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Mediation as a Tool in Local Environmental and Land Use Controversies

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Abstract: This article dedicates itself to highlighting the benefits of alternative dispute resolution. Through the use of mediation and other flexible alternative dispute resolution methods, many conflicts can be resolved without the use of expensive and timely litigation. In turn, court workloads are relieved and cooperation is fostered among neighbors, companies, and other groups or organizations that would have otherwise resorted to litigation to solve a dispute. Negotiations that involve process experts, such as mediators and facilitators, often diffuse disputes by introducing a cooperative, rather than an adversarial attitude. Government is beginning to embrace alternative dispute resolution and legislatures are passing statutes to help encourage cooperation between opposing legal parties in a large variety of contexts.

Counseling to prevent disputes and orchestrating their settlement are among the most valuable tools lawyers provide their clients. As early as 1886, the New York Legislature recognized the importance of mediation in resolving conflicts in collective bargaining disputes. (NY Labor Laws §141) In this context, mediation was not conceived as an alternative to litigation but as a means of preventing labor strikes and the societal disruptions they cause. By 1925, mediation was being used in New York City in court-related conciliation programs as a cost-effective means of resolving cases through conciliation rather than adjudication.

In this early period, the lesson of mediation was that consensus-based compromise was an effective method of producing mutually satisfying results to critical disputes in society and to particular quarrels among individuals. By the 1970's, the field of alternative dispute resolution had emerged, sparked by the interest of jurists in case load management. In 1982, Chief Justice Burger warned that we had "reached a period where our system of justice may literally break down before the end of the century...." He called for a "fresh, hard look" at alternative methods of dispute resolution.

At the time the Chief Justice spoke, community-based mediation programs were emerging as a productive method of resolving disputes among community members who had to live with one another in shared environments.

live with one another in shared environments. More recently, mediation has been embraced by corporation counsel in large companies as a method of achieving settlement based on sound business practices rather than strict legal standards. Today, federal and state agencies are experimenting with mediation as a method of developing consensus on pending regulations and of resolving disputes that arise in the administrative process of issuing development and environmental permits. Mediation is beginning to be used at the local level in a variety of land use and environmental contexts.

As it has evolved, mediation has been defined in a variety of ways and has developed a range of applications and approaches about which there is vigorous debate. It has remained vibrant, however, as a voluntary, consensus-based conflict prevention and resolution strategy. It is a non-predictive method that leaves the outcomes to its participants. In essence, it is a negotiation-assisting process that works when the contestants believe that settlement is a better alternative than protracted hostility or the winner-take-all results of litigation.

Land Use Approvals

When a landowner submits an application for a development permit to a local land use agency, an extended process of negotiation is initiated. The parties to this negotiation are the owner, the members of the local administrative agency with approval authority, other involved public agencies, and those affected by the proposed project: neighbors, taxpayers, and citizens of the community. Unlike commercial and personal negotiations, this process is not viewed by most of its participants as a negotiation, in the traditional sense. Local zoning ordinances give the landowner property rights that must be respected. State and local statutes prescribe standards and procedures that the agency members must follow. Affected neighbors and citizens receive notice of their right to attend and speak at one or more public hearings. This process is not organized, in most localities, as a structured negotiation in which the parties meet face-to-face, follow a self-determined process of decision-making, and arrive at a mutually acceptable agreement based on facts gathered in the process and compromise on all sides.

The local development approval process often costs the applicant significant sums of money, involves only indirect contacts among interested parties, and provides little opportunity to develop creative, win-win solutions. For most significant development proposals, the process is lengthy, inflexible, and frustrating. The outcomes are unpredictable and relationships among those involved are more often damaged than strengthened. Nonetheless, during the awkward journey of a development proposal through the local approval process, critical interests of many stakeholders in the matter are expressed, heard, considered, and disposed of by a decision rendered by a voluntary board of local citizens. This is, in the classic sense, a negotiation that resolves, if not satisfies, each participant's interests. When it is seen as such, methods of making it more productive, satisfying, and efficient seem obvious.

Local Approval Process

Recent efforts have been made to improve the structure of negotiations among affected parties during the course of the approval process. The Court of Appeals, for example, sanctioned informal multi-party negotiations during the local environmental review process in *Merson v. McNally*, 90 NY2d742 (1997). The issue in that case was whether a project which, as originally proposed, involved several potentially large environmental impacts could be mitigated through project changes negotiated in the early environmental review process mandated by the State Environmental Quality Review Act (SEQRA) process. The agency involved in the *Merson* case was the Planning Board in the Town of Philipstown. The owner of a mining site submitted a full Environmental Assessment Form as required by SEQRA along with its application to the Board for a special permit to conduct mining operations. In an unusual move, the Planning Board conducted a series of open meetings with the project sponsor, other involved agencies, and the public. As a direct result of the input received at these meetings, the applicant revised the project to avoid any significant negative impacts. The Planning Board then issued a negative declaration, finding that the project, as now configured, would not negatively affect the environment.

The Court of Appeals found that the Planning Board had conducted an “open and deliberative process” characterized by significant “give and take.” It described the Planning Board’s actions as “an open process that also involved other interested agencies and the public” rather than “a bilateral negotiation between a developer and lead agency.” It found that the changes made in the proposal were not the result of conditions imposed by the Planning Board but, instead, “adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies....” In short, the Planning Board had created an effective multi-party negotiating process that met due process requirements.

Another example involves the Department of Environmental Conservation in New York. DEC has trained its administrative law judges and other staff in the mediation of disputes that arise during its permitting process. Under Governor Pataki’s Executive Order 20, which encourages parties to state regulatory processes to settle disputes through negotiation, the DEC has begun to mediate disputes that arise in permit condition negotiations, for example, as well as after an administrative law judge’s decision is rendered and before an appeal to the state courts.

Under a recently adopted statute in Maine, landowners who are aggrieved by a land use decision of a local decision-making body may submit their cases to mediators for resolution. (5 M.R.S.A. § 3341) The landowner must have suffered significant harm from the denial of a local land use permit and have pursued all avenues of administrative appeal. If these conditions are met, the landowner may make an application to the Superior Court clerk who forwards the matter to the Court Mediation Service, which appoints a mediator in the county where the dispute originated. The purpose of providing this alternative to court litigation is “to facilitate...a mutually acceptable solution to a conflict between a landowner and a governmental entity regulating land

use.” The mediation is open to all persons who significantly participated in the underlying governmental land use proceeding. Others who feel their participation is necessary may request to be involved.

Mediators and Facilitators

Mediation of this type is properly understood as negotiation assisted by a third party who is usually a neutral. Professional mediators can be called in when the parties to a dispute recognize that they have a dispute, understand the importance of mediated resolution, and can agree upon, and have the resources to pay, a neutral mediator. Where these conditions do not exist, someone involved in the local matter may come forward and attempt to structure a process that results in a facilitated decision, using the techniques of the experienced mediator. The alternative to traditional mediation or structured facilitation is to stumble through the local decision-making process and to risk litigation by parties not satisfied by it.

Facilitators and mediators are process experts who carefully structure multi-party negotiations. Mediators and facilitators are skilled in effective negotiation and decision-making processes. They help by bringing involved parties together, building trust, clearly establishing the interests of those involved, serving as intermediaries, seeing that options to the resolution of the matter are generated, and working toward a settlement that is acceptable to all parties.

Mediated proceedings are usually informal and flexible, allow the parties to structure the decision-making process itself, and result in consensus-based settlements that are not binding on the participants or public bodies. When the agreement is based on the consensus of all affected parties, supported by credible facts, and consistent with regulatory standards, it can be highly influential in determining the administrative or policy outcome. In the court-assisted mediation program in Maine, any agreement that requires governmental action is not self-executing. The landowner must submit the written agreement to the governmental agency involved. The Maine statute gives that entity the authority to reconsider its earlier decision as long as no statutory provision regarding the approval process is violated.

Broader Applications

Mediation has been used in recent years as a method of building consensus regarding public policies and formulating land use regulations. In this context, mediation techniques assist parties with disparate interest to participate in a productive public decision-making process. In the land use and environmental field, this can involve the development of a comprehensive land use plan, the scope of an environmental impact study of a proposed project, determining how to rezone a community, a landscape or a neighborhood, and coming to agreement regarding specific development proposals advanced by a land developer during the permit issuance process.

Illustrations of this use of mediation methods include the Negotiated Rulemaking Act (5 USC § 581), the Administrative Dispute Resolution Act (Pub L No. 101-552), and the U.S. Department of Labor's Negotiated Rulemaking Handbook (1992) at the federal level. Several state legislatures have adopted statutes establishing negotiated rulemaking processes. (Fla Stat § 120.54; Neb Rev Stat §§ 84-919.01 et.seq.; Idaho Code §§ 67-5206(3)(c), 67-5220; 1993 Or Laws 647; Mont Legis 400; Tex Legis 776.) In New York, Governor Pataki's Executive Order 20 encourages state administrative agencies to use negotiation to prevent and resolve disputes in a wide range of administrative contexts, including permit issuance proceedings.

Increasingly, mediation and facilitation are becoming used as consensus-building tools for administrative decision and public policy matters at the local level where those affected by the decision or policy are involved in a very early stage in a multi-party negotiation, assisted by a mediator or facilitator. Theoretically, this process stands to benefit the parties the most since, if the outcome is positive, it not only avoids costly future litigation but makes the administrative decision-making process much more efficient and beneficial.

Training Facilitators

Just as the DEC is equipping itself to use mediation skills in its administrative decision making, local leaders must be trained to facilitate land use and environmental decision-making at the local level. New York has delegated the principal responsibility for determining how the land is used to its 1600 cities, towns, and villages and it is the decisions of local leaders that will dictate the future of land development and conservation in New York. To use a current cliché, for us to have smart growth at the local level we need to invest in and create smart local leaders.

In 1994, the Land Use Law Center at Pace University School of Law completed an extensive study of the obstacles to sustainable community development in the Hudson River Valley. This study was completed in conjunction with the President's Council on Sustainable Development. It found that the principal need was for better-informed leadership at the local level. The study led to the creation of the Community Leadership Alliance Training Program, cosponsored by the Land Use Law Center at Pace University School of Law and the Glynwood Center. Approximately, 200 mayors, legislators, planning and zoning board members and other civic and private sector leaders have completed the program since it began in 1994. Leaders must agree to attend each day of a four-day intensive program that thoroughly trains them to use their extensive land use authority efficiently and to facilitate consensus-based decisions regarding land use and environmental matters.

The Community Leadership Alliance training team borrows from the extensive history of mediation and its applications to train local leaders to facilitate community decision-making in several contexts. These include establishing effective negotiation processes that involve all stakeholders affected by development proposals; involving all interested parties in the adoption of improved zoning ordinances and other land use regulations;

the involvement of all interest groups in preparing an updated comprehensive plan; and negotiating intermunicipal agreements with neighboring communities to protect shared resources or to promote compatible development patterns.