

# Building Consensus:

## DEALING WITH CONTROVERSIAL LAND USE ISSUES & DISPUTES

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### INTRODUCTION

Locating a large superstore, siting a new landfill, reviewing a major new development, reconstructing an abandoned railroad line for a bike path – all of these can create conflict. In most communities, the usual process is for the planning commission or zoning board to hold public hearings, review the evidence presented, and render a decision. When a project is highly controversial, odds are good that this decision will be appealed, ultimately ending up in court. But court proceedings can be costly and time consuming. Moreover, the final outcome will likely be unsatisfactory to at least one of the parties.

Over the last twenty-five years, a growing body of evidence suggests that

mediation and facilitation – what we term “consensus building” in this article – can be effective in helping align divergent interests, develop creative solutions, and resolve heated disputes. Consensus building can lead to outcomes which *all* parties to a dispute find acceptable.

Perhaps the earliest consensus building effort in the environmental and land use context was initiated in 1973 and focused on a long-standing dispute over the location of a flood-control dam on the Snoqualmie River in Washington. In one year, with the help of a mediator, the parties agreed not only on a location for the dam, but also on the creation of a river basin planning council and the purchase of development rights to maintain the area’s rural character. Since then, hundreds of land use and environmental conflicts have been resolved through the use of consensus building techniques.

Consensus building can be particularly helpful in: (1) resolving appeals of contentious local commission decisions; and (2) resolving “not in my backyard” (NIMBY) disputes.

### RESOLVING APPEALS OF LOCAL COMMISSION DECISIONS

Despite a community’s best efforts, a land use decision may find its way into court or be appealed to some other review body. Proponents of a project that has been turned down may feel they have no choice but to pursue litigation, especially if they see their case as strong and their sunk costs high. Similarly, opponents of a project that has been approved may feel they have no recourse but to go to court to block the project. While mediation is not always the answer, in many situations it can help the parties address the issues and reach settlement faster and at lower cost

than litigation. See also “Q & A #4: Does Land Use Mediation Work?” on page 18.

Take the following example. After the recession of the early 1990s, a local bank in a community north of Boston found itself in repossession of 97 acres of developable land. The bank (through an investment corporation) proposed to build a 100 unit residential development, of which 25 units would be affordable housing. Local officials, however, were worried that the project would eliminate one of the last major parcels in town available for commercial development.

After a lengthy review, the town’s zoning board rejected the application on the basis of wetlands and traffic concerns. The bank appealed the decision to the Massachusetts Housing Appeals Committee, relying on a state law that allows this state board (under certain circumstances) to override local zoning denials when affordable housing has been proposed.<sup>1</sup>

The Housing Appeals Committee, with a heavy backlog of cases, encouraged the parties to try to mediate the dispute. The parties agreed. For the bank, mediation held the promise of avoiding protracted and costly litigation. For the local officials, mediation offered the possibility of reaching an agreement which they could help shape, instead of one imposed by the state.

The Massachusetts Office of Dispute Resolution helped arrange for a mediator. Over a period of nine months, the mediator worked with the parties, keeping them focused, and reminding them of agreements already reached on key issues.

<sup>1</sup> Since 1969 Massachusetts has had a unique state zoning law designed to encourage affordable housing. Chapter 40B, as it is known, allows developers who propose to build housing in which at least 25 percent of the units are affordable to apply to the local zoning board for a “comprehensive permit,” which includes all the required local approvals needed for development. If the zoning board denies the application (or grants it with conditions which would make building uneconomic), the applicant may appeal the board’s decision to the state Housing Appeals Committee.



### Glossary

**Consensus Building:** a set of techniques used to help diverse stakeholders reach agreement. Non-partisan professionals are usually needed to facilitate such a process.

**Mediation:** a way to resolve disputes that relies heavily on the assistance of a trained neutral acceptable to all the stakeholders. Unlike an arbitrator, a mediator has no power to decide anything. As a general rule, mediation assumes the tasks of facilitation.

**Facilitation:** a general term for the management of problem-solving conversations. The role of the facilitator is to keep the parties on track during meetings.

**Arbitration:** a voluntary but highly structured adjudicatory process that produces binding decisions.

**Stakeholder:** a person or group likely to be affected by (or who thinks they will be affected by) a decision, whether it is their decision to make or not.

Ultimately, the bank and town officials agreed to a mixed-use development of 40 single-family homes, with a 20-acre commercial/industrial park. Ten of the homes would be affordable; land would be set aside for open space; and the wetlands would be protected. The parties also agreed to jointly select an outside engineer to review plans and monitor construction.

### RESOLVING NOT IN MY BACKYARD DISPUTES

Siting landfills, homeless shelters, halfway houses, and countless other uses can provoke strong, and frequently bitter, reactions from nearby residents or businesses. Opponents will fight every inch of the way to prevent something they deem unsafe or destructive to the property values of their homes or businesses. On the other side, proponents will spare no cost in promoting the need for their project and generating support for it. Local officials often find themselves caught in the middle, between groups with firmly set opinions that seem miles apart. Consensus building can help the parties step back, consider possible options, and determine if there may be a way to satisfy the interests of all sides.

In West Chester, Pennsylvania, a proposed downtown homeless shelter divided the community. Local business owners organized in opposition, fearing the shelter would hurt nearby businesses and cause the downtown to further deteriorate. Others saw the shelter as essential to meeting an important community need. The County Commission wanted the dispute resolved, but also wanted to see if this could be done outside the context of a formal zoning permit hearing.

At the County Commissioners' urging, the parties agreed to try mediation. The County assisted by covering its costs. The mediators started by conducting a "conflict assessment," which included a series of confidential, one-on-one meetings with those involved in the dispute. The mediators then convened several meetings which all the stakeholders attended.

One major concern to the business owners was that the shelter would operate 24 hours a day, with the homeless not

merely seeking a bed for the night, but other support services. Although shelter advocates argued strongly for day time job training and counselling services, the parties reached agreement that, at least initially, the shelter would operate only in the evenings. The shelter provider also offered a pledge to the community to be a good neighbor. The agreement ended with a motto coined by one of the original opponents: "Together we can do it." Four years later, after proving itself to be a good neighbor, the shelter was allowed to expand its operations to include daytime hours and additional services.

### ELEMENTS OF CONSENSUS BUILDING

The two examples described above provide just a flavor of how consensus building can make a difference. Given these examples, you might ask, "OK, this might make some sense, but how does it really work?"

The consensus building process typically includes five key steps: convening; clarifying responsibilities; deliberating; deciding; and implementing agreements.

**1. Convening.** A sponsoring or "convening" body (usually a government agency) typically initiates discussions about whether or not to have a consensus building dialogue. This is best done by commissioning a mediator or some other "professional neutral" to talk privately with the obvious stakeholders to see if they have sufficient reason to support such an effort. Such consultations usually lead to the preparation of a draft conflict assessment report, which maps the views and interests of all the stakeholders (without attributing any statements to specific individuals).

This assessment provides the means for both the mediator and the stakeholders to clarify whether it is worth trying to reach an agreement through open deliberations (see step 3 below). If there does appear to be sufficient interest in moving forward with the mediation, the conflict assessment report can then be used to generate a work plan, timetable, operating ground rules, budget, and an outline of the data or technical material that needs to be gathered.

One of the advantages of conducting a

conflict assessment is to test the idea of consensus building with the participants before diving in. Assessments can also provide a "cooling off" period during which the parties can review their interests and more calmly weigh how to proceed. Assessments take no commitment from the parties beyond the willingness to be interviewed confidentially for an hour or so and to review the draft conflict assessment report.

**2. Clarifying Responsibilities.** Assuming the parties decide to proceed, they must agree on a mediator. This does not necessarily have to be the same person who conducted the conflict assessment. The mediator's responsibilities should be spelled out in a contract between the mediator and the parties. It is also necessary to agree on who will participate in the mediation sessions as representative for each of the parties.

Since the subsequent consensus building process usually takes place in a public forum, it is essential to agree on rules about the role of observers (i.e., individuals who are not stakeholder representatives) during the mediation process. Finally, the relationship between the consensus building process and any legally required decision making (e.g., a ruling of a zoning board or a court) must be clearly spelled out.

**3. Deliberating.** It is the mediator's job to ensure that each face-to-face session is professionally managed. This can be a daunting challenge especially when a group involves 15, 20, or more participants. An agenda (approved by all participants) must be prepared prior to each meeting. Often subcommittees of participants, assisted by outside experts agreed to by all involved, prepare reports on specific issues, laying out options or arguments for the full group to consider.

Deliberations are most effective when the parties take sufficient time to "invent" options for each issue, and explore various combinations of those options before final decisions are made. It is common for the mediator to meet privately with each of the parties to identify and test possible trades or "packages." Often, the mediator

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## Q&A:

### 1. How much does mediation cost?

Like any consultant, a mediator generally operates on a fee-for-service basis. Depending on the region of the country, the level of expertise needed, the kind of organization (for-profit, non-profit, or state agency), costs can vary widely. Mediators may charge as little as \$75 per hour to as much as \$350 or \$400 an hour. Conflict assessments, depending on their scope, can range in cost from under \$10,000 to as much as \$30,000. Mediation efforts, again depending on scale, length, and intensity, may cost as little as \$20,000 or as much as \$100,000 or more. At first blush, these numbers may scare away local officials with very limited budgets. However, one should consider the implications of *not* reaching consensus in terms of administrative, litigation, and other costs, plus the non-quantifiable costs of intensive and extended conflict.

Small towns can take advantage of several less expensive resources. Your town may have a community mediation center with volunteers trained in mediation and able to assist parties in smaller scale disputes. Many colleges and universities, especially those with planning and policy programs, have professors trained in land use issues and dispute resolution who may be able to help.

### 2. Who pays for the mediation?

There is no one answer. In some cases, it is the local government. In others, it is the developer or, perhaps, a state agency. Costs can also be shared. But bear in mind that who pays for the mediation is far less important than having a clear understanding that the mediator will serve *all* parties in a fair, non-partisan, and professional fashion.

### 3. How do you find a mediator?

A growing number of states have offices of dispute resolution that can provide lists or rosters of mediators. States with particularly active offices include California, Ohio, Montana, Minnesota, New Jersey, Florida, Massachusetts, and Oregon. There are also numerous firms around the country who specialize in this kind of work, and there

are sole practitioners who can be located through bar associations or planning organizations.

In one innovative program in New York, the Pace University Land Use Law Center has established a network of local planners, officials, and consultants who are available at low or no cost to assist local officials in assessing whether their particular problem might be amenable to mediation <[www.pace.edu/lawschool/landuse/mediation.html](http://www.pace.edu/lawschool/landuse/mediation.html)>.

A number of other universities also have active conflict resolution programs. Finally, the U.S. Institute for Environmental Conflict Resolution maintains a national roster of experienced mediators. <[www.ecr.gov](http://www.ecr.gov)>

### 4. Does land use mediation work?

A nationwide study, conducted by the Consensus Building Institute in 1997-1998, identified over 100 local land use and environmental conflicts in which mediation had been utilized. Lawrence Susskind, Mieke van der Wansem, and Armand Ciccarelli, *Mediating Land Use Disputes: Pros and Cons* (Lincoln Institute for Land Policy, 2000).

The study included a survey of participant satisfaction with mediation. 86 percent of the more than 400 individuals who responded to the survey reported either favorable or very favorable views of the mediation process. Moreover, 81 percent believed the mediation resulted in less cost *and* less time than would otherwise have been needed.

Among those respondents who stated that some sort of settlement was reached in their case, most thought the agreement was well implemented (75 percent), was more stable than what could have been achieved without mediation (69 percent), and was creative in producing the best possible outcome for all parties (88 percent). Furthermore, 92 percent of respondents whose cases were settled thought that their own interests were well served. At least from the perspective of participants in consensus building, it can and does work much of the time.

The study also sought to determine in which situations land use mediation was most likely to work. It found that mediation was most helpful when one or more of the following factors was present:

- The dispute was local.
- Importance of the outcome to each participant was high.
- Issues were relatively clear.
- Relevant laws were flexible enough to permit a negotiated settlement.
- Actual decision makers were willing to participate or convene the mediation.
- There was no immediate danger to life/safety.

Mediation was found to be less useful when one or more of the following factors was reported:

- Precedent setting was important.
- Participants did not recognize the rights of others to pursue their interests.
- Fundamental rights were at stake that were not clearly delineated by law.
- A mediator acceptable to all key parties could not be found.
- No action on the issue was the best possible outcome for some parties.
- There were few issues to trade or package in an agreement.
- The process was used as a means to delay real action or create an illusion that something was being done.

### 5. How can I learn more about mediation?

We may be biased, but two good resources are *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Sage Publications, 1999; 1176 pages, \$145.95) and *Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials* (Lincoln Institute, 1999; 26 pages, \$12.00). Lawrence Susskind, one of the co-authors of this article, also co-authored both of these publications. Information on ordering the publications can be found respectively on the Sage Publications web site <[www.sagepub.com](http://www.sagepub.com)> and the Lincoln Institute web site <[www.lincolninst.edu](http://www.lincolninst.edu)>.

Another useful publication from the Lincoln Institute is *Resolving Land Use Conflicts through Mediation: Challenges and Opportunities*, by David Lampe and Marshall Kaplan (1999; 94 pages, \$14.00). Finally, *Mediating Land Use Disputes: Pros and Cons* (cited in Question 4 above) can also be ordered from the Lincoln Institute (40 pages, \$14.00).

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will develop a “single text draft agreement” synthesized from the views and ideas expressed during this phase of the deliberations.

The mediator may also help the participants articulate the proposed agreements to their respective constituencies, ensuring that all representatives have been in touch with the groups or individuals they are supposed to represent.

**4. Deciding.** It is at this point that the consensus building process differs most sharply from what most people are accustomed to in public decision making settings. The goal is not necessarily to arrive at a result which most closely meets the local ordinance’s review criteria. Neither is it to find an agreement only barely acceptable to all (i.e., lowest common denominator). Instead, the goal is to reach an agreement which maximizes the *joint gains* of all participants.

Given the group problem-solving nature of the consensus building process,

participants are responsible not only for presenting their own views, but for suggesting ways of meeting the interests of others. The mediator will typically help formulate a set of proposals, and will seek to have the participants clarify why they support or do not support a particular proposal. The new solutions developed in this way often satisfy more of the parties’ interests than would have occurred without negotiation.

Reaching consensus does not mean that every participant has to be pleased with every aspect of a proposed agreement. But consensus does require concurrence by all participants – or at least an overwhelming number – with the overall agreement.

**5. Implementing Agreements.** Any agreement resulting from the consensus building process should include means to ensure it will be effectively implemented. This may be through provisions where third party experts are assigned the job of monitoring various aspects of an agreement’s implementation, or through dispute resolution clauses which clarify how disputes over implementation will be resolved.

The product of a consensus building effort may be a plan that must still be formally adopted by a local board or commission, or a legal settlement that must be signed off by a judge. If consensus is reached (and assuming the mediator has kept the local board or the judge updated on the group’s progress), boards or judges will likely be more than happy to finalize and formalize the agreement. Indeed, many mediations were convened in the first place by local officials, or were authorized by the court. ♦

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### On-Line Comments

“One of the challenges of

land use mediation is meshing the mediation effort with the public process. A mediation must be designed to appropriately supplement the public (rights based) process and not override it. Authority to mediate is sometimes a barrier for government. Planners can play an important role by including appropriate opportunities for mediation within their planning codes. ... I would also note that in Oregon, the state provides grant funding and technical assistance to encourage mediation of land use appeals within the state planning framework. The state has created the Land Use Board of Appeals (LUBA) to hear land use cases at the state level. Parties involved in appeals to the board are advised that they may stay the appeal process to enter mediation and may obtain assistance from the state’s public policy dispute resolution program. Grant funding is available to pay for a private sector mediator in qualified cases.”

– Dale Blanton, *Dispute Resolution Coordinator, State of Oregon Public Policy Dispute Resolution Program*