

REPAVING THE LEGAL SYSTEM: STEPPING AWAY FROM THE COURTS AND MOVING TOWARDS MEDIATION TO SOLVE LAND USE DISPUTES

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I. Representing Entire Communities – Mediation used in Land Use Decision-Making

A. Why Use Mediation in Land Use?

Whether disputes arise over public resources, new regulations proposed by a Planning Commission, or a new development planned to occupy Town Square, mediation allows community members to set the structure of the discussion, which diffuses power disparities to create an even playing field. Whereas litigation offers only objective rules and standards, mediation focuses on the subjective issues that the court system often neglects. Mediation allows parties to focus on the current issues, and draw up solutions specific to their unique situation. Mediation offers something more to gain—a chance to settle instead of going to trial—and is best used if each party has something it can offer the other side.¹ Whether there is an existing relationship between parties, or where future dealings are at stake, mediation allows the parties to readdress the concerns that may not have been voiced during a public hearing. Where a decision is uncertain and the parties feel the need to maintain control over their town, mediation provides a “safety zone;” to discuss the issues from where they stem, and to redirect the parties’ thinking from competitive towards a more integrative style. Ultimately, mediation gives the parties the power to decide what will determine their success in the process.

¹ See Edith. Netter, *Using Mediation to Resolve Land Use Disputes*, 15 Zoning & Plan. L. Rep. 25, 27 (April 1992) (discussing the importance of alternative methods of bargaining and solving land use decisions).

Considering the following hypothetical, mediation is often the most viable solution, whether looking at a situation through a legal or public policy lens:²

A developer submits an application for a controversial development approval, which the surrounding community is strongly opposed to. The community argues that adding twenty-five residential buildings to the town will upset its tranquil character. The developer has been approved to build, but contention over this new development is unending. The community voices opinion that the number of units built will contribute to overcrowding, as well as noise and traffic congestion. Since many community members agreed not to oppose the project if it was built on a smaller scale, the city planner suggested mediation, in order to find a compromise to the issue. Following the mediation, the developer agrees to revise the plan to constitute a mix-use development, including only ten units at a new site location. Subsequently, the neighbors agree to this project because it is less dense, there will be more recreational space, and the site reflects the characteristics of the community.

While most mediations are more complicated than the above-mentioned scenario, this example shows the benefits of collaboration. Had this issue gone to trial, there is no clear determination who would have won, and both parties might have been worse off. Solving this controversial development problem required cooperation, and a focus on mutual gain; one that encompassed the interests of both sides. Focusing beyond the legal positions of either side, the project was built as planned, while sustaining the community's interests and desires. Through mediation, the parties were able to work together, and use transformative-style bargaining to reach a mutual agreement, and establish a relationship for the future.

B. Facilitating Land Use Disputes – Cutting Costs and Time

Land use decisions often require months, if not years of planning, and become increasingly complicated, as more and more

² *Id.*

parties become involved. The increasingly controversial nature of land use regulations and property law have led to an “explosion of litigation”³ over many highly contentious disputes, and “like other forms of litigation, land use litigation has caused delays in project implementation.”⁴ Stepping out of the court room, and resolving controversial decisions through mediation would result in better outcomes for all parties: advancing project implementation; addressing issues in a timely manner; and promoting community growth. Mediation “lead[s] to a mutually agreeable compromise or settlement,”⁵ which saves municipalities from the costs and frequent delays of litigation. However, despite the evident advantages of mediation, it still is not used as frequent as it should be.

Today, land use disputes come in all sizes and shapes, “occur[ing] between communities and their decision makers . . . and between organizations and the public.”⁶ Disputes arise when organizations (i.e. a contractors, developers, or corporations) enter into communities and propose building plans that directly hinder the interests and needs of the public (i.e. communities, housing associations, or local clubs and unions). On the surface, these disputes involve the parties’ positions: one party desiring to develop the land for business, and the other desiring to stop development to preserve the town. A prudent mediator focuses on separating the people from the problem, which requires the mediator to dig below the surface of the legal dispute.

Digging below the surface, and uncovering fundamental issues leads to long-term reconciliation, rather than a solution that appeases the parties’ temporary concerns. Digging below the surface means focusing on the varying needs, motives, and values

³ DANIEL P. SELMI, JAMES A. KUSHNER & EDWARD H. ZIEGLER, *LAND USE REGULATION: CASES AND MATERIALS* 578 (4th ed. 2012).

⁴ *Id.*

⁵ *Id.*

⁶ SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS’ GROUPS* 3 (John, Wiley & Sons, Inc., 2001).

affecting collaboration. Mediation draws attention away from “what seems to be the substance of the controversy,”⁷ and moves towards ways to rebuild or foster relationships. Facilitating mediation requires a thorough understanding of the situation, beyond what is floating on the surface, thus, allowing parties to address specific components of a dispute to create lasting solutions.⁸

A wise mediator balances his or her obligation to the client with the integrity of the process. When a mediator is expected to serve the interests of an entire community, the dynamic of mediation changes. Large groups often consist of individuals who hold contending views: some in favor of a certain land use decision; some opposed; and some who fall in between. Regardless of the differing views of a group, it is important that the mediator interacts with the parties in a manner that balances the group’s overall commitment to the mediation itself. As mediators continue to shuttle diplomacy between clients, the mediator must understand that everything he or she does is geared towards the parties shaking hands at the end of the day. However, this will only occur if both parties are committed to reaching an agreement that accounts for the needs and interests of all the individuals involved.

II. Promoting the Advantages and Alleviating the Disadvantages of Mediation

Advantages: Mediation as an Effective Tool

Whether mediation is implemented early in the decision-making process, or after concessions have already been exchanged, mediation offers the following advantages: (1) positions have not hardened—at this moment, it becomes easier for parties to engage in joint problem solving; (2) improved communication and creative problem solving—since public hearings do not offer opportunities for meaningful dialogue, the parties are actually able to showcase their positions for the benefit of the mediation; (3) cost savings—if parties are invested in the process, and a

⁷ *Id.* at 71.

⁸ *Id.*

settlement is reached, each party feels that the ultimate decision is satisfactory, and parties will draw back from litigation; and (4) improved community relationships—if the parties are satisfied with the outcome, they are more likely to work cooperatively in the future.⁹ Mediation offers more than just an agreed-upon solution—mediation addresses the wants, needs, hopes, and desires of a community, and packages these critical interests and values into more appealing aspects than the court-system can offer.

Disadvantages: Problems that can be fixed

Just as every well-oiled machine has its hiccups, which requires occasional fixes and repairs, mediation similarly requires the same maintenance and care. One problem with complex land use issues is difficulty in including everyone in the discussion—essentially eliminating mediation privileges from community members. This leads to lack of confidence in the process, that is: non-present community members do not have full assurance that decision-makers will adequately represent their interest; or representatives may not accept the recommendation that arises out of the mediation process. Nevertheless, a mediator can establish trust and rapport that generates confidence in the mediator and confidence in the system. By doing so, the mediator can best promote the public's interest, rather than just solving the problem for the sake of a solution. Thus, by establishing trust and instilling confidence in community members, the parties feel that their voice is heard, whether or not they are physically present at the mediation.

III. Overcoming Obstacles in Mediation: Serving the Interests of the Whole Town

Seeking Adequate Representation – Satisfying the Needs of Everyone

When representing large parties, the mediator must be sensitive to the interests and needs of both sides, as well as the impacts a particular decision will have on the future. But how can the mediator best serve the public's interests, when only a few

⁹ Netter, *supra* note 1 at 27-28.

individuals are present during the actual mediation? When land use regulations are disputed on a local level, state statutes often mandate a public hearing, giving individuals a voice in a particular planning process. However, there is concern whether mediation shuts out the voice of the public, since public hearings are not always held prior to mediation. While mediation will not necessarily invite the entire public to join in conversation, mediation remains advantageous for land use regulation, because it is “absent of legal constraints,” and “local officials can effectively work with mediators to creatively solve local land use disputes.”¹⁰

While the role of the local official is important in that he or she embodies the public’s “voice,” the mediator’s perception of the local official plays an even more significant role. It is the duty of the mediator to gather from representatives, what the true concerns of the public are. If a mediator believes a representative is not adequately speaking for a party, it changes the way the mediator handles the discussion. Concerns also arise from the representative’s standpoint, in that he or she does not want to be held entirely accountable if a decision is not met, or if a decision does not meet the needs of every single individual. However, the mediation model provides the parties with protection from these “legislative or judicial handcuffs,” by “guarantee[ing] each party [provides] input into the decision making process, allow[ing] each party to raise concerns beyond those that might be reflected in any [legal] document.”¹¹ Further, while a comprehensive plan or zoning ordinance cannot anticipate all the interests of the community, mediation encourages compromise, as to accommodate the community’s concerns. Unlike litigation, mediation provides protection that “shape[s] and discipline[s] municipal decisions,”¹² rather than just providing judicial oversight. Using a system that searches for solutions beyond the

¹⁰ Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U. L. Rev. 227, 246 (2011) (highlighting that the mediation model provides the ability to piecemeal changes that reach the “heart of land use regulation,” ultimately “require[ing] decision makers to take careful account of a number of values [when] making individualized decisions.”). *Id.* at 250.

¹¹ *Id.* at 251.

¹² *Id.* at 253.

law, provides a more flexible environment, where the parties can think more creatively, and seek mutual gain beyond the objective constraints of the court system.

B. Participation in the Process – Necessity for Legitimacy

Public hearings are vital to land use decision-making, since they give communities an opportunity to “participate”¹³ in the process, essentially devising solutions that incorporate the overall needs of the public. While this model works well in the decision-making process, this same method of recourse does not regularly occur before mediation. Although mediation only offers indirect¹⁴ participation, the public is still be able to contribute with help of the mediator. An effective mediator recognizes that “participation by all interested parties is critical—both because participation itself may be a value, and because participation generates information that permits officials to make more informed decisions.”¹⁵ Since land use decisions operate to ensure adequate involvement from all parties, mediators ensure the voice of the public is present during mediation, whether the individuals are sitting at the table or not.

Since individual community members are indirectly involved, the mediator must actively listen, and recognize what interests are being communicated. Crucial to the effectiveness of mediation is the ability for a mediator to understand the concerns of the community and guide the parties towards practical options. By understanding the root of the issue, and the affects a particular

¹³ *Id.* (“Participation is the mechanism for transforming land use regulation from a zero-sum game to one where the interests of multiple parties can be accommodated. Judicial review retains a role within the mediation model, but the focus of judicial review is on ensuring that all parties have had an opportunity to participate in the decision making process, not on evaluating the merits of the municipality's decision.”).

¹⁴ In this context, indirect participation simply means that the interests and concerns of the community were voice previously, and are recorded by the local officials. Thus, the public’s concerns are then directly addressed during mediation.

¹⁵ Sterk, *supra* note 6 at 253.

decision will have on the community, the mediator can promote solutions that reflect the community's desires. Being keen to who is representing the community, and zealously advocating for mutual gain, the mediator ensures the community is heard.¹⁶ When parties create sufficient value, well beyond what any of the parties expected at the outset of the dispute, there should be no problem working out an acceptable distribution of the value created.¹⁷ Participation involves collaboration, so that decisions can be formed to "restructur[e] regulatory processes and agreements to further public goals of efficiency, fairness and long-term [goals]."¹⁸

IV. Conclusion: Creating a More Inclusive System in the Future

The future of mediation requires more public involvement, where "the mediator may invite [and parties may suggest] other relevant stakeholders to attend."¹⁹ While the overarching goal of mediation is to allow all relevant parties to engage, affected parties can only participate in the process if invited,²⁰ which often excludes absent parties from the agreement. Although mediation can be used to solve disputes in more creative ways, dispute resolution in land use contexts is limited to certain circumstances,

¹⁶ ROBERT H. MNOOKIN & LAWRENCE E. SUSSKIND, *NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS AND EVERYBODY ELSE* 53 (Sage Publications, Inc., 1999) (regarding the shifting role of agents in interest-based negotiations, this article hinges on the element of trust, that "[i]f representatives are trusted by constituents, they will be better able to create value, but the more extensively that they are involved in creating value, the harder it is to persuade constituents that these activities are appropriately advancing their interests.").

¹⁷ *Id.*

¹⁸ Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions Installment Two*, 24 *Stan. Env'tl. L.J.* 269, 277 (2005).

¹⁹ *Id.* at 290.

²⁰ *Id.* (emphasis added)

and may not be the best method in every case. Nevertheless, mediation is an invaluable stride towards building more open and collaborative land use regulation processes.²¹

Mediating on behalf of others requires us to realize that as humans, “we are inherently great; we are just no longer solution driven.”²² What needs to be done is to start finding reasonable solutions to our problems; that is, using dispute resolution for mutual gain. But we all have to be on the same page—our policy makers, our industries, our attorneys, our businesses, and our people. However, none of us have been on the same page. Currently, there is hesitation to branch away from the law, and it is not an issue about the system; “it is that no one seeks mediation as the first option. Everybody has his or her agenda. Take a look around and tell me if it’s working. Because I don’t see that it is.”²³ When parties are transparent with each other, our society functions more productively. Mediation brings parties back on track, allowing the public to communicate clearly, solve issues, and find solutions for the benefit of all.

²¹ *Id.*

²² Interview with Erin Brockovich, Consumer Advocate, Erin Brockovich Research & Consulting (Nov. 2, 2014) (discussing the context of dispute resolution in class action lawsuits and how to best serve the interest of entire communities).

²³ *Id.*