

LAND USE MEDIATION – WE CAN ALL JUST GET ALONG

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I. INTRODUCTION

Land use disputes arise in the context of the permitting of development proposals of all kinds and in relation to legislative policy decisions. They include disputes relating to private residential, commercial or industrial development proposals; the adoption or amendment of comprehensive plans, zoning, critical areas regulations or shoreline regulations; annexations; and public infrastructure projects. They involve diverse proposals, properties, parties and interests. The common thread running through all land use disputes is that the appeal process is lengthy, costly and uncertain.

Land use disputes are often highly personal and emotionally charged, due to the strong connections most of us have to our homes, neighborhoods and communities. Legal processes for the resolution of these disputes are costly and can take years, despite attempts at permit streamlining and fast-tracking appeals. Frequently, these processes do not address the underlying reasons for the dispute and the results are unsatisfying for all parties. Mediation is widely accepted and used in many areas, ranging from personal family law matters to international peacekeeping efforts, to achieve successful resolution of conflicts. Why is it so rarely used in land use matters?

Last year a group sponsored by the Washington State Bar Association (“WSBA”) and King County Alternative Dispute Resolution (“ADR”) Sections set out to answer this question. This group has since grown to include land use attorneys representing public and private clients, hearing examiners, members of state hearings boards, elected officials and mediators. The group serves as a clearinghouse for information on land use mediation. Many of its members, who are experienced mediators and land use attorneys, are available to provide pro bono or reduced fee mediation of land use matters. Recently, the group proposed to form a Joint Standing Committee of the WSBA ADR and Environmental and Land Use Law (“ELUL”) Sections to improve the use of mediation in land use matters. The group welcomes the participation of land use planners interested in the subject of mediation.¹

This paper discusses the advantages to mediating land use cases, barriers to land use mediation and the unique characteristics of land use cases that affect the mediation process.

II. BENEFITS OF MEDIATION

Mediation is a voluntary process in which parties in dispute meet with a neutral third party to resolve their conflict. The mediator does not dictate a result but facilitates the negotiations of the parties to assist them to achieve their own mutually agreeable solution. Mediation is regularly used in disputes that involve claims for monetary relief, but is rarely used when the dispute is about the land use proposal itself.

¹ Anyone interested in participating should contact the author. The group’s web site can be viewed at <http://wsba-adr.org/group/landusemediationgroup>.

Mediation provides a valuable tool for the efficient and effective resolution of land use disputes. The use of a third party neutral can increase both the efficiency of the settlement negotiation process and the chances of achieving settlement. Mediation provides a structured process that brings decision makers together for focused discussions without outside distractions. Mediation provides a forum for discussion between parties who are unable to effectively communicate with each other directly. When the parties are represented by attorneys, mediation consolidates settlement discussions into one or a few intensive mediation sessions. These discussions could otherwise take weeks or months with messages being passed back and forth through the parties' attorneys.

In addition, the mediator is often in a better position to facilitate communication and agreement between the parties than their attorneys, who act in an advocacy role. The mediator's neutral status also differs from that of land use planners, who may informally mediate between parties with different interests during the permitting process, but then must make a decision on the proposal.

The mediator may also encourage settlement by assisting the parties to identify their "best alternative to a negotiated agreement" based on the merits of the case and the timeframe and cost of litigation. The objective assessment of a case by a neutral third party often motivates parties to consider settlement.

Finally, the mediation process can create improved communication and better relationships between the parties, which in turn decreases the likelihood of future disputes.

III. BARRIERS TO LAND USE MEDIATION

Despite its benefits, mediation is infrequent in the land use context. There are many barriers to the use of mediation in this area. They include distrust between the parties. Land use disputes affect property rights and values. In addition to their personal interests, individuals on all sides of a dispute have abstract values that make them unwilling to compromise and lead them to believe the other side will be inflexible.

The difficulty in identifying interested parties, particularly early in the permitting process, can also be a barrier to mediation. In some jurisdictions, an applicant is required to hold a public meeting prior to submitting an application. Most frequently, the public becomes aware of a project through the notice of application. Interested parties may be identified through their written comments or at public hearings. Additional interested parties may appear at any time before issuance of the permit, however. In some cases, project opponents will organize into an informal association with a membership and decision making structure that is not clear to outsiders.

The significance of delay in the permitting process is another significant factor influencing the use of land use mediation. By the time interested parties are identified, the applicant is well into the permitting process, and has invested substantial resources in the proposal. The land use permitting process is most often lengthy and fraught with

delay from many sources. Additional delay caused by negotiations has a direct practical and economic impact. This is often not something the applicant will voluntarily agree to absent a compelling reason to believe the ultimate result will be superior to proceeding with the permitting or appeal process.

The procedural requirements of land use law can also be viewed as a barrier to mediation. State statutes require open public processes in land use permitting and appeals. These processes are potentially inconsistent with the expectation of parties to mediation that discussions will be confidential and privileged. State statute also imposes timeframes for decision making that may need to be waived by the applicant in order to accommodate mediation discussions.

In addition, the lack of mediators with substantive expertise in this area may be a barrier to mediation. The land use permitting and appeal process is substantively and procedurally complex. While mediators without land use expertise can be effective due to their skill in facilitating negotiations, knowledge of land use processes increases the mediator's ability to assist the parties to identify their realistic options and to craft agreements that comply with legal requirements and, therefore, will be lasting.

The scarcity of mediation in land use disputes operates to the detriment of all interested parties, including property owners and developers, government agencies, and citizens groups, increasing their costs and yielding less satisfying results. In the current economic climate, all parties are demanding increased efficiency and reduced cost in the land use process. Land use practitioners and governmental entities should include mediation as one of their central strategies for meeting this demand.

IV. THE LAND USE MEDIATION PROCESS

In some respects, land use disputes are just like other types of disputes, and can be mediated using mediation processes that work in other contexts. Land use disputes have some distinguishing characteristics, however. A land use practitioner or governmental entity involved in land use mediation should be aware of the characteristics of land use disputes that may affect whether mediation should be used or how it is conducted.

1. Regulatory Context

Land use is heavily regulated and procedurally complex. A development project may require several different permits and approvals from multiple local, state and federal agencies. Each of these permits requires a separate application, is evaluated by different decision makers and standards, and has its own timeframe for issuance and appeal. The permitting process can take years.

Just as there are many permits required for a development, there are also many potential venues for adjudication of disputes. Disputes over land use may be heard by hearing examiners, planning commissions, city and county councils, multiple state hearings

boards, and the state and federal courts. Appeal deadlines are typically short (less than 30 days after the decision) and procedural requirements unforgiving.

An understanding of these regulations is important to identifying the parties required for resolution, understanding the balance of power, assisting the parties in evaluating their best alternative to a negotiated agreement, and identifying the constraints that may affect the durability of the agreement. For example, the fact that a citizens group has missed a mandatory appeal deadline will significantly affect both parties' stance in the mediation. As another example, if the parties agree to a solution that violates the local zoning code, this agreement will not be able to be implemented and will not be durable.

2. Suitability for Mediation

There is no "one size fits all" formula for determining whether a land use case is a good candidate for mediation. There are a number of factors that may be considered in relation to mediation of disputes in general that are also applicable to land use disputes. Generally, factors indicating that the case is appropriate for mediation include:

- There is a need for fast, economical resolution;
- The parties necessary to resolve the dispute are identifiable and able to participate in the mediation;
- The parties want to maintain control of their dispute;
- There is a need for confidentiality;
- Any power imbalance between the parties is manageable;
- The parties do not require a legal precedent or want to avoid one;
- The parties have or hope to establish an ongoing relationship.

In 2009, the Consensus Building Institute and Green Mountain Environmental Resources LLC conducted a study of more than 300 Vermont land use cases at different stages of the permitting and appeal process. Field, Strassberg and Harvey, *Integrating Mediation in Land Use Decision Making* (Consensus Building Institute and Green Mountain Environmental Resolutions LLC, 2009). The study examined and made recommendations on the process for screening cases for mediation. Among other things, the study concluded that the most important factors in determining whether mediation would be successful were the applicant's willingness to consider modifications to the project and the opponent's willingness to agree to some kind of development. If either of these factors were not present, mediation was not recommended. *Id.*, p. 26. In other words, if the parties are willing to negotiate in good faith and address the matter in a manner that recognizes the interests of the other party, the dispute is a good candidate for mediation.

3. Optional and Mandatory Mediation Programs

Unlike in many other substantive areas, mediation is rarely mandatory in land use cases. While many civil litigation matters are subject to mandatory settlement conference requirements in superior court, Land Use Petition Act (“LUPA”) (RCW Chapter 36.70C) cases are typically exempted from this requirement. LUPA cases can be distinguished from damages actions arising out of land use disputes or actions to resolve real estate disputes, which are typically subject to standard civil litigation settlement conference requirements.

At the state appeals board level, the Growth Management Hearings Board, Shorelines Hearings Board and Pollution Control Hearings Board offer free mediation by a Board member from another panel (in the case of the Growth Management Hearings Board) or an Administrative Appeals Judge (in the case of the Shorelines Hearings Board and Pollution Control Hearings Board). The option of mediation is typically discussed at the prehearing conference, but mediation is not required.

At the local level, land use planners and city and county decision makers frequently encourage discussions (direct or mediated) between the parties. The availability of mediation services varies widely, however. Land use planners often play the role of informal mediator. This presents some difficulties, since in many cases the planner is also the first decision maker on a permit. In some jurisdictions, such as Seattle, the Hearing Examiner’s office provides free mediation services. The mediation is conducted by a Hearing Examiner who is not assigned to hear the case. In addition, the City of Bellevue has a Neighborhood Mediation Program that offers free mediation services in land use and other matters.² In many jurisdictions, the parties must find and pay for the mediator themselves.

Kitsap County recently adopted a unique program. In April 2010, the County enacted an ordinance encouraging voluntary mediation prior to the issuance of a permit decision and requiring mediation for some land use appeals to the Hearing Examiner. The County contracted with the Kitsap County Dispute Resolution Center³ to provide free mediation services. Parties may, in the alternative, use a private mediator at their own cost. The mediation must commence within 14 days of being agreed to or required and must terminate within 21 days of commencement, unless otherwise agreed by the parties. The mediation program will be evaluated in September 2011.

Parties utilizing private mediators have many mediators with diverse backgrounds, mediation approaches and fee schedules to choose from. Parties may utilize retired

² Other jurisdictions with mediation programs are identified by the Municipal Research and Services Center, at <http://www.mrsc.org/Subjects/Legal/mediate.aspx>.

³ There are 20 Dispute Resolution Centers in Washington providing low cost mediation services to the public. The Dispute Resolution Centers are funded by courts, government agencies, donations and fees. They are authorized by statute, RCW Chapter 7.75.

judges, individual private practice mediators, or the sliding scale services of the Dispute Resolution Centers. Also, some private practice land use attorneys provide mediation services for land use matters.

4. Timing of Mediation

There are many opportunities for mediation in land use matters. In a project specific setting, mediation is usually used after either an administrative or judicial appeal has been filed. Depending on the circumstances, however, mediation may be used earlier, during the permit review process. Facilitated or moderated dialogue may be appropriate to identify stakeholders and interests prior to the filing of a project specific permit application or to gather information for legislative decision making on policy issues.

5. Identification of Parties

Land use disputes typically involve multiple parties. The parties to a land use dispute may include the property owner, the property developer, neighbors, environmental groups, and elected and non-elected local, state and federal agency decision makers.

Depending on the stage at which the mediation occurs, it may be difficult to identify all the people necessary for resolution. Sometimes, for example, a project is opposed by an informal group of neighbors that has no established decision making structure and members whose individual interests and opinions differ. In this case, the most active neighbors may participate and reach an agreement on behalf of most of the others, but it is possible that one or more neighbors will remain dissatisfied and continue to pursue appeals.

There is often an imbalance of power between these parties, although who has the superior strength depends on the individual circumstances and can change over time. The developer may have the upper hand due to superior financial resources and expertise. Conversely, the neighborhood or citizens' group may have the greatest power due to its political clout.

6. Confidentiality and Privilege

A hallmark of mediation is that it is a confidential process. This characteristic allows the parties to speak freely in mediation without the fear that their statements will be passed along to third parties. In 2005, the legislature adopted the Washington Uniform Mediation Act (RCW Ch. 7.07) ("UMA"). The UMA provides that mediation communications are confidential to the extent agreed by the parties or otherwise required by law. RCW 7.07.070.

Mediation communications are also as a general rule privileged, so that they cannot be used in subsequent litigation. The UMA provides that mediation statements and documents are privileged, and not subject to discovery or admissible in court, with some exceptions. RCW 7.70.030.

The principles of confidentiality and privilege have the potential to conflict with fundamental procedural requirements of land use law. In particular, the governmental parties to a land use dispute operate under legal constraints. Under the Open Public Meetings Act (RCW Chapter 42.30), city and county councils can conduct business only in public open meetings, and cannot discuss a pending matter between themselves in private (except that an “executive session” is permitted in limited situations). The UMA recognizes this potential conflict, and provides that communications are not privileged if they are “[m]ade during a session of a mediation which is open, or is required by law to be open, to the public.” RCW 7.07.050(1)(b).

In addition, under the Appearance of Fairness Doctrine (RCW Chapter 42.36), if a land use matter is “quasi-judicial,” which is frequently the case if it involves a particular property or proposal, then agency decision makers cannot communicate with third parties about the matter in private (unless the communication is disclosed on the record) or prejudge the substance of the matter. Thus, while a city or county may be a party to a land use dispute, the decision makers may not be able to participate directly in a mediation of the dispute. Because of the constraints on government decision makers participating directly in mediation, often a settlement agreement will be made by a government staff person, contingent on later formal approval by the appropriate governmental body.

Finally, under the Public Records Act (RCW Chapter 42.56), government records are subject to disclosure to the public. The UMA provides that mediation records that are privileged under the UMA are exempt from disclosure under the Public Disclosure Act. RCW 7.07.050(5). However, “[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.” RCW 7.07.030(3).

7. Characteristics of Agreements

Since the parties’ interests in a land use dispute relate to the characteristics of a development project or a jurisdiction’s plan for its future development, the resolution of land use disputes rarely turns on the payment of costs or damages alone. In fact, many settlements in land use matters do not involve the payment of money at all. The resolution of land use disputes requires creative thinking on the part of the parties about the proposal under dispute.

Settlement agreements in land use matters are often contingent on discretionary government approvals for their implementation. Depending on the terms of the settlement, subsequent action by the government may be required to implement the agreement. For example, a developer and environmental group may both agree that they can settle their dispute if a number of specific revisions are made to a subdivision proposal. Under the Subdivision Act (RCW Chapter 58.17), these revisions cannot be made without the approval of the city. In order to implement the settlement, the developer must submit an application to the city for these changes, city staff must review

them for compliance with its code, and the city council must hold a public hearing on the changes, consider public comment, and approve the changes. This approval is then subject to appeal by any third party with standing under LUPA. The durability of the settlement agreement depends on these procedural hurdles being cleared successfully.

The legal requirements for the land use permitting process are extensive. In addition to the Subdivision Act, the Growth Management Act (“GMA”) (RCW Chapter 36.70A) requires local governments to develop public participation programs for the adoption and amendment of comprehensive plans and development regulations. The Local Project Review Act (RCW Chapter 36.70B) requires local governments to develop procedures for review of project permits, including procedures for public notice and hearings. The State Environmental Policy Act (RCW Chapter 43.21C) also imposes procedural requirements that often include public notice and comment. Local codes may add additional requirements to those in state law.

While it may be tempting for parties who have reached agreement to attempt to sidestep the administrative process, they do so at their peril. Courts have invalidated settlement agreements providing for land use approvals and permits without compliance with otherwise applicable law. *See e.g., League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007) (settlement agreement allowing construction of church without required conditional use permit invalidated). Parties must ensure their settlements are both procedurally and substantively defensible.

8. Moderation and Facilitation

Some land use matters may not be appropriate for mediation but instead may benefit from a moderated or facilitated public process to gather factual information and identify stakeholders, interests, common ground, and areas of dispute. These land use matters generally include those that involve public policy choices by government agencies, such as the adoption of new zoning and land use regulations.

V. CONCLUSION

Mediation can reduce delay and unnecessary waste of resources while producing a quality result for all parties. The unique characteristics of land use matters must be taken into account, however, to maximize the chances of reaching a satisfying and durable agreement.