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# Fairness as Compassion: Towards a Less Unfair Facility Siting Policy\*

Benjamin Davy\*\*

## Orthodox Siting Policy

The European Court of Human Rights' judgment in *López Ostra v. Spain*<sup>1</sup> captured the essence of orthodox siting policy when it ruled that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole." Mrs. Gregoria López Ostra had been forced to move away from her residence in Lorca because of the pollution and "pestilential smell" caused by a waste treatment plant that had commenced operation only twelve meters from her home. Although the operator had failed to obtain a permit, the authorities did not stop the illegal activity. After all, the facility had been sited on municipal land and was subsidized by the government "to solve a serious pollution problem in Lorca due to the concentration of tanneries."

The European Court of Human Rights, however, found that the government had overstepped its discretion to promote the public interest. The right of individuals to enjoy their private lives and homes, protected under Article 8 of the European Convention for the Protection of Human Rights (1957), comprises the right to protection from severe environmental pollution. Although the government may allow industrial developments to the extent necessary in a democratic society, it must not completely relinquish the legally protected interests of its citizens. Therefore, the Court ruled that the Kingdom of Spain violated Mrs. López Ostra's rights, because it "did not succeed in striking a fair balance between the interest of the town's economic well-being — that of having a waste-treatment plant — and the applicant's

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<sup>1</sup> December 9, 1994, Series A, No. 303-C.

effective enjoyment of her right to respect for her home and her private and family life.”

Orthodox siting policy is adamant that nobody be exposed to “pestilential smell” or other severe pollution caused by a hazardous waste facility. The facts in *López Ostra* provide a good description of bad siting policy. A waste treatment plant must not be located too close to homes, especially if it malfunctions and emits waves of hydrogen sulphide (characteristic rotten-egg smell), and the government must not support such an abominable development. Conspicuously unfair, it amounts to violation of civil rights and liberties.

Yet, good “orthodox” siting policy requires much more than simply preventing abominable developments. It considers economic progress, environmental protection and a wide variety of other public and private concerns to balance competing interests. The overarching principle of orthodox siting policy is to maximize the general welfare by efficiently accounting for all costs and benefits involved in the siting of a hazardous waste facility. Efficient pollution control, use of land or business operation all manifest the same spirit of efficiency. Orthodox siting policy considers the siting of a hazardous waste facility as a *technical* problem that has to be addressed and solved by experts, such as managers, engineers, planners or regulators. Accordingly, the manifold requirements for the siting of a hazardous waste facility can be consolidated into four criteria: profitability, functionality, safety and legality. A development of a hazardous waste facility must yield a profit to the developer (to avoid financial disaster). A facility must perform as it is expected to, namely treat hazardous waste so as to render it less hazardous or non-hazardous (to avoid technical failure). The development must be carried out in a way that human health and the environment are protected from risk (or it would be dangerous). Finally, the development of a hazardous waste facility must comply with all standards and permit requirements to avoid illegality.

The four criteria of orthodox siting policy can be traced back to the utilitarian underpinnings of private property, technology-based economic growth ideology, land use regulation under the police power, and the mainstream of environmental protection and hazardous waste management. They distinctly influenced, for example, the 1972 Stockholm Declaration of the United Nations Conference on the

Environment, the 1976 U.S. Resource Conservation and Recovery Act or the 1985 EC Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment. These and similar sources of international and domestic law presuppose that commercial hazardous waste treatment may be a lucrative business and an essential component of economic infrastructure. It is also assumed, however, that the development of a hazardous waste facility must be closely scrutinized and controlled to protect human health, the environment and other public interests.

### The Social Limits to Orthodox Siting

In many countries, the siting of hazardous waste facilities and other locally unwanted land uses (LULUs) is delayed or obstructed by “not in my back yard” (NIMBY) opposition. Potential host communities, local residents or environmental activists often resist the development of noxious facilities, even if the proposed facilities are — according to orthodox criteria — in a broad sense efficient.<sup>2</sup> Although industry and regulators had ample opportunity over the past fifteen years to consider the shortcomings of orthodox siting, only little has been achieved in coming to terms with LULU and NIMBY disputes. Surprisingly, developers and governments are still rather dumbfounded by opposition to profitable, functional, safe and legal developments. Endless courtroom battles or spectacular displays of citizens activism and civil disobedience clearly indicate the social limits to orthodox siting policy. Moreover, the U.S. environmental justice movement flags the disturbing consequences of orthodox siting policy, namely the disproportional burden of poor and minority communities which are encumbered with hazardous waste facilities and similar LULUs.<sup>3</sup>

Frequently, orthodox siting policy is not only baffled by public opposition, but also chooses the wrong remedies for overcoming the NIMBY syndrome. These remedies also address siting disputes as *technical* problems that require efficient solutions. The logic behind

<sup>2</sup> Frank J. Popper, *Siting LULUs*, 47 *Planning* 12 (1981) and Frank J. Popper, *The Great LULU Trading Game*, 58 *Planning* 15 (1992).

<sup>3</sup> Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (2d ed. 1994) and Jim Schwab, *Deeper Shades of Green: The Rise of Blue-Collar and Minority Environmentalism in America* (1994).

orthodox reactions considers public opposition either as an obstacle for necessary developments or as a call for stricter regulation: If local communities resist, curb their opportunities to impede LULUs; if the public complains about risk, issue stricter safety regulations! Siting disputes are only exacerbated, however, by preempting local planning powers, increasing the regulatory pressure on developers or streamlining the formal permit proceedings.

In sharp contrast, a considerable wealth of literature challenges the orthodox siting policy. It advises to address public opposition to the siting of hazardous waste facilities completely different:

- The design of risk assessment should be aware of differences in the risk perception of experts and laypersons and must account for the problems of the social amplification of risks.<sup>4</sup>
- Developers and regulators should particularly pay attention to establishing trust between all stakeholders to avoid the detrimental effects of mutual distrust.<sup>5</sup>
- The social costs for host communities and its residents, caused by the development of a hazardous waste facility, should be offset by financial compensation or risk substitution.<sup>6</sup>
- With respect to potential host communities, siting should be voluntary and abstain from coercing communities to host LULUs.<sup>7</sup>

<sup>4</sup> Baruch Fischhoff et al., *How Safe is Safe Enough? A Psychometric Study of Attitudes Towards Technological Risks and Benefits*, 9 *Policy Sci.* 127 (1978); Roger E. Kasperson, *Six Propositions on Public Participation and Their Relevance for Risk Communication*, 6 *Risk Anal.* 275 (1986); Roger E. Kasperson et al., *The Social Amplification of Risk: A Conceptual Framework*, 8 *Risk Anal.* 177 (1988); Ortwin Renn et al., *The Social Amplification of Risk: Theoretical Foundations and Empirical Applications*, 48 *J. Soc. Issues* 137 (1992) and Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, *Why Study Risk Perception?* 2 *Risk Anal.* 83 (1982).

<sup>5</sup> Robin Bidwell et al., *Public Perceptions and Scientific Uncertainty: The Management of Risky Decisions*, 7 *Env'l Impact Assess. Rev.* 5 (1987); James Flynn et al., *Trust as a Determinant of Opposition to a High-Level Radioactive Waste Repository: Analysis of a Structural Model*, 12 *Risk Anal.* 417 (1992); Roger E. Kasperson, Dominic Golding & Seth Tuler, *Social Distrust as a Factor in Siting Hazardous Facilities and Communicating Risks*, 48 *J. Soc. Issues* 161 (1992); Paul Slovic, James H. Flynn & Mark Layman, *Perceived Risk, Trust, and the Politics of Nuclear Waste*, 255 *Science* 1603 (1991) and Paul Slovic, *Perceived Risk, Trust, and Democracy*, 13 *Risk Anal.* 675 (1993).

<sup>6</sup> David Morell & Christopher Magorian, *Siting Hazardous Waste Facilities: Local Opposition and the Myth of Preemption* (1982); Michael O'Hare, Lawrence Bacow & Debra Sanderson, *Facility Siting and Public Opposition* (1983) and Kent E. Portney, *Siting Hazardous Waste Treatment Facilities: The NIMBY Syndrome* (1991).

<sup>7</sup> Michael B. Gerrard, *Whose Backyard, Whose Fairness? Fear and Fairness in*

- Siting disputes should not be addressed in terms of legal conflict resolution, but as a challenge for negotiating mutually beneficial agreements and for consensus building.<sup>8</sup>
- Siting disputes should not be considered as locally confined skirmishes, but as a *conflict between political cultures* that struggle over the definition of risk, pollution and fairness.<sup>9</sup>

The common denominator of this literature is the conviction that the siting of a hazardous waste facility does not only entail technical, but specific *social* questions. Accordingly, a resolution of siting disputes cannot be expected from a better treatment technology (“the perfect incinerator”) or increased permit conditions (“the perfect regulation”). A resolution, or at least an improvement, can only be expected from addressing the social issues involved in LULU and NIMBY disputes. This aspect is emphasized by *The Facility Siting Credo*, a concise guideline for finding alternatives to orthodox siting policy.<sup>10</sup>

### Fairness as Compassion

Addressing hazardous waste facility siting as a social rather than a technical problem reveals several important aspects that are concealed by absorption with efficiency. The environmental impact statements or expert opinions about facility design become less important than the fact that the stakeholders (developers, regulators, opponents) differ in

Toxic and Nuclear Waste Siting (1994) and Barry G. Rabe, Beyond NIMBY: Hazardous Waste Siting in Canada and the United States (1994).

<sup>8</sup> Bryan H. Massam, *The Right Place: Shared Responsibility and the Location of Public Facilities* (1993); Lawrence E. Susskind, *The Siting Puzzle: Balancing Economic and Environmental Losses and Gains*, 5 *Env'l Impact Assess. Rev.* 157 (1985); Lawrence Susskind & Jeffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (1987) and Lawrence Susskind & David Laws, *Siting Solid Waste Facilities in the United States*, in *Handbook of Solid Waste Management* (Frank Kreith, ed. 1994).

<sup>9</sup> Karl Dake, *Myths of Nature: Culture and the Social Construction of Risk*, 48 *J. Soc. Issues* 21 (1992); Mary Douglas & Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (1983); Steve Rayner & Robin Cantor, *How Fair is Safe Enough? The Cultural Approach to Societal Technology Choice*, 7 *Risk Anal.* 3 (1987); Michiel Schwarz & Michael Thompson, *Divided We Stand. Redefining Politics, Technology and Social Choice* (1990).

<sup>10</sup> Howard Kunreuther, Kevin Fitzgerald & Thomas D. Aarts, *Siting Noxious Facilities: A Test of the Facility Siting Credo*, 13 *Risk Anal.* 301 (1993); Lawrence Susskind, *A Negotiation Credo for Controversial Siting Disputes*, 1990 *Negotiation J.* 309 and David Laws & Lawrence Susskind, *Changing Perspectives on the Facility Siting Process*, 1 *Maine Policy Rev.* 29 (1991).

their *perceptions* of risks, benefits and burdens. The long-term relationships between the stakeholders gain more relevance than the short-term result of their interactions. The overall efficiency of a project grows less significant than the *distribution* of advantages and disadvantages caused by a project or its obstruction.

Orthodox siting policy is poorly equipped to address diverse perceptions, long-term relationships or distributive effects. Propaganda disguised as “community outreach,” perfunctory public hearings or trash-for-jobs promises cannot mitigate a fundamental lack of compassion for victims of “efficient” siting. Developers and regulators often fail to comprehend the sharp sense of injustice that energizes opposition to a LULU. Opponents consider themselves as victims of injustice for different reasons. The development may defile their sense of purity. They may feel aggrieved because their community has been singled out to bear the brunt of hazardous waste management. They may reject technology-based waste treatment as a whole, e.g., because it only stimulates the generation of more waste. Yet whatever the reasons, as long as the sharp sensation of injustice remains, it produces considerable political energy. Judith Shklar clearly pointed out that social arrangements are “unjust unless we take the victim’s view into full account and give her voice its full weight. Anything less is not only unfair, it is also politically dangerous.”<sup>11</sup>

Siting policy must not only be aware of efficiency but also account for grievances of losers of the siting game. Fairness as compassion does not yield to anyone who complains about having been victimized, simply because signs of distress are displayed. Nor does it take protests lightly. Unfortunately, many developers and regulators neglect signs of public opposition, especially in its early stages, when they dismiss objections as “irrational” or “hysterical.” Ignoring the outcry against injustice leads to their own demise, however. LULU and NIMBY disputes drastically change the makeup of developments which may look “efficient” from the perspective of the drawing board. I have yet to see the project of a hazardous waste facility that, after becoming entangled in public controversy, remained profitable, functional, safe and legal.

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<sup>11</sup> Judith N. Shklar, *The Faces of Injustice* 126 (1990).

### Essential Injustice

If siting stakeholders suffer from injustice, why not redress their plight by treating them equitably? It is often assumed that injustice can be remedied by dispensing justice. By complying with a certain standard of justice or fairness, a person can avoid being unjust or unfair to others. From this point of view, siting a hazardous waste facility would have to comply with a presupposed standard of justice and fairness. But what standard should be selected? Fairness as compassion — a heightened awareness for whomever is the victim of a particular siting policy — renders a disturbing answer to this question. The stakeholders in LULU and NIMBY disputes usually assume *different* concepts of justice. A result of the siting process that appears to be blatantly unjust to some can appear entirely just to others. Therefore, modifications of the siting process may not necessarily render a more just or more fair result (but only a differently unfair result).

To describe the predicament, three types of justice can be distinguished, namely libertarian, utilitarian and social. *Libertarian justice* assumes that social arrangements have to provide for unrestrained interactions between free individuals. Friedrich von Hayek's "catallaxy" (a spontaneous order produced by the market) or Robert Nozick's concept of a minimal state illustrate the idea of libertarian justice that directs to let the strongest prevail in a free competition. Utilitarian justice assumes that social arrangements have to provide for the greatest happiness of the greatest number. Jeremy Bentham's and John Stuart Mill's utility principle is a predecessor of the modern administrative state, equipped with cost-benefit-analysis and regulatory powers to protect and promote the public best. *Social justice* assumes that social arrangements must cater to the destitute. John Rawls' difference principle, which allows inequality only to the extent as it is beneficial to the least advantaged, is the most popular contemporary example for social justice.

The following epitomize the three concepts.

- Justice is what is beneficial to the strong, or: *Maximize liberty!*
- Justice is what is beneficial to the most, or: *Maximize happiness!*
- Justice is what is beneficial to the poor, or: *Minimize pain!*

In siting, these three notions often determine how stakeholders address risk, environmental impact assessments, permit conditions, citizens'



activism, economic progress or other issues pertaining to siting a hazardous waste facility. From a highly generalizing point of view, stakeholders expect justice to be done as follows: Developers assume a standard of libertarian justice and expect as little restraint as possible to pursue developments competitively. Regulators assume a standard of utilitarian justice and try to keep the broader picture of environmental protection *and* hazardous waste management in mind. Opponents, who regard themselves as victims of a powerful industrial-regulatory complex, assume a standard of social justice and expect protection from being exploited for the developer's profit or the public interest.

The coexistence of rival notions of justice puts considerable strain on social arrangements of all kinds. Compared with the large variety of social conflicts, LULU and NIMBY disputes actually are innocuous examples of collision between rival notions of justice. Yet they are, as Popper put it, a metaphor for a country's "incapacity to govern itself assertively or productively, much less fairly or trustfully."<sup>12</sup>

The problem of the coexistence of different concepts of justice cannot be solved by identifying and pursuing the "right" concept of justice. The problem is to cope with the consequences of any choice of a particular concept of justice. Assume, for example, that the standard of social justice is adopted as a blueprint for the design of a fair siting policy. This may ensue a BANANA (Build Absolutely Nothing Anywhere Near Anybody) approach to facility siting. Although this consequence will be welcomed by environmentalists or environmental justice advocates, it will hardly be appreciated by industry, regulators or consumers. The same is true, *mutatis mutandi*, for utilitarian justice (the prevalent approach to facility siting) or libertarian justice (which would lead to aggressive deregulation).

In other words, the coexistence of rival notions of justice renders the adoption of any standard of justice (whether libertarian, utilitarian or social justice) vulnerable to critiques of those whose notion of justice is, at the same time, rejected. This phenomenon can be called "essential injustice."<sup>13</sup> Fairness as compassion cannot speak to essential injustice

<sup>12</sup> Popper (1992), *supra* note 2, at 17.

<sup>13</sup> Benjamin Davy, *Essential Injustice: When Legal Institutions Fail to Resolve Environmental and Land Use Disputes*, *forthcoming*.

by dispensing justice pursuant to the violated concept of justice. This would only enrage the beneficiaries of other concepts of justice who, in turn, would be victimized by this remedy. Social conflicts rarely can be settled by applying a presupposed standard for the obvious reason that "justice" itself is a very controversial topic. Yet if "justice for all" cannot be the goal of facility siting, what else could be done to address issues of justice and fairness in environmental and land use policy?

### Avoiding Injustice

Fairness as compassion does not advise to pick one group of stakeholders in the siting arena and turn them into the champions of a sweeping campaign for justice. Rather, it advises to consider each of the different notions of justice that are involved in LULU and NIMBY disputes and to eliminate and avoid injustice to the extent possible. Whenever injustice cannot be avoided, it urges not to dismiss the complaints of its victims as "irrelevant" or "unfortunate," but to aggressively search for ways to cope with their anguish.

Much too often, orthodox siting policy compels the losers of a siting game (whether developers, regulators or opponents) to accept the results as *causa finita*. However, defeated stakeholders cannot easily accept that the case is settled. Developers whose profit margins dwindle away if their permit applications are denied cannot always turn to more profitable endeavors. The scars inflicted upon administrative agency personnel, traumatized by citizens' activism in public hearings, do not heal quickly. The citizens who fought against the siting of a hazardous waste facility cannot return to their normal lives, once a permit has been granted, and rest assured that the plant in their backyard is "safe" and "legal." The point in question is not, however, that the respective winners of a siting dispute should shake hand with the losers and say: "We're sorry... and, by the way, you've been jolly good sports!" (although shaking hands and apologizing sometimes can prevent the escalation of a siting dispute). The point in question is that the predominant framework for siting actually encourages to isolate the losers and to leave them alone in their disappointment about the mishaps of justice. Neither the development nor the defeat of a controversial development can be considered as success, as long as diverse perceptions, long-term relationships or distributive effects are

not thoroughly accounted for. Fairness as compassion is not a moral or ethical category. It is a prerequisite for maintaining the social stability required for efficient facility siting. It is not satisfied with consolation prizes that are awarded to lull the victims of injustice, but it demands to acknowledge that “essential injustice” requires full attention for diverse perceptions, the relationships between stakeholders and the distributive impact of siting efforts.

Fully addressing the problem of essential injustice in hazardous waste facility siting has to employ a two-tier approach towards avoiding injustice (of whatever flavor).

First, all social arrangements must be abandoned which entrench facility siting in a way that systematically disadvantages one group of stakeholders and hampers with their opportunity to accomplish justice. In many legal systems, hazardous waste facility siting is regulated in a way that critically disadvantages local communities and their residents. The infamous NIMBY syndrome is a consequence of the firm commitment to utilitarian justice and the goal of orthodox siting policy to promote profitable, functional, safe and legal projects.

Second, the adversarial and result-oriented framework for facility siting should be replaced with a system that encourages not only to search for a fair balance of interests, but also to accomplish a fair balance between different justices, different rationalities. This system would combine a large number of needful elements which are adopted for their aptitude to consider the needs and preferences of differently rational stakeholders. Suggestions like *The Facility Siting Credo* which emphasize the importance of consensus-building offer valuable advice as to how vast accumulations of injustice can be avoided through a process that accounts for the social tensions involved in the siting of a hazardous waste facility.

