Resolving Land Use Disputes
Clinic

Ona Ferguson, Merrick Hoben, Matt McKinney, Ric Richardson
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Agenda

8:45  Characteristics of Land Use Disputes
9:15  Getting Past No: Strategies to Resolve Land Use Disputes
9:30  Integrating Collaborative Methods into Land-use Decision-making
10:00 Break
10:15 Analysis and Problem Solving of Participant Land Use Conflicts
11:45 Adjourn
Question

- What makes land use disputes complicated?
- What is unique about land use disputes as opposed to disputes about other subjects?
Characteristics of Land Use Disputes

- Competing values and rights
- Fundamental ideological beliefs
  - How the world “is” or “ought to be”
  - Who has a moral or legal right to do something
  - Attempt to force one belief or value system on another
Characteristics (cont.)

- **Clash of interests**
  - Substantive (allocation of resources, goals)
  - Procedural (who is involved, how, when)
  - Psychological (perceptions of trust, fairness, respect)

- **Complex information**
  - Lack of information & misinformation
  - Different views on what information is relevant
  - Different procedures to collect and assess data
  - Different interpretations of data
  - Different level of comfort with risk and uncertainty
Characteristics (cont.)

- **Structural factors**
  - Competing missions and mandates
  - Institutional procedures
  - Time constraints
  - Unequal control of power, authority, and resources
  - Changing demographic, economic, and political variables

- **Negative relationships**
  - Historic tension
  - Lack of trust, misperceptions among groups
Getting Past No

Strategies to Resolve Land-use Disputes
The Changing Concept of Land Use Planning

<table>
<thead>
<tr>
<th></th>
<th>Conventional Approach</th>
<th>Facilitative Approach</th>
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<tbody>
<tr>
<td><strong>Planning Task</strong></td>
<td>Provide technical data and advice</td>
<td>Integrate interests and data</td>
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<tr>
<td><strong>Product</strong></td>
<td>Technically viable plan</td>
<td>Technically and politically viable plan</td>
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<tr>
<td><strong>Primary Clients</strong></td>
<td>Decision makers (maybe developer)</td>
<td>All stakeholders</td>
</tr>
<tr>
<td><strong>Role of public participation</strong></td>
<td>Provide input and advice</td>
<td>Build understanding and agreement</td>
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<td><strong>Skills</strong></td>
<td>Technical</td>
<td>Dialogue and deliberation</td>
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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 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
81% said negotiation consumed less time and money than traditional adjudicatory appeals
How important was the mediator?

- Crucial: 60%
- Important: 25%
- Somewhat Important: 11%
- Not Important: 4%
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

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- Property rights
Case referred to Mediation from other process

- Don't know: 2%
- No: 27%
- Yes: 71%
Integrating Collaborative Methods into Land-use Decision-making
The Challenge

- 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
Systems to Resolve Recurring Multi-party Disputes

Theory of Dispute Systems Design

3 approaches to resolve any dispute
- Power
- Rights
- Interests

Which approach is best?
- Satisfaction with the outcomes
- Sustainability of the outcomes
- Transactions costs
- Impact on relationships

Proposition -- Reconciling interests:
- Tends to be less costly than …
- Determining who is right, which in turn is less costly than
- Determining who has more power.
An Effective System

- Power
- Rights
- Interests
Scope of the Study
25 land use dispute resolution programs, representative sample, not comprehensive

<table>
<thead>
<tr>
<th>State Programs (18)</th>
<th>Local Programs (7)</th>
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<td>California</td>
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<td>Florida (2)</td>
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<td>Georgia (2)</td>
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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?

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<tr>
<th>Intergovernmental and Interagency (10)</th>
<th>Property Owners, Citizens and Regulatory Bodies (15)</th>
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When in the Process?

Pre-application (6)
- Austin
- Bozeman
- Albuquerque
- Denver & Colorado Springs
- North Carolina

On Appeal (11)
- Connecticut
- Florida
- Maine
- Idaho
- Baltimore
- South Carolina
- Vermont
- Georgia (2)
- Washington
- Warwick, NY

Anytime in the Process (8)
- California
- Florida
- Vermont
- Idaho
- Massachusetts
- Delaware
- Colorado
- Oregon
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
Land Use Disputes Clinic

Finding Solutions to Participant Challenges
Land Use Disputes Clinic Survey

1. What is the nature of the conflict?
2. Who are the stakeholders? Who’s the decision-making authority?
3. Is anyone working to resolve the conflict now? If so, how?
4. What aspect of the situation would you like help with?
The Consensus Building Institute

- Consensus Building Institute (CBI) is a 501(c)3, not-for-profit organization dedicated to helping organizations of all kinds reach better agreements.
- CBI has extensive experience in the public and private sectors and CBI staff are actively involved in mediating some of the world’s most complex business and political disputes.
- CBI advocates use of the “Mutual Gains Approach” to negotiation developed at the Program on Negotiation at Harvard Law School.
- CBI has a global network of full time staff and affiliates.

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