

FRIDAY SESSION: 1:15–2:30 PM

Getting Past No: Strategies for Resolving Land Use Disputes

1:15—2:30 p.m.

Friday, March 10, 2006

Sturm College of Law/Frank J. Ricketson Law Building

An examination of the use of negotiation and mediation to prevent and resolve land use disputes, and considers the degree to which these techniques are being integrated into land use decision-making processes. The session will include one or more case studies, a report on two national studies, and time to consider how these approaches can work in your community.

(Please note that there is a follow-up clinic to this session at 2:45 p.m. in Room 125.)

Moderator/ **Matthew McKinney**

Speaker: Director
University of Montana Public Policy Institute
Helena, Montana

Panelists: **Barbara Green, Esq.**
Partner
Sullivan Green Seavy
Boulder, Colorado


Ric Richardson
Professor of Planning
University of New Mexico
Albuquerque, New Mexico




Integrating Collaborative Methods into Land-use Planning

Matthew McKinney
Ric Richardson

Presented to the
Rocky Mountain Land Use Institute
March 2006





- The challenge/goal
 - We know negotiation & mediation works on a case-by-case basis
 - Move beyond ad hoc applications and design systems to deal with an inevitable stream of disputes
 - Use collaborative methods as the forum of first resort, rather than a forum of last resort
- Ongoing research
 - Develop a theoretical framework
 - Evaluate existing programs
 - Offer recommendations





Theoretical Framework

- Determine who has more “power”
 - Impose decisions and costs on others.
 - Elections, voting, war.
- Determine who is “right”
 - An independent, legitimate, fair standard.
 - Some rights formalized in law and contract.
 - Others are socially accepted standards of behavior (reciprocity, precedent, equality, and seniority).
- Reconcile “interests”




Which Approach is Best?



- Apply the following criteria:
 - Satisfaction with the outcomes
 - Sustainability of the outcomes
 - Transactions costs
 - Impact on relationships

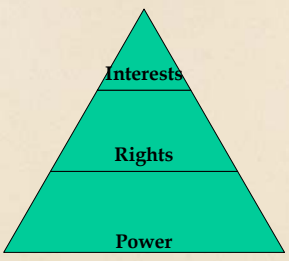
Proposition


Reconciling interests:


1. Tends to be less costly than ...
2. Determining who is right, which in turn is less costly than ...
3. Determining who has more power.

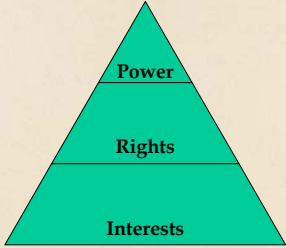
A Distressed System







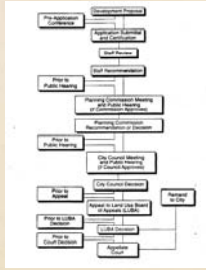



An Effective System



One Illustration Integrating Collaborative Methods into Land-use Planning







Scope of the Study



25 land use dispute resolution programs
Representative sample, not comprehensive

State Programs (18)	Local Programs (7)
<ul style="list-style-type: none"> • California • Colorado • Connecticut • Delaware • Florida (2) • Georgia (2) • Hawaii • Idaho • Maine • Massachusetts • Minnesota • North Carolina • South Carolina • Vermont • Oregon • Washington 	<ul style="list-style-type: none"> • Denver • Colorado Springs • Baltimore • Bozeman • Albuquerque • Warwick, NY • Austin


Geographic Distribution

- Northeast (7) - Connecticut; Delaware; Maine; Baltimore; Massachusetts; Warwick, NY; Vermont
- Southeast (6) - Florida [2]; Georgia [2]; North Carolina; South Carolina
- West (7) - California; Colorado; Denver; Colorado Springs; Hawaii; Idaho; Bozeman
- Southwest (2) - Albuquerque; Austin
- Northwest (2) - Oregon, Washington
- Midwest (1) - Minnesota

A Preliminary Analysis

- What Type of Issues?
- Who Participates?
- When in the Process?
- Program Design
 - Somewhat Common Elements
 - Best Practices
- Next Steps




What Type of Issues?

- **Site Specific Development Disputes**
 - Neighbors and environmental groups oppose proposed site development
- **Community Planning and Growth Policy Conflicts**
 - Landowner disagrees with rezoning resulting from annexation
 - Community, neighborhood or redevelopment planning effort opposed by neighbors or developers
 - Appeal of a local regulatory decision or state planning initiative
- **State Interagency and Intergovernmental Plan Approvals**
 - Infrastructure plan is inconsistent with adjacent jurisdiction or state policy
 - A local plan conflicts with a state agency plan or policy
- **Natural Resource and Conservation Disagreements**
 - Protest over development of land designed for conservation or open space
 - State conservation efforts opposed by local landowners






Who Participates?

<p><u>Intergovernmental and Interagency (10)</u></p> <ul style="list-style-type: none"> • California • Colorado Springs • Delaware • Denver • Georgia • Minnesota • Hawaii • Oregon • Vermont • Massachusetts 	<p><u>Property Owners, Citizens and Regulatory Bodies (15)</u></p> <ul style="list-style-type: none"> • Austin • Albuquerque • Baltimore • Bozeman • Connecticut • Delaware • Florida (2) • Georgia • Idaho • Maine • North Carolina • Oregon • South Carolina • Warwick, NY
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When in the Process?

<p>Pre-application (6)</p> <ul style="list-style-type: none"> • Austin • Bozeman • Albuquerque • Denver & Colorado Springs • North Carolina <p>On Appeal (11)</p> <ul style="list-style-type: none"> • Connecticut • Florida • Maine • Idaho • Baltimore • South Carolina • Vermont • Georgia (2) • Washington • Warwick, NY 	<p>Anytime in the Process (8)</p> <ul style="list-style-type: none"> • California • Florida • Vermont • Idaho • Massachusetts • Delaware • Colorado • Oregon
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Program Design: Somewhat Common Elements

- Use a screening tool to select cases
- Parties select the mediator
- Parties share costs of mediation
- Require land use expertise or other mediator qualifications
- State or local list of qualified mediators
- Agency provides staff mediators or contracts with others
- Legal proceedings are put on hold during mediation
- Time frame for mediation set in ordinance or statute
- Agency provides mediator training, education, research and evaluation, and dispute resolution systems design
- Requirement for co-mediation with junior and senior mediators
- Convene public meeting to review outcome





Program Design: Best Practices

- Provide a sequence of opportunities
 - Pre-application meetings
 - Unassisted negotiation
 - Mediation (throughout the review_
 - Non-binding recommendations (mediators, citizens, other)
- Supportive role of state agencies:
 - Authorize (if necessary)
 - Maintain rosters
 - Provide training
 - Encourage and support
 - Promote public review and citizen participation

Next Steps

- More research
 - Other programs
 - Evaluation of program outcomes
- Convene program directors
 - What works?
 - What doesn't?
 - What would help?
- More comprehensive (experimental?) programs
- Publish and distribute results
 - Build awareness and understanding
 - Foster civic and political will




For More Information

- www.resolvinglandusedisputes.org
- Skill-building Workshops
 - Resolving Land Use Disputes
 - Mediating Land Use Disputes
- Regional learning networks






California Land Use and Environmental Dispute Resolution Act (1994)

- Superior Court may recommend mediation, but it is voluntary
- Disputes must involve public agency
- No provision for distribution of costs
- Legal proceedings are put on hold during mediation
- Statute expired in January 2006





California Inter-agency Conflicts

- Enacted in 2002 (California Code § 65404)
 - Resolve conflicting requirements of state agencies in plans and permits
 - Address conflicts in multi-agency state functional plans
 - Mediate conflict between state and local infrastructure plans
- Governor did not establish the Office of Dispute Resolution to implement the act


Colorado Office of Smart Growth (2000)

- Local governments are compelled to use mediation prior to litigation
- Focus limited to intergovernmental disputes
- OSG maintains a roster of mediators & provides training
- Local governments not required to keep records, thus no hard data on use






Denver, Colorado Springs, and Community Mediation

- Public-private partnership initiated in 1998
- Cities pay for mediation service through contract with local no-profit
- Land use dispute referrals from City Councilors, Boards of Adjustment, and local planners
- Focus on resolving site specific development, community planning and redevelopment disputes
- Non-profit contractor requires co-mediation


Connecticut – Mediation of Planning and Zoning Appeals (2001)

- Appeals to the Superior Court must be mediated first
- Any person may appeal a planning or zoning commission decision
- Other affected parties must receive court approval to join the mediator
- Legal proceedings are put on hold during mediator
- Parties share the costs of mediation
- Mediators must file a report with the court

Delaware Planning Act (2001)

- Governor's Advisory Council on Planning Coordination is charged with facilitating intergovernmental land use disputes
- Statute does not limit facilitation to any particular phase of the planning process







Florida Land Use and Environmental Dispute Resolution Act (1995)

- Property owners who appeal any state or regional land use decision must engage in mediation before litigation
- Mediation conducted by a “special magistrate” selected by parties
- If parties fail to reach agreement, special magistrate may offer a recommendation






Georgia Department of Community Affairs (1989)

- Department provides facilitation and mediation services for disputes over
 - comprehensive planning
 - coordinating land uses
- Participation seems to focus on intergovernmental actors
- Department maintains a roster of facilitators and mediators



Georgia Resolution of Land Use Classification Disputes (2004)

- Applications
 - Resolve disputes over rezoning of land to a more intense use
 - Facilitate coordinated planning between cities and counties when land is annexed
- If county objects to city proposal:
 - City may propose mitigating measures
 - If not satisfactory, either entity may request mediation
 - Government agency requesting mediation must pay 2/3 the costs (if they both request, share the costs)
 - If dispute not resolved, either entity may request review from a citizen review panel



Idaho Local Land Use Planning Act (2000)

- Authorizes mediation in response to intense development in ski communities
- Mediation may be requested by any person (including the applicant and decision-maker) during or after the decision process
 - If mediation is requested by the governing body, participation in one meeting is mandatory; otherwise optional
 - If mediation resolve a dispute during the appeals process, the resolution must be subject to a public meeting
- Mechanics
 - Legal proceedings are put on hold during mediation
 - Governing body selects and pays for first meeting; after that, the applicant pays all costs of mediation


Maine Land Use Mediation Program (1996)


- Landowners may seek mediation after:
 - Failing to obtain permits, variances, special exceptions, etc.
 - Exhausting administrative appeals
- Superior Court ADR Program provides service
- State pays for first four hours of mediation, then parties share costs
- Mediator is instructed to balance need for transparency and confidentiality
- Mediator must file a report with the court 90-days after landowner initiates mediation

Baltimore Department of Planning


- Initiated in 2002 to train and institute dispute resolution capacity
- Focus on site specific development conflicts - neighbors and development proposals
- Recent case on large urban renewal plan - instituted a comprehensive dispute management program
- Program funding has been cut and is under evaluation







Minnesota Planning Dispute Resolution (1997)

- Focused on intergovernmental disputes related to comprehensive planning
- An aggrieved party (?) may request mediation prior to final decision or within 30 days of final action
- MN Bureau of Mediation Services maintains roster of facilitators & mediators
- If dispute not resolved within 30 days, it goes to binding arbitration before a panel selected by the parties



Bozeman Facilitated Land Use Program (2002)

- Partnership between City of Bozeman and Community Mediation Center
- Applicants request facilitation during pre-application phase to:
 - Exchange information
 - Seek feedback on initial proposal
- City of Bozeman not bound by outcomes of facilitated dialogues
- Although disputes are chronic, the program remains ad hoc

Albuquerque Land Use Facilitation Program (1992)

- Created and funded by the city as part of its Dispute Resolution Office
 - Provides information and education
 - Provides free facilitation
- Applies primarily to pre-application phase, but seem to be available during phases of planning and decision-making
- All affected parties invited to participate
- Facilitators produce report within 48 hours of meeting; report becomes part of formal record
- Participation does not preclude legal options
- Over 400 cases facilitated


Warwick, NY Land Use Mediation

- Law encourages the use of voluntary mediation between developers, homeowners and other interested parties
- Mediation option available throughout the planning process upon consent of the parties
- Mediating expenses paid by the parties and the Town may share in the costs.
- The Town suspends regulatory review during mediation after public notice in 60 day, renewable increments





South Carolina Land Use Dispute Resolution Act (2003)


- Landowners who file an appeal with circuit court may request mediation before litigation
 - Applies to decisions by zoning commission, architectural review board, and local planning commission
- Several counties have adopted mandatory mediation provisions

Austin Pilot Project (1999)


- Provide mediation for selected land development projects
 - Create Office of Dispute Resolution
 - City provides trained mediators
- Issues - map amendments, ordinance amendments, special exceptions, PUDs, and public project siting





Vermont Pilot Project (2001-2004)


- Focused on appeals to zoning decisions
- Convened by Environment Court
 - Mediation services provided at no cost to participants
- Negotiated agreements are not binding



Washington Growth Management Act (1990)

- Created Growth Management Hearings Boards
 - Ensure that local plans are consistent with state Growth Management Act
 - Resolve appeals on city and county land use plans
 - May use mediation
 - Requires public participation
- Board members appointed by Governor







Getting Past No:

Strategies to Resolve Land-use Disputes



Prepared for the 15th Annual
Rocky Mountain Land Use Conference

By
Ric Richardson
The University of New Mexico
And
Matthew McKinney
The University of Montana


The Changing Concept of Land Use Planning

	Conventional Approach	Facilitative Approach
Planning Task	Provide technical data and advice	Integrate interests and data
Product	Technically viable plan	Technically and politically viable plan
Primary Clients	Decision makers (maybe developer)	All stakeholders
Role of public participation	Provide input and advice	Build understanding and agreement
Skills	Technical	Dialogue and deliberation


Definitions

- Negotiation
- Mediation
- Arbitration






Claims of Supporters

- Avoids problems caused by litigation
- Encourages better communication
- Offers opportunities for joint gains
- Builds trust
- Dispels cynicism
- Fosters efficient use of resources / better compliance
- Resolves underlying issues
- Develops shared knowledge base
- Increases confidence in govt officials
- Empowers disadvantaged groups


Claims of Opponents

- Neither faster nor less expensive
- Cannot alter stakeholder competitiveness
- Results in “lowest common denominator agreements”
- Lacks a code of ethics
- Must ultimately be litigated

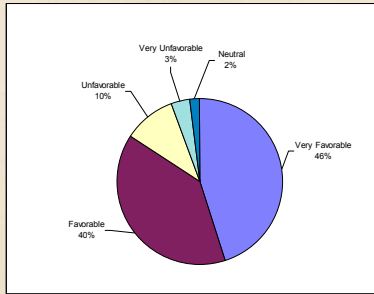



Analysis of Experience

- LILP/CBI evaluation of 100 cases across the country in land development, comprehensive planning, transportation, environmental disputes, and community development
- Participant Questions
 - How satisfied were stakeholders with both the mediation process and its outcome?
 - Were underlying issues resolved and relationships improved using mediation?
 - Did the mediation process consume less time and money than traditional processes?
 - How important was the mediator?



Satisfaction with the Process



Satisfaction with the Outcomes

- 77% stated they reached agreement
- 92% believed their interests were well served
- 86% said that all parties' interests were well served
- 88% stated their outcome was creative
- 75% percent thought their settlement was implemented as intended
- 69% thought their settlement was more stable than the alternatives

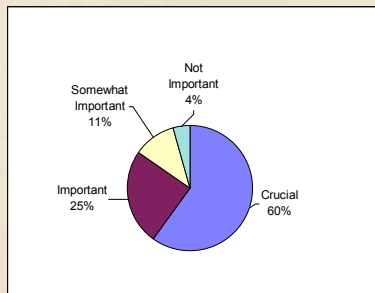
Impact on underlying issues and relationships

- Even though dispute not completely resolved:
 - 33% reached minor agreements
 - 23% improved relationships
 - 22% clarified other stakeholders' interests
 - 12% increased knowledge of the issues

Cost and Time of Mediation vs. Other Processes


- 81% said negotiation consumed less time and money than traditional adjudicatory appeals

How important was the mediator?





Obstacles

- Obstacles among stakeholders
 - Distrust
 - Entrenched positions
 - Conflicting values
 - Personality conflicts
 - Agents ability to represent client's interests
 - Perception of BATNA
 - Negotiating in bad faith
- Procedural obstacles
 - Lack of experience with process
 - Time and cost of the process
 - Political influences
 - Identifying and engaging stakeholders
- Substantive obstacles
 - Planning
 - Modeling
 - Access to information
 - Property rights



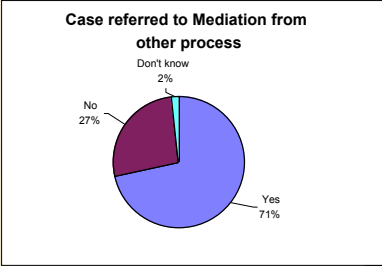
Obstacles

- Obstacles Among Stakeholders
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Negotiation and Mediation: The Forum of Last Resort

Case referred to Mediation from other process



Response	Percentage
Yes	71%
No	27%
Don't know	2%



GETTING PAST NO: STRATEGIES FOR RESOLVING LAND USE DISPUTES

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Boulder, CO 80303

TOP TEN REASONS WHY LAND USE DISPUTE MEDIATION FAILS

1. *Lack of support/buy-in from the elected officials or administration.*

When elected officials or the administration are not committed to alternative dispute resolution, the entire process is likely to fail for a number of reasons. For example:

- (a) There may be communication among the parties of importance to the process which never gets communicated to the mediator.
 - (b) The mediator cannot suggest creative solutions that involve participation by the city/county.
 - (c) The neighborhood groups may go around the mediator because he/she does not appear to have legitimate authority to mediate a resolution.
 - (d) If the mediator is an outside third-party, the planning staff may intentionally or unintentionally undercut the process by convening meetings with stakeholders that exclude the mediator, or by disregarding a mediation process.
- 2. *The neighborhood group is not organized enough to be able to express all concerns or enter into binding resolution of issues.***
- 3. *The developer or neighborhood group has poisoned the well before the mediation begins.***
- 4. *The scope of concerns raised by the neighbors is actually irrelevant and falls outside the regulatory framework.***
- 5. *The parties refuse to enter into principled negotiations based on interests as opposed to positions. For example:***

- (a) There is no possibility to generate options because the only acceptable outcome for the neighborhood is no development at all, and the developer is wedded to one and only one land use for the parcel.
 - (b) The mediation process is a ruse, established to buffer the decision-makers and to give the illusion that a predetermined decision was actually made without bias.
- 6. *What constitutes a successful outcome to the city/county, neighbors and developer is never defined.***
- (a) There are no criteria against which to measure the acceptability of elements of an agreement.
- 7. *There are not properly defined and managed expectations for the process. For example:***
- (a) Timeframes are not defined...the process goes on and on with no end in sight.
 - (b) The participants demand unanimous support for solutions rather than understanding that as long as every effort has been made to address concerns, unanimity may not be necessary, i.e. grudging support/agreement not to oppose solutions.
 - (c) The universe of real concerns and issues continues to expand throughout the process.
- 8. *Lack of expertise and imbalance of power. For example:***
- (a) The issues that need resolution may be too complex or arcane to ensure that all stakeholders are participating with the same understanding of the issues.
- 9. *Agreements are not enforceable.***
- 10. *Litigation is the only remedy.***

Strategies to Resolve Land Use Disputes

A Problem-solving Clinic

BY

PUBLIC POLICY RESEARCH INSTITUTE

THE UNIVERSITY OF MONTANA

To help us better prepare for the “Problem-solving Clinic,” please complete this form and hand it to one of the instructors before lunch on day two of the workshop. You may choose to answer one or both questions.

1. If you would like some input and advice on a land-use issue that you are currently involved with or concerned about, or an issue that you may be confronted with in the near future, please tell us -- Who are the key participants? What are the issues? What process has been or is likely to be used to address this issue or dispute?

2. Alternatively, if you are interested in learning more about strategies to be an effective participant in a collaborative, consensus building process, or to convene and manage an effective consensus building process, please tell us specifically what you would like to learn more about.

Integrating Collaborative Methods into Land-use Planning

Preliminary Data and Request for Comment & Information

Public Policy Research Institute
The University of Montana

Collaborative Governance Working Paper

In partnership with
Consensus Building Institute

Land Use Law Center
Pace University School of Law

Review Draft -- February 12, 2006

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Introduction

Research Methodology

The Nature of Chronic Land Use Disputes

Dispute Systems Design: A Conceptual Framework

An Analysis of Existing Land Use Dispute Resolution Programs (forthcoming)

1. What issues are addressed?
2. Who are the parties?
3. At what point in the planning process are collaborative methods used?
4. What “best practices” seem to be emerging in terms of:
 - a. Selecting mediators
 - b. Who pays
 - c. Relation of mediation to legal time-frames and proceedings
 - d. Role of public participation relative to mediation
 - e. Role of state agencies (creating rosters, providing training)
 - f. Need or value of authorizing legislation

Recommendations (forthcoming)

Conclusion (forthcoming)

Literature and Resources

Appendix 1: Model Statute (forthcoming)

Appendix 2: Profiles of Selected State and Local Land Use Dispute Resolution Programs

Preface

The mission of the Public Policy Research Institute is to foster sustainable communities and landscapes through collaboration, consensus building, and conflict resolution. To help achieve this mission, the Institute conducts action-oriented research and produces a number of reports, including *Collaborative Governance Reports*. The purpose of this series of reports is to inform and invigorate discussions on the use of public dispute resolution and deliberative democracy to shape public policy. To ensure that the *Reports* are relevant, the Institute partners with appropriate organizations involved in collaborative governance.

Integrating Collaborative Methods into Land-use Planning builds two studies and a series of training programs produced by the Lincoln Institute of Land Policy and the Consensus Building Institute. The Public Policy Research Institute's director, Dr. Matthew McKinney, helps run these training programs, and further explores the issue of land use dispute resolution in cooperation with students in The University of Montana's Natural Resources Conflict Resolution Program.

This *Collaborative Governance Working Paper* is a work in progress.

Integrating Collaborative Methods into Land-use Planning
by Matthew McKinney and Sarah Bates Van de Wetering
In partnership with Pat Field, Sean Nolon, and Michael Nave

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The University of Montana

Introduction

Land use planners and decision makers are increasingly making use of a wide range of collaborative methods to prevent and resolve differences between landowners, public officials, and other interested parties.¹ As described in two 1999 studies by the Lincoln Institute of Land Policy and the Consensus Building Institute, case-by-case use of negotiation and mediation effectively resolves individual land use disputes. Based on this premise, *the challenge is to move beyond the ad hoc use of negotiation and mediation, and instead anticipate and manage disputes by incorporating a wide range of collaborative strategies into every step of the land use decision making process. This means not only integrating mediation into the dispute resolution process, but integrating the principles and practices of collaboration into the standard procedures and operations of land use decision-making bodies.*

This purpose of this *Collaborative Governance Working Paper* is to

1. Explore the degree to which collaborative methods are being integrated into the standard operating procedures of land-use planning and decision-making;
2. Present a conceptual framework to guide the design of land use dispute resolution program;
3. Present preliminary data on the variety of land use dispute resolution program; and
4. Request comments and information on other programs and initiatives.

We would greatly appreciate your feedback on this working paper. Let us know if the conceptual framework is useful, if you are aware of other programs we should include in this study, and whether the initial categories for analysis are appropriate (See Table of Contents)

Please send information, suggestions, or comments to:

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¹ Collaborative methods include a variety of forums for public deliberation, collaborative problem solving, and multi-stakeholder dispute resolution. See Doug Henton, et. al., *Collaborative Governance: A Guide For Grantmakers* (The William and Flora Hewlett Foundation, undated report).

Sidebar – Collaborative Methods

Forums for Public Deliberation

One of the first steps in collaborative governance is to identify citizen preferences through forums for public deliberation. These types of public forums start by providing the best available information to citizens, and then facilitate the exchange of different viewpoints. The goal is to foster “informed input and advice.” Deliberative dialogue can also build working relationships and promote cooperation. Various tools and techniques have been used in small discussion groups as well as in large-scale meetings. Specific tools include:

- 21st Century Town Meetings (www.americaspeaks.org)
- Study Circles (www.studycircles.org)
- Online Dialogue (www.ethepeople.org)
- Deliberative Polling (www.la.utexas.edu/research/delpol)
- Citizens Jury (www.jefferson-center.org)

Collaborative Problem Solving

Beyond gaining citizen input through deliberation and dialogue, another form of collaborative governance involves organizations working together with government to find solutions to community problems, often on an ongoing basis. Collaborative problem solving usually involves actively engaging stakeholders directly in addressing specific issues. Specific tools include:

- Partnerships
- Policy Dialogues
- Roundtables
- Joint Fact Finding

Multi-party Dispute Resolution

Proactive approaches to involve people through deliberation and collaborative problem solving do not always prevent land-use disputes. Multi-party dispute resolution processes can be used when various stakeholders are headed toward, or locked into, a contentious dispute. Dispute resolution approaches bring together the interested parties, including government representatives, in discussions that begin with an attempt to enhance the participants’ mutual understanding of the problem and their different perspectives. This approach to collaborative governance seeks a mutually satisfactory agreement on a common problem through a process negotiation among participants. Specific tools include:

- Negotiation
- Facilitation
- Mediation
- Arbitration

Research Methodology

During the spring of 2003, students in Dr. McKinney's *Natural Resources Dispute Resolution* class at The University of Montana's School of Law began this research by completing a literature review and a preliminary survey of land use dispute resolution programs across the country. In 2005, the Public Policy Research Institute identified additional programs (and several that no longer existed) and new literature on the subject.

In the summer of 2005, the Institute distributed a draft of this report to all those contacted in the two phases of research, as well as to others identified as potential sources of information on land use dispute resolution programs. Their input helped improve the accuracy and completeness of the information in this report, and provided helpful insights into the potential for land use dispute system design.

This report does not provide a comprehensive list or review of land use dispute resolution programs, but instead offers an overview of the variation in existing programs and suggests a preliminary typology.²

The Nature of Chronic Land Use Disputes

State and local governments face many challenges managing diverse public interests in land use planning and decision making. Although each parcel of land is unique, predictable issues arise when that land is the subject of a proposed development, change of use, or protective designation. Public officials bear an increasingly heavy burden of balancing competing claims of private property rights, economic imperatives, environmental needs, and social equities. Each decision involves multiple parties and technical and scientific uncertainties. Frequently the stakes are high and public sentiment is polarized.

Land use disputes throughout the country often result in expensive court battles, personal resentments, and civic discord. Although state and local laws require public participation at several stages throughout the decision process, citizens do not often feel welcome or comfortable in formal hearings, or they are not aware of the potential impact of a proposal until it is nearly or already approved. By failing to understand the full range of interests at the outset, planners miss opportunities to engage in joint problem solving, and small differences in opinion can grow into major, seemingly intractable disputes.

Land use planning has evolved over the past century in an attempt to address and resolve these predictable and chronic disputes. The early model of technocratic planning emphasized efficient processes, giving a great deal of autonomy to professional planners who developed and implemented large-scale land use plans for urban areas. Later, as planners realized the inadequacies of this approach, they sought to provide a more open forum to hear from diverse

² By "land use dispute resolution" program, we are referring to any systematic – in contrast to ad hoc -- effort to engage people with different viewpoints to prevent and resolve land use disputes. This may include statutory policies, administrative programs, and other initiatives to integrate ADR into the standard operating procedures of land use decision-making.

interest groups in what has been characterized as the advocacy planning model. As described in the policy report published by the Lincoln Institute of Land Policy in 2000, the most recent evolution of land use planning is represented by the collaborative model, which the authors describe as “a highly structured problem-solving process in which all stakeholders learn about each others’ interests, challenge previously accepted assumptions, and develop strategies aimed at maximizing mutual gains.”³

Of course, in reality, local land use planners incorporate some parts of each model in their daily decisions. Nowhere have planners or decision-makers given up their professional autonomy, and anyone attending a local public hearing on a land use issue can attest to the ongoing viability of advocacy groups. We explore below the various means by which collaborative governance tools may be incorporated into the planning process to address these chronic and predictable disputes.

Dispute Systems Design: A Conceptual Framework

In recent years, the field of dispute resolution has moved beyond the application of dispute resolution procedures in isolated, ad hoc cases. People engaged in what is referred to as “systems design” seek to design comprehensive systems for dealing not with just a single dispute, but the stream of disputes that often arise in nearly all relationships, communities, and institutions—the so-called “chronic” disputes.

In *Getting Disputes Resolved*, William Ury, Jeanne Brett, and Stephen Goldberg identify three basic ways to resolve disputes: (1) reconcile the disputants’ underlying interests; (2) determine who is right; and (3) determine who is more powerful. The “best” approach to resolve a particular dispute can be determined by considering the four following criteria:

1. How satisfied are the stakeholders likely to be with the outcomes of a particular process?
2. What is the chance that the issue will be resolved – and not recur – through one process or another? That is, how sustainable is the outcome likely to be?
3. What are the likely costs – time, money, and emotional energy – of relying on one process rather than another?
4. How will the use of one process over another impact the relationships among stakeholders?

These four criteria are related. Dissatisfaction with outcomes may lead to the recurrence of disputes, which strains relationships and increases transaction costs. Based on these criteria, the core proposition of the theory of dispute systems design is that integrating interests (through various forms of collaborative governance) is less costly than determining who is right, which in turn is less costly than determining who is more powerful. This does not mean that focusing on interests is always better than resorting to rights or power, but simply means that it tends to result in greater satisfaction with outcomes, less recurrence of disputes, lower transaction costs, and less strain on relationships.

³ Lawrence Susskind, et al., *Mediating Land Use Disputes in the United States: Pros and Cons* (Lincoln Institute of Land Policy, 2000).

In light of this analytical framework, *Getting Disputes Resolved* goes on to present six principles of dispute systems design:

1. Put the focus on interests
2. Build in “loop-back” procedures that encourage disputants to return to negotiation
3. Provide low-cost rights and power back-up procedures
4. Build in consultation before and feedback after
5. Arrange procedures in a low-to-high cost sequence, and
6. Provide the motivation, skills, and resources necessary to make the procedures work.

Using this theoretical framework, the range of collaborative governance tools described earlier provides the beginning of a more comprehensive “system” to prevent and resolve land-use disputes. By combining opportunities for public deliberation, collaborative problem solving, and multi-party dispute resolution into the land-use decision-making process, planners, decision-makers, and others can create a more responsive system of governance, which in turn will likely improve land-use decisions and land-use.

The ideal system would start by trying to prevent unnecessary disputes by engaging people early and often throughout the decision-making process – again, through various forms of deliberative dialogue and collaborative problem solving. Realizing that may not be possible to prevent all land-use disputes, the system would provide low-cost procedures to resolve disputes before moving to litigation and other rights and power-based procedures.

The two models presented in Figures 1 and 2 on pp. _____ offer two illustrations of what this ideal system might look like. The core proposition here is that collaborative strategies could, and should, be integrated into every step of the land use planning and decision-making process. It is important to emphasize that not all land use disputes can or should be resolved by reconciling interests. The problem is that rights and power procedures often become the forums of first resort, and are frequently used whether or not they are necessary or preferred. The goal in designing a more effective system to govern land use is to resolve most disputes by integrating interests, some by determining who is right, and the fewest by determining who is more powerful.

This approach to designing more effective systems to prevent and resolve land use disputes is experimental. While there has been some work on the merits of institutionalizing alternative forms of dispute resolution in natural resources and environmental policy, we believe that there is a tremendous need and value to promoting thinking as well as experiments along these lines. Bingham (1986) cautions that “much remains to be learned about how to draft statutes that specify general procedures for negotiation, mediation, or arbitration of environmental disputes,” noting the difficulty in specifying in advance which parties belong at a negotiation table and which ground rules will foster productive work among various combinations of parties. Moreover, she notes: “It is also not clear what effect establishing specific rules has on parties’ incentives to negotiate in good faith or at all.” Brock (1991) concludes that “the design complexity, political controversy, and intersection with existing regulatory and administrative practices makes institutionalizing alternative dispute resolution mechanisms more difficult than using alternative dispute resolution to resolve individual site-specific disputes.”

**Figure 2:
A Model Land Use Dispute Resolution System ⁵**

Stages of Process⁶	General Characteristics of Stage	Role of Neutral⁷	Incentive to Negotiate⁸	Likelihood of Success⁹
Community Planning	<p>The earliest stage of the process before there is significant investment in any proposals.</p> <ul style="list-style-type: none"> • Multiple parcels • No clear proposal • Multiple or unknown decision makers • Multiple jurisdictions • Minimal public awareness of possibilities 	<p>The neutral can take a variety of roles depending on the intensity and complexity of the situation. The neutral will work with a convener and the group to clarify a purpose and define a process. The more the convener and the parties are willing to invest, the more the neutral can get involved.</p>	<p>While the neutral has the most freedom to help the parties identify areas for mutual gain, there may not be sufficient incentive to negotiate on behalf of all the parties. Parties often need a deadline or an impending decision to be willing to invest time, energy and resources.</p>	<p>High due to several factors, particularly the following:</p> <ul style="list-style-type: none"> -the neutral has the greatest flexibility to identify mutual gains -most parties have not taken public positions, and -investment in a particular proposal is limited.
Pre-application	<p>A legitimate applicant with proposal that is likely to be submitted in the near future.</p> <ul style="list-style-type: none"> • Proposed plan is reasonable under existing regulations/laws • A limited number of known decision makers • Some public awareness of project • Applicant's investment may be considerable. 	<p>The neutral still has great flexibility to work with the parties. He/she can become heavily involved in the negotiations or less so. The level of involvement will depend on the commitment of the convener and parties.</p>	<p>The incentive is typically low at this stage. Several factors will increase or decrease the incentive such as the:</p> <ul style="list-style-type: none"> -likelihood of an application -intensity of the project -history of the site(s) -characteristics of the community 	<p>If the parties have sufficient incentive to participate at this stage the chance of reaching an agreement that meets a considerable number of the parties' needs and interests is very high.</p>

⁵ Prepared by Sean F. Nolon, Director, Land Use Law Center, Pace University School of Law.

⁶ This chart adopts a very broad view of the land use process. Accordingly, the process begins in the "Community Planning" stage long before the official approval process is implicated and ends with the "Court-Annexed" stage when a local decision is challenged in a court of law.

⁷ This column describes when a neutral should provide facilitation services or mediation services. As a general trend, the neutral's ability to serve as a facilitator diminishes as the process progresses and the need to serve as a mediator increases as the decision making process progresses.

⁸ This column shows how the incentive to negotiate is low in the beginning stages and increase as the process progresses. This is mainly due to the fact that parties have not given adequate consideration to the limitations of the traditional process and are hopeful that they can use it to meet their highest goals.

⁹ This column shows that the likelihood of success is great in the beginning stages of the process because the options for building agreement are greater. As the process progresses, the range of solutions diminishes and the neutral's ability to help the parties become more limited. While there is always room for agreement that can be facilitated by the involvement of a neutral, the ability of that agreement to meet as many interests as possible diminishes in later stages of the process.

Stages of Process⁶	General Characteristics of Stage	Role of Neutral⁷	Incentive to Negotiate⁸	Likelihood of Success⁹
Post Submission	<p>A legitimate applicant has submitted a formal proposal to a decision making body.</p> <ul style="list-style-type: none"> • This stage consumes the most time • Official procedure and timelines control process • Some states may have environmental review procedures to follow • The decision making body(s) is/are identified • Opponents and proponents are identified as public positions are stated • Applicant's investment is significant as the application process evolves 	<p>Since the official process has begun, the neutral must be cognizant of the legal timelines. Despite these constraints, a neutral can be used very effectively to supplement the legal procedures with consensus based techniques. Most states' laws have provisions that allow for the legal process to include assisted negotiations. At this stage a neutral should take a very active role in the negotiation.</p>	<p>The incentive rises considerably as the parties move through this stage. As the official process progresses, parties invest more time and resources into the proposal or the opposition. In addition, they may start to realize that the official process is not well equipped to address and meet all of their needs and interests.</p>	<p>The opportunities for success become narrower, but are still considerable. The fact that parties become further entrenched in positions, invest more resources, and behave in ways that damage relationships makes the neutral's task slightly more difficult. If the neutral gets involved earlier, the chances of success are greater. If the neutral is not involved until the end of the official process, his/her ability to assist the parties can be curtailed.</p>
Post Decision	<p>At least one decision-making body has made a final decision on the application.</p> <ul style="list-style-type: none"> • Project is approved or denied in part/in full • Investment by all parties is considerable • Opponents are now required to invest considerable resources 	<p>After the official process produces a decision, the neutral is once again free to work with the parties on forming a process to meet their needs. However, the parties and the neutral should be cognizant of how the statute of limitations could impact any legal appeal of the local decision.</p>	<p>Generally, incentive to reach an agreement after the decision is higher than before the decision. If the decision is unsatisfactory to all parties, the parties can use a neutral to help them find a suitable alternative. If one party is less satisfied than the other, they may convince the prevailing party to negotiate on some of the issues in exchange for not filing a legal appeal.</p>	<p>A final decision tends to limit the subject matter in a negotiation to the particular decision that was issued. While the areas for agreement may be somewhat narrower, the decision can help to clarify the issues and improve the likelihood of reaching an agreement.</p>

Stages of Process⁶	General Characteristics of Stage	Role of Neutral⁷	Incentive to Negotiate⁸	Likelihood of Success⁹
Court Annexed	<p>A legal challenge to a local decision has been filed in court</p> <ul style="list-style-type: none"> • Judge may strongly suggest mediation • Parties may have the option to choose a court appointed neutral or chose one from the private sector. • In most cases a judge will suspend the proceedings while the parties try to reach an agreement. 	<p>The neutral will work with the parties who have legal standing to help them reach agreement on the issues identified in the court papers. The neutral is likely to rely on a variety of techniques such as caucusing and one-text agreement approach to identify areas of agreement. The neutral will primarily use techniques of a mediator to help the parties reach agreement.</p>	<p>Now that the parties are in court, faced with paying for lawyers and consultants, and the possibility of an unfavorable decision incentive to negotiate through mediation is highest.</p>	<p>Opportunities for agreement at this stage are possible within the context of the legal challenges. The likelihood of success at this late stage is somewhat limited. At this point, a neutral's ability to help the parties has been impacted by the violence that usually occurs in the traditional decision-making process. Once the parties have reached this stage they have damaged their relationships, undermined the trust that is important to collaborative approaches, and they are strongly committed to their positions.</p>

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Appendix 1: Model Statute to Prevent and Resolve Land-use Disputes

[Forthcoming]

Appendix 2: Profiles of State and Local Land Use Dispute Resolution Programs

The following information reflects research begun in 2003 and updated in 2005. Given the limitations of the survey, this summary does not provide a comprehensive list or review of land use dispute resolution programs, but instead offers an overview of the variation in existing programs. Each of the identified state and local programs includes available information on:

1. Statutory or program foundation
2. Program history
3. Stage of planning process in which mediation is authorized
4. Administrative department or program hosting the program
5. Description of the process
6. Examples of program application
7. Comments from administrators and participants
8. Other information

Some states or localities with established or emerging dispute resolution systems are not reflected in this summary. *The Public Policy Research Institute seeks both corrections to this information and any additional information on other programs. Please use the contact information at the end of this Policy Report to share further information.*

California

Statute: **California Land Use and Environmental Dispute Resolution Act**, Cal. Gov. Code, §§ 66030-66037

History: Enacted in 1994 (S.B. 517)

Planning stages: Applies to appeals filed in Superior Court concerning:

- public agency's approval/denial of any development project;
- public agency's act/decision pursuant to California Environmental Quality Act
- public agency's failure to meet time limits for permits or subdivision maps;
- imposition of fees related to development;
- adequacy of general plan or specific plan
- decisions related to sphere of influence, urban service area, change of organization, or reorganization;
- adoption of amendment of a redevelopment plan
- validity of selected zoning decisions
- validity of selected public utilities decisions

Responsible agency: Superior Court

Process: The court may recommend mediation, which is voluntary. There is no provision for distribution of costs. At the end of the mediation, the mediator is supposed file a

report with the Office of Permit Assistance, which is charged with providing reports back to the legislature about the use of mediation in land use and environmental mediation. All time limits with respect to the legal action are tolled while the mediation is underway, subject to the mediation being renewed by written agreement of both parties every 90 days.

Examples: None reported

Comments: This statute expired on January 1, 2006. Our contact in California (the former head of the State Clearinghouse) reported that the Office of Permit Assistance was dissolved several years ago. He was aware of no mediations handled through California Superior Courts under this provision.

Other information: A.B. 857, enacted in 2002, and codified at Cal. Gov. Code § 65404, directed the Governor to develop conflict resolution processes to resolve: (1) conflicting requirements of two or more state agencies for a local plan, permit, or development project; (2) conflicts between state functional plans; and (3) conflicts between state infrastructure projects. In addition, local agencies and project applicants may also request access to the conflict resolution process. According to our contact, the Governor never created a dispute resolution office as described in A.B. 857.

Contact: Terry Roberts, Office of Planning & Research, Terry.Roberts@opr.ca.gov

Colorado

Statutory program: **Office of Smart Growth**, Colo. Rev. Stat. Ann. §§ 24-32-3209

History: Enacted in 2000 to establish the Office of Smart Growth (OSG) and to charge it with developing a program to assist local governments in resolving land use disputes short of litigation. The creation of the OSG was fueled by Colorado's rapid growth that has focused increased attention on the land use decision making processes of local governments. Moreover, as local governments struggled to formulate and adopt policies to address growth, the public dialogue concerning when and where development should occur took on increased importance and grew increasingly contentious. In addition, as such disputes proved to be costly and time consuming, especially when litigation ensued, the legislature sought to provide alternative solutions to land use issues. The OSG is funded through the state's general fund.

Planning stage: For certain types of planning disputes, local government agencies are compelled by law to use ADR prior to undertaking litigation. Mediation can be either policy based or site-specific. However, the mediation process is designed to address conflicts between government entities (i.e. conflicts between growth management plans in bordering jurisdictions). The program does not directly address conflicts involving private landowners unless two or more governments disagree over an approval for a specific project.

Responsible agency: Colorado Department of Local Affairs, Office of Smart Growth, Intergovernmental Land Use Dispute Resolution Program

Process: The OSG maintains an online list of qualified ADR professionals with experience in local land use planning who are available to assist local governments in resolving land use disputes. To qualify for the list, mediators must have professional expertise in land use planning, zoning, subdivision, annexation, real estate, public administration, mediation, arbitration, or related disciplines. In addition, all ADR professionals must agree to abide by ethical standards and a code of conduct and to participate in continuing education. If the ADR professional is an attorney, the professional must also agree to abide by the Colorado Rules of Professional Conduct. The OSG also provides ADR guidebooks to assist local officials and staff in the land use mediation process.

Examples: None reported

Comments: The program has been in operation for three years. To date, 18 ADR professionals have met the criteria for inclusion and been added to the online list of mediators. The online nature of the program allows local government officials and staff to discretely search for an ADR professional in their area. OSG does not require local governments to provide notification if they are seeking to retain a mediator. While this protects the confidentiality of the local governments involved (important in many high-profile land use conflicts), it prevents OSG from keeping records on mediation outcomes and program successes. OSG periodically surveys the mediators on the list in an attempt to discern how many inquiries have come from the local government sector.

OSG has also been active in the education and training of mediators and local elected officials and staff in the area of land use disputes and conflict resolution. OSG has partnered with the Lincoln Institute of Land Policy and Consensus Building Institute, Inc. to offer multi-day mediation courses in Colorado. These courses have been offered three years running and consistently draw praise from both the ADR community and local governments.

Contact: Eric Bergman, Office of Smart Growth, eric.bergman@state.co.us

Program: **Contractual agreement** between the cities of Denver and Colorado Springs and Community Mediation Concepts

History: Agreement initiated in 1998 to facilitate and mediate some of the simpler land use issues that both Denver and Colorado Springs faced. The contractual arrangements have remained in place but have actually expanded to include more complex and contentious land use issues.

Planning stage: Initially the contracts called for mediation of land use variances and planned unit developments (PUDs). Since 1998, the cities have called upon CMC to increase the amount of cases to include more complex, contentious, site-specific issues. On average, CMC mediates or facilitates about 35 cases per year, with approximately 75% of those cases ending in signed agreements.

Responsible agency: Community Mediation Concepts, a private nonprofit entity

Process: Typically, land use referrals come from city council members, the Board of Adjustments, and planners, who call CMC with a request to provide conflict resolution or mediation for a specific land use issue. One of CMC's mediators then meets with the referring individual to get initial background information. After collecting this information and contact information for all the parties involved, CMC sets up an initial meeting with each interest separately to provide the parties with a safe and comfortable environment to honestly discuss their concerns and issues. CMC provides a very brief and general summary of the basic issues that were discussed and identified in these separate and initial meetings to all the parties involved, and then schedules a meeting of all the parties, or if the parties involve a neighborhood or large group of people, their representatives. CMC is also responsible for working with the parties to determine if additional informational resources are needed at the meetings. These informational resources may be a specific planning individual, a specific funding source, etc. CMC then works with the informational resources to make certain they understand their role and are present at the meetings. Mediators run the meetings, manage the necessary communication between meetings, keep a tracking sheet and provide a summary of agreements, issues and concerns after each meeting. CMC provides an agreement or summary which the parties then rely upon to proceed in the city's process.

Examples:

- Union Boulevard. The city proposed significant improvement to Union Boulevard that would require utilizing their easement rights and taking eight feet from the front yards of three blocks of homes. Many of the neighbors were incensed. CMC met with the parties, worked the process and arrived at a collaborative agreement that met the interests and needs of both the city and the neighbors.
- Old Denver International School. Developer bought the old school site with the intentions of razing the site and building single family homes. Three neighbors filed a Landmark application, effectively tying up the property and costing the developer significant money in process and time. This was referred to CMC, which met with the parties, completed the process and have a very acceptable agreement to both the preservationist and the developer. Next, they will proceed to the larger neighborhood.
- McDonalds and the neighborhood it proposed moving into were in a contentious fight. The situation was referred to CMC, which met, managed the process, and came to agreement on 25 of 26 issues.
- Target was moving into a neighborhood which didn't want a "big box" store. CMC worked with five surrounding neighborhood organizations, the city, the

developer, and Target to agree upon an acceptable development for the neighborhood.

- Marian House Soup Kitchen was redeveloping; they fed approximately 625 individuals a day, 365 days a year. The neighbors saw the redevelopment as an opportunity to “get them out.” CMC facilitated and mediated with the city, downtown partnership, adjacent businesses, the neighborhood, police, parks & recreation, and Catholic Charities to come to a resolution that kept the soup kitchen where it was, developed it in a way acceptable to the neighbors and resolved a number of non-land use issues in the process.

Comments: CMC requires mediators to co-mediate with senior mediators, a key factor, they say, of success. Other factors that CMC believes influence success or failure include: the requirement that all signed agreements become part of the formal planning decision; effective marketing of the mediation product; clear planning/zoning goals on the part of the government agency; and an investment by the government agency to seek solutions rather than quick fixes. CMC also notes that the main challenges facing land use mediation include: writing agreements that are enforceable; ensuring that all parties have a clear understanding of the issues; and finding good mediators.

Contact: Steve Charbonneau, Community Mediation Concepts,
stevecharbonneau@earthlink.net

Connecticut

Statute: **Mediation of Appeals of Decisions of Planning and Zoning Commissions**,
Conn. Gen. Stat. Ann. § 8-8; 22a-43

History: Enacted in 2001 to enable and encourage mediation to resolve inland wetland, zoning, and planning appeals. 2001 Conn. Legis. Serv. P.A. 01-47 (S.S.B. 1037). Despite initial concerns, the bill passed unanimously. According to the lead proponent, the legislators were convinced that mediation might provide a lower cost alternative to the 300 land use cases that are litigated every year in Connecticut.

Planning stage: Appeals filed in Superior Court concerning any decision by a municipal zoning commission, planning commission, combined planning and zoning commission, zoning board of appeals, or other board or commission. Mediation is also available for appeals from local decisions enforcing state dumping laws.

Responsible agency: Superior Court

Process: Parties to an appeal must file a statement with the court that the dispute may be resolved by mediation. Other aggrieved parties must obtain the court’s permission in order to join the mediation. The eligible parties must agree to the mediation before it can go forward, and must begin mediating on the same day they notify the court they intend to try this option. All time limits with respect to the legal action are tolled while the

mediation is underway, subject to the mediation being renewed by written agreement of both parties after 180 days (subsequent extensions must be approved by the court). Any party can end the mediation by withdrawing from it. At the end of the mediation, the mediator must file a report with the court, stating whether or not the dispute was resolved. The parties share equally the cost of the mediation.

Examples: None reported

Comments: According to our contact, fewer than ten percent of the judicial cases involving land use are going to mediation under this program. He identified several obstacles to more widespread use: (1) hard to get people to recognize a problem; (2) parties may hesitate to agree to mediation, as it is a change from the traditional ways of doing business; (3) courts are becoming more supportive, but are not yet pushing parties to use the mediation option; and (4) attorneys have not yet embraced the mediation option. He also mentioned that few land use planners understand how the program works, and he described the pressure upon commissioners to make quick decisions on land use matters as a disincentive to engage in more deliberative, participatory processes (although he said that parties could agree to extend the decision timeline if they wished to do so).

Contact: Bill Voelker, Town of Simsbury, wvoelker@simsbury.k12.ct.us

Delaware

Statute: **Delaware Planning Act**, Del. Code Ann. § 9102

History: Enacted in 2001. Del. 2001 Sess. Laws Ch. 43, S.B. 105. Modified slightly in 2002 to increase the number of council members to 17.

Planning stage: Not defined by statute

Responsible agency: Governor's Advisory Council on Planning Coordination is charged with facilitating dispute resolution among government jurisdictions regarding disagreements involving land use planning issues.

Process: Not defined

Examples: None reported

Comments: This provision is part of the Preliminary Land Use Service (PLUS), within the Delaware Office of State Planning Coordination. It replaces the earlier program, known as the Land Use Planning Act (LUPA), which dated back to the 1970s.

Florida

Statute: **Florida Land Use and Environmental Dispute Resolution Act**, Fla. Stat. Ann. § 70.51

History: Enacted in 1995, as part of the “Bert J. Harris, Jr., Private Property Rights Protection Act,” Fla. 1995 Legis. Sess. Ch. 95-181, C.S.H.B. No. 863, and following a multiple-year study by the Governor’s Property Rights Study Commission, which recommended an informal, non-judicial “mediation-type” proceeding designed to resolve disputes between property owners and government regulators.

Planning stage: Administrative appeal of a “development order” of any state or regional government agency, including decisions granting, denying, or conditioning development permits and specific parcel rezoning. Before initiating the proceeding to review a local development order or local enforcement action, an aggrieved property owner must exhaust all nonjudicial local government administrative appeals if the appeals take no longer than four months.

Responsible agency: Special magistrate, agreed to by parties

Process: Mediation is handled by an appointed “special magistrate,” selected by the parties pursuant to statutory procedures. Hearings before the special magistrate are informal and open to the public. If the parties are unable to reach agreement through mediation, the special magistrate is empowered to make a determination whether the challenged government action is unreasonable or unfairly burdens the real property. The agency with decision-making authority may accept, modify, or reject the magistrate’s opinion.

Examples: In one case the developer of an affordable housing project requested a hearing and the parties were able to work out a number of design changes that made the project more acceptable to the neighbors, with the assistance of the special magistrate.

Comments: Special magistrates, acting as mediators, have enabled parties to better understand each others’ interests and work out creative solutions. In cases where the parties reach an impasse, the special magistrate becomes an arbitrator and makes a decision. If the property owner loses or if the government entity refuses to modify its decision the property owner’s only option is to go to court; which the owner could have done in the first place without the cost of the hearing. This uncertain value of the special magistrate hearing process has been cited as one reason why there has been little use of this statute. The main impact of this statute has been on government decision making. It is broadly believed that agencies have been hesitant to deny permits or make zoning or plan changes because of the threat of a property rights challenge.

Statutory program: **Florida Conflict Resolution Consortium**, Fla. Stat. Ann. § 1004.59 (formerly § 240.702)

History: The Florida Conflict Resolution Consortium (FCRC) was initially established following a gubernatorial study commission recommendation with an appropriation to Florida State University in 1987. In 1996, the legislature enacted statutory language stating that FCRC should “serve as a neutral resource to assist citizens and public and private interests in Florida to seek cost-effective solutions to public disputes and problems through the use of alternative dispute resolution and consensus-building.” Laws 1996, c. 96-416, § 16. The legislature hoped that the use of ADR would assist in meeting the growing demand for better and more durable solutions to Florida’s land use and other public policy issues.

Planning stage: Public policy development.

Responsible agency: The Florida Conflict Resolution Consortium, based at Florida State University. For many years the FCRC received approximately \$500,000 annually from the state, providing core funding for the operation of the central office in Tallahassee and three regional offices. FCRC matched state funds with project funds, enabling it to add project staff and build greater capacity to respond to requests for assistance. FCRC’s mission is to bring people together to facilitate consensus regarding Florida’s public policy issues. FCRC offers assistance directly or by referral to ADR professionals. In the aftermath of the post-9/11 budget crisis, FCRC’s state funding was cut and it now operates on project dollars only.

Process: FCRC works with state and local governments and other stakeholders on public policy issues by providing venues for public involvement, collaborative planning, conflict assessment and dispute system design, facilitation and mediation services. FCRC also provides dispute resolution training, education, research, and evaluation services. FCRC focuses solely on public policy issues.

Examples: FCRC assisted several statewide commissions to build consensus on building codes, transportation planning initiatives, Everglades restoration, manatee protection, Florida panther protection, ecosystem plans, forest management plans and environmental permitting. Most recently, FCRC completed an 18-month pilot project involving 36 mediation demonstration cases to encourage the use of mediation and negotiated rulemaking under the State’s Administrative Procedures Act.

Comments: During the last five-year period, FCRC has handled approximately 30 cases at any one time. Resolution rates are not currently tracked, as FCRC focuses on facilitating public policy discussions rather than settlements per se. Moreover, as the program manager noted, facilitation of major public policy issues rarely settles all issues for all time. Most issues must be periodically revisited.

Contact: Bob Jones, Florida State University, flacrc@mailier.fsu.edu

Georgia

Statutory program: **Department of Community Affairs**, Georgia Code Ann. § 50-8-7.1

History: Enacted in 1989

Planning stage: Disputes arising in the formulation of coordinated and comprehensive land use plans

Responsible agency: Department of Community Affairs, which assists the Governor in encouraging , coordinating, developing, and implementing coordinated and comprehensive land use planning.

Process: The department is required to provide mediation services for growth strategies for siting and growth strategies disputes. The department maintains lists of facilitators available to help resolve such disputes. Local governments that fail to participate in a mediation of a planning dispute may suffer sanctions, including a loss of planning certification and reduced state and federal funds.

Examples: None reported

Comments: Georgia also provides a statutory mandate for facilitated negotiated concerns the siting of hazardous waste facilities. See Georgia Code Ann. § 43-1613.

Statutory authorization: **Resolution of Land Use Classification Disputes**, Georgia Code Ann. § 36-36-11.

History: In 2004 the legislature amended the state Service Delivery Act to provide a mechanism “to resolve disputes over land use arising out of the rezoning of property to a more intense land use in conjunction with or subsequent to annexation in order to facilitate coordinated planning between counties and municipalities particularly with respect to areas contiguous to municipal boundaries.” Laws 2004, Act 443, § 18.

Planning stage: Initial zoning or rezoning of annexed property

Responsible agency: Joint responsibility between the municipality and the county

Process: If a county objects to a municipality’s proposed action, the municipality first has an opportunity to propose mitigating measures to address the county’s objections. If the parties cannot reach agreement on these measures, then either the governing authority of the municipality or the governing authority of the county may insist upon appointment of a mediator to help resolve the dispute. The party insisting on use of the mediator must bear two-thirds of the expense of the mediation; if the parties both demand mediation, they split the cost. The mediator has up to 28 calendar days to meet with the parties and develop alternatives to resolve the objections. If the objections are not resolved, either entity may request review by a three-member citizen review panel, which has up to 21 days to review the proposed mitigating measures and make its own recommendation for

approval or denial of the proposed zoning. The municipality then may make its own decision to approve or deny the zoning application.

Examples: None reported

Comments: None available

Hawaii

Statute: **Geothermal Resource Zone Management**, Haw. Rev. Stat. § 205-5.1.

History: Enacted in 1983

Planning stage: Permit application to develop geothermal resources

Responsible agency: County authority

Process: When considering a permit application for activities proposed within agricultural, rural, or urban districts, within which such proposed activities are not permitted uses pursuant to the county general plan and zoning ordinances, the county must conduct a public hearing on the proposed activity. Anyone who submits comments at that meeting may request mediation within five days of the hearing. The county authority may require the parties to participate in the mediation. The mediation, which runs for up to 30 days (unless extended by the county), is confined to the issues raised at the public hearing by the party requesting mediation. The mediator submits a written report to the county authority, which then makes its final decision on the permit application. If the county's decision is subsequently challenged in court, the mediator's written recommendation is part of the record.

Examples: None reported

Comments: The Hawaii legislature also has stated that one of the goals of its Coastal Zone Management Program is to “organize workshops, policy dialogues, and site-specific mediations to respond to coastal issues and conflicts.” Haw. Rev. Stat. § 205A-(c)(8)(C).

Idaho

Statute: **Local Land Use Planning Act**, Id. Code § 67-6510.

History: In 2000, Idaho passed enabling legislation (2000 Idaho Acts Ch. 199, H.B. 601) authorizing land use mediation in response to intense development pressures in ski communities such as Sun Valley. Previously, development pressures caused property values to rise, which led to litigation associated with subdivision applications. The

legislation passed by the State attempted to curtail land use decision-making via the appeals process in the courts. Therefore, the legislature authorized mediation as an alternative decision-making tool.

Planning stage: At any point during or after the decision process, mediation may be requested by an applicant, an affected person, the zoning or planning commission, or the governing board. If mediation occurs after a final decision, any resolution of differences must be the subject of another public hearing before the decision-making body. During mediation, any time limits relevant to the land use application shall be tolled. The mediation process is not part of the official record regarding the application.

Responsible agency: The governing board responsible for the planning decision must make this mediation available if requested.

Process: If the mediation is requested by the governing body or commission, then participation in one session is mandatory; otherwise participation is optional. Assuming that the governing board (typically a county) agrees to mediation, the governing board selects the mediator and pays for the first mediation session. After the first session, the applicant bears all costs for mediation. The state enabling legislation permits counties to enact their own land use mediation ordinance, which may allocate costs differently in the future.

Examples: None reported

Comments: Idaho's land use mediation process focuses exclusively on site-specific issues. To date, two cases have been addressed, one of which was resolved through mediation. According to one contact, Idaho's program is problematic for several reasons. First, an inherent tension exists between the public's right to participate and right to know, and the need to ensure confidentiality in the mediation process. The option is either to take detailed notes of closed door meetings, or keep meetings open and sacrifice privacy and possibility the ultimate success of the mediation. Secondly, the enabling legislation is not detailed enough to be useful. The solution to this problem is either to amend the statute or enact more detailed ordinances addressing process (and when mediation should be used) at the county level. Thus far, the statute has not been effective at encouraging parties to use mediation to settle subdivision and zoning disputes. Finally, mediation is used too late in the process, and should also be used at the policy level to prevent conflicts in the first place.

One positive and unintended consequence of the program is that when used, mediation has proven to be very effective at bringing all the stakeholders together and getting results. And even when mediation fails in terms of obtaining a formal settlement, positive benefits still accrue merely from opening the lines of communication. Idaho's program uses mediators that actually serve as facilitators. Although no specific qualifications for mediators exist, mediators typically possess neutrality, land use expertise, and familiarity with the issue in question.

Contact: Timothy K. Graves, Blaine County Deputy Prosecuting Attorney,
tgraves@co.blaine.id.us

Maine

Statute: **Land Use Mediation Program**, Maine Rev. Stat. Ann. 2 § 8, 4 § 18, 5 § 3331, and 5 § 3341.

History: Enacted in 1996, implementing the recommendations of a study commission. 1996 Me. Legis. Serv. Ch. 537 (H.P. 1188)(L.D. 1629)

Planning stage: A landowner who has “suffered significant harm as a result of a governmental action regulating land use” may apply for mediation after: (1) seeking and failing to obtain a land use permit, variance, or special exception from municipal government, and has exhausted administrative appeals; or (2) seeking and failing to obtain approval from state government for a land use, such that the landowner would be eligible to file for judicial appeal.

Responsible agency: Superior court and the Court Alternative Dispute Resolution Service

Process: State agencies are mandated to participate in mediation when requested by the Court ADR Service. The state provides the first four hours of mediation services for free, and then the participants share the cost. Within 90 days after the landowner files an application for mediation, the mediator must file a report with the court. The mediator is instructed to “balance the need for public access to proceedings with the flexibility, discretion and private caucus techniques required for effective mediation.” Any agreement that requires government action is not self-executing. The land owner must submit the written agreement to the appropriate government agency, which then has the authority to reconsider its earlier decision as long as no statutory provision regarding the approval process is violated. The Land and Water Council is directed to report annually on the operation and effectiveness of the Land Use Mediation Program.

Examples: None reported

Comments: Maine also has a program to mediate disputes involving natural gas pipeline activities, enacted in 1999. Me. Rev. Stat. Ann. 5 § 3345. The Court Alternative Dispute Resolution Service provides the mediation services for this program as well.

Maryland

Program: **Baltimore City resolution**

History: During the fall of 2002, the Baltimore Department of Planning began to train staff on collaborative problem solving techniques. The informal program was funded by a

grant from the Maryland Mediation and Conflict Resolution Office (an agency of the Maryland state courts system) in order to assist staff in addressing contentious land use decision-making processes. As originally conceived, the program was intended to assist planners by: (1) providing training on how to collaboratively find creative solutions to resolve contentious planning or development-related conflicts; and (2) create a pool of in-house facilitators to mediate conflicts in parts of the city in which planners do not normally work. Funding cutbacks and organizational changes have resulted in the need for a new round of training (scheduled for summer 2005), and a reevaluation of the feasibility of having an in-house pool of facilitators.

Planning stage: Most conflicts involve site-specific conflicts, such as zoning issues and requests for permits that are objected to by neighbors.

Responsible agency: Baltimore Department of Planning

Process: Ad hoc dispute resolution

Examples: In summer 2004, the Department of Planning hired a facilitator to resolve a highly contentious dispute revolving around the revision of an urban renewal plan. The dispute had been going on for almost five years and came down to a battle between property owner/developers and property owner/residents over the issue of proposed height limits. The facilitator did extensive interviews with stakeholders as part of an assessment process and gave the Department several alternatives for resolving the dispute, including varying degrees of facilitation. The Department chose to manage the process on its own, with a highly proscribed schedule and process. The project remains contentious, but is nearing an end with new legislation to be introduced in early summer 2005.

Comments: Since the program is in its infancy, data on the number of cases settled and the resolution rate are not available at this time. Assessing the program, our contact observed, "Overall, I would say that our hopes for the outcomes of these projects were perhaps a bit ambitious, but that we have benefited . . . from an increase in facilitation skills and from our experience with the hired facilitator."

Contact: Kristin Smith, City of Baltimore, Kristin.Smith@baltimorecity.gov

Massachusetts

Statutory program: **Office of Dispute Resolution**, Mass. Gen. L. Ch. 7, § 51

History: Started as a pilot project in 1985, established as a state agency in 1990, and transferred to the University of Massachusetts Boston in September, 2004.

Planning stage: Varies

Responsible agency: Massachusetts Office of Dispute Resolution (MODR), University of Massachusetts, Boston

Process: MODR collaborates with state agencies in the design and operation of ADR programs, including conflicts involving land use matters. MODR charges fees for its services.

Examples: None reported

Comments: None

Minnesota

Statute: **Planning Dispute Resolution**, Minn. Stat. Ann. Chapter 572A

History: Enacted in 1997. Minn. Laws 1997, c. 202, art. 6, § 4

Planning stage: Available for disputes concerning development, content, or approval of a community-based comprehensive land use plan, involving a county and the office of strategic and long-range planning or a county and a city. An aggrieved party can file a written request for mediation any time prior to final action on a community-based comprehensive plan or within 30 days of a final action on such a plan.

Responsible agency: Bureau of Mediation Services

Process: The Bureau makes recommendations of qualified neutrals to provide mediation services, and makes recommendations to the parties for resolution of the dispute if it is not resolved after 30 days. If the dispute is not resolved in 60 days, it goes to binding arbitration before a panel selected by the parties and (if necessary) the Bureau of Mediation Services.

Examples: None reported

Comments: None

Montana

Program: **Contractual agreement** between the City of Bozeman and the Community Mediation Center (CMC)

History: The CMC has worked with the City of Bozeman to offer Facilitated Land Use Information Meetings and Facilitated Dialogue since 2002. For the first several years there was quite a demand and CMC's efforts were focused on facilitating disputes (or potential disputes) between developers, neighborhoods, and land owners. Applicants

requested the service in order to exchange information with neighbors and receive early feedback on a potential project. Neighbors were able to learn about the application early and voice concerns in a neutral setting.

After the City hired a Neighborhood Coordinator, the demand for CMC's services dropped considerably. She is an effective "ombudsman" who now diffuses situations fairly routinely. Consequently, CMC recently revamped its agreement with the City and broadened it to allow for CMC to help with any type of dispute

Planning stage: As originally conceived, the land use facilitated meeting program offered free mediation early in the application review process. Only outcomes including areas of agreement were reported to the City of Bozeman. The City of Bozeman Commission retained full decision making power over the application, and was not required to follow the recommendations of the facilitated meeting.

Responsible agency: Community Mediation Center, a private nonprofit entity

Process: Varies; ad hoc mediation

Examples: CMC is currently facilitating a special Bozeman City-Public Library Taskforce which is trying to resolve a conflict that arose over the possible sale of land adjacent to a proposed library in an area many people had expected would become part of an existing linear trail and Lindley Park. CMC also has a new contract with Gallatin County to facilitate land use disputes, and is presently working with a New Zoning District Subcommittee established by the County Commission to come up with recommendations for better processes to create zoning districts.

Comments: These efforts continue to be ad hoc, rather than integrated into local ways of doing business. It is clear, however, in the present climate of rapid growth, that the resources of County government are not always adequate nor available to deal with the volume of needs for their services. Conflict is becoming part of the status quo and the Gallatin County Planning Department recently asked for some help in dealing with conflicts in a more systematic way.

Contact: Mary Ellen Wolfe, Community Mediation Center, mew@montana.com

New Mexico

Program: **City of Albuquerque Land Use Facilitated Meeting Program**, created by local resolutions

History: After a year of lobbying the City Attorney's Office to build collaborative problem solving into their local government, the City of Albuquerque created the City's Alternative Dispute Resolution Office in 1992. The City of Albuquerque Administration and City Council created the Dispute Resolution Office by passing resolutions to

facilitate local ADR programs, along with funding to support such programs. When surveyed in 2003, the Land Use Program was one of several ADR programs, and was receiving \$50,000 annually from the City's general fund to pay for facilitators and other program costs. The goals of the Land Use Program included: (1) promoting the sharing of information through public dialogue; (2) identifying issues early; and (3) promoting collaborative problem solving among those directly involved in and impacted by local land use decisions. The program has been modified in recent years, but continues to offer facilitation services at the outset of a land use application process.

Planning stage: Available early in the planning process, prior to application acceptance

Responsible agency: City of Albuquerque

Process: The City offers the Land Use Facilitated Meeting Program free of charge for land uses cases once an application fee has been filed and the Alternative Dispute Resolution Office determines the potential need for program participation. Participants may include the applicant, neighborhood associations, and others whose property might be affected by the proposed use. Participation is "voluntary and strongly encouraged." The facilitators must generate a disposition report within 48 hours of the facilitated meeting, summarizing the meeting and its outcome. Planning Department staff then must incorporate the facilitator's report into its staff report to the land use decision-making board, noting any conflicts between the disposition report recommendations and law or policy.

Examples: None reported

Comments: When originally contacted in 2003, the city coordinator reported that over 400 cases had been facilitated, but statistics on the number of cases settled was unavailable. The contact reported that the integrity and skills of this facilitator was crucial to the process, as all stakeholders must trust the facilitator and believe that their voice is heard in order for the program to be a success. Other variables that influence the success of the program included: (1) constant outreach and education to ensure appropriate expectations; (2) formal rules and regulations with clear guidelines and a well-defined process; and (3) a guarantee that participation does not preclude other legal remedies as the preservation of legal standing encourages all parties to participate more fully. The Land Use Program encouraged developers to reach out to stakeholders in advance of filing applications, and shifted the planning dialogue from a micro-level focusing on specific project details to a broader, more sophisticated discussion of land use issues. In the future, the problems with the program could possibly arise if the City does not adopt an agreement reached by stakeholders participating at the grassroots level.

Contact: Shannon Watson, Office of the City Attorney, swatson@cabq.gov

New York

Statute: Town of Warwick Code § 164-47.5. **Land Use Mediation**

History: None identified

Planning stage: Available throughout planning process

Responsible agency: Mediation is provided by a private party, upon the consent of all parties of interest. The Town of Warwick may consent to share the costs of mediation, but it not obligated to do so.

Process: The law encourages the use of voluntary mediation in disputes between developers, homeowners, and other interested parties in connection with decisions made by the Town Board. The primary means of encouragement is the possibility of suspending time limits for permit approvals for the period in which mediation is taking place. The Town Board has discretion to suspend time limits for 60 days (this may be renewed indefinitely), upon public notice of the basis of the dispute, the permit and/or approval being sought, the name of the party seeking the permit and/or approval, and contact information to allow others to become involved in the mediation process. The mediator has no power to impose a settlement or to bind the Town of Warwick to the terms of the agreement. Any settlement must be approved through the regular channels for obtaining a permit or approval.

Examples: None reported

Comments: None

North Carolina

Statute: **Prelitigation Farm Nuisance Mediation Program**, N.C. Gen. Stat. § 7A-38.3.

History: Enacted in 1995, the program is designed to encourage and promote early resolution of disputes alleging the existence of an agricultural nuisance.

Planning stage: Unlike other statewide dispute resolution programs in North Carolina, this program is designed to operate before a lawsuit has been filed. In fact, mediation of such disputes is mandatory before a civil action can be brought alleging the existence of a farm nuisance in either superior or district court. Any case filed to a prelitigation mediation can be dismissed upon motion of either party.

Responsible agency: District court

Process: Not identified

Examples: Most cases mediated pursuant to this statute have involved hog farm operations. Entire communities have been involved in some such disputes, alleging, among other things, offensive odors and groundwater contamination.

Comments: Mediation can be waived if requested in writing from all parties.

Oregon

Statute: Ore. Rev. Stat. §§ 197.805-197.855

History: The Land Use Board of Appeals (LUBA) was established in 1979. In 1989, the Oregon Legislature created the Oregon Dispute Resolution Commission (ODRC) to promote and foster dispute resolution programs within the state. Subsequently, the LUBA statutes were amended to provide that all parties to a LUBA appeal may at any time stipulate that the appeal proceeding be stayed to allow the parties to enter into mediation. ODRC's Public Policy Dispute Resolution Program assisted in getting LUBA cases into mediation, and administered grants to pay for private mediation services. The grant funds were made available from the Oregon Dept. of Land Conservation and Development. In 2003, the Oregon Legislature abolished the Oregon Dispute Resolution Commission and transferred its Public Policy Program to the Hatfield School of Government at Portland State University. It now operates as the Oregon Consensus Program (OCP).

Planning stage: Post-decision appeals

Responsible agency: The Land Use Board of Appeals (LUBA), consisting of three people appointed by the Governor and confirmed by the Senate

Process: LUBA has exclusive jurisdiction to review all governmental land use decisions, whether legislative or quasi-judicial in nature. The circuit courts no longer hear appeals of land use decisions made by local governments or special districts. The Oregon Consensus Project helps parties involved in such appeals assess the possibility of mediation and helps them select a mutually agreeable mediator from a list of private mediators. OCP is funded by the state from a portion of court filing fees dedicated to dispute resolution, and from fees and grants.

Examples: None reported

Comments: None

Contact: R. Elaine Hallmark, Oregon Consensus Program, elaineh@pdx.edu

South Carolina

Statute: **South Carolina Land Use Dispute Resolution Act**, S.C. Code Ann. §§ 1-23-630; and 6-29-800, -820, -825, -830, -890, -900, -915, -920, -930, -1150, -1155, 1310-80

History: Enacted in 2003, S.C. S. 204, Sess. 115, 2003-2004. The primary intent, reportedly, was to encourage landowners to use mediation (rather than takings lawsuits) as the principal means to resolve claims against local governments. Bradford W. Wyche, "An Overview of Land Use Law in South Carolina," 11 *Southeastern Env't'l L.J.* 183 (Spring 2003).

Planning stage: Decision by board of zoning appeals, board of architectural review, or local planning commission

Responsible agency: Circuit court

Process: After an adverse decision, a landowner may file a notice of appeal with the circuit court, accompanied by a "request for pre-litigation mediation." If the mediation is successful, the settlement must be approved by both the local legislative governing body and the circuit court before it becomes effective. If the mediation is unsuccessful, or if the reviewing bodies do not approve it, the landowner may appeal the decision in court. Mediation is informal, with a third party mediator facilitating face-to-face settlements between the parties. The mediator has no decision making authority, but may guide parties toward settlement.

Examples: None reported

Comments: Several counties in South Carolina have adopted mandatory mediation programs, which may require mediation of landowner claims. Wych, *id.*, at n. 91.

Texas

Program: **City of Austin** local pilot project

History: In 1997, the State of Texas passed legislation expanding existing ADR processes in the state to include municipalities. In 1998, the Austin City Council directed the City Manager to "evaluate the feasibility of a pilot program to provide mediation services for selected land use development projects" in order to better address contentious land use issues. As a result, a pilot program was launched in 1999. In 2002, the City Manager created the Office of Dispute Resolution. This office is separate from other government agencies and is organized under the City Manager. However, the program does not have its own line-item in the City budget. The City Manager's Office (general fund) and the Electric Utility Fund currently pay the salaries of staff while the Planning Office pays for office space.

Planning stage: Map amendments, ordinance amendments, special exceptions, PUDs, and public project siting

Responsible agency: The Office of Dispute Resolution's mission is to provide a responsive, neutral resource for conflict resolution services for public policy issues and activities. In practice, it serves as the last resort before interested parties litigate.

Process: Not identified

Examples: None reported

Comments: The 2003 contact reported that this program mediates approximately five cases per year, with a resolution rate ranging from 60 to 70 percent. The Senior Dispute Resolution Officer (previously the person that led the pilot program) received training from mediators at the University of Texas Law School and The Dispute Resolution Center in Austin. The Senior Officer also served as the Director of Planning. In addition to the Senior Officer, selected city employees have received a 40-hour mediation training course. Outside facilitators providing services on a pro bono basis are also utilized. In addition to qualified mediators, the ADR coordinator identified the following as prerequisites for success: (1) screen conflicts prior to undertaking mediation to assess ADR applicability;¹⁰ (2) keep stakeholders rather than their attorneys involved in the process; (3) maintain the support of technical staff; (4) ensure confidentiality for all participants; (5) select representatives carefully to avoid the formation of splinter groups; (6) guarantee the neutrality of facilitators; (7) confirm that all stakeholders are committed to negotiating in good faith prior to undertaking mediation; (8) develop a reliable funding stream; and (9) continuously work to inform constituents about available ADR services.

Contact: None available in 2005; not clear whether program is still in place

Vermont

Statute: Act 250 (statewide land-use law)

History: None identified

Planning stage: Post-litigation, as ordered by the court

Responsible agency: Environmental Court, which hears appeals on zoning, Act 250, water resource classification, and permits. The two Environmental Court judges currently require mediation in about 25 percent of the appeals before them.

Process: This is an ad hoc use of mediation, mandated by the judges in many cases. Our contact described an effort he is initiating to make this process more systematic

¹⁰ Large scale speculative issues are typically not good candidates. Issues with specifics tend to be the most negotiable

(including more formal case screening) and to integrate mediation earlier in the land use process, perhaps as early as the pre-application stage.

Examples: None reported

Comments: Vermont enacted an Act 250 Facilitator and Mediator Pilot Project in 2001 (H.B. 475, secs. 12 and 13), which expired in 2004. The program sought to encourage applicants and interested parties to prepare for their participation in Act 250 proceedings and to exchange information with one another. Mediation services were to be provided at no charge to applicants or other parties, although only \$25,000 was appropriated for the provision of such services. Agreements obtained through mediation were not binding on decision makers.

Contact: Matt Strassberg, private attorney (formerly with the Environmental Board),
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Washington

Statute: **Growth Management Act**, Wash. Rev. C. § 36.70A

History: Enacted in 1990

Planning stage: Appeals filed on local and county land use plans

Responsible agency: Growth Management Hearing Boards provide an overview function by ensuring that city and county plans and land use policies are in compliance with the State's GMA.

Process: The Growth Management Hearing Boards clarify the substance and intent of the GMA whenever appeals are filed on local and county land use policies. On average, the three Boards handle approximately 30 cases annually. Contrary to popular opinion, the Boards often (but not always) uphold local government land use policies, and the vast majority of these cases are not litigated. The boards include provisions for mediating appeals brought before them. One of the boards resolves more than 15% of its issues through mediation.

Examples: None reported

Comments: Unintended problems facing the GMA Hearing Boards include the erroneous perception that the Board: (1) does not defer to local government decisions (the Board will defer unless the GMA has been violated); (2) discourages public participation (the Board actually requires such participation); and (3) writes and implements land use plans (the Board does not have this authority). The GMA Boards have also been criticized because the Governor appoints Board members, rather than members being appointed by the State Senate. However, the Board members appointed by the Governor must be

experts in the field of land use planning and one must be a former local government elected official to ensure that appointees fully understand the complexity of the land use issues at hand.

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Mediating Land Use Disputes in the United States: Pros and Cons

Lawrence Susskind, Mieke van der Wansem, and Armand Ciccareli

Abstract

Land use planning both causes and sometimes helps to resolve land use disputes. While land use planning in North America initially focused on finding the most technically efficient method of segregating land uses, its emphasis has shifted toward a concern for fairness in the allocation of public resources. This shift has led to an increased demand for stakeholder participation in decision making, thereby stimulating some conflicts but also offering a basis for the effective resolution of land use disputes. Consensus building, or mediation, as a method of resolving land use disputes offers a strategy for balancing technical considerations, broader political concerns about fairness, and conflicting stakeholder interests.

Based on the results of a study of efforts to mediate land use disputes in 100 communities around the United States, this article reviews the historical context in which land use decisions have traditionally been made as well as the relevant literature produced by supporters and opponents of consensus building techniques like mediation. It is hoped that this proves instructive to those who have to make decisions about how best to handle land use disputes.

French version

Key Words:

Land use planning, land use disputes, mediation, consensus building, dispute resolution

Introduction: Land Use Planning and Dispute Resolution

In the face of conflict, local officials, especially land use planners, struggle to find ways of balancing the goals of environmental protection and economic development while also protecting private property rights. In the United States, many such disputes lead to litigation, but the courts are not interested in reconciling underlying disagreements, and judicially mandated outcomes usually leave someone dissatisfied. Members of the general public become frustrated, too, because they feel they have no role in determining how local land resources should be allocated when the courts are involved. Furthermore, the cost of land use disputes, especially those that end up in court, can be staggering. All of these concerns have fueled the search for better methods of resolving land use conflicts.

Historical Background

Since the beginning of the twentieth century, the field of urban and regional planning has undergone several key transformations. Most have revolved around redefining who determines the goals that master plans are designed to achieve. While master plans were popular for many years, they failed to take account of important socioeconomic, environmental, and political concerns. They did not address issues of affordability, pollution prevention, or the implied unfairness of distributional “gains and losses” that kept certain groups in poverty. They also presented the city as it was meant to look in an idealized form in the future, without indicating how this ideal state would be achieved (Branch 1983: 28). Since the late 1950s, planners have become less concerned with the efficient allocation of land from a purely technical perspective, and more concerned about fairness and the ways that land use allocations impact the quality of life for various groups. These concerns are linked directly to the demand for increased public participation in land use decision making.

Technocratic and Advocacy Planning Models

Technocratic planning is dominated by concerns about economic efficiency in the use of space. It specifies well-organized, centrally managed solutions to urban land use problems aimed at providing the greatest benefits to the population and ensuring overall economic vitality. Planners are presumed to have the education and experience needed to find solutions to urban problems and to be free from any corrupting political influences that might otherwise bias their judgment. This model also assumes that planning agencies have the autonomy to set policy, or at least make recommendations to the elected city council, as well as a role in implementing them.

The advocacy model of planning emerged in reaction to the failures of the technocratic model's approach to urban renewal during the late 1950s and early 1960s. Advocacy planners aim to redistribute resources more fairly, increase social equity, and improve quality of life for minority groups and the poor (Burchell and Sternlieb 1978: 69). They attempt to reshape the political processes through which land use decisions are made, by such efforts as blocking urban renewal and working to protect poor and working class neighborhoods.

The concept of advocacy planning hinges on the notion that, as in a civil lawsuit, there are at least two sides using expert advisors to pursue their conflicting points of view. Supporters of advocacy planning assert that under the technocratic model plans that seem to be directed toward the “common good” are, in reality, meant to serve only those in power. Accordingly, advocacy planners seek to provide the expertise necessary to empower the interest groups to represent themselves at each step in a local decision-making process.

Whereas a few insiders make technocratic planning decisions, advocacy planners believe in open forums where planners and community groups can confront traditionally powerful interests. This planning model was strongest in the United States during the War on Poverty of the 1960s, when the disparities created by urban sprawl began receiving greater attention from the federal government. While addressing many of the weaknesses of the technocratic model, advocacy planning has its own drawbacks. It raises questions about the ability of (mostly white) advocacy planners to identify with the real needs of (mostly minority) groups they seek to represent; many of the planners are more interested in short-term improvements than long-term solutions to persistent land use problems. Furthermore, advocacy planners actually work with only a small fraction of their target constituency, resulting in plans that do not always represent neighborhood-wide views. Project plans based on the advocacy model have not always made the best possible use of technical information and analysis to ensure their effectiveness. As a result, advocacy planning often boils down to nothing more than a contest among

Table 1: The Changing Conception of Land Use Planning in the United States

	Technocratic Model	Advocacy Model	Mediation Model
Tasks	The planner operates as an apolitical and technically skilled advisor to elected decision makers.	The planner represents a particular interest group in the politics of land use decision making.	The planner tries to facilitate a balancing of concerns about efficiency and fairness by building an informed consensus.
Focus of Activity	Produces plans that offer the “best” solution, given a set of goals and limitations set by elected decision makers.	Seeks to redistribute resources to ensure greater equity and improved quality of life for those least able to fend for themselves.	Ensures that the interests of all stakeholders are taken into account along with the best possible technical advice.
Products/Solutions	Comprehensive plans that represent the most efficient allocation of resources for a specific point in time.	Policy proposals and plans that best serve the group being represented.	Negotiated agreements that are both fair and implementable.
Skills	Technical skills in preparing efficient plans.	Technical skills, plus a greater understanding of social and economic issues and political organizing.	Same as the advocacy model, plus the ability to facilitate interaction among contending stakeholders.
Primary Client	City Planning Commission and elected decision makers.	An interest group, usually poor/minority.	All stakeholders.
Basis of Legitimacy	Planners have the technical expertise necessary for this type of work and are unaffected by external influences that might otherwise compromise their professionalism.	Planners contend that few problems can be settled on technical or efficiency grounds alone.	By playing a neutral role or hiring a mediator and pursuing mutually acceptable agreements, the planner enhances the probability that an implementable plan will result.

interest groups to determine whose preferences will prevail (Susskind and Ozawa 1984: 9).

Stakeholders such as public agencies, private developers, issue-oriented advocacy groups, and community residents continue to disagree on whether technocratic efficiency or political advocacy should be given priority. In addition, all of these voices now have even greater opportunities to be heard through public participation requirements, open meeting laws, and related right-to-know requirements. Few people would argue that increased participation has been detrimental to the public good.

Confronted by escalating conflicts whenever land use development or resource allocation decisions must be made, many planners are turning to a third planning model based on consensus building and mediation. This "mediation model" offers a strategy for resolving land use disputes and channeling public involvement in more productive ways.

Emergence of the Mediation Model

Whereas technical planners tend to emphasize efficiency and advocacy planners seek to represent the political interests of a particular group, planners working as mediators seek to resolve disagreements and build consensus. This process usually requires the participation of spokespeople for each stakeholder group, the involvement of a professional facilitator or mediator, and the negotiation of informal yet written agreements that can be linked with, or incorporated into, more formal governmental processes.

The Mediation Model

The purpose of the mediation model is to ensure that the allocation of land uses takes place in a way that is viewed as fair by all stakeholders and that all possible joint gains are incorporated into a technically feasible agreement that can be implemented easily. Using this model, planners seek to integrate competing interests with concerns about process and transparency. The result is a highly structured problem-solving process in which all stakeholders learn about each others' interests, challenge previously accepted assumptions, and develop strategies aimed at maximizing mutual gains.

Facilitators and Mediators

The mediation or consensus building process does not require the use of a professional facilitator or mediator, but their participation is often necessary. In the simplest form of consensus building, the facilitator keeps the discussion on a useful course and fosters an environment conducive to joint problem solving. Mediators have greater substantive involvement as they help the parties move from a zero-sum mind-set to integrative bargaining. Despite taking a large measure of responsibility for the quality of the agreement that emerges, the mediator must remain absolutely neutral.

Key Steps and Opportunities

The mediation model can be used in many types of land use disputes, including disagreements sparked by facility siting, comprehensive planning, growth management, environmental clean-up, natural resource management,

and infrastructure design. Generally, even the most complex land use disputes can be transformed into opportunities for increased understanding of other stakeholder interests. By following an established process, creative negotiators can almost always find trades that will lead to outcomes that are better for all parties than no agreement.¹

Step 1: Convening Stakeholders

First, stakeholders must be brought together by an agency convener, often a public official in a group directly affected by the dispute or an organization with regulatory responsibility. Once the key stakeholders have agreed to try to work together, a neutral party usually prepares a written conflict assessment summarizing the concerns of all the relevant parties in their own terms (based on confidential interviews).

After the stakeholders have reviewed the conflict assessment, an organizational meeting is convened to consider the neutral's recommendations and to determine if a consensus building process should indeed be pursued. The decision depends on the nature of the issue, the relationships that exist among the parties, procedural or legal constraints, and the willingness of the parties to proceed. To be credible, a consensus-building group must include appropriate participants representing the full range of stakeholder interests.

Step 2: Clarifying Responsibilities

The participants must ratify a draft agenda and set ground rules for future meetings. This may include: (a) the rights and responsibilities of participants; (b) behavioral guidelines; (c) rules governing interaction with the media; (d) decision-making procedures; and (e) strategies for handling disagreements and ensuring implementation of an agreement, if one is reached. It is crucial to keep a record of the key points of agreement and disagreement. Consensus building processes should be transparent and open to scrutiny by anyone affected by the group's efforts.

Step 3: Deliberating

This step helps participants agree on the information they need to collect and how gaps or disagreements among technical sources will be handled. Participants are asked to begin envisioning and articulating solutions to the land use dispute at hand. It is important for stakeholders to "focus on interests, not positions."² Brainstorming can be used to expand the range of proposals for each agenda item and to generate packages that incorporate trade-offs among items. The goal should be to create as much value as possible and then to ensure that whatever value is created is shared in ways that encourage effective relationships and successful implementation. The

¹ Even so, there are certain circumstances in which mediation is inappropriate—particularly when constitutionally defined rights are at stake or setting a precedent is important. See Susskind and Cruikshank (1987).

² The distinction between interests and positions is explained further in Fisher, Ury, and Patton (1991).

key is to avoid the mistake of trying to complete discussion on complex items one at a time. When a written agreement emerges, it ensures that the parties have understood each other and are clear about the commitments they are making.

Step 4: Deciding

Following the identification of options, participants can begin the process of crafting a final agreement. A list of objective criteria, or indicators, by which the acceptability of an agreement must be gauged gives parties a tool to assess various packages that all parties can accept. Most consensus building groups seek unanimous agreement within the time frame established at the outset of the process. If unanimity cannot be achieved, groups often settle for an overwhelming level of support as long as every effort has been made to meet the most important concerns of every key group.

Step 5: Implementing Agreements

It is extremely important to devise a means of holding the parties to their commitments. Some agreements can be nearly self-enforcing while others are enforceable only by law. Often, the results of a consensus building process are often advisory and must be ratified by a set of elected or appointed officials.

Claims of Supporters and Opponents of the Mediation Model

Consensus building techniques such as mediation have been used for almost two decades to resolve land use disputes in the United States³. To date no universally agreed upon method has been developed to test consensus-building techniques against more traditional methods of resolving land use disputes. Most published studies have attempted to determine whether mediation costs less, saves time, produces settlements more often, and ensures higher compliance rates⁴. The quality of mediated settlements has been overlooked or avoided, as has the question of whether or not the process has improved long-term relationships among the participants.

The Claims of Supporters

Supporters of the mediation model claim that research has shown that these techniques can produce outcomes that are more satisfying to the parties and leave them in a better position to deal with their differences in the future. Indeed, experience with public dispute resolution in America indicates that consensual approaches to handling resource allocation conflicts often yield

³ For more information on the use of consensus building techniques during the 1970s and 1980s, see Bingham (1986). For more recent examples, see Susskind, McKearnan, and Thomas-Larmer (1999).

⁴ A number of sources present information about case studies: O'Leary and Husar (2003), Godschalk (1994); Dukes (1990); Crowfoot and Wondolleck (1990); Huelsberg (1985); Talbot (1983); Bacow, Wheeler, and Susskind (1983).

outcomes that are fairer and more stable than traditional (particularly adjudicatory) methods.

Some of the benefits claimed by supporters are that mediation:

- avoids problems caused by litigation, such as the threat of high legal fees and protracted court cases and the creation of a hostile atmosphere;
- encourages better communication as meeting times are mutually agreed upon and stakeholders can engage in actual conversation and negotiation, allowing them to clarify interests and carry on sustained dialogue;
- offers opportunities for joint gains, especially when multiple issues are addressed;
- builds trust and establishes long-term relationships among parties;
- fosters more efficient use of resources and better compliance;
- resolves underlying issues that are not normally considered during traditional adjudicatory proceedings;
- develops a shared base of knowledge and technical information, allowing stakeholders to formulate reasonable, creative, credible, and longer-lasting solutions that everyone understands;⁵
- increases confidence in government officials as they are more in touch with the public;
- empowers disadvantaged groups as the process offers opportunities for information sharing that are not available via conventional decision making and allows them to enhance their capacity to influence public decisions; and,
- offers greater overall satisfaction with the decisions that are made as “all gain” solutions are created.

Although it is not realistic to expect that all land use disputes can be resolved using mediation, in its various forms, this approach has the potential to create substantially better short- and long-term results for all stakeholders. Most of all, proponents of the mediation model refute the criticism that it is no more than an extension of traditional methods of land use decision making, resulting in “lowest common denominator” outcomes. When the right problem-solving context is created, all sides can find substantial value from the process.

The Claims of Opponents

The detractors of mediation argue that its benefits have been greatly exaggerated, and that it is merely an extension of traditional adversarial politics, rather than an alternative to them (Amy 1987: 68). Opponents make the following arguments against mediation.

Their primary arguments are that mediation:

- is neither faster nor less expensive than traditional processes; the cost of preparing for negotiation may be as high as or even higher than the cost of preparing for some types of litigation (Bingham 1986: xxvi), especially when negotiations involve complex legal or scientific issues and parties

⁵ For more information on the use of technology in consensus building, see Ozawa (1991).

may have to hire scientists, economists, and other experts to assist them;

- cannot alter stakeholder competitiveness or their fundamental power relationships, causing some more powerful parties to not negotiate in good faith, or resort to other, more traditional means if they do not like a settlement (Amy 1987: 228, 80);
- results in “lowest common denominator” agreements which are neither precedent setting nor definitive;
- lacks enforceable and nationally recognized codes of ethics; and,
- must ultimately be litigated if an agreement is considered to be unfair or legally inappropriate.

Until recently, there has been insufficient evidence to test the claims of the supporters and the opponents of the mediation model. In the following section, we present the first comprehensive analysis of the experience with land use mediation in the United States over the last ten years.

An Analysis of Recent Experience with Land Use Mediation

Overview of the Consensus Building Institute’s Study

Increasingly, public officials are turning to professional neutrals (facilitators and mediators) for assistance in resolving difficult land use disputes. The Consensus Building Institute (CBI) undertook a study of mediated land use disputes to evaluate its use to help public officials decide whether or not to use mediation to resolve land use disputes.⁶ The CBI study is based on interviews with participants in 100 cases in which a professional neutral assisted in the resolution of a land use dispute.

The 100 cases ultimately selected were stratified to ensure that they represented all regions of the United States – Midwest, North, Pacific Coast, Rocky Mountains, and South – as well as the six major types of land use disputes (comprehensive planning, development and growth, environmental clean-up, facility siting, infrastructure design, and natural resource management). Two-thirds of the cases were considered by the participants to have been settled and one-third were unsettled.⁷

The study focused on overall attitudes toward the mediation model as expressed by all respondents. Interview results were analyzed by category of respondent such as government official, proponent, and opponent. CBI’s research attempted to answer the following questions:

1. How satisfied were stakeholders with both the land use mediation process and the outcome?

⁶ These efforts, both successes and failures, were selected from an inventory of 147 disputes suggested by 25 of the nation’s leading land use mediators.

⁷ Each of the 100 cases involved multiple stakeholders, so CBI staff carried out interviews with at least three key participants in each case (totaling over 400 participants). Each respondent was asked approximately 25 questions, during one hour face-to-face or telephone interviews. The findings were then supplemented by eight in-depth case studies prepared by the Institute for Policy Research and Implementation at the University of Colorado. See CBI website (www.cbi-web.org) for a copy of the questionnaire used in this study. See Lampe and Kaplan (1999) for case studies.

2. Were underlying issues resolved and relationships improved in a way that helped to avoid subsequent disputes?
3. Did the mediation model cost less and/or take less time?
4. How important was the role of the mediator?

Study Findings

1. How satisfied were stakeholders with both the mediation process and its outcome?

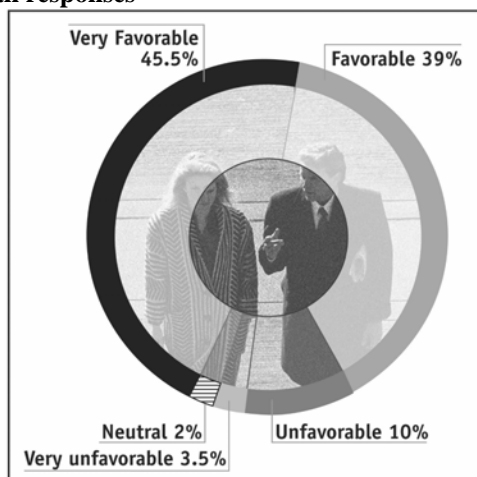
Overall views of the process: 84.5 percent of participants, not including the mediators, had a positive view of mediation: 45.5 percent of participants viewed the process as very favorable and 39 percent as favorable (Figure 1). Even in the cases that were not settled, 28 percent of respondents viewed the process as either very favorable (9 percent) or favorable (19 percent) (Figure 2).

Interests served: Additionally, of respondents who participated in cases that were settled, 92 percent believed that their own interests were well served by the settlement and 86 percent believed that all parties' interests were served by the agreement reached.

Rating of settlements: Of the respondents who stated that some sort of settlement was reached:

- 77 percent stated they reached an agreement regarding how to implement or monitor their settlement.
- A total of 75 percent thought their settlement was implemented very well (41 percent) or sufficiently (34 percent).
- 69 percent thought their settlement was more stable than what they probably could have reached through another process such as litigation or administrative appeal; 23 percent said they did not know.
- 88 percent stated that their settlement was creative: that is, it produced

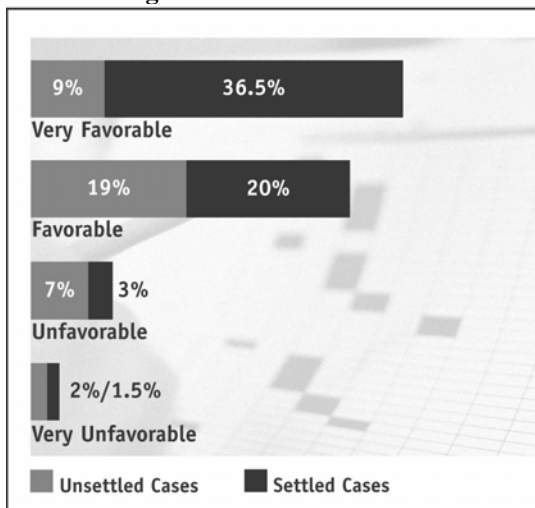
Figure 1: How Would You Rate the Process in General?
– overall responses



the best possible outcome for all sides given what they knew after the mediation.

Progress attained even without settlement: The high level of satisfaction on the part of respondents in unresolved cases most likely stems from the fact that 65 percent believed that the negotiation process produced significant progress toward the resolution of the conflict. The respondents stressed that, even when a complete settlement was not achieved, some issues were resolved, relationships were enhanced, political and interpersonal attacks were avoided, public confidence in the working of government was increased, and useful information was gathered that made it easier to define and understand the questions that were unresolved.

Figure 2: How Would You Rate the Process in General? – responses according to outcomes



2. Were underlying issues resolved and relationships improved using mediation?

The respondents in the unsettled cases identified four major benefits of mediation that helped them make significant progress in their cases, even though the dispute was not resolved completely:

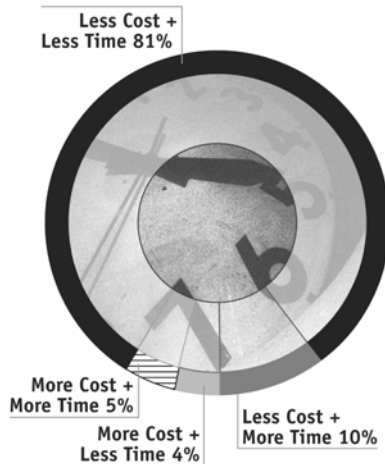
- Achieved minor agreements (33 percent). Even in the most difficult situations, minor or partial agreements were reached on which future negotiations could be based;
- Improved relationships (23 percent). In some cases, improved relationships allowed the parties to: avoid misunderstandings because communication had been enhanced; rework their agreements at a later time when new information or new circumstances arose; or avoid subsequent disputes, or resolve them more easily, because the parties had a new model of how to work things out and a higher level of trust.
- Clarified other stakeholders' interests (22 percent). Participants became more aware of both their own and other stakeholders' underlying

interests, and as a result had a better understanding of what was required to reach an agreement;

- Increased knowledge of the issues (12 percent). Through the sharing of information and joint research, stakeholders developed a clearer understanding of the problems and avoided technical battles that so often obscure underlying disagreements.
3. Did the mediation model consume less time and money than traditional processes?

The researchers asked all respondents to compare the time and cost of the mediation with what they thought would have been required to resolve the same dispute using traditional adjudicatory appeals. While 5 percent of interviewees stated that the negotiation process took more time and cost more money, 81 percent said they finished the negotiation with the impression that it consumed both less time and less money (Figure 3).

Figure 3: Cost and Time of Mediation vs. Other Processes



Although some of the disputes in the study required the investigation of complex legal and scientific issues that had real costs, the central requirement in the majority of cases was merely that the participants sit down and listen to what others had to say. Nevertheless, responses to this question did vary by type of dispute. For example, a smaller percentage of respondents involved in infrastructure design disputes believed that mediation required both less time and money than more conventional processes (64 percent) than did respondents in any other type of dispute.

4. How important was the mediator?

When asked whether or not the parties thought they could have reached an agreement without the assistance of a professional neutral, 80 percent of all respondents answered “no.” In a related question, 85 percent of all respondents stated that the mediator was either “crucial” or “important” to

achieving whatever level of agreement was reached among the parties. This percentage did not vary much by either the role of the respondent or the type of dispute. Even in cases that were not settled, 33 percent of respondents stated that the mediator was “crucial” or “important” to the overall process (Figures 4 and 5).

Figure 4: How Important was the Mediator? – overall responses

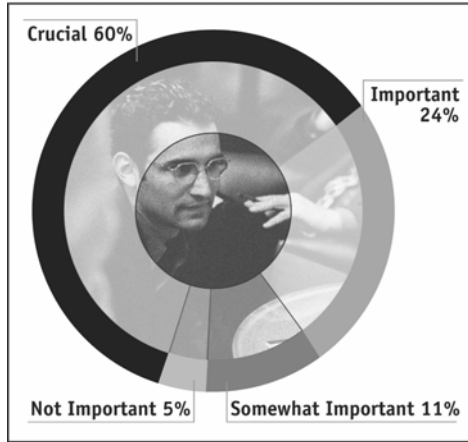
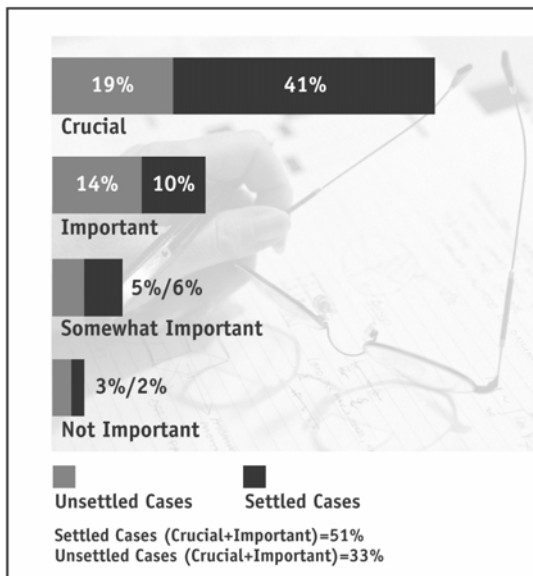


Figure 5: How Important was the Mediator? – responses according to outcome



Mediators made invaluable contributions by:

- employing techniques that assisted the stakeholders in overcoming an impasse which precluded them from resolving the dispute on their own;
- discovering underlying interests that were concealed by the inability of the parties to deal with each other effectively;
- managing the interaction of the stakeholders to ensure that all parties had both an opportunity to express their views and the responsibility to listen to what others had to say; and
- facilitating joint fact-finding.

Study Summary

Most respondents had a positive view of mediation, as indicated by their 86 percent very favorable/favorable assessment. Even when cases were not settled, significant progress was often made. Moreover, neutrals were generally viewed by stakeholders as having made “important,” if not “crucial,” contributions to either the resolution of the dispute or the improvement of the conditions that surrounded it. Finally, mediation appeared to cost less money and take less time.

The study results also indicate that not all disputes are appropriate for mediation. When asked under what circumstances mediation should not be utilized, respondents answered:

- when setting a precedent is important;
- when participants do not recognize each other’s rights;
- when a complete stalemate has been reached;
- when payment for the process is coming from only one side; or
- when the process is only being utilized to delay any action or to create the illusion that something is being done.

As a general rule, the success of mediation relies on the disputants’ commitment. A mediator cannot force any party to accept a settlement. Moreover, failure to follow through on promises made during a negotiation can result in the disintegration of trust and the initiation of bitter subsequent conflicts. This is more likely to occur if one or more parties feel coerced or tricked into accepting an agreement.

If the parties involved in a dispute are truly committed to implementing a negotiated agreement, then “the combination of the mediation session itself, the fact that an outside party is bringing the parties together, and the mediator’s incentive to achieve settlement can combine to overcome inertia and move the case to settlement” (Sipe 1998: 282). In such situations, the mediator can make a critical contribution.

Lessons From the Field: Obstacles and Successes in Land Use Mediation

Obstacles to Mediation

The CBI study identified three main sets of obstacles to achieving a mediated settlement in land use disputes: tensions among stakeholders, procedural obstacles, and substantive obstacles.

Tensions among Stakeholders (52%)

Interpersonal problems among the stakeholders, such as personality, attitude, and other behavioral tensions often impede effective negotiation. Within this category, “distrust” was reported with the greatest frequency (15 percent), with “entrenched positions” a close second (12 percent). To avoid these problems, it is very important to establish ground rules and create an atmosphere in which parties can deal with their differences.

Procedural Obstacles (28%)

Almost one-third of responses to questions about the management of the mediation process were related to procedural concerns. Some were a direct outgrowth of the fact that the stakeholders had no prior negotiation experience and were confused about their role and about what the process was intended to achieve. Additionally, disputes arose among stakeholders who believed in traditional decision-making processes and those who championed the idea of a mediated process. These situations highlight the importance of explaining the goals of the process and the roles that the various stakeholders and neutrals prior to the initiation of negotiations.

Substantive Obstacles (20%)

Although substantive land use problems made up a total of only 20 percent of the obstacles enumerated by survey respondents, “technical planning issues” accounted for more than half of this total. Land use planners rely on technical jargon and abstract concepts that often act as barriers to entry for interested lay people. Thus, it is important for those managing a consensus building process to ensure that all stakeholders understand the technical issues involved.

The Policy Debate

Interest in mediation continues to grow, spurred on by the increasing supply of experienced mediators, growing familiarity with dispute resolution techniques, and increased legitimization of consensus building via laws, regulations, and state programs offering dispute resolution services.

For planners, in particular, mediation offers an approach to dealing with increasingly complex land use issues and a growing number of stakeholder concerns. The question is, if land use disputes should be settled using mediators, what does that say about the role of planners and planning? Indeed, what is the role of other stakeholders such as elected officials, public agency employees, the business community, local activists, volunteer planning commissioners, and the general public in consensus building efforts?

The Role of Mediation in Land Use Planning

Several questions remain unresolved about the use of the mediation model in land use planning situations. To what extent can mediation enable a shift from efficiency to fairness, or to assist stakeholders in resolving their differences? Should land use planners or other public officials mediate local land use disputes, or should mediation services be provided primarily by

outside neutrals? What kinds of regulations, if any, are needed to ensure an appropriate role for mediation in land use disputes?

Use of the Mediation Model

The mediation model as a tool to resolve land use disputes emerged as a natural outgrowth of the shifting demands on land use planners in the 1990s to resolve disagreements and build consensus. The ultimate purpose of this model is to ensure that land use decisions are made fairly and that all possible joint gains are incorporated into technically feasible and implementable agreements.

Local planners often have complex and contradictory duties. They may seek to serve political officials, legal mandates, professional visions, and the specific requests of citizens' groups all at the same time. They typically work in situations of uncertainty; great imbalances of power; and multiple, ambiguous, and conflicting political goals. Many local planners therefore, may seek ways both to negotiate effectively, as they try to satisfy particular interests, and to mediate practically, as they try to resolve conflicts through a semblance of a participatory planning process (Forester 1987: 303).

In the mediation model, planners facilitate interparty communication, aid in the formulation of agreements on technical matters, suggest "packages" that allow contending parties to trade across issues they value differently, and seek opportunities to shift stakeholder relationships from adversarial to collaborative. Thus, planners assist all stakeholders in reaching agreement.

Planners as Mediators

The question remains whether planners should mediate land use disputes themselves or leave that role to outside professionals. Do planners have the right attitudes and skills to mediate fairly? Can they act in a neutral way while still expressing opinions on the substantive issues at hand? Should mediation services be provided by autonomous entities such as nonprofit centers or should they be available through court- or government-annexed agencies?

Land use planners can, and have, mediated disputes successfully even when they were directly involved in the case. The purpose of asking planners to mediate their own disputes is not to save money on outside services, but to encourage collaborative decision making as a normal method of handling resource allocation disagreements. When the parties involved in a land use dispute are not aware of, or experienced with, consensus building techniques, land use planners can encourage them to take advantage of mediation without much fanfare and without the need to stop and wait until the services of an outsider become available. As long as a planner has the right skills, and is able to stay neutral, he or she can facilitate a joint problem-solving effort.

Other Public Officials as Mediators

An alternative to having planners play the role of the neutral is to build mediation capability within government, while keeping these capabilities separate and distinct from other departments. Currently, such in-house arrangements exist in Massachusetts, Florida, Montana, and Oregon.⁸ Disputants do not usually choose between hiring an outside mediator or using internal expertise; instead, they choose between using this internal service and not using mediation at all. Typically, because internal expertise is readily available and relatively inexpensive, parties are willing to use it as long as they have the right to opt out at any point (without compromising their normal administrative options).

In general, the following preconditions should be met before any public official assumes the role of a neutral mediator:

- The government agency for the neutral works should also send another representative to voice its interests in the negotiation, clearly freeing the neutral to concentrate on the mediation role.
- The relationship between the agency representative and the staff person serving as the neutral should be disclosed immediately to all parties involved.
- When making a decision regarding which staff member to place in each role, the agency should clarify its decision-making hierarchy internally. Failure to do so could lead to difficult situations in which a subordinate, acting as a neutral, is required to oversee his or her superior.

Considering that government officials initiated 75 percent of the land use dispute resolution cases in the CBI study, these preconditions are very important.

Given the complexities of the mediator's role, most mediation services should be provided by neutral parties outside of government. As professionals not affiliated with any government institution, they will be able to function most effectively. Those who have developed expertise in land use and natural resource management are most likely to be successful in such cases. An increasing number of nongovernmental organizations (NGOs) now offer consensus-building services, so the availability of qualified outside professionals is no longer an issue (Tonkin and Swanson 1998: 2).

Institutionalization and Regulation

There are federal, state, and even some local statutes on negotiated rulemaking, but few of them are specific to the mediation of land use disputes. One option is that land use mediation be regulated by state enabling statutes on zoning to avoid some of the experimentation that is less than fully informed. Or, states could draft separate land use mediation statutes.

⁸ Examples include the Massachusetts Office of Dispute Resolution, the Montana Consensus Council, the Florida Conflict Resolution Consortium, and the Oregon Dispute Resolution Commission.

For example, the Montana Consensus Council has proposed a statutory framework for resolving local land use disputes.⁹ The intent of the framework is to encourage local government officials, landowners, developers, and other citizens to develop better informed, more creative, and lasting solutions to land use disputes through various forms of dispute resolution and consensus building. The proposed legislation seeks to supplement, not duplicate or replace, existing laws. It includes guidelines on the need for consensus building, the creation of representative negotiating committees, techniques for implementing informal agreements, the use of facilitators or mediators, and public reporting requests.

Conclusions

Today, land use disputes are becoming increasingly complex. The time is ripe for land use planners and other public officials to explore alternative ways of resolving these conflicts, and the mediation model represents an important new option for achieving this goal.

Increasingly experience with consensus building, as a means of resolving complex land use disputes, is being documented and evaluated. However, further evaluative research is still needed to sharpen our understanding of what works well in the mediation process and what does not.

Practitioners must develop a clearer understanding of the ways in which procedural adjustments increase or decrease the efficiency and quality of mediation. This includes identification of the key obstacles to achieving settlements in different types of situations, the actions that assist in, or hinder, overcoming these obstacles, and the characteristics of each case that make it amenable, or not, to negotiated settlement.

It is eminently clear that land use disputes will not give way to technical planning and analysis alone. Furthermore, advocacy of various political interests, although it may be absolutely necessary to ensure that key voices are heard, tends to exacerbate rather than resolve disputes. While litigation may resolve some aspects of some land use disputes temporarily, it does not address the underlying concerns of the parties very often; nor does it improve the very relationships required to reconcile differences in the future. The mediation model offers a way to accomplish all these objectives.

Acknowledgments

This article is based on the report, "Mediating Land Use Disputes: Pros and Cons," that was published in 2000 by the Lincoln Institute of Land Policy. It is one in a series of policy focus reports that address timely public policy issues relating to land use, property, taxation, and the value of land. The original report was based on a major research project funded in part by the Lincoln Institute. It was conducted by researchers at the Consensus Building Institute (CBI), headed by Lawrence Susskind, and at the Institute

⁹ "Resolving Land Use Disputes: A Discussion Paper for Suggested Legislation," Montana Consensus Council, Draft of July 22, 1998. As well, Connecticut has legislation on the mediation of land use disputes (see sect. 8-8, chpt. 124 of the *Connecticut General Statutes*).

for Policy Research and Implementation at the Graduate School of Public Affairs, University of Colorado, Denver, headed by Marshall Kapland. The actual data collected in the initial study are available for researchers on CD-ROM from CBI.

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