Land Use Mediation

Conflict has been and probably always will be a normal part of a planning commissioner’s work.

Typically, conflicts are resolved through negotiation or through a commission making a decision.

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and disappointed parties filing a lawsuit. Mediation is a new approach to resolving land use disputes that occur before a permit is issued or after litigation has commenced. This article will focus on mediation in the land use context - what it is, where it has been used, and how it can be used in your community.

WHAT IS MEDIATION?

Mediation is a voluntary, informal process of dispute resolution. A person who is not a party to a dispute and is neutral in relation to it, assists two or more parties in settling a dispute. The mediator's role is to establish, with input from the parties, the negotiation process, and to assist the parties in resolving the substance of their dispute. The mediator does not function as a judge or arbitrator, and does not render decisions or make recommendations. It's a "bottoms up" process, not top down.

A "successful" mediation is one where all of the parties believe that they have negotiated a result that is better than that which they could otherwise have obtained. Successful mediation processes often result in settlements or recommendations that include solutions which are different from those that were proposed by either party.

For example, imagine a mediation occurring before a developer submitted an application for development approval. The neighbors vehemently oppose the proposed project, that includes twenty-five residential buildings. They say they will agree not to oppose a project with ten or fewer buildings. A mediation process results in a mixed use project (mostly residential with some commercial), which includes ten buildings and a new site design. The developer is satisfied with the result because the commercial uses will provide a higher return on his investment than the residential. The neighbors have agreed not to oppose the project because it is less dense, there is more green space, and the site design reflects the characteristics of the community.

The mediation process includes "public" and private sessions. The private sessions involve the mediator meeting with the parties individually, to learn of their concerns (some of which they might not choose to express publicly) and to assist them in exploring their options. The public sessions include the mediator and all of the parties. These sessions may or may not involve the general public, depending on legal and policy requirements. They can include opportunities for effective dialogue, freewheeling brainstorming and negotiations that provide the basis for packaging agreements.

The mediator engages in a type of "shuttle diplomacy": going back and forth between the parties with the benefit of a body of knowledge that is more complete than that held by any of the parties. The mediator is privy to this information because the mediator has been asked by the parties to keep certain information confidential. And of course, must do so.

WHEN CAN MEDIATION BE USED?

One of the most difficult (from my point of view) workshops that I have given on mediation involved an articulate and very vocal planning director who informed me, and the audience, that mediation was totally and without question, inappropriate for resolving land use disputes. His reason: plans and ordinances answer all questions, there is no room for negotiation in the land use field. After a year or so elapsed, I heard from him again. Was I available to help his community negotiate a dispute concerning a very controversial developer-initiated rezoning?

Mediation should be considered for those land use disputes that allow discretion on the part of decision-makers. In other words, if a local board's decision concerns whether or not a project meets a statutory standard of hardship — as with variances — negotiation should probably not be considered. In this instance the zoning board of appeals must make a legal finding as to hardship. That finding is not negotiable.

On the other hand, there are many instances where land use decision making

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involves considerable discretion and therefore, provides opportunities for negotiation. For example, a special permit standard stating that developments shall be “in harmony with the neighborhood”, can be interpreted in different ways. Considerable leeway is left for negotiation, if a commission chooses to do so. Another example is a garden-variety rezoning, such as a change from residential to commercial. Here planning commissions, when rendering advice to local legislative bodies, such as city councils, generally have a great deal of discretion. In this context, the use of a mediator to resolve disputes between various factions in the community may be not only appropriate but beneficial.

The examples mentioned concern conflicts or potential conflicts occurring before permits are issued. The more common use of mediation is after permits are issued and litigation has been commenced, either in court or before a state administrative tribunal. In the land use context, any case can be mediated if the parties feel they have something to gain from settling as opposed to going to trial. Settlements can save the community considerable expense, and certainly lead to a better result than an adverse court ruling. Of course, mediation should not be considered if it is clear that the community’s position will be supported by the court. One other circumstance where mediation should not be used is where it is important that a legal precedent be established by means of a court decision on the issue at hand.

WHY MEDIATE?

More often than not conflicts are resolved when mediation is used. Settlement statistics range from 65 to 75 percent. Among the advantages that mediation offers are:

* Improved communications and creative problem solving. Often public hearings do not offer opportunities for meaningful dialogue. More often than not the parties are showcasing their positions for the benefit of the media.

* An opportunity to separate facts from emotions, leading to improved communications. There’s no need for grandstanding if certain discussions are with the mediator only.

* Cost savings. If parties are invested in the process that leads to settlement and they feel the decision is satisfactory, they will not bring a lawsuit. Obviously, this will avoid legal expenses.

* Improved community relationships. If parties are satisfied with an outcome, they are more likely to work cooperatively in the future. For controversial projects or policies, a mediated outcome also results in less political fallout for the decision-makers.

WHAT TYPES OF LAND USE DISPUTES HAVE BEEN MEDIATED?

Land use mediation is relatively new, as compared to environmental or labor mediation. But there is a track record for its use in both policy-making and policy application (permitting) contexts.

Mediation has been used, for example, to effectuate historic preservation and affordable housing policies. Several years ago mediators assisted the City of Atlanta in fashioning zoning regulations designed to promote historic preservation. Other mediators assisted the territory of the U.S. Virgin Islands in creating cultural resources legislation. Also, Connecticut cities recently engaged in a mediation process to create fair share affordable housing allocation plans.

Mediation can be used to assist in developing the full range of planning policies. In fact, some of the newer planning laws authorize or require mediation in a policy-making context. Laws such as those enacted in Vermont, Georgia, and New Jersey require or encourage the use of negotiation or mediation processes to resolve disputes concerning inconsistencies between comprehensive plans. \( \text{p. 7} \)

Mediation can be used to settle con-
troversies both large and small. Mediation was recently used to resolve a controversy concerning a sixteen lane highway interchange proposed to cross Boston's Charles River. Mediation also was used to resolve a dispute on Cape Cod involving the approval of a small mixed income housing project located in an historic district.

**WHAT SHOULD YOU DO IF YOU WANT TO USE MEDIATION?**

*Before a permit is issued.* Mediation may occur at any stage in the development review process (before or after the hearing is commenced), without violating legal constraints, so long as the process is structured properly and is completed before the public hearing is closed.

While mediation can proceed without the benefit of express authorization in a zoning statute, statutory provisions such as those incorporated into Pennsylvania's zoning act signal to communities that mediation is a desirable option. When structuring mediation processes it is important to note that open meetings laws and procedural due process requirements cannot be violated. For the most part these concerns can be addressed by ensuring that mediation sessions that involve decision-makers occur in public.

Where mediation is used after an application for development approval has been filed, the resulting settlement should be presented as a recommendation to the board that is either charged with advising the decision-making entity (e.g., the planning board or commission) or making the decision (e.g., zoning commission, city council, zoning board of appeals). Mediation should, if at all possible, occur before the planning commission makes its decision. The planner may then, if he or she determines that the mediated agreement complies with the regulations and promotes the public interest, incorporate it into the staff report.

Using a professional mediator, whether it is a planner or someone else familiar with land use issues, will also enhance the process. The mediator should be trained in dispute resolution techniques, including communication skills, the ability to assist in identifying the various "stakeholders" and a knowledge of how to structure the negotiation process.

*After litigation has commenced.* In some courts there are established programs that provide mediation and other types of alternative dispute resolution services to parties to lawsuits. Where parties are interested in mediation and programs do not exist, one party can contact a mediator and ask the mediator to contact the other party to determine whether they are interested in mediation or two parties can agree to mediate and then contact a mediator.

**SUMMING UP:**

Mediation can be seen as the crest of the wave of flexible land use decision-making — the logical outcome of negotiated decision-making processes — or it can be seen as a new way of doing business — seeking to ensure that all community voices are heard before decisions are made. However it is viewed, mediation should be considered when planning commissioners are seeking to resolve difficult conflicts in a productive manner. Test it out, on a case-by-case basis in your community. \( \copyright \) 1992

Determine whether it works. If it does, consider creating guidelines which provide the foundation for incorporating mediation into your decision-making processes.

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*Edith Netter, a land use attorney and professional mediator, is a principal in two Boston-based firms: Edith M. Netter & Associates (a land use law and consulting firm) and LandAccord (a land use and environmental dispute resolution firm). Netter has also co-edited [A Planner's Guide to Land Use Law](https://example.com), edited [Land Use Law: Issues for the Eighties](https://example.com), served on the board of directors of the American Planning Association; and edited [Land Use Law & Zoning Digest](https://example.com), and written and lectured extensively on land use law topics.*

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**Resources:**

Edith Netter, the author of this article, would be pleased to provide you with additional information on mediation. You can reach her at: 132 Boylston St., Boston, MA 02116; (617) 338-7002.

For a good book explaining how mediation works, and what it can accomplish for communities, see *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (1987), written by Lawrence Susskind and Jeffrey Cruikshank, available from the APA Planners Bookstore, (312) 955-9100.

"The Program on Negotiation," co-sponsored by Harvard University, MIT, and Tufts University, is a useful source of information on training and publications dealing with mediation. The Program's "Public Disputes Network" publishes, on an occasional basis, *Consensus*, a newsletter which provides news about cases of successful public dispute settlement. For more information, phone: (617) 495-1684.