existence of Sullivan II and III, even though they had yet to go through legislative debate and approval, changed the dynamics of the discussions in a profound way. 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 made mediation of this problem an extremely difficult task.

Hypothesis 3 – No Viable Bargaining Range Existed Between Parties

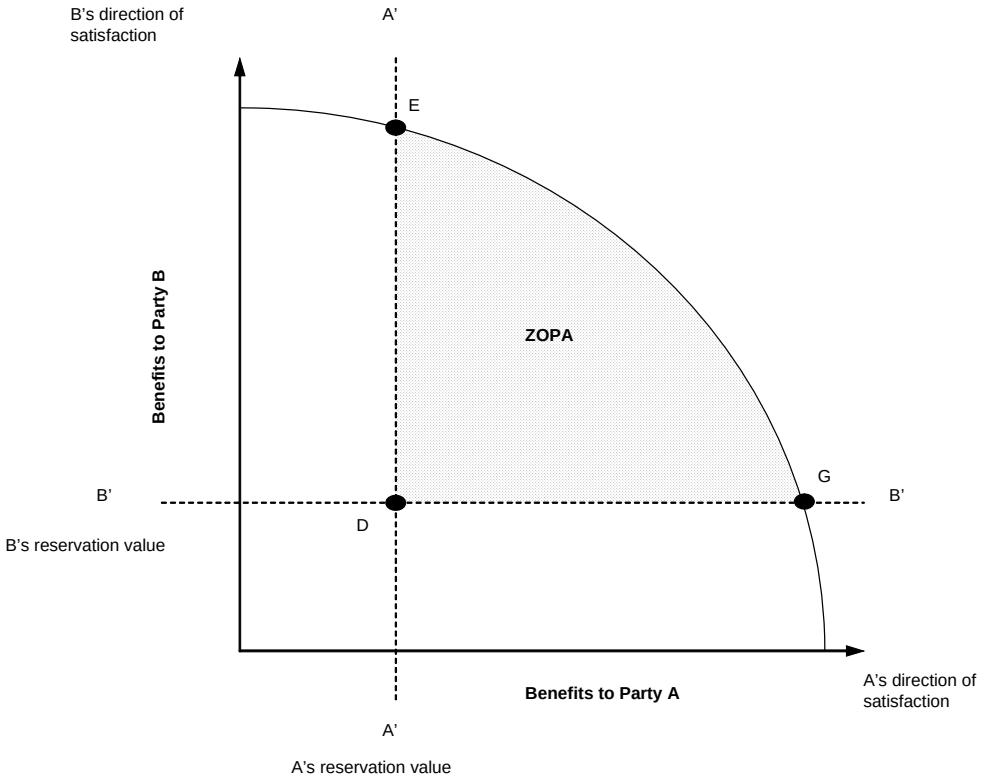
The third hypothesis of why the mediation failed addresses the nature of the negotiations and the behavior of the negotiators. Rather than focusing on the strategies and tactics of the mediator, or on the influence of external events and actors, we can turn our analysis on the negotiations themselves. In this view, the mediated session was just one of many negotiation sessions that had occurred since 2002 and continued past the April 2005 mediation.

The causes of negotiation failure presented in Hypothesis 3 are somewhat similar to those presented in Hypothesis 2, but are attributed less to external forces, and more to the actions and statements of the negotiating parties. This distinction between external influences and internal dynamics is admittedly inexact. As negotiations proceed over time, what was once an external influence can become internalized. For example, with the help of the state legislative delegation, the provisions of Sullivan Acts II and III became internalized as the county's bottom line. Nonetheless, this phenomenon is distinct enough to allow us to draw some conclusions.

The hypothesis examined here is that, for a number of reasons that can be attributed to circumstances surrounding the negotiators themselves, it is highly unlikely that the parties could have reached agreement at all during the mediated session.

In any bargaining situation, the negotiators' preference orderings should overlap such that some options exist that are preferable to both negotiators' best alternatives outside of the negotiation. The idea that parties negotiate to explore whether they can do better through negotiation than by acting on their **B**est **A**lternative **T**o a **N**egotiated **A**greement, or BATNA, is thoroughly described by Fisher and Ury (1991). This 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" or BATNAs (Raiffa, 2002). The ZOPA consists of the set of

Figure 1. The Zone of Possible Agreement (ZOPA) and reservation values.

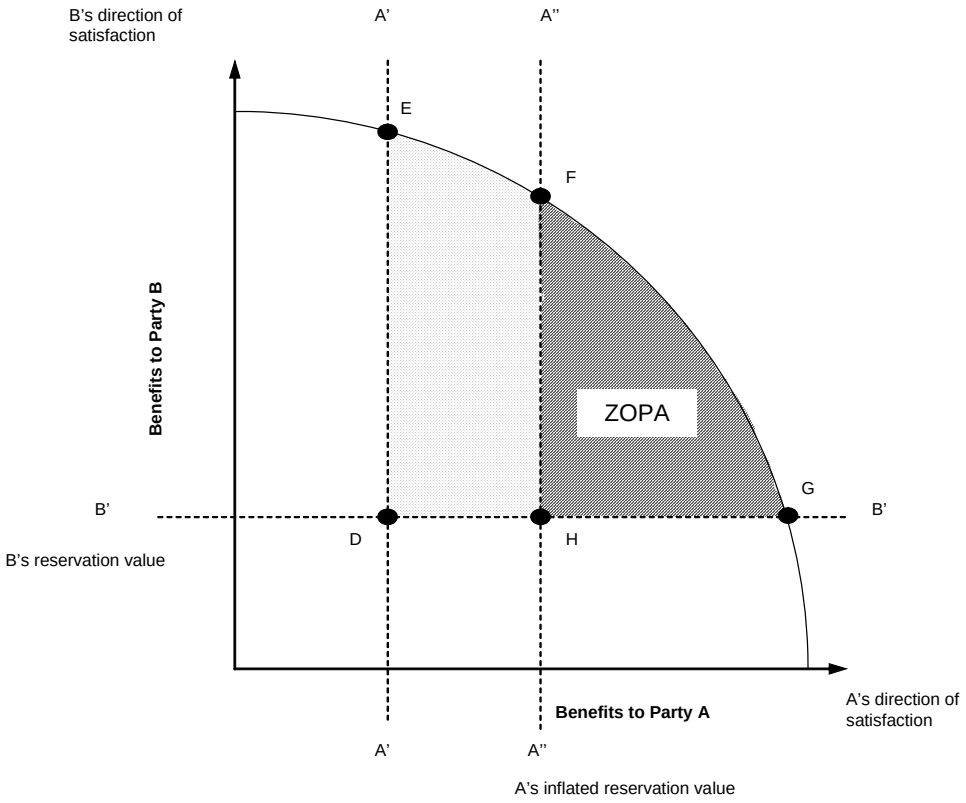


outcomes that provide all parties with greater benefit than their respective BATNAs. All things being equal, any option that puts both parties in the ZOPA is better than no agreement.

Figure 1 illustrates symbolically the benefits that can be gained by two negotiators A and B. Each stands to benefit in the negotiation if, by a series of offers and counter offers they steadily move in a northeasterly direction. The line A′A′ is Party A's reservation value, a graphical depiction of the benefits A would maintain if negotiations fail and she must resort to her BATNA. Party A needs a value east of A′A′ to gain more than she could otherwise accomplish with no negotiation. Party B needs a value north if his reservation value, B′B′. Negotiators A and B seek agreements depicted in the shaded region northeast of point D. Ideally, they want to find an agreement that gets them to line EG. The ZOPA is defined as the shaded region defined by DEG. The higher the reservation levels of each party, the smaller the ZOPA.

It is not always the case, however, that a negotiator's declared reservation value is the same as the value of his BATNA. The BATNA is a function of reality – it depicts what would actually be the negotiator's next best choice if the negotiations fail. The reservation value is a construct devised by the negotiator that defines his bottom line but doesn't necessarily reflect the benefits he may realize if the negotiation fails. A negotiator may overestimate the value of his BATNA and set his reservation value higher than what he could expect to gain outside of the negotiation.

Figure 2. The Zone of Possible Agreement (ZOPA) and A's inflated reservation value.



This is illustrated in Figure 2. While line A′A′ may be a reflection of the value of Negotiator A's BATNA, she has established a reservation value at line A″A″. The practical effect is that the zone of overlap where negotiators can find solutions they can accept has shrunk to the cross-hatched area designated by points HFG. Inflated reservation values are particularly pervasive in negotiations where the issues are highly publicized and politicized (Raiffa, 2002).

High Political Cost of Negotiating and Making Concessions

Negotiating carries a high political cost. To be successful, negotiations involve a delicate balancing of moves to create joint gains with moves to claim individual shares. The tactics used for claiming a larger part of the pie often interfere with the tactics for creating a larger pie for both parties to share. In tough, highly publicized negotiations between official representatives, negotiators must talk to the other side as well as to their constituencies, some of whom are counting on their elected official to stick to promises he may have made to get elected.

Moreover, there is a need to posture when negotiating in a fishbowl. In formal negotiations political leaders speak for the record with their constituencies as well as with each other.

Negotiators are forced to do a good deal of positional bargaining and are not free to engage in speculative brainstorming. Leaders may find it difficult to float ideas that may be unpopular among key constituencies, especially if they have a potential of being distorted by political opponents or the press. Some positions are considered nonnegotiable either because of longstanding tradition or political promises made in past campaigns.

All of this leads political leaders to posture, use positional bargaining and engage in excessive claiming, inflate their reservation value, and attempt to persuade the other side to make concessions. Value-claiming statements such as "There is not enough money you can offer that will make us change our minds" replace value-creating statements such as "How can we both get what is most important to each of us without hurting the other?"

The water negotiations suffered from such politicized circumstances. The pressures that political leaders were under to maintain their stated positions on growth and development swamped their ability to negotiate the specifics of a water agreement. The issues under discussion in the water system negotiations evolved as the negotiations became more public. In 2004, when negotiations were being handled by city and county staff, the discussions were focused primarily on the structure of a regional water authority and methods of achieving equity between the city and the county.

By February 2005, the negotiations had become highly publicized, with offers and counter offers being made in open letters in the Asheville papers. By this time, the central issue had coalesced around growth control. Reported one respondent about the turn of events during the negotiations, "The managers had it worked out to a point that it would be financially neutral so this was not the big point. Control of the future was the big issue. They had worked out the parks and recreation issue and most of the other issues."

The city made it clear in their 2004 Strategic Operating Plan that they wanted to gain control of growth by disengaging from the existing water agreement. Although the plan did not specify that annexation would follow water line extensions in unincorporated areas, this eventually became a position held by the city in the negotiations.

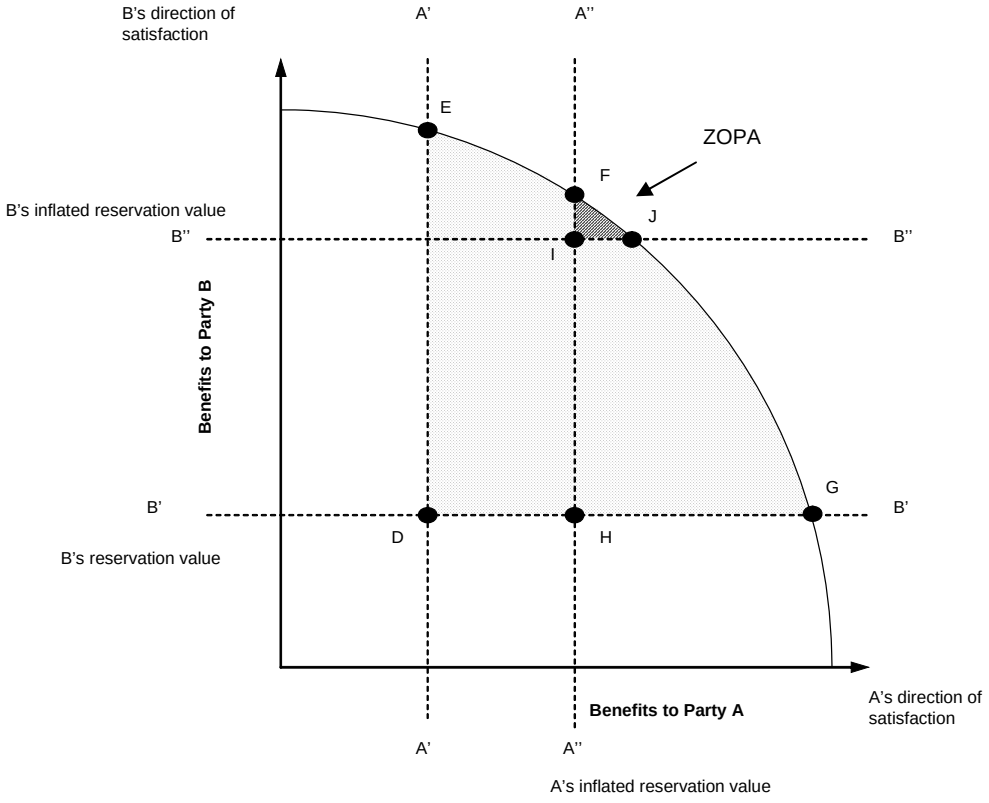
The city assessed its alternative to a negotiated agreement to be a lawsuit to overturn the Sullivan Act. They had looked carefully at the wording of the act and believed that it applied only to the early water-district lines that were still in place. Moreover, they doubted its constitutionality (Barnard, June 2, 2004). With this assessment of their BATNA, they entered the April mediation session clearly focused on achieving their growth control objectives.

In the days leading up to the April mediation session, 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 (Barnard, May 4, 2005). This created a rather strong BATNA for the county, increasing its reservation value and reducing the size of the ZOPA.

Symbolically, this is depicted in the graph in Figure 2 as the city shifting its reservation value from line A′A′ to line A″A″ and reducing the zone of possible agreement. The county's position

was directly opposite the city's with respect to annexing for water extensions. One could envision this position as a commensurate shift in the county's reservation value and might be depicted in Figure 3 as a northward shift of line B′B′ to B″B″ further restricting the ZOPA.

Figure 3. The effect of very high reservation values on the Zone of Possible Agreement.



Furthermore, given that the two positions for and against annexation for water are mutually exclusive, unless the negotiations produce some enticement for one or both parties to concede on this issue, there is no possibility for agreement. There is no ZOPA.

The timing of the legislation changed the dynamics of the negotiation as the parties went into mediation. Although there was still time to change the language of the legislation, the existence of Sullivan Acts II and III drastically reduced the zone of possible agreement. With their strong BATNA, the county 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. With no incentive to negotiate on the two issues that were most important to the city, the county kept its offers focused on compensation schemes to the city for providing water under a newly structured agreement. In the words of one city interview respondent, "The county commissioners thought that we were there to discuss and debate *financial* issues – money for the city government. So they kept asking "how much money will it take?" But the city's primary concern was relief for

city water rate payers, as well as growth and annexation management. We were missing what the other entities' key issue was."

Looking again at the implication by many interview respondents that Stephens should have exerted more pressure on the negotiators to settle, but in the light of the county's strengthened BATNA, it appears that this belief may have been misplaced. There are few scenarios where pressure from Stephens would have convinced the county, the more powerful of the two negotiating parties, to make a concession to the city on one of its key issues – rate differentiation or growth control. Even had the county made the first concessions, it would have had to be followed by a similar move by the city. Working against this scenario is the tendency of negotiators to devalue any concessions made by the other party. The city would have had to match the value of their concession to the value of the county's concession as the county negotiators perceived it to keep the negotiations moving.

The posturing and value claiming behavior of the negotiators together with unequal distribution of negotiating power by the two parties significantly reduced the probability that the city and county could have reached an agreement during the mediation session. It is difficult for political leaders to negotiate in a fishbowl and make the concessions necessary to maintain negotiating momentum and create opportunities for effective solutions.

Summary and Conclusions

We examined the failure of the City of Asheville / Buncombe County water system mediation from the perspective of three 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. Our conclusion is that there was very little that the mediator, Dr. John Stephens, director of the Public Disputes Program at the School of Government at UNC-Chapel Hill, could have done to get the two governing bodies to consensus.

Stephens generally adhered to mediation best practices as described by Moore (1986). From the negotiators' accounts of the mediation session, it is clear that Stephens followed, more or less, mediator best practices while in session with the negotiators. He worked to establish trust early in the discussions. He assisted the parties in identifying the broad topics and subtopics to be discussed, and established a sequence for discussion. He worked with the parties to uncover hidden interests as a way to help them broaden their thinking about potential options. And, he spent considerable time, but without success, in working with the parties to create value in the negotiation by generating new options that could satisfy both sides.

If he made any error in tactical judgment, it was that he allowed the parties to remain anchored in their previous discussions of the issues and did not push them in a new direction by going back to the basics – identifying and discussing interests and refocusing them on ways to satisfy those interests toward mutual gain.

The other trouble spot pointed out by the interview participants – inadvertent but inaccurate or incomplete disclosure of the mediation session by the negotiators to their full bodies – could have been dealt with more effectively. Although constrained from meeting with the full bodies by the requirements of North Carolina open meetings law, Stephens could have made sure that offers made at the negotiating table were documented on paper and deemed accurate and complete by both parties before sending them back to their boards for discussion and possible ratification.

But, all things considered, it is almost certain that Stephens' strategies, tactics and behavior did not prevent the parties from settling. Instead, a host of other factors effectively overwhelmed Stephens' mediation procedures.

The NC Open Meetings Law was created to ensure that the business of the people is conducted in public view. For mediation to work, parties must freely share information, engage in speculative brainstorming, and be willing to relent on strongly held positions and focus on the merits of the interests. All irony aside, the open meetings law makes it difficult for political leaders to engage in full, open, truthful exchange. When two governing bodies are negotiating, privacy is rarely an option. In order to meet the requirements of the NC Open Meetings Law and enable the negotiators to speak openly and confidentially, some degree of efficiency in the mediation process is sacrificed. This was certainly the case here. 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 water issue became increasingly politicized after 2004. Informal negotiations between the two governing bodies in 2002, 2003 and 2004 moved slowly and yielded little result. By the time Asheville chose to withdraw from the Water Authority, the positions of the two boards had galvanized, and further movement became even more difficult. Moreover, the City Council was not fully unified behind some of the more nuanced proposals on equity sharing and structuring the Water Authority. This exacerbated the differences among the parties going into the mediation, and made it more difficult for the city negotiators to offer proposals and respond to counter proposals.

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. 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 external pressures unique to this case and the fact that this issue was being negotiated among political bodies had the cumulative effect of diminishing the zone of potential agreement such that consensus may never have been possible. This hypothesis is strengthened by the fact negotiations continued between the two parties for two months after the mediation. The parties were unable to reach agreement and the issue ended in litigation.

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Appendix A
Interview Results

City of Asheville / Buncombe County
Water System Mediation Evaluation

INTERVIEW PROTOCOL

On April 26, 2005, John Stephens, of the Public Dispute Resolution Program at the UNC School of Government, lead a mediation session between the Asheville City Council and the Buncombe County Board of Commissioners. We are conducting an evaluation of the mediation and would like to ask you some questions.

The purpose of the research is to learn from this case to guide future mediation efforts on high profile issues affecting North Carolina local government. Your participation in this interview is completely voluntary.

All the information received from you by phone, including your name and any other identifying information will be strictly confidential and will be kept under lock and key. I will not identify you or use any information that would make it possible for anyone to identify you in any presentation or written reports about this study. We may use direct quotes from you, but these would only be quoted as coming from "a person" or a person of a certain label or title, like "one municipal official said."

We are contacting the elected officials and staff involved in the April 26, 2005 mediation effort. Thus there are about 17 people in this study.

The first few questions will focus on the mediation process itself. We want your perception of the process and what helped or hindered your ability to try to reach an agreement. The second set of questions focus on the behavior of the mediator, John Stephens. In this part of the interview, we will want your perception of John's skills as a mediator. Even if you had little direct contact with John, your views are important.

John will not see the individual responses. The individual interview information will only be available to me, Lynn Weller, and Dr. Steven Smutko of North Carolina State University.

This study is being paid for by the Environmental Finance Center at UNC at Chapel Hill.

You can also call Dr. Steven Smutko at 919-515-4683 with questions about the research study. All research on human volunteers is reviewed by a committee that works to protect your rights and welfare. If you have questions or concerns about your rights as a research subject you may contact, anonymously if you wish, the UNC at Chapel Hill Institutional Review Board at 919-966-3113 or by email to IRB_subjects@unc.edu.

TELEPHONE INTERVIEW
DATA COLLECTION

Total interviewed: 13
City team members interviewed: 7
County team members interviewed: 6

Open-ended responses have been removed from this document in order to protect the identity of interviewees.

1. First, about the mediation process itself. Please indicate the extent to which agreement was reached. **(Choose one from the list below)**

The term "AGREEMENT" applies to the written or unwritten agreement reached by participants in the process, including, proposals/recommendations, procedures, collaborative decisions to work together, or settlements. To answer this question, think about what it was that the group was charged to come up with at the end of this collaborative process.

1. *Agreement reached on all key issues*
2. *Agreement on most key issues*
3. *Agreement on some key issues*
4. *No agreement on any key issues, but progress was made towards addressing the issues or resolving the conflict.*
5. *No agreement, we ended the process without making much progress.* ***100%***

Number of Respondents: 12

Would you like to elaborate on your response?

Now, more about the process, you may recall that The City's mediation group included Mayor Worley, Brownie Newman and two city attorneys. The county's group included Vice Chairman David Gantt and three county attorneys. The two contingents met with the mediator and then reported back to their full boards. Both elected boards went into closed session for most of the day in order to hear confidentially from their negotiators. There were some changes throughout the day in which commissioners and city council members were in the private mediation sessions.

Please answer the following questions on a scale of 1 – 10.

2. Do you think that the structure of this process helped or hindered the mediation?
Scale: 1: completely hindered, 10: significantly helped

Please elaborate if you would like to clarify.

Number of Respondents: 12
Average score 5.2

	1 ***Hind-ered***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Helped***
City	17%	17%		17%	17%	17%		17%		
County	17%	17%						50%	17%	
Total	17%	17%		8%	8%	8%		33%		8%

3. Were all the participants that were needed part of the process? **Yes or No (1: Yes, 2: No)**
Please elaborate if you would like to clarify.

Number of Respondents: 12

	Yes	**No**
City	50%	50%
County	67%	33%
Total	58%	42%

4. If no, the extent to which the absence of participants had a negative impact on the collaborative process.
Scale: **1: no negative impact, 10: very negative impact**

Number of Respondents: 2
Average score: 9

5. Please rate the extent to which you felt that the roles of the parties involved in the mediation (mediator, attorneys, board representatives) were clear and appropriate to the situation.
Scale: 1: not appropriate, 10: completely appropriate

Number of Respondents: 11
Average score: 8.5

	1 ***Not appropriate***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Completely appropriate***
City							20%	20%	20%	40%
County				17%			17%		33%	33%
Total				4%			18%	9%	27%	36%

6. Was the timing of the mediation appropriate? ***Choose one***
Too soon Just right Too late (1: too soon, 2: just right, 3: too late)

Number of Respondents: 12

	Too Soon	***Just Right***	***Too Late***
City		50%	50%
County	17%	67%	17%
Total	4%	52%	44%

7. Please rate the extent to which you were confident that your objectives could be met using this process.
Scale: **1: not at all confident, 10: completely confident**

Number of Respondents: 12
Average score: 6.8

	1 ***Not at all confident***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Compl. con-fident***
City	17%			17%		17%	17%	17%	17%	
County				17%	17%				33%	33%
Total	1%			10%	6%	7%	9%	10%	33%	24%

8. To what extent were you were willing to work collaboratively with other participants in this process.
Scale: **1: not at all willing, 10: completely willing**

Number of Respondents: 12
Average score: 8.9

	1 ***Not at all willing***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Compl. willing***
City	17% *							17%	17%	50%
County									17%	83%
Total	1%							7%	17%	75%

****this person did not attend the mediation***

9. If you had not participated in this mediation, what do you think would have been the most likely process for the issues to be addressed or resolved? *Open- ended*

10. I'm going to read nine statements to you about your hopes for the mediation process. Respond to each statement with your level of agreement or disagreement:

1 is strongly disagree
2 is disagree
3 is neutral
4 is agree
5 is strongly agree.

Do you strongly disagree, disagree, feel neutral, agree, or strongly agree that…

a. The results of the mediation would better serve the interests of the participants.

Number of Respondents: 12
Average score: 4.5

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City	17%			17%	67%
County				17%	83%
Total	8%			17%	75%

b. The participants would be more likely to be able to work together in the future on matters related to this case or project.

Number of Respondents: 12
Average score: 4.4

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4 – Agree***	***5 – Strongly Agree***
City	17%			33%	50%
County				17%	83%
Total	8%			25%	67%

c. The results of the mediation would be less likely to be challenged.

Number of Respondents: 12
Average score: 4.1

	1- Strongly Disagree	***2 –Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City			33%	50%	17%
County			17%	33%	50%
Total			25%	42%	33%

d. The mediation would more effectively address the issues or resolved the conflict.

Number of Respondents: 12
Average score: 4.5

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4 – Agree***	***5 – Strongly Agree***
City			17%	17%	67%
County				50%	50%
Total			8%	33%	58%

e. The mediation would lead to a more informed public action/decision.

Number of Respondents: 12
Average score: 3.8

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City		17%	33%	33%	17%
County			17%	50%	33%
Total		8%	25%	42%	25%

f. The mediation would take less of our time.

Number of Respondents: 12
Average score: 3.7

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City			83%		17%
County			17%	67%	17%
Total			50%	33%	17%

g. The mediation would take more time, but the extra time would be worth the investment.

Number of Respondents: 12
Average score: 3.6

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City		17%	33%	17%	33%
County		33%		50%	17%
Total		25%	17%	33%	25%

h. The mediation in would be less expensive.

Number of Respondents: 12
Average score: 3.3

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City		17%	50%		33%
County	17%		67%		17%
Total	8%	8%	58%		25%

i. The mediation would be more expensive, but the extra costs would be worth the investment.

Number of Respondents: 12
Average score: 2.8

	1- Strongly Disagree	***2– Disagree***	***3- Neutral***	***4– Agree***	***5– Strongly Agree***
City		17%	67%		17%
County	17%	33%	33%	17%	
Total	8%	25%	50%	8%	8%

11. Do you think there were there any factors beyond the control of the participants in this mediation that HINDERED your ability to reach agreement? If **YES**, what were those factors? *Open-ended*

12. Do you think there were any factors beyond the control of the participants in this mediation that HELPED your ability to reach agreement? If **YES**, what were those factors? *Open-ended*

**** (This question added after the City interviews)**
Please rate the extent to which you feel that the legislation proposed by state lawmakers affected the mediation. (laws prohibiting differential rates and forbidding the city from using water revenues for anything except maintaining or improving the water system and prohibiting it from denying water lines to new customers as long as there's adequate capacity to serve them.) *** only one City person was asked this question**
Scale 1: not at all, 10: completely

Number of Respondents: 6
Average score: 5.8

	1 Not at all	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10 Compl.***
City										100%*
County	40%				20%			20%		20%
Total	33%				17%			17%		33%

13. Please rate the extent to which you feel that strong emotions negatively affected the mediation.
Scale: 1: not at all, 10: completely

Number of Respondents: 11
Average score: 7.4

	1 Not at all	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10 Compl.***
City	20%							80%		
County					17%		17%	33%		33%
Total	9%				9%		9%	55%		18%

14. Please rate the extent to which you feel that, when things got tense, the mediator was able to help you find ways to move forward constructively.
Scale 1: not at all helpful 10: completely helpful

Number of Respondents: 7
Average score: 4.6

	1 ***Not at all help-ful***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Compl. helpful***	***Did not answer***
City					33%		17%				50%
County		17%	17%		33%						33%
Total		9%	9%		36%		9%				36%

15. Was the mediator known by you or one of the other negotiating parties prior to his involvement in this dispute? ***Yes / No*** *(1: yes, 2: no)*

Number of Respondents: 12

	Yes	***No***
City	83%	17%
County	33%	67%
Total	58%	42%

16. Do you believe that the prior relationship with you or other parties helped or hindered the mediation?
Scale: 1: strongly hindered, 10: greatly helped

Number of Respondents: 8
Average score: 5.6

	1 ***Strongly hindered***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Greatly helped***	***Did not answer***
City					67%					17%	17%
County					50%						50%
Total					58%					8%	33%

The next set of questions are about the mediator. They focus on your confidence in his abilities and your views on how well he conducted the mediation. Your responses are important whether or not you participated in the private mediation sessions.

17. What was your level of participation in the private mediation sessions?

1. **Not at all**
2. **Participated some of the time**
3. **Participated a lot of the time**
4. **Participated in every private mediation session**

Number of Respondents: 12

	1– Not at all	***2– Some of time***	***3– A lot of time***	***4– Every private mediation session***
City	67%		17%	17%
County	67%			33%
Total	67%		8%	25%

18. Please rate the extent to which you were confident, AT THE START OF THE PROCESS, that the mediator was the appropriate mediator to guide the process.
Scale: 1: very skeptical, 10: highly confident

Number of Respondents: 12
Average score: 8.3

	1 ***Very skeptical***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Highly confident***
City							17%	17%	17%	50%
County					17%		50%		17%	17%
Total					8%		33%	8%	17%	33%

19. Please rate the extent to which you were confident, AT THE COMPLETION OF THE PROCESS, that the mediator was the appropriate mediator to guide the process.
Scale: 1: very skeptical, 10: highly confident

Number of Respondents: 11
Average score: 4.5

	1 ***Very skeptical***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Highly confident***
City	20%	20%			20%			20%		20%
County	33%		17%		17%	17%		17%		
Total	27%	9%	9%		18%	9%		18%		9%

20. Please rate the extent to which you feel the mediator was prepared prior to the time the mediation began.

Number of Respondents: 10
Average score: 8.3

Scale: 1: not at all prepared, 10: very prepared

	1 ***Not at all prepared***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Very prepared***
City						20%			20%	60%
County				20%				60%		20%
Total				10%		10%		30%	10%	40%

21. Please rate the extent to which the mediator's knowledge or lack of knowledge of the issues hindered or helped the process.
Scale: 1: hindered the process, 10: helped the process

Number of Respondents: 10
Average score 5.2

	1 ***Hindered process***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Helped process***	***Did not answer***
City					40%	20%		20%		20%	
County		33%		17%	33%						17%
Total		18%		9%	36%	9%		9%		9%	9%

22. Do you believe that the mediator made sure that the views and perspectives of all participants were heard and addressed?
Scale: 1: strongly disagree, 10: strongly agree

Number of Respondents: 10
Average score: 6.0

	1 ***Strongly disagree***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Strongly agree***	***Did not answer***
City					20%		20%	20%	20%	20%	
County	33%	17%					17%			17%	17%
Total	18%	9%			9%		18%	9%	9%	18%	9%

23. Do you believe that the mediator dealt with you in a fair and unbiased manner?
Scale: 1: strongly disagree, 10: strongly agree

Number of Respondents: 11
Average score: 9

	1 ***Strongly disagree***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Strongly agree***
City				20%				20%		60%
County								17%	17%	67%
Total				9%				18%	9%	64%

24. Do you believe that the mediator made sure that no one dominated the process or other participants?
Scale: 1: strongly disagree, 10: strongly agree

Number of Respondents: 9
Average score: 7.6

	1 ***Strongly disagree***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Strongly agree***	***Did not answer***
City					40%		20%			40%	
County					17%			33%		17%	33%
Total					30%		10%	20%		30%	10%

25. Do you believe that the ground rules used to guide the mediation process were appropriate for the situation?
Scale: 1: strongly disagree, 10: strongly agree

Number of Respondents: 11
Average score: 7.3

	1 ***Strongly Disagree***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Strongly Agree***
City					20%		20%	20%		40%
County			17%	17%		17%		17%	17%	17%
Total			9%	9%	9%	9%	9%	18%	9%	27%

26. Please rate the extent to which the mediator's interventions were either too light (he should have put more pressure on the parties to settle), or too heavy (he put too much pressure on the parties to settle) or about right.
Scale: 1: too light, 10: too heavy

Number of Respondents: 11
Average score: 2.7

	1 ***Too light***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Too heavy***
City	20%		40%	20%	20%					
County	50%	17%	17%	17%						
Total	36%	9%	27%	18%	9%					

27. Do you believe that the mediator's affiliation with the UNC School of Government was a positive attribute?
Scale: 1: strongly disagree, 10: strongly agree

Number of Respondents: 11
Average score: 9.3

	1 ***Strongly Disagree***	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***	***10*** ***Strongly Agree***
City								40%	20%	40%
County								17%	17%	67%
Total								27%	18%	55%

28. Under what circumstances would you be willing to try mediation again?
Open-ended

[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.
[ii] There were breaks during the approximate 8:30 a.m. to 11:30 p.m. span of the mediation.
[iii] Act of April 28, 1933, ch. 399, 1933 N.C. Sess. Laws (Pub. Loc.) 376..
[iv] Resolution No. 04-122 - Resolution to Amend or Terminate the Restated and Amended Supplemental Water Agreement - adopted at the May 25, 2004 meeting. Source: http://www.ashevillenc.gov/government/mayor_city_council/city_council/05-25-04.htm
[v] N.C. Gen. Stat. § 143-318.11 (a) 3.
[vi] Sullivan II is N.C. Sess. Law ch. 2005-139 (House Bill 1064). Sullivan III is N.C. Sess. Law ch. 2005-140 (House Bill 1065).
[vii] City of Asheville v. State, 665 S.E.2d 103.
[viii] N.C. Gen. Stat. § 143-318.11.