Mediating Land Use Disputes

Pros and Cons

Lawrence Susskind

Mieke van der Wansem

Armand Ciccarelli

This report is one in a series of policy focus reports published by the Lincoln Institute of Land Policy to address timely public policy issues relating to land use, property taxation and the value of land. Each report is designed to bridge the gap between theory and practice by combining research, case studies and personal experiences from scholars in a variety of academic disciplines and from professional practitioners, local officials and citizens in different types of communities.

Mediating Land Use Disputes: Pros and Cons

Lawrence Susskind is the Ford Professor of Urban and Environmental Planning, Massachusetts Institute of Technology, and president of the Consensus Building Institute (CBI), both in Cambridge, Massachusetts. Mieke van der Wansem is vice president and Armand Ciccarelli is an associate of the Consensus Building Institute.

This report is based on a major research project funded in part by the Lincoln Institute of Land Policy and conducted by researchers at the Consensus Building Institute, headed by Lawrence Susskind, and at the Institute for Policy Research and Implementation at the Graduate School of Public Affairs, University of Colorado, Denver, headed by Marshall Kaplan (see inside back cover).

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Executive Summary

Land use planning both causes and sometimes helps to resolve land use disputes. While land use planning in America initially focused on finding the most technically efficient method of segregating land uses, its emphasis has shifted toward a concern for fairness in the allocation of public resources. This shift has led to an increased demand for stakeholder participation in decision making, thereby stimulating some conflicts but also offering a basis for the effective resolution of land use disputes. Consensus building as a method of resolving land use disputes offers a strategy for balancing technical considerations, broader political concerns about fairness, and conflicting stakeholder interests.

Consensus building techniques such as mediation and assisted negotiation have been used for almost two decades to resolve land use disputes in the United States.[1] Research has shown that these techniques can produce outcomes that are more satisfying to the parties and leave them in a better position to deal with their differences in the future. Indeed, experience with public dispute resolution in America indicates that consensual approaches to handling resource allocation conflicts often yield outcomes that are fairer and more stable than traditional (particularly adjudicatory) methods. Some of the benefits claimed by supporters are that mediation:

- fosters more efficient use of resources and better compliance;
- resolves underlying issues and develops a shared base of knowledge;
- achieves more creative, longer-lasting outcomes that take account of the best available technical information; and
- increases confidence in government officials and helps empower disadvantaged groups, thus offering greater overall satisfaction with the mediated outcomes.

Nevertheless, critics of the mediation process argue that its benefits have been exaggerated and that it is nothing more than traditional politics in a new guise. Their primary arguments are that mediation:

- is neither faster nor less expensive than traditional processes of dispute resolution;
- cannot overcome the intrinsically competitive nature of land use planning; and
- results in only marginally better agreements which are neither precedent-setting nor definitive.

Critics also claim that mediators are not legally accountable to the courts or the parties involved in land use disputes and that bad agreements arrived at by incompetent mediators must ultimately be litigated anyway.

Despite these opposing claims, interest in mediation continues to grow, spurred on by the increasing supply of experienced mediators, growing familiarity with dispute resolution techniques, and increased legitimization of consensus building via laws, regulations, and state programs offering dispute resolution services.

Based on the results of a national study involving 100 communities around the United States that utilized assisted negotiation in an attempt to resolve local land use disputes, this report examines the pros and cons of pursuing such processes in what is becoming an increasingly complex political environment. We review the historical context in which land use decisions have traditionally been made as well as the relevant literature produced by supporters and opponents of consensus building techniques. We hope that this report proves instructive to those who have to make decisions about whether and how to use assisted negotiation to resolve land use disputes.

RESOLUTION

Introduction: Land Use Planning and Dispute Resolution

Land use conflicts are among the most contentious issues facing municipalities throughout the United States. Local officials, especially land use planners, struggle to find ways of balancing the goals of environmental protection and economic development while also protecting private property rights. Many such disputes lead to litigation, but the courts are not interested in reconciling underlying disagreements, and judicially mandated outcomes usually leave someone dissatisfied. Members of the general public become frustrated, too, because they feel they have no role in determining how local land resources should be allocated when the courts are involved. Furthermore, the cost of land use disputes, especially those that end up in court, can be staggering. All of these concerns have fueled the search for better methods of resolving land use conflicts.

Historical Background

Since the beginning of the twentieth century, the field of urban and regional planning has undergone several key transformations. Most have revolved around redefining who determines the goals that master plans are designed to achieve. A brief review of these historical transformations will enhance understanding of how the new mediation approach to land use planning has evolved.

One hundred years ago, most large American cities faced a number of serious problems: rapid population growth, poor sanitation, and deterioration of the basic physical infrastructure. Inefficient and sometimes corrupt city politicians were often blamed for this predicament. In response, a number of popular movements, catalyzed by groups such as the National Municipal League, worked to reform or professionalize municipal government. The League promoted a model city charter that, among other things, called for better-trained administrators, including city managers, planners and budget analysts, and greater reliance on technical expertise.

Since the late 1950s, planners have become less concerned concerned about fairness and the ways that land use allocations

One immediate result was the establishment of city planning commissions. The first one was created in Hartford, Connecticut, in 1907, and soon afterwards officials in New York City drew up the nation's first zoning ordinance, enumerating different categories of land use and segregating inappropriate uses to help guarantee long-term property values.[2] Over time, these commissions adopted official master plans, generally published in a map-style format, that showed the location of major street systems, the designation of allowable land uses, and relevant density restrictions.

While these master plans were popular for many years, they failed to take account of important socioeconomic, environmental and political concerns. They did not address issues of affordability, pollution prevention, or the implied unfairness of distributional gains and losses that kept certain groups in poverty. They also presented the city as it was meant to look in an idealized form in the future, without indicating how this ideal state would be achieved.[3] Since the late 1950s, planners have become less concerned with the efficient allocation of land (from a purely technical perspective) and more concerned about fairness and the ways that land use allocations impact the quality of life for various groups. These concerns are linked directly to the demand for increased public participation in land use decision making.

Technocratic and Advocacy Planning Models

Technocratic planning is dominated by concerns about economic efficiency in the use of space. It specifies well-organized, centrally managed solutions to urban land use problems aimed at providing the greatest benefits to the population and ensuring overall economic vitality. In general, these city plans are designed to "encourage commerce and facilitate the transaction of business."[4] Thus, the most valuable land is allocated for use by the most profitable enterprises, relegating less profitable uses to less productive land.

Although they use a planning model that emphasizes the physical arrangement of city spaces and functions, technocratic planners are most concerned about enhancing property values, segregating inappropriate land uses, regulating the city's most rundown housing to avoid public health problems, ensuring adequate (automobile) transport, and allowing market activities to operate productively. Planners are presumed to have the education and experience needed to find solutions to urban problems and to be free from any corrupting political influences that might otherwise bias their judgment. This model also assumes that planning agencies have the autonomy to set policy, or at least make recommendations to the elected city council, as well as a role in implementing them.

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The technocratic planning model has been criticized for the assumptions it makes regarding the authority and autonomy of planners to develop and implement both policies and plans. Moreover, technocratic planners generally advocate policies attuned primarily to the needs of those segments of society with political clout—primarily the wealthy and politically powerful—while ignoring the needs of middle- and low-income groups. As one astute observer of planning during the 1960s remarked:

> "The ends underlying planners' physical approach reflected their Protestant upper- and middle-class view of city life. As a result, the master plan tried to eliminate as 'blighting influences' many of the facilities, land uses, and institutions of working-class, low-income, and ethnic groups. . . . These plans called for many parks and playgrounds, but left out the movie house, the neighborhood tavern, and the local club room; they planned for industrial parks, but not loft industry; for parking garages, but not automobile repair stations."[5]

The advocacy model of planning emerged in reaction to the failures of the technocratic model's approach to urban renewal during the late 1950s and early 1960s. Advocacy planners aim to redistribute resources more fairly, increase social equity, and improve quality of life for minority groups and the poor.[6] They attempt to reshape the political processes through which land use decisions are made, by such efforts as blocking urban renewal and working to protect poor and working class neighborhoods.

For advocacy planners, physical conditions (i.e., density and green space) are important only in relation to their impacts on different user groups: who benefits if a plan is implemented, how much they receive or lose, and how that might improve or worsen their situation. Paul Davidoff, regarded by many as the author of this model, stated in 1965:

> "Most planners know the acres in a square mile and the color of a residential zone. But few know the amount of income received annually by income fifths of the population. . . . Knowledge of the distribution of internal living space or of the time, condition, or cost relative to income of commuting is lacking. We must begin to understand these things, for as planners we affect them by our work."[7]

The concept of advocacy planning hinges on the notion that, as in a civil lawsuit, there are at least two sides using expert advisors to pursue their conflicting points of view. Supporters of advocacy planning assert that under the technocratic model plans that seem to be directed toward the "common good" are, in reality, meant to serve only those in power. Accordingly, advocacy planners seek to provide the expertise necessary to empower the interest groups to represent themselves at each step in a local decision-making process.

Whereas technocratic planning decisions are made by a few insiders, advocacy planners believe in open forums where planners and community groups can confront traditionally powerful interests. This planning model was strongest during the War on Poverty of the 1960s, when the disparities created by urban renewal began receiving greater attention from the federal government. Model Cities Programs, for example, were created to rebuild inner-city neighborhoods in a way that acknowledged the social complexities that urban renewal had ignored. Decentralization of development decisions to the neighborhood level meant that citywide master plans were no longer relevant and a whole new level of citizen involvement was required.

While addressing many of the weaknesses of the technocratic model, advocacy planning has its own drawbacks. It raises questions about the ability of (mostly white) advocacy planners to identify with the real needs of (mostly minority) groups they seek to represent, many of whom are more interested in short-term improvements than long-term solutions to persistent land use problems. Furthermore, advocacy planners actually work with only a small fraction of their target constituency, resulting in plans that do not always represent neighborhood-wide views. Project plans based on the advocacy model have not always made the best possible use of technical information and analysis to ensure their effectiveness. As a result, advocacy planning often boils down to nothing more than a contest among interest groups to determine whose preferences will prevail.[8]

Stakeholders such as public agencies, private developers, issue-oriented advocacy groups, and community residents continue to disagree on whether technocratic efficiency or political advocacy should be given priority. In addition, all of these voices now have even greater opportunities to be heard through public participation requirements, open meeting laws, and related right-to-know requirements. Few people would argue that increased participation has been detrimental to the public good. However, one result is that planners must now "account for a new sort of public participation that has expanded far beyond the involvement of the poor and minorities in the participation programs of previous decades, to include combative interest groups of every possible type."[9]

Confronted by escalating conflicts whenever land use development or resource allocation decisions must be made, many planners are turning to a third planning model based on consensus building and assisted negotiation. This mediation model offers a strategy for resolving land use disputes and channeling public involvement in more productive ways.

TABLE 1.

The Changing Conception of Land Use Planning in the United States

	Technocratic Model	Advocacy Model	Mediation Model
Tasks	The planner operates as an apolitical and technically skilled advisor to elected decision makers.	The planner represents a particular interest group in the politics of land use decision making.	The planner tries to facilitate a balancing of concerns about efficiency and fairness by building an informed consensus.
Focus of Activity	Produces plans that offer the "best" solution, given a set of goals and limitations set by elected decision makers.	Seeks to redistribute resources to ensure greater equity and improved quality of life for those least able to fend for themselves.	Ensures that the interests of all stakeholders are taken into account along with the best possible technical advice.
Products/ Solutions	Comprehensive plans that represent the most efficient allocation of resources for a specific point in time.	Policy proposals and plans that best serve the group being represented.	Negotiated agreements that are both fair and implementable.
Skills	Technical skills in preparing efficient plans.	Technical skills, plus a greater understanding of social and economic issues and political organizing.	Same as the advocacy model, plus the ability to facilitate interaction among contending stakeholders.
Primary Client	City Planning Commission and elected decision makers.	An interest group, usually poor/minority.	All stakeholders.
Basis of Legitimacy	Planners have the technical expertise necessary for this type of work and are unaffected by external influences that might otherwise compromise their professionalism.	Planners contend that few problems can be settled on technical or efficiency grounds alone.	By playing a neutral role or hiring a mediator and pursuing mutually acceptable agreements, the planner enhances the probability that an implementable plan will result.

MEDIATION

The alternative dispute resolution (ADR) movement, which utilizes mediators or a designated facilitator, began in the 1970s, when stakeholders had few options other than traditional adjudicatory channels for settling public disputes. As larger numbers of people began experimenting with joint problem-solving approaches for resolving community conflicts, interest in facilitation and mediation grew.

Emergence of the Mediation Model

The first significant land use dispute employing ADR took place in 1974 in Washington state. Two mediators initiated and facilitated a dialogue among opposing parties to settle a long-running dispute over the proposed location of a flood control dam on the Snoqualmie River. The project's proponents were pitted against environmental stakeholders concerned about the survival of the river's ecosystem, farmers concerned about cutbacks in water for irrigation, and citizens concerned about the potential for uncontrolled suburban sprawl. Although the agreed-upon dam was never constructed, many of the land use recommendations were implemented, and the coordinating council continued operating for ten years. Subsequently, decision makers from around the country took a closer look at the idea of using professional mediators to facilitate the resolution of difficult disputes.

The Mediation Model

The purpose of the mediation model is to ensure that the allocation of land uses takes place in a way that is viewed as fair by all stakeholders and that all possible joint gains are incorporated into a technically feasible agreement that can be implemented easily. Using this model, planners seek to integrate competing interests (ranging from the efficiency concerns of government agencies and developers to the equity concerns of special interest groups) with concerns about process and transparency. The result is a highly structured problem-solving process in which all stakeholders learn about each others' interests, challenge previously accepted assumptions, and develop strategies aimed at maximizing mutual gains.

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Planners who use this model serve a wide variety of functions. They seek to insure that all parties are well-informed, have an equal opportunity to participate, and are part of an effort to produce a technically informed set of decisions that are better for all stakeholders than what they are likely to obtain if there is no agreement. Planners facilitate communication, identify potential zones of agreement, urge participants to assess carefully what no agreement is likely to mean for them, aid in the codification of agreement on technical points, and suggest "packages" that allow parties to trade across issues they value differently. By filling this role, planners can help to ensure the credibility of public decision making and shift stakeholder relationships from being adversarial to collaborative.

Facilitators and Mediators

The assisted negotiation or consensus building process does not require the use of professional mediators, but their participation is often necessary. In the simplest form of assisted negotiation, the planner or an appointed facilitator fills the role of a process manager, taking whatever procedural steps are necessary to keep the discussion on a useful course and to foster an environment conducive to joint problem solving. To accomplish this, facilitators monitor the quality of the dialogue and intervene with questions designed to enhance understanding. Facilitators sometimes act as moderators, usually when many parties are involved, to ensure a positive and productive discussion.

Mediators have greater substantive involvement (without seizing control of the outcome from the parties), in addition to the procedural responsibilities of facilitation. In general, mediators help the parties move from a zero-sum mind-set to integrative bargaining. Despite taking a large measure of responsibility for the quality of the agreement that emerges, the mediator must remain absolutely neutral. Land use planners are often in an ideal position to sponsor the involvement of professional mediators.

Glossary

Agenda: an order of business that sets out the sequence of events during a negotiation.

Alternative Dispute Resolution (ADR): a variety of techniques for resolving disputes without litigation, including arbitration, mediation, early neutral evaluation and conciliation.

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

Assisted Negotiation: a general term for processes that rely on a neutral party to assist stakeholders in resolving disagreements or reaching consensus. Facilitation, mediation and arbitration are all forms of assisted negotiation.

BATNA (Best Alternative to a Negotiated Agreement): the most likely outcome if no agreement is reached through negotiation.

Conflict Assessment: a technique for gathering essential information in order to determine whether and how an assisted negotiation should proceed. A conflict assessment is generally a document that spells out the issues in a conflict, the stakeholders, their disagreements, and how they might find common ground.

Consensus: a settlement that all stakeholders can accept (i.e., it exceeds their BATNAs), even though they may not be completely satisfied.

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

Convening: the gathering together of parties for a meeting or a series of face-to-face dialogues.

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.

Integrative Bargaining: an approach to maximizing joint outcomes through cooperation, sharing information, and mutual problem solving; also referred to as collaborative bargaining, win-win or creating value.

Interests: what each participant in a negotiation seeks to achieve. Rather than being what people say they must have (positions), interests are the underlying reasons, needs or values that explain why they take the positions they do.

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 subsumes the tasks of facilitation.

Mutual gains negotiation: a joint problem-solving technique for resolving each party's underlying issues, needs and concerns by encouraging the parties to focus on interests rather than positions, and to use information, communication and innovative thinking to identify superior solutions.

Negotiation: the process of discussion and give-and-take between two or more disputants who seek to find a solution to a common problem.

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.

Key Steps and Opportunities

The mediation model can be used in many types of land use disputes, including disagreements sparked by facility siting, comprehensive planning, growth management, environmental clean-up, natural resource management, and infrastructure design. Generally, even the most complex land use disputes can be transformed into opportunities for increased understanding of other stakeholder interests. By following an established process, creative negotiators can almost always find trades that will lead to outcomes that are better for all parties than no agreement.[10] The following steps are based on "The Short Guide to Consensus Building" in Susskind et al., *The Consensus Building Handbook* (1999).

Step 1: *Convening Stakeholders*

First, stakeholders must be brought together by an agency convenor, often a public official in a group directly affected by the dispute or an organization with regulatory responsibility. Once the key stakeholders have agreed to try to work together, a neutral party usually prepares a written conflict assessment summarizing the concerns of all the relevant parties in their own terms (based on confidential interviews).

After the stakeholders have reviewed the conflict assessment, an organizational meeting is convened to consider the neutral's recommendations and to determine if a consensus building process should indeed be pursued. The decision depends on the nature of the issue, the relationships that exist among the parties, procedural or legal constraints, and the willingness of the parties to proceed. To be credible, a consensus building group must include appropriate participants representing the full range of stakeholder interests.

Step 2: *Clarifying Responsibilities*

The second step addresses the administrative and logistical aspects of the consensus building process. Since this process is usually new to many of the participants, procedures, roles and responsibilities of the professional mediator or facilitator and the recorder must be clarified, preferably in writing. The participants must ratify a draft agenda (another product of the conflict assessment) and set ground rules for future meetings, such as: (a) the rights and responsibilities of participants; (b) behavioral guidelines; (c) rules governing interaction with the media; (d) decision-making procedures; and (e) strategies for handling disagreements and ensuring implementation of an agreement, if one is reached.

It is crucial to keep a record of the key points of agreement and disagreement. Consensus building processes should be transparent and open to scrutiny by anyone affected by the group's efforts. This includes the group's mandate, its agenda and ground rules, the list of participants and the interests each is representing, proposals under consideration, finances, and a report of the final recommendations.

Step 3: *Deliberating*

This step helps participants agree on the information they need to collect and determine how gaps or disagreements among technical sources will be handled. Participants are asked to begin envisioning and articulating solutions to the land use dispute at hand. It is important for stakeholders to "focus on interests, not positions"[11] so they avoid inflated demands and the kind of escalation that so often accompanies positional debates.

Brainstorming can be used to expand the range of proposals for each agenda item and to generate packages that incorporate tradeoffs among items. In some cases the stakeholder group may create subcommittees or seek expert advice to research facts or explore alternatives to bring back to the entire group. The goal should be to create as much value as possible and then to ensure that whatever value is created is shared in ways that encourage effective relationships and successful implementation.

A useful approach is to provide a working draft of preliminary proposals for all parties to review and revise. This "single-text" method provides a structure for discussions and implies that there will not be any agreement until the full range of issues is resolved. The key is to avoid the mistake of trying to complete discussion on complex items one at a time. When a written agreement emerges, it ensures that the parties have understood each other and are clear about the commitments they are making. Written agreements also provide something concrete for representatives to take back to their constituents for review and ratification. Such documents may ultimately be transformed into binding contracts of various kinds.

Step 4: *Deciding*

Following the identification of options, participants can begin the process of crafting a final agreement. A list of objective criteria or indicators by which the acceptability of an agreement must be gauged gives parties a tool to assess various packages that all parties can accept. Most consensus building groups seek unanimous agreement within the time frame established at the outset of the process. If unanimity cannot be achieved, groups often settle for an overwhelming level of support as long as every effort has been made to meet the most important concerns of every key group.

Step 5: *Implementing Agreements*

At the conclusion of a consensus building process, stakeholders are asked to endorse the final recommendations. It is extremely important to devise a means of holding the parties to their commitments. Some agreements can be nearly self-enforcing while others are enforceable only by law. In either case, decisions about enforcement must be reached in time to include them in the final written agreement. Often, the results of a consensus building process are advisory and must be ratified by a set of elected or appointed officials. An agreement usually contains a clear statement of who will follow up on specific steps to ensure that informal agreements are incorporated or adopted by whatever formal means are appropriate.

Agreements reached by a consensus building process can be monitored to ensure effective implementation. If a monitoring system is set up, responsibilities and methods for overseeing implementation are usually specified in a written report. Any agreement reached by a consensus building group should include within it a mechanism by which participants can be reassembled if there is a change in circumstances or a failure on the part of some participants to live up to their commitments.

CLAIMS

The Claims of Supporters and Opponents of the Mediation Model

To date no universally agreed upon method has been developed to test consensus building techniques against more traditional methods of resolving land use disputes. Many attempts at comparative analysis have been criticized for relying too much on case studies and not enough on statistical studies of large sets of cases. Most published studies have attempted to determine whether assisted negotiation costs less, saves time, produces settlements more often, and ensures higher compliance rates.[12] The quality of mediated settlements has been overlooked or avoided, as has the question of whether or not the process has improved long-term relationships among the participants.

The Claims of Supporters

Following the assisted negotiation of the Snoqualmie River dam project, decision makers around the country looked more closely at the idea of using professional mediators to assist in the resolution of land use disputes. At the outset, interest in consensus building was motivated by a desire to avoid the substantial cost of litigation. However, supporters of the mediation model claim that, in addition to being less expensive, consensus building responds well to several other sources of dissatisfaction with traditional land use decision making.

Avoids Problems Caused by Litigation

Although some critics dispute whether or not conventional adjudicatory methods require years of litigation, the very threat of high legal fees and protracted court cases creates disincentives for many groups to fully pursue their interests when land use decisions must be made. As a result, stakeholders lacking adequate financial resources or those who need quick decisions may be at a disadvantage. Moreover, sustained litigation tends to create a hostile atmosphere, significantly reducing the likelihood that the parties will be able to generate mutually advantageous solutions on their own. Mediation encourages collaborative decision making and a more positive and creative atmosphere, allowing for the exploration of mutual gains and enhanced relationships.

Encourages Better Communication

Public hearings on land use cases are often held at inconvenient times and follow rigid procedures that restrict constructive interaction among public officials and community members. Citizens are given a fixed amount of time to make statements and are often barred from asking questions of the officials most directly involved. Under such circumstances, traditional types of public hearings do little to clarify conflicting interests or encourage sustained dialogue. Mediation allows all relevant stakeholders to participate at agreed upon times and encourages actual discussion of the issues, not simply the presentation of prepared statements.

Offers Opportunities for Joint Gains

Land use decision making ought to leave room for multiple objectives to be met simultaneously, but that rarely happens. Typically, one set of actors "wins" while all the others "lose." Mediation allows for multiple issues to be addressed so disputes can be tackled more comprehensively.

Builds Trust

Land use conflicts can be quite contentious, with a great deal of money and highly emotional claims at stake. Traditional approaches to land use decision making put little emphasis on the need to build trust and establish long-term working relationships among parties who are likely to live side-by-side for years to come. The process of mediation allows parties to build trust and enhance their long-term relationships.

Dispels Cynicism

Traditional decision-making processes lead many people to believe that whoever has the most money will prevail, thus raising doubts about the fundamental legitimacy of government decision making. One direct consequence is that the average citizen feels detached from and cynical about public decision making.

Traditional approaches to land use decision making put little emphasis on the need to build trust.

On a more positive note, supporters of the mediation model assert that it has the potential to achieve multiple benefits.

Fosters More Efficient Use of Resources and Better Compliance

Both time and money can be saved by avoiding drawn-out, expensive litigation, while simultaneously arriving at agreements that are at least as advantageous as those generated by traditional methods. Moreover, the search for mutually beneficial outcomes often leads to improved communication and trust. Agreements reached via assisted negotiation often include self-enforcing mechanisms that the parties themselves have crafted to ensure compliance. "Indeed, some practitioners argue that its use promotes the institutionalization of a particular social ethic that values collaboration as a form of social capital."[13]

Resolves Underlying Issues

The flexibility of mediation encourages the parties to address underlying issues that would not normally be considered during traditional adjudicatory proceedings.

Develops a Shared Base of Knowledge

Technical matters in the mediation model are addressed via joint fact finding. When necessary, outside experts are brought in to assist all sides in the collection and analysis of data, or to educate stakeholders on technical matters. Rather than arguing over the facts or engaging in what is called "adversary science," stakeholders can formulate reasonable and credible solutions that everyone understands.[14]

Increases Confidence in Government Officials

Mediation reduces the vulnerability of public officials to charges of taking unilateral action or being out of touch with the public. Likewise, if the community believes that an issue was handled fairly, it will have increased confidence that other issues will be resolved appropriately.

Empowers Disadvantaged Groups

Although it is not likely that any form of assisted negotiation will alleviate all underlying sources of injustice, advocates believe that it can make a difference. Various forms of assisted negotiation offer opportunities for information sharing that are not available via conventional decision making. Since poorer groups usually lack the resources necessary to acquire information, a shift to consensus building that emphasizes joint fact finding can result in significant advantages for traditionally under-represented groups. Furthermore, groups with small budgets may be unable to afford involvement in other adjudicatory processes. Assisted negotiation is a means of enhancing their capacity to influence public decisions.

Offers Greater Overall Satisfaction with the Decisions that Are Made

In contrast to conventional decision making, mediation is designed to resolve disputes by creating "all gain" solutions. This approach avoids the pitfalls of zero-sum negotiating in which there is a distinct winner and loser.

> "Anecdotal evidence consistently supports the proposition that (assisted negotiation) produces superior results, particularly when measured in terms of the satisfaction of the parties. This is, in part, due to the essence of the dispute resolution process, which attempts to identify the participants' interests and fashion solutions that respond to them. In court-like proceedings, narrow questions or interests are decided within the framework of the law. Most courtroom time is spent ascertaining past facts, not in creating value or brainstorming future possibilities. Verdicts or judges' decisions may not address or satisfy any parties interests; indeed, the adjudicatory process may well miss the point of the dispute entirely."[15]

Although it is not realistic to expect that all land use disputes can be resolved using mediation, assisted negotiation in its various forms has the potential to create substantially better short- and long-term results for all stakeholders. Most of all, proponents of the mediation model refute the criticism that assisted negotiation is no more than an extension of traditional methods of land use decision making, resulting in "lowest common denominator" outcomes. When the right problem-solving context is created, all sides can find substantial value from the process.

The Claims of Opponents

The detractors of assisted negotiation argue that its benefits have been greatly exaggerated, and that it is merely an extension of traditional adversarial politics, rather than an alternative to them.[16] Opponents make the following arguments against assisted negotiation.

Is Neither Faster nor Less Expensive than Traditional Processes

Although supporters of assisted negotiation argue that it is less time-consuming than litigation, there is little empirical evidence to support this claim. A few protracted lawsuits have made litigation appear to be lengthy, but more research must be done before anyone can truly say whether or not negotiated settlements are concluded more quickly than those that are litigated.

It has been argued that the expense of litigation can be so great that it prohibits many people from seeking legal solutions to certain disputes. However, the cost of preparing for negotiation may be as high as or even higher than the cost of preparing for some types of litigation.[17] For example, in negotiations involving complex legal or scientific issues, both sides may have to hire scientists, economists and other experts to assist them.

At the outset of any consensus building process, a thorough conflict assessment must be carried out in order for the mediator to perform effectively. It may also be necessary to train stakeholders in consensus building techniques. Both of these take time and cost money. Thus, while the cost of litigation can be a problem, it is not clear that mediation is always an inexpensive alternative.[18]

Cannot Alter Stakeholder Competitiveness

Doug Amy, a leading critic of assisted negotiation, concludes that "politics is not only about communication, but also about exercising power. And it is not only about common interests, but about conflicting interests as well."[19] He asserts that these are basic characteristics of our society, and that political processes such as assisted negotiation that ignore such facts are built upon false understandings and will enjoy at best only limited success.[20]

Overall, Amy and other critics believe that assisted negotiation will not alter fundamental power relationships, no matter how desirable such changes might be. As a result, mediation may require a balance of power among the stakeholders that makes it impossible for any of them to act unilaterally in what they perceive to be their own best interest.[21] Without such a balance, he believes there is little chance that more powerful parties will negotiate in good faith. If they do not like a settlement, they can simply resort to other, more traditional means.

Experienced mediators concede that the parties involved in voluntary dispute resolution processes must have sufficient incentives to negotiate. However, it is not necessary that they wield equal power. Moreover, it is not generally agreed how power should be assessed in such circumstances. Consequently, the results of negotiations involving parties who wield disparate amounts of power depend heavily on "the parties' pre-negotiation preparations, particularly their ability to marshal resources, develop options, and organize support."[22]

Results in "Lowest Common Denominator" Agreements

Negotiated agreements require a certain amount of cooperation among stakeholders. As a result, everyone may end up only marginally better off than if the conflict had been resolved using traditional adjudicatory processes. This can create incentives for some parties to stay out of negotiations in the hope of doing substantially better some other way. Those who are prepared to negotiate only in a win-lose fashion cannot imagine agreements that are the product of joint problem solving.

Lacks a Code of Ethics

There are no enforceable or even nationally recognized codes of ethics or measures of competence to guide the selection of mediators. Codes for mediation are constantly being debated and the question of enforcement and what constitutes good practice and accountability are still unresolved.

Must Ultimately Be Litigated

If an agreement arrived at using assisted negotiation is considered to be unfair or legally inappropriate, the parties will still need to turn to the court system after a great deal of effort and resources have already been invested in a failed mediation process.

Although critics of the mediation model concede that it has spurred increased public participation, they contend that this modification in the decision-making process has not resulted in increased power sharing. In fact, many of them believe that many government bodies and private ventures utilize such processes to distract their opponents, distort the issues, and give a false sense of legitimacy to their projects and policies. Moreover, critics also maintain that the decisions achieved through mediation are often influenced by the application of political pressure by powerful stakeholders. As a result, they assert that the mediation model should be viewed with a great deal of skepticism, playing only the smallest of roles in the resolution of public conflict.

ANALYSIS

An Analysis of Recent Experience with Land Use Mediation

Overview of the Consensus Building Institute's Study

Increasingly, public officials are turning to professional neutrals (facilitators and mediators) for assistance in resolving difficult land use disputes. Although advocates of mediation make many promises with regard to its merits, most research has focused only on whether facilitation and mediation save time and money, produce settlements more often, and achieve higher compliance rates. Researchers have not attempted to assess the quality of the settlements reached, determine whether relationships among participants have been enhanced, or analyze whether confidence in government has been restored. However, these types of evaluations are required to help public officials decide whether or not to use assisted negotiation to resolve land use disputes. Consequently, the Consensus Building Institute (CBI) undertook a study of mediated land use disputes to address these questions.

The CBI study is based on interviews with participants in 100 cases in which a professional neutral assisted in the resolution of a land use dispute. These efforts, both successes and failures, were selected from an inventory of 147 disputes suggested by 25 of the nation's leading land use mediators. The 100 cases ultimately selected were stratified to ensure that they represented all regions of the country, as well as the six major types of land use disputes. Two-thirds of the cases were considered by the participants to have been settled and one-third were unsettled.

Each of the 100 cases involved multiple stakeholders, so CBI staff carried out interviews with at least three key participants in each case (totaling over 400 participants).

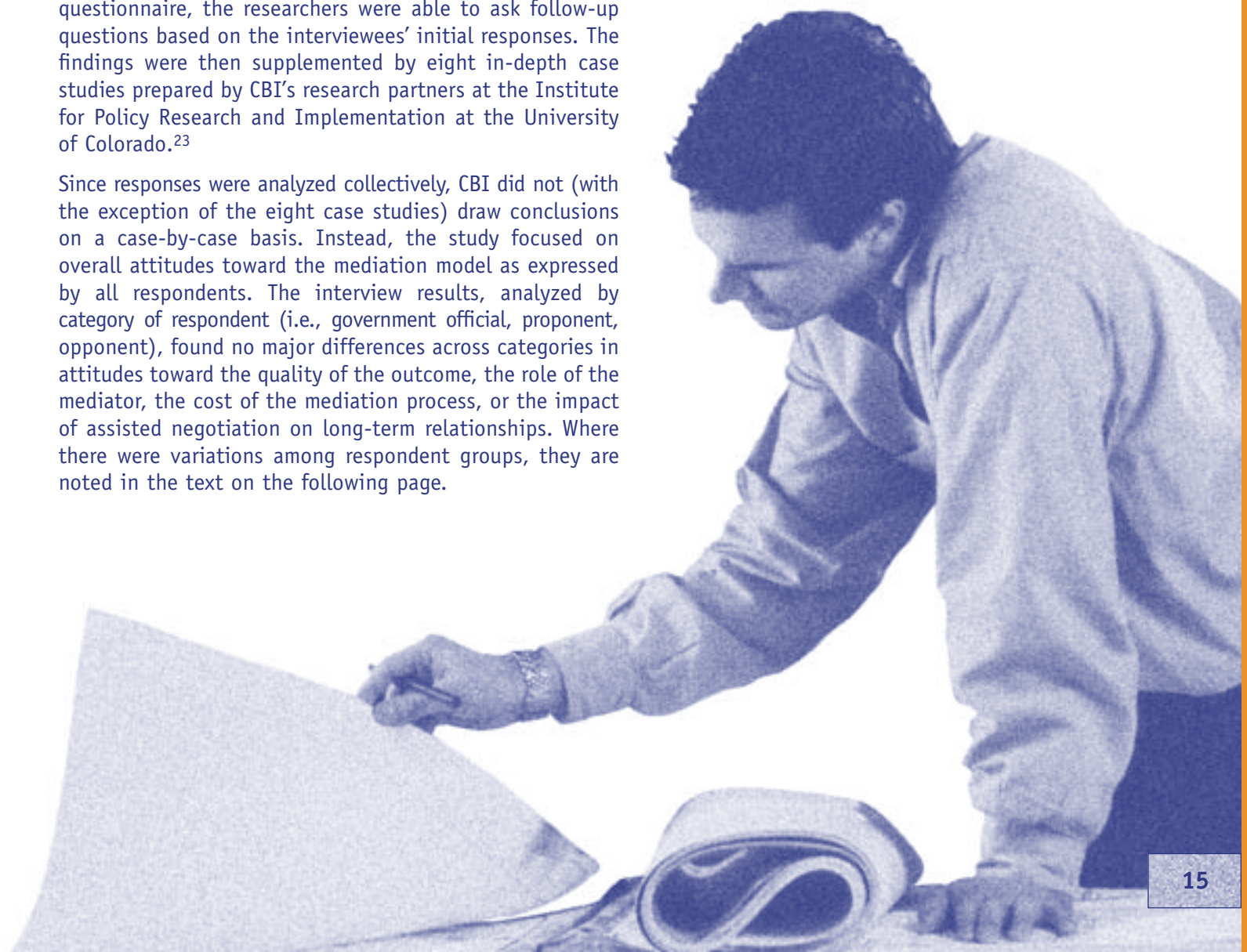
…most research has focused only on whether facilitation and mediation save time and money, produce settlements more often, and achieve higher compliance rates.

TABLE 2. Locations and Types of Cases

Types	Midwest	North	Pacific Coast	Rocky Mtns.	South	Total
Comprehensive Planning	0	0	8	2	6	16
Development and Growth	1	4	6	4	3	18
Environmental Cleanup	0	3	2	1	0	6
Facility Siting	3	6	5	1	1	16
Infrastructure Design	4	6	4	3	3	20
Natural Resource Management	3	13	4	4	0	24
Total	11	32	29	15	13	100

Each respondent was asked approximately 25 questions, depending on the outcome of the case and the respondent's role. Most interviews took approximately one hour. By utilizing person-to-person interviews rather than a mailed questionnaire, the researchers were able to ask follow-up questions based on the interviewees' initial responses. The findings were then supplemented by eight in-depth case studies prepared by CBI's research partners at the Institute for Policy Research and Implementation at the University of Colorado.[23]

Since responses were analyzed collectively, CBI did not (with the exception of the eight case studies) draw conclusions on a case-by-case basis. Instead, the study focused on overall attitudes toward the mediation model as expressed by all respondents. The interview results, analyzed by category of respondent (i.e., government official, proponent, opponent), found no major differences across categories in attitudes toward the quality of the outcome, the role of the mediator, the cost of the mediation process, or the impact of assisted negotiation on long-term relationships. Where there were variations among respondent groups, they are noted in the text on the following page.



CBI chose a research strategy that would produce results of the greatest possible interest to both public officials and citizen activists by attempting to answer the following questions:

1) How satisfied were stakeholders with both the land use mediation process and the outcome?
2) Were underlying issues resolved and relationships improved in a way that helped to avoid subsequent disputes?
3) Did the mediation model cost less and/or take less time?
4) How important was the role played by the mediator?

The study was not able to avoid some of the usual pitfalls of this kind of qualitative research. For example, some interesting and important cases, especially unsuccessful efforts, may have been missed. Given that the interviews took place several years after the cases ended, some respondents may have exaggerated the most positive or negative aspects of their experience (because of what they remembered). Although this time lapse offered a chance to study the extent to which the parties lived up to their commitments, an independent observer (rather than a direct participant) might have seen things differently. On the other hand, the eight in-depth case studies prepared by the University of Colorado team did include many interviews with people who were not directly involved. Matched pairs (sets of nearly identical disputes that were alternatively settled and not settled using assisted negotiation) do not exist, so it was not possible to make such comparisons. Finally, the researchers did not rely on elaborate statistical tests to substantiate the findings because the total number of cases in various sub-categories did not lend itself to traditional statistical analysis. Nevertheless, the following conclusions were overwhelmingly supported by all of the study's findings.

Findings

1: How satisfied were stakeholders with both the mediation process and its outcome?

To gauge the level of satisfaction with mediation, the researchers asked participants to answer four questions that could compare what they had achieved with what they thought would have occurred otherwise: (1) How did they view the process overall? (2) Did the process serve all stakeholder interests? (3) Were the settlements reached actually implemented and were they stable and creative? and (4) Was significant progress made towards resolution of the conflict even if no settlement was reached? Each stakeholder was also asked to reflect on the relationships established during the dispute resolution effort.

Overall views of the process: 84.5 percent of participants, not including the mediators, had a positive view of assisted negotiation: 45.5 percent of participants viewed the process as very favorable and 39 percent as favorable (see Figure 1). Even in the cases that were not settled, 28 percent of respondents viewed the process as either very favorable (9 percent) or favorable (19 percent) (see Figure 2).

Stakeholder interests served: Additionally, of respondents who participated in cases that were settled, 92 percent believed that their own interests were well served by the settlement and 86 percent believed that all parties' interests were served by the agreement reached.

Rating of settlements: Of the respondents who stated that some sort of settlement was reached:

- 77 percent stated they reached an agreement regarding how to implement or monitor their settlement.
- A total of 75 percent thought their settlement was implemented very well (41 percent) or sufficiently (34 percent).
- 69 percent thought their settlement was more stable than what they probably could have reached through another process such as litigation or administrative appeal; 23 percent said they did not know.
- 88 percent stated that their settlement was creative: that is, it produced the best possible outcome for all sides given what they knew after the mediation.

Progress attained even without settlement: The high level of satisfaction on the part of respondents in unresolved cases most likely stems from the fact that 65 percent believed that the negotiation process produced significant progress toward the resolution of the conflict. The respondents stressed that, even when a complete settlement was not achieved, some issues were resolved, relationships were enhanced, political and interpersonal attacks were avoided,

public confidence in the working of government was increased, and useful information was gathered that made it easier to define and understand the questions that were unresolved.

2: Were underlying issues resolved and relationships improved using mediation?

Respondents in the unsettled cases identified four major benefits of mediation that helped them make significant progress in their cases, even though the dispute was not resolved completely:

33%

Achieved minor agreements. Even in the most difficult situations, minor or partial agreements were reached on which future negotiations could be based.

23%

Improved relationships. Even though final agreements were not reached, those involved were more respectful of the other stakeholders' opinions. In some cases, improved relationships allowed the parties to avoid misunderstandings because communication had been enhanced; rework their agreements at a later time when new information or new circumstances arose; or avoid subsequent disputes or resolve them more easily because the parties had a new model of how to work things out and a higher level of trust.

22%

Clarified other stakeholders' interests. Participants became more aware of both their own and other stakeholders' underlying interests, and as a result had a better understanding of what was required to reach an agreement.

12%

Increased knowledge of the issues. Through the sharing of information and joint research, stakeholders developed a clearer understanding of the problems and avoided technical battles that so often obscure underlying disagreements.

10%

Other benefits

100%

Total benefits from mediation in unsettled cases.

Most of the land use disputes examined in this study took place over a long period of time and were characterized by highly negative feelings and substantial mistrust among the parties. To address this problem, mediators paid particular attention to improving relationships, both to overcome certain stakeholders' reluctance to participate and to avoid confrontations that could sidetrack problem-solving efforts. Overcoming these obstacles involved exploring underlying interests, sharing information, and trying to achieve mutually beneficial outcomes for everyone. These efforts consumed a great deal of time, but stakeholders generally came away with an increased appreciation of others' concerns and greater trust of the other parties.

This increase in the level of trust occurred even in cases that remained unresolved. Seventeen percent of respondents in unsettled cases said their own relationships with other stakeholders improved as a result of the mediation. Such changes in attitude not only encouraged stakeholders to comply with their promises, but also helped them to avoid misunderstandings, rework their agreements when circumstances changed unavoidably, and resolve or avoid subsequent disputes more readily.

FIGURE 1.

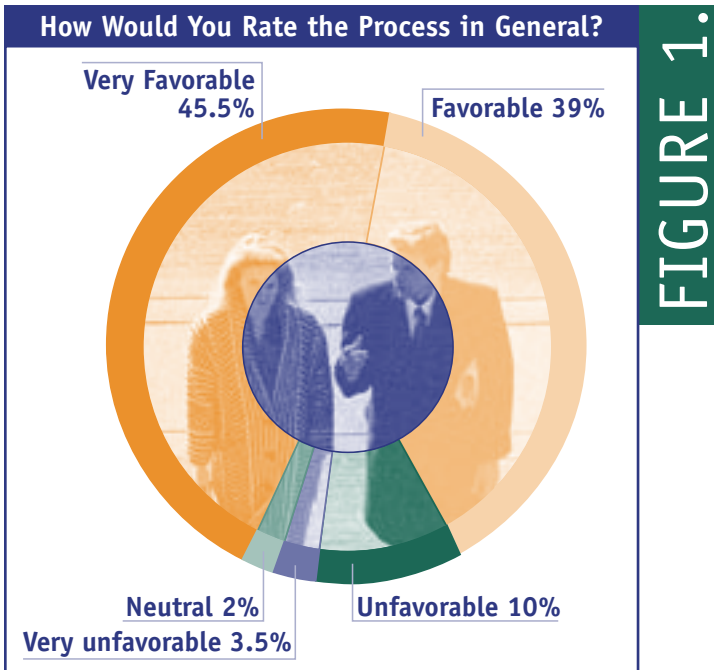
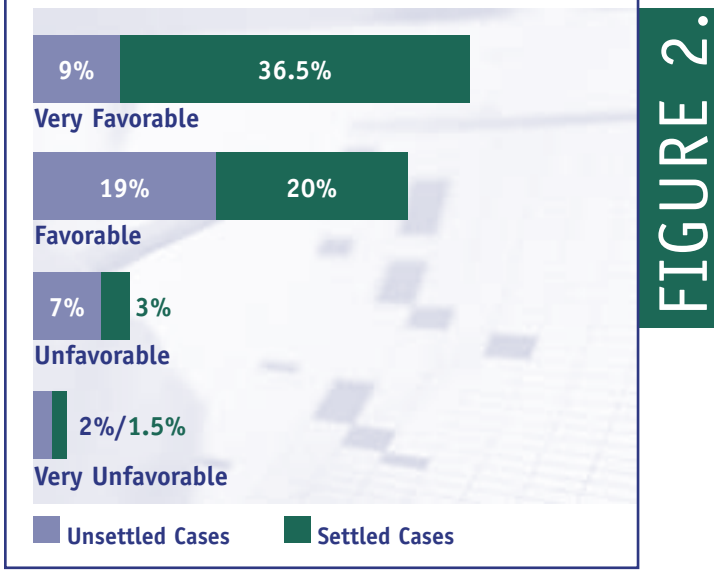


FIGURE 2.



For example, during the Safe Harbor Homeless Shelter dispute (see page 24) representatives of the business community believed that the shelter's proponents did not understand their concerns (e.g., that the shelter might cause increased panhandling, loitering and crime in the business district). As a result of the mediation, the business community realized that the proponents of Safe Harbor were actually quite willing to address these issues as best they could. As a result of the mutual support that this change in attitudes engendered, the Safe Harbor shelter has not only continued to operate but has expanded its operations to provide more services to the homeless.

3: Did the mediation process consume less time and money than traditional processes?

The researchers asked all respondents to compare the time and cost of the mediation process with what they thought would have been required to resolve the same dispute using traditional adjudicatory appeals. While 5 percent of interviewees stated that the negotiation process took more time and cost more money, 81 percent said they finished the negotiation with the impression that it consumed both less time and less money (see Figure 3). This is a strong counter-argument to the critics who have asserted that assisted negotiation is neither faster nor less expensive than traditional processes.

Although some of the disputes in the study required the investigation of complex legal and scientific issues that had real costs, the central requirement in the majority of cases was merely that the participants sat down and listened to what others had to say. Nevertheless, responses to this question did vary by type of dispute. For example, a smaller percentage of respondents involved in infrastructure design disputes believed that mediation required both less time and money than more conventional processes (64 percent) than did respondents in any other type of dispute.

When discussing expenditures of time and money for traditional approaches, it should be understood that such costs do not result only from litigation. Enormous losses of time and money can also accrue during work stoppages caused by appeals before administrative bodies that must issue permits. For example, during the Santa Fe Summit dispute (see page 28) the residents of Hyde Park Estates made it clear to the owner of Summit Properties that they could bleed the profits out of his project merely by filing lawsuits and appeals that would hold up construction. By pursuing a negotiated settlement, Summit Properties precluded both future lawsuits and construction delays stipulated by court injunctions.

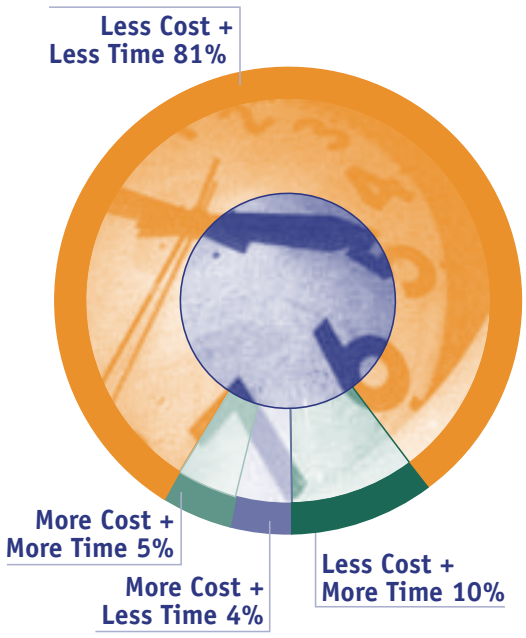
4: How important was the mediator?

When asked whether or not the parties thought they could have reached an agreement without the assistance of a professional neutral, 80 percent of all respondents answered "no." In a related question, 85 percent of all respondents stated that the mediator was either "crucial" or "important" to achieving whatever level of agreement was reached among the parties. This percentage did not vary much by either the role of the respondent or the type of dispute. Even in cases that were not settled, 33 percent of respondents stated that the mediator was "crucial" or "important" to the overall process (see Figures 4 and 5).

Mediators made invaluable contributions by:

- employing techniques that assisted the stakeholders in overcoming an impasse which precluded them from resolving the dispute on their own;
- discovering underlying interests that were concealed by the inability of the parties to deal with each other effectively;
- managing the interaction of the stakeholders to ensure that all parties had both an opportunity to express their views and the responsibility to listen to what others had to say; and
- facilitating joint fact finding.

FIGURE 3. Cost and Time of Mediation vs Other Processes



For example, during the dispute over the Safe Harbor Homeless Shelter (see page 24), the mediators used "caucusing" so they could better understand the underlying rationale on which one of the stakeholders' opposition to the shelter was based. As a result, they were able to steer discussions among the parties so that those issues received greater attention. In contrast, the success of the mediator in the Santa Fe Summit dispute (see page 28) was primarily a consequence of his ability to gain the trust of all those involved. Only after gaining their confidence was he able to work with them to resolve the conflict in an equitable manner.

Conclusions

Most respondents had a positive view of assisted negotiation, as indicated by their 84.5 percent very favorable/favorable assessment. Even when cases were not settled, significant progress was often made. Moreover, neutrals were generally viewed by stakeholders as having made "important," if not "crucial," contributions to either the resolution of the dispute or the improvement of the conditions that surrounded it. Finally, mediation appeared to cost less money and take less time.

The study results also indicate that not all disputes are appropriate for mediation. When asked under what circumstances mediation should not be utilized, respondents answered:

- when setting a precedent is important;
- when participants do not recognize each other's rights;
- when a complete stalemate has been reached;
- when payment for the process is coming from only one side; or
- when the process is being utilized only to delay any action or to create the illusion that something is being done.

As a general rule, the success of assisted negotiation relies on the disputants' commitment. A mediator cannot force any party to accept a settlement. Moreover, failure to follow through on promises made during a negotiation can result in the disintegration of trust and the initiation of bitter subsequent conflicts. This is more likely to occur if one or more parties feels coerced or tricked into accepting an agreement.

If the parties involved in a dispute are truly committed to implementing a negotiated agreement, then "the combination of the mediation session itself, the fact that an outside party is bringing the parties together, and the mediator's incentive to achieve settlement can combine to overcome inertia and move the case to settlement."[24] In such situations, the mediator can make a critical contribution.

FIGURE 4.

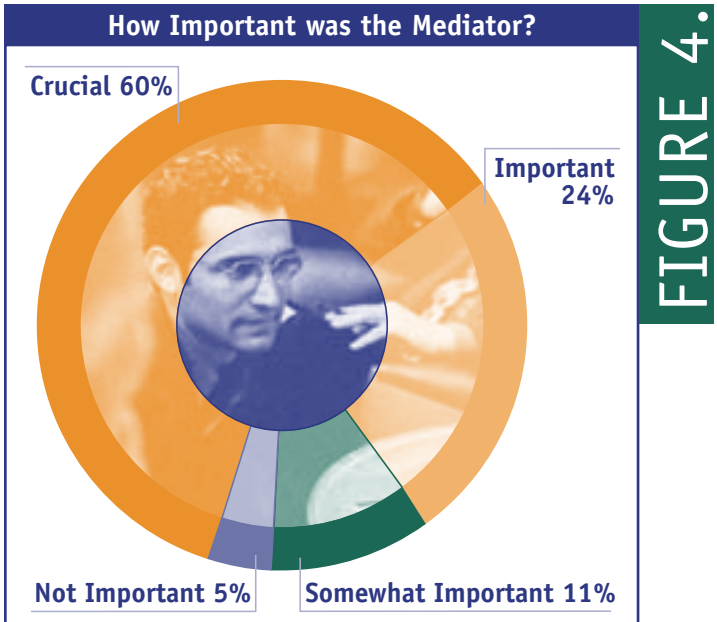
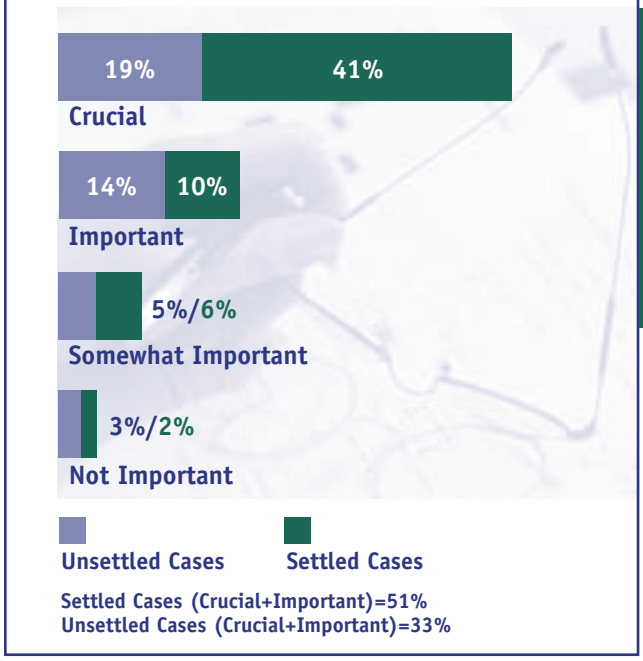


FIGURE 5.



Case Studies: Outcomes of Land Use Mediation

Obstacles to Assisted Negotiation

The CBI study identified three main sets of obstacles to achieving a mediated settlement in land use disputes: tensions among stakeholders, procedural obstacles, and substantive obstacles. In this section, several short cases illustrate different types of obstacles and three longer case studies present successful resolutions and the lessons learned in each situation.

TABLE 3. Summary of Obstacles

Tensions Among Stakeholders	**52%**
Distrust	15%
Entrenched Positions	12%
Conflicting Values	8%
Personality Issues	8%
Stakeholder Ability to Represent their Group	4%
Perception of Strong BATNA	4%
Negotiating in Bad Faith	1%
Procedural Obstacles	**28%**
Distrust of or Lack of Experience with the Process	6%
Time and Cost of the Process	5%
Outside Influence	5%
Identification of Stakeholders	5%
Neutrals	3%
Communication	2%
Distributive Bargaining	2%
Substantive Obstacles	**20%**
Technical Planning Issues	11%
Technical Modeling	4%
Access to Information	4%
Property Rights Issues	1%
Total	**100%**

...establish ground rules and create an atmosphere in which parties can deal with their differences.

Tensions Among Stakeholders

Interpersonal problems among the stakeholders, such as personality, attitude, and other behavioral tensions, often impede effective negotiation. Within this category, "distrust" was reported with the greatest frequency (15 percent), with "entrenched positions" a close second (12 percent). To avoid these problems, it is very important to establish ground rules and create an atmosphere in which the parties can deal with their differences.

Distrust: Jefferson County, Montana

A dispute between county residents and a local cement plant threatened to disrupt efforts to draft a comprehensive county plan. In order to counteract the disputants' ability to stall negotiations by raising objections, the mediator established a ground rule allowing stakeholders to raise objections only if they were also able to suggest a constructive alternative. This prevented vindictive participants from blocking progress and encouraged more constructive dialogue. The use of ground rules helped parties reach agreement on land use classifications and the types of land uses permitted within each classification.

Entrenched Positions: Highfield Hall, Falmouth, Massachusetts

A local conservation organization and other citizens groups held strong opposing positions concerning the historic significance of an old mansion: "keep it" or "tear it down." The mediator tried to control animosity among the parties by creating an atmosphere in which they could become more familiar with each other and communicate more effectively. He worked to keep them focused on the facts rather than emotional reactions to the situation and caucused privately with each of the groups to hear their concerns. This approach allowed the parties to hear each other more objectively and, in the end, to reach agreement on the use of the building as well as on how to proceed in the event of similar cases in the future.

Procedural Obstacles

Almost one-third of responses to questions about the management of the assisted negotiation process were related to procedural concerns. Some were a direct outgrowth of the fact that the stakeholders had no prior negotiation experience and were confused about their role and about what the process was intended to achieve. Additionally, disputes arose among stakeholders who believed in traditional decision-making processes and those who championed the idea of a mediated process. These situations highlight the importance of explaining the goals of the process and the roles of the various stakeholders and neutrals prior to the initiation of negotiations.

Lack of Experience with the Process: Pine St. Barge Canal, Burlington, Vermont

Participants in this Superfund cleanup wanted the mediator to take control of the process and tell them what they should do. In response, the mediator proposed protocols that defined each participant's role and explained how the process would work. Once the stakeholders understood and felt comfortable with their responsibilities, they were able to focus on the substantive issues in dispute. The parties then became full participants in the mediation, which took the form of a regulatory negotiation (also called a 'reg-neg'). The parties agreed on a remedy for the cleanup as well as on other projects to help restore the surrounding ecosystem.

Substantive Obstacles

Although substantive problems made up a total of only 20 percent of the obstacles enumerated by survey respondents, "technical planning issues" accounted for more than half of this total. Land use planners rely on technical jargon and abstract concepts that often act as barriers to entry for interested lay people. Thus, it is important for those managing a consensus building process to ensure that all stakeholders understand the technical issues involved.

Technical Planning Issues: Camp Sherman, Oregon

Most participants involved in the development of a comprehensive plan for this community wanted to define density of residential development solely in terms of the number of homes that could be built. The mediator worked with the stakeholders to explore a more expansive definition of density (i.e., in terms of design and scale). This change was important because it gave stakeholders greater insight into the range of issues involved in the preparation of a comprehensive plan and allowed all parties to agree on a new draft ordinance, which was ultimately adopted by the county and ratified by the state.

Characteristics of Unsettled Cases

Northern Provinces: Rehoboth, Massachusetts

A developer wished to construct single-family homes on lots near a wetland that was connected to the local drinking water supply. Abutters complained of wetland degradation from construction and runoff, as well as increased potential for flooding. The local conservation commission approved the developer's plans, but abutters appealed this decision to the state. The Massachusetts Department of Environmental Protection (DEP) also approved the developer's plans, but abutters continued to appeal. Eventually, DEP suggested that the parties attempt mediation.

The mediation process lasted for nine months, but ultimately failed for the following reasons:

- Use of the mediation process as a delaying tactic by some parties
- Inability of some parties to compromise
- Personality conflicts
- Inexperienced mediator

Monroe County Comprehensive Plan: Florida Keys

The governor and his cabinet, sitting as the Administrative Commission, found the Monroe County Comprehensive Plan not in compliance with state law. Major conflicts in the Florida Keys region included wastewater policies, development permit allocation policies, and endangered species and land acquisition policies for the Big Pine Keys. The Commission ordered the plan to be brought into compliance using a facilitated negotiation process, including representatives from the Departments of Environmental Protection, Transportation, and Health and Rehabilitative Services, as well as the South Florida Water Management District.

The facilitators provided assistance to the parties in their search for mutual understanding and consensus agreement on the various issues addressed in the commission's report. They prepared proposed meeting agendas, developed meeting summaries, and facilitated all negotiation sessions. All plenary and small group, multiparty negotiations were open to the public. Public comments were received at each of the three sessions, and the public was encouraged to submit any concerns or ideas in writing to the administration staff and negotiators. In addition, a "public input draft" of consensus language was provided to the public for comment at the commission's public hearings, which were held in the Keys.

Factors that prevented resolution of this comprehensive planning process included:

- Difficult history prior to the negotiation
- Intraparty disagreements
- Lack of authority for one side to make binding commitments, causing mixed signals
- Cultural differences
- Difficulty translating scientific issues into policy decisions
- Concerns about future development

American Stone Quarry: Orange County, North Carolina

American Stone Company was seeking county and municipal approval in order to expand existing operations of its crushed stone quarry. The county water and sewer authority supported the expansion in return for a promise to receive a mine pit for use as a reservoir. A local group, Citizens against Quarry Expansion, opposed the expansion plans and sought a decision from the Carrboro Board of Alderman.

The Alderman called for a mediation process to resolve the dispute, but it met with the following obstacles:

- Lack of dialogue between the parties at a public hearing, resulting in presentations made about one another, not discussion with each other
- No exploration of the other sides' interests and points of view
- Failure to address concerns of noise and environmental impacts (e.g., threat to the water supply)
- Unwillingness of one side to move from a competitive to a collaborative mode
- Lack of trust among stakeholders

CASE 1

Safe Harbor Homeless Shelter: West Chester, Pennsylvania

Despite being located in a generally prosperous county, the city of West Chester exhibits numerous symptoms of socioeconomic distress, the most dramatic being its high rate of homelessness. In an attempt to find a solution to this problem, the local charitable community formed Safe Harbor of Greater West Chester, Inc., a non-profit organization that proposed the establishment of a shelter that would provide meals and counseling for the homeless. However, West Chester's business interests, the mayor, and the shelter's potential neighbors were deeply troubled by the prospect of a homeless shelter operating near the city's downtown business district. Due to the tensions between these interests and Safe Harbor, the county hired three professionals to mediate this conflict: Melva Mueller, Director of the Community Mediation Program of the Family Service Center of Chester County, Wendy Emrich of PennAccord, and Hans Dietze of the Community Dispute Settlement Program of Delaware County

The primary objectives of this mediation were to overcome general objections to the shelter and establish ground rules for the coexistence of the stakeholders. As a first step, a series of interviews were conducted so that the mediators might gain a better understanding of both the nature and history of the dispute. Based on this information, Melva Mueller suggested a process consisting of four sessions. During the first session, participants were given the opportunity to voice their feelings regarding the shelter. According to the mediators, such uninterrupted time is a critical first step in almost any mediation. As a result of this meeting, it became clear that the business community was concerned that the presence of the shelter would lead to increased loitering, panhandling and crime.

The primary objectives of this mediation were to overcome general objections to the shelter and establish ground rules for the coexistence of the stakeholders.

To respond to these safety concerns, representatives of homeless shelters and their neighboring business owners from Harrisburg and Philadelphia were invited to attend the next meeting. They were able to provide information on how Safe Harbor could deter criminals from using the facility to gain easy access to the downtown area. Moreover, Safe Harbor pledged to work actively with both local law enforcement and the business community to address potential problems. Although this session appeased some of the opponents' concerns, many representatives of the business community continued in their opposition. The mediators responded by employing a technique called a caucus during the third session. A caucus is a private meeting held during a mediation session, giving participants an opportunity to speak confidentially with the mediators and/or other participants. During the mediators' caucus with one of the shelter's staunchest adversaries, it became evident that his opposition to the shelter stemmed primarily from a friend's negative experiences at a homeless shelter. This disclosure resulted in an in-depth discussion of Safe Harbor's counseling and referral services. According to participants, this discussion significantly altered this opponent's opinion of the project and subsequently changed the course of the entire mediation.

During the final session, Safe Harbor presented its detailed business plan for the shelter. To demonstrate that they truly understood the business community's fears, Safe Harbor drafted a "Statement of Commitment to the Community," in which they again reviewed the safety and livability issues raised during the mediation. This statement and the language of the final settlement substantially contributed to the fostering of good will between Safe Harbor's supporters and the business community.

As part of this settlement, Safe Harbor agreed to postpone opening the shelter on a 24-hour basis until they had demonstrated their ability to deliver basic emergency shelter services to the community's homeless population. In response, representatives of the business community recognized that there was a pressing need for a shelter and that the proposed location was appropriate.

Four years later, the shelter expanded its operations to include 24-hour accessibility, counseling, and access to other rehabilitative services. The controversy is gone and the shelter enjoys widespread community support.

Lessons Learned

Mediator Hans Dietze noted that a successful mediation requires a careful evaluation of the parties involved and their specific interests. Since the exclusion of any legitimate stakeholders or failure to resolve the conflict's underlying issues may result in a re-emergence of the conflict, such an analysis is vital to the success of the process. However, for the negotiation to work satisfactorily, all participants must wholeheartedly commit to solving the problem.

Dietze maintains that, although the mediator should assist those involved in identifying goals, it is the stakeholders themselves who must construct a mutually satisfactory agreement. The mediator's most important purposes are to ensure that participants have a forum in which to speak, keep confidentiality, and operate in a non-partisan manner. If properly executed, this role should ensure an environment in which all stakeholders may voice their positions with confidence, thereby facilitating the exchange of information necessary for participants to formulate solutions.

Consistent with this goal of the mediation process, Dietze recalled that a major milestone in this case occurred when the parties finally began communicating clearly with one another. Proponents of Safe Harbor began to better understand the support that the business community could provide and, at the same time, the business community realized that Safe Harbor's shelter was the most viable solution to the downtown area's homeless problem. In the final analysis, it was this interaction that allowed the stakeholders to establish a mutually supportive and long-lasting relationship.

CASE 2

Indian Ford Creek: Deschutes County, Oregon

Indian Ford Creek flows through both federally protected and privately held land in northeastern Deschutes County, Oregon. During the late 1980s, residents were becoming increasingly concerned about the implications of increasing development on local water quality.

In 1991, a local resident applied to subdivide and develop 30 of his 60 acres adjoining the creek into three 10-acre home sites. Some neighbors were incensed by this proposed use of the area knows as Indian Ford Meadow and voiced their objections to the county. While understanding that some county residents desired strict conservation regulations, county officials also realized that they lacked the necessary resources to satisfy all potential stakeholders. The county applied to the Oregon Dispute Resolution Commission for a grant to finance the mediation of this dispute. The grant was approved, and the Deschutes County Board of Commissioners selected Alice Shorett of Triangle Associates and an Indian Ford Creek Mediation Committee to conduct the mediation.

Rather than focusing specifically on the subdivision proposal, the purpose of the mediation was to reach an agreement on a set of regulations that could "satisfy the objectives of controlled growth and sound environmental stewardship." Accordingly, Shorett designed a mediation process that focused on the effective management of Indian Ford Creek. The mediation itself consisted of four full sessions over three months, with time between each meeting for the collection of relevant information and private meetings with representatives from each group.

…the purpose of the mediation was to reach an agreement on a set of regulations that could "satisfy the objectives of controlled growth and sound environmental stewardship."

The first session involved the identification of stakeholder interests with respect to riparian land use regulations. During the second and third sessions, more detailed information was presented on the stream's ecology. By the end of the third session, a variety of settlement options were discussed, including the creation of a conservation easement and the designation of all ecologically critical land as permanent open space. In an attempt to reach an accord, the committee was divided into two working groups. Unfortunately, by the time this meeting ended, no clear consensus had been reached.

The landowner whose proposal had been the impetus for the mediation process was particularly frustrated by the lack of results during the first three sessions. In his opinion, opponents of the development plan were too concerned with his subdivision proposal and failed to adequately consider the issues at hand. As a result, Shorett chose to conduct the final session as a discussion of county-wide private property rights.

During this session, it became apparent that Indian Ford Meadow was not the only developable land in the vicinity of Indian Ford Creek. Indeed, even some opponents of the subdivision plan owned smaller parcels that they could sell as home sites. Consequently, several of them began to realize that they might, at some future time, be in a position similar to that of the landholder they currently opposed. This realization led to a renewed focus on the true purpose of the mediation, and the swift procurement of an agreement.

The settlement concluded by the Indian Ford Creek Mediation Committee consisted of three sets of recommendations: more rigorous enforcement of existing regulations, formation of a land trust to preclude future construction on and around Indian Ford Meadow, and incentives and other enticements to landholders who preserved ecologically sensitive areas adjacent to Indian Ford Creek.

Two years later, the landowner whose property was in question donated his entire 60-acre plot to the newly established Deschutes Basin Land Trust. Since then, the land trust has been highly successful, receiving numerous contributions both in land dedications and cash donations.

Lessons Learned

Participants seemed to agree that facilitation by an unbiased mediator was highly important in the resolution of this conflict. Some parties also believed that the mediation's success was attributable primarily to the ample time that stakeholders had to familiarize themselves with all of the issues. Lastly, the landowner felt that the success of this mediation was based on the opportunity given to him by the opposition to explain his proposal. "The mediation was great because it finally gave me a chance to explain to them what I was trying to do, and how it felt to have others try to strip a personal asset of its value. As soon as the leadership of the other side heard that, they decided to cooperate. Before the mediation, all they wanted to do was something that would stop me from doing anything."

While the mediation led to the development of new conservation policies and the establishment of a land trust, one former opponent of the development proposal astutely observed that the most enduring result of the mediation was the good will it engendered among former adversaries.

CASE 3

Santa Fe Summit: City of Santa Fe/ Santa Fe County, New Mexico

Hyde Park Road lies seven miles northeast of downtown Santa Fe, traversing parts of the Santa Fe National Forest and Hyde Memorial Park. One private section of this National Scenic Byway is Hyde Park Estates, a community of about 60 families just outside the Santa Fe city boundary. During the spring of 1991, residents of Hyde Park Estates noticed the construction of a massive water tank and the installation of large-scale water supply lines just south of their subdivision. Their concern grew as it became clear that this infrastructure foretold the importation of city water and the likely construction of a large number of homes.

At a quickly organized meeting, Hyde Park Estates residents decided that the most prudent course of action would be to initiate delaying tactics against the Santa Fe Summit Project until they could obtain more information. They subsequently filed a lawsuit challenging the city's authority to extend its infrastructure into the county. Although extension of the city's water supply was upheld in court, the resulting legal proceedings delayed the work being done by the developer (Summit Properties) causing it to lose thousands of dollars. Realizing that repeated use of such tactics could make completion of the project a financial impossibility, the owners of Summit Properties became responsive to the initiation of a collaborative planning process.

To promote resolution of the controversy surrounding the Summit Properties project, representatives of Hyde Park Estates, a local business called 10,000 Waves, and a local condominium association petitioned the Extraterritorial Zoning Authority (EZA) to create the Hyde Park Planning

…the Planning Group formed five task forces to gather information on various issues.

Group. This group would also include representatives of Summit Properties and any other interested landowners along Hyde Park Road. In addition to finding a solution for the current problem, this group was charged with drafting a comprehensive planning document for all of the remaining developable land between the Santa Fe City line and the Santa Fe National Forest.

Meanwhile, Hyde Park Estates decided to employ their own planning consultant, Ric Richardson, chair of the Community and Regional Planning Program in the School of Architecture and Planning at the University of New Mexico, and a member of the Harvard Negotiation Project. Although working directly for the residents of Hyde Park Estates, Richardson also played a role in the Hyde Park Planning Group. At his suggestion, the Planning Group formed five task forces to gather information on various issues. Using this information, the Planning Group established a set of issues on which future negotiations would be based.

In response to Summit Properties' initial plan, representatives of the Planning Group began working with the developer's representatives to design an alternative proposal. However, towards the end of 1992, negotiations between the two parties broke down due to the filing of development plans by Summit Properties that were completely different from the plans previously agreed upon.

What happened next is far from the norm in reaching a negotiated settlement. During his time as a consultant for Hyde Park Estates, Richardson had developed a strong relationship with Summit Properties' representatives to the Hyde Park Planning Group. Utilizing this relationship as a foundation for mutual trust, he helped facilitate the re-establishment of negotiations among the stakeholders. Though Richardson facilitated many of these efforts, including the convening of unofficial meetings between representatives of the stakeholder groups, the participants themselves worked hard to improve inter-party communication and design a final agreement that would take both sides' interests into account.

At the Planning Group meeting held during late March 1993, a formal agreement articulating the details of the settlement was drawn up and signed by all of the stakeholders. Overall, those involved in the negotiation remain pleased with its results. Even the owners of Summit Properties acknowledge that the process compelled them to design a better development. Most importantly, however, the planning process resulted in the formulation of a comprehensive neighborhood plan, the first such plan ever adopted by the Santa Fe County Commission.

Lessons Learned

The Santa Fe Summit dispute is unusual in that the mediator's initial contact with the project was as negotiator for one of the stakeholders. However, his ability to satisfy other participants' questions regarding his planning expertise and commitment to a fair and equitable process enabled him to fulfill the role of a neutral third party when the negotiation reached an impasse. Additionally, Richardson maintains that it was important to keep relevant officials apprised of what was going on. Participants credit his ability to focus those involved on underlying interests (i.e., traffic, the viewshed, noise), rather than broader issues such as density, for spurring the consideration of other mutually acceptable solutions.

Although the participation of a skilled facilitator cannot be understated, it was the efforts of local residents that truly drove the process. As a result of the residents' investment of significant amounts of time and money, Summit Properties was forced to take their concerns seriously. At the same time, local residents and business owners realized that they needed to compromise with Summit Properties; they could not just say no. Thus, a situation was created in which all of the parties were willing to negotiate in good faith and make significant efforts to accommodate other stakeholders' interests.

One representative of Hyde Park Estates stated that "identifying interests early on was a great thing to do. We also benefited from a local government that wanted the input of community members. It was critically important that the developers decided to participate—that they realized they had to—and that was wise on their part."

POLICY

The Policy Debate

The field of assisted negotiation has grown rapidly over the past 20 years. For planners in particular, mediation offers an approach to dealing with increasingly complex land use issues and a growing number of stakeholder concerns. The question is, if land use disputes should be settled using mediators, what does that say about the role of planners and planning? Indeed, what is the role of other stakeholders in consensus building efforts—elected officials, public agency employees, the business community, local activists, volunteer planning commissioners, and the general public?

Growth Trends in the Use of Mediation

Several trends have influenced the growing interest in mediation for many kinds of disputes.

Institutionalization of the Mediation Process

Increasing government commitment to mediation at the federal and state levels has been facilitated by a growing body of laws, regulations and model rules. The U.S. Environmental Protection Agency was the first federal agency to experiment successfully with the new negotiation approach, and other agencies soon followed. To legitimize this innovative approach, Congress enacted the Negotiated Rulemaking Act of 1990, and state and local level agencies have decided to use these consensus building techniques to resolve their disputes as well.[25]

The U.S. Institute for Environmental Conflict Resolution was created by the federal Environmental Policy and Conflict Resolution Act of 1997 to assist in the resolution of environmental and land-related conflicts in which the federal government is a stakeholder. Congress passed the Alternative Dispute Resolution Act of 1998, which "requires federal district courts to authorize the use of ADR in all civil actions and to encourage litigants to use the ADR process."[26] This followed passage of two legislative acts designed to increase the use of ADR by federal agencies,[27] and two executive orders directing federal litigation counsel to suggest and use ADR in appropriate circumstances.[28]

State efforts include the creation of state-supported offices of dispute resolution in 28 states. According to a recent survey conducted by the Policy Consensus Initiative (PCI), these offices are most frequently involved in civil court cases, environmental issues and public policy disputes.[29] However, staff also reported dealing with conflicts such as state-level inter-agency disputes, agricultural controversies and transportation issues.

…there is greater general awareness of dispute resolution techniques to address complex land use disputes.

Several professional groups have developed standards and guidelines for "best practices" in public dispute resolution. The Public Dispute Resolution Section of the Society of Professionals in Dispute Resolution (SPIDR), whose mission is to advance dispute resolution through public education and to support the highest possible standards for dispute resolution, has drafted guidelines entitled "Best Practices for Government Agencies"[30] and "Ethical Standards of Professional Responsibility."[31] The American Arbitration Association (AAA), the American Bar Association (ABA), and SPIDR have jointly prepared "Model Standards of Conduct for Mediators."

While SPIDR has promoted these professional standards for its members, it is ultimately the responsibility of the stakeholders in each consensus building effort to ensure that the neutral involved in their case conforms to these principles. Some of the key principles are maintenance of impartiality and confidentiality, avoidance of conflicts of interest, and ensuring that agreements do not damage the integrity of the mediation process.[32]

Greater Familiarity with Dispute Resolution Techniques

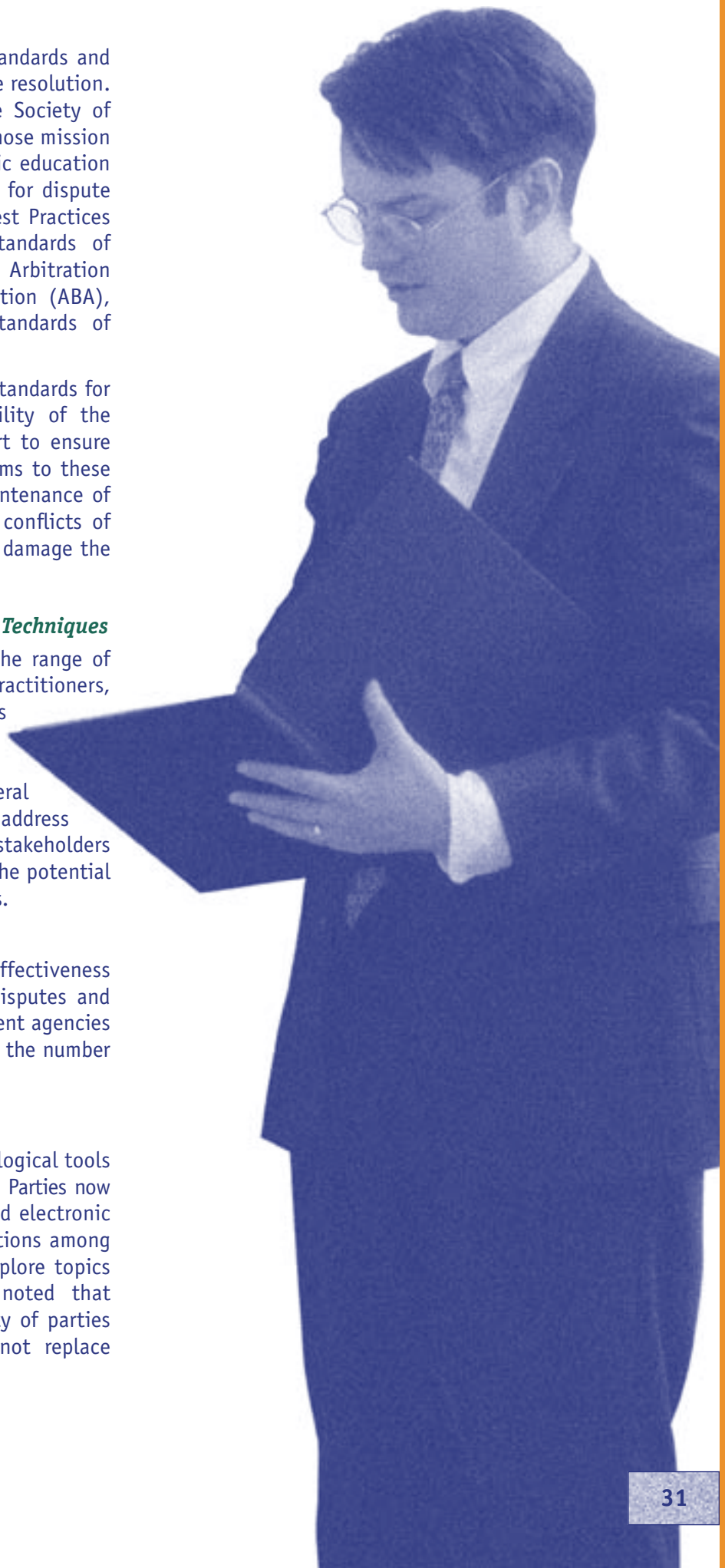
The past 10 years have seen an increase in the range of training opportunities for dispute resolution practitioners, as well as the publication of books and articles for both researchers and practitioners and the establishment of informal networks for professionals. As a result, there is greater general awareness of dispute resolution techniques to address complex land use disputes. Moreover, many stakeholders are taking steps to educate themselves about the potential benefits of participating in mediated processes.

Growing Numbers of Experienced Mediators

Increased awareness of the availability and effectiveness of mediation as a tool for solving complex disputes and growing commitment to mediation by government agencies at all levels have contributed to the increase in the number and quality of mediators.

Availability of Technological Tools

The availability of web-based and other technological tools for use in consensus building has also increased. Parties now depend on computers for joint fact finding, and electronic networks are available to enhance communications among parties. Chat rooms are sometimes used to explore topics in greater depth. However, it should be noted that although these tools can enhance the capacity of parties to communicate on the sidelines, they cannot replace face-to-face negotiation.



The Role of Mediation in Land Use Planning

Several questions remain unresolved about the use of mediation in land use planning. To what extent can mediation enable a shift from efficiency to fairness or assist stakeholders in resolving their differences? Should land use planners or other public officials mediate local land use disputes or should mediation services be provided primarily by outside neutrals? What kinds of regulations, if any, are needed to ensure an appropriate role for mediation in land use disputes?

Use of the Mediation Model

The mediation model as a tool to resolve land use disputes emerged as a natural outgrowth of the shifting demands on land use planners in the 1990s to resolve disagreements and build consensus. The ultimate purpose of this model is to ensure that land use decisions are made fairly and that all possible joint gains are incorporated into technically feasible and implementable agreements.

> "Local planners often have complex and contradictory duties. They may seek to serve political officials, legal mandates, professional visions, and the specific requests of citizens' groups all at the same time. They typically work in situations of uncertainty; great imbalances of power; and multiple, ambiguous, and conflicting political goals. Many local planners therefore, may seek ways both to negotiate effectively, as they try to satisfy particular interests, and to mediate practically, as they try to resolve conflicts through a semblance of a participatory planning process."[33]

Planners as Mediators

The question remains whether planners should mediate land use disputes themselves or leave that role to outside professionals. Do planners have the right attitudes and skills to mediate fairly? Can they act in a neutral way while still expressing opinions on the substantive issues at hand? Should mediation services be provided by autonomous entities such as nonprofit centers or should they be available through court- or government-annexed agencies?

Land use planners can and have mediated disputes successfully even when they were directly involved in the case. The purpose of asking planners to mediate their own disputes is not to save money on outside services, but to encourage collaborative decision making as a normal method of handling resource allocation disagreements. When the parties involved in a land use dispute are not aware of or experienced with consensus building techniques, land use planners can encourage them to take advantage of mediation without much fanfare and without the need to stop and wait until the services of an outsider become available. As long as a planner has the right skills and is able to stay neutral, he or she can facilitate a joint problem-solving effort.

Unfortunately, most land use planners are not especially knowledgeable about consensus building techniques or the manner in which they should be applied in complex public disputes. This kind of training for planners could be provided by existing universities, specialty education centers and accredited planning schools. In addition, other government officials, especially members of planning boards and city councils, should receive mediation training so they can participate effectively as consumers of mediation services.

In general, land use planners can serve as facilitators of consensus building processes which encourage general collaborative decision making as a normal way of handling land use conflicts. When formal mediation is needed for more severe and complex disputes, planning agencies should hire outside professional neutrals.

Other Public Officials as Mediators

It is also possible to build mediation capability within government, and to keep this capability separate and distinct from other departments. Currently, such in-house arrangements exist in Massachusetts, Florida, Montana and Oregon.[34] Disputants do not usually choose between hiring an outside mediator or using internal expertise; instead, they choose between using this internal service or not using mediation at all. Typically, because internal expertise is readily available and relatively inexpensive, parties are willing to use it as long as they have the right to opt out at any point (without compromising their normal administrative options).

In general, the following preconditions should be met before any public employee assumes the role of a neutral mediator: the government agency involved must send other representatives to voice its interests in the negotiation, clearly freeing the neutral to concentrate on the mediation role; any relationship between agency representatives and the staff person serving as the neutral should be disclosed immediately to all parties involved; when making a decision regarding which staff member to place in which role, each agency should clarify its decision-making hierarchy to avoid difficult situations in which a subordinate, acting as a neutral, is required to oversee his or her superior.

One of the key advantages of using internal personnel to mediate is that a well-respected, well-connected staff member will have greater familiarity with the information being discussed, as well as a clear understanding of the pressures under which the agency must work. This assumes that the neutral party is, in fact, well respected both within the agency and by the outside parties. Although neutrality is still of the utmost importance, experience suggests that stakeholders ultimately judge a neutral more by behavior than by affiliation. Once people in the community have had a positive experience with an in-house neutral, that individual's credibility will be more important in future negotiations than any general objections over who pays his or her salary.

Government officials have found the availability of in-house neutrals to be a valuable option when the neutral is used in a responsible way.[35] On the other hand, in-house neutrals often face impossible tensions if they are expected to be both mediators and agency representatives. There may be unspoken pressures to act on behalf of a particular party's interest.[36] If any agency does not show substantial support for the mediator, the other parties will not take the process seriously.

Considering that 75 percent of the land use dispute resolution cases in the CBI study were initiated by government officials, these preconditions are very important. Even in disputes between private parties in which government involvement was limited to regulatory review, public officials often suggested the use of assisted negotiation to solve the dispute. It seems likely that public officials will continue to recognize and support the use of neutrals to tackle difficult disputes of all types, especially land use disputes.

Given the complexities of the mediator's role, most mediation services should be provided by neutral parties outside of government. As professionals not affiliated with any government institution, they will be able to function most effectively. Those who have developed expertise in land use and natural resource management are most likely to be successful in such cases. An increasing number of non-governmental organizations (NGOs) now offer consensus building services, so the availability of qualified outside professionals is no longer an issue.[37]

Institutionalization and Regulation

As mentioned earlier, there are federal, state, and even some local statutes governing the use of mediation in certain situations, but few of them are specific to the mediation of land use disputes. The field is expanding so rapidly that it has been difficult to fashion a uniform set of standards to govern land use mediation. Such regulations may be needed in some contexts, not so much to guide mediation itself but to legitimize its use in land use planning. One option is that land use mediation be regulated by state enabling statutes on zoning to avoid some of the experimentation that is less than fully informed. Or, states could draft separate land use mediation statutes.

For example, the Montana Consensus Council has proposed a statutory framework for resolving local land use disputes.[38] That framework is entirely consistent with the rights that individuals already enjoy to participate in the operation of governmental agencies and the implementation of laws, regulations, and ordinances governing land use. The intent of the framework is to encourage local government officials, landowners, developers, and other citizens to develop better informed, more creative and lasting solutions to land use disputes through various forms of dispute resolution and consensus building. The proposed legislation seeks to supplement, not duplicate or replace, existing laws. It includes guidelines on the need for consensus building, the creation of representative negotiating committees, techniques for implementing informal agreements, the use of facilitators or mediators, and public reporting requests.

In Canada, the Office of the Provincial Facilitator (OPF) was created to mediate land use disputes in the Province of Ontario in 1992, partially because the provincial planning and approval process was bureaucratic and slow. The official purpose of the OPF is to facilitate development projects that could benefit the province but are caught in administrative delays. The OPF handled over 600 planning and development disputes between 1992 and 1996. A study of 15 of these cases found that the OPF could be instrumental in bringing government officials to the table, narrowing conflict, and proposing mutual gains solutions to problems. Other examples of institutionalized land use mediation in the U.S. exist in Oregon, Florida and Montana.[39]

At the local level, dispute resolution procedures might be added to local zoning bylaws. Because each dispute resolution situation has its own unique characteristics, procedural flexibility is required. For example, a different process may be needed to encourage the mediation of environmental cleanup disputes than for resolving comprehensive planning disputes. Thus, statutory rigidity should be strenuously avoided.

Conclusions

Land use disputes are becoming increasingly complex. The time is ripe for land use planners and other public officials to explore alternative ways of resolving these conflicts, and the mediation model represents an important new option for achieving this goal.

Further evaluative research is still needed to sharpen our understanding of what works well in the assisted negotiation process and what does not. For example, the hypothesis that mediation is more efficient than traditional administrative or adjudicative procedures and the extent to which mediation reduces administrative costs (by reducing the number of formal hearings) need to be examined more closely.

Practitioners must develop a clearer understanding of how procedural adjustments increase or decrease the efficiency and quality of mediation. This includes identification of the key obstacles to achieving settlements in different types of situations, the actions that assist in (or hinder) overcoming these obstacles, and the characteristics of each case that make it amenable (or not) to negotiated settlement. Additional analysis is also needed to determine how a mediator's actions affect settlement. We need to know more about the quality of the agreements reached under various circumstances and the extent to which assisted negotiation does or does not protect various elements of the public interest.

Increasingly, experience with consensus building as a means of resolving complex land use disputes is being documented and evaluated. Through broader dissemination of these cases, both individuals and organizations can make sense of their own use of and experience with the assisted negotiation process. Not all land use disputes can be resolved using mediation, but its use is offering better and longer-lasting solutions to many communities.

It is eminently clear that land use disputes will not give way to technical planning and analysis alone. Furthermore, advocacy of various political interests, although it may be absolutely necessary to ensure that key voices are heard, tends to exacerbate rather than resolve disputes. While litigation may resolve some aspects of some land use disputes temporarily, it does not always address the underlying concerns of the parties; nor does it improve the very relationships required to reconcile differences in the future. The mediation model offers a way to accomplish all these objectives.

Related Lincoln Institute Publications

Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials

Lawrence Susskind and the Consensus Building Institute

1999, 26 pages, paper, $12.00. 134-4

As land use issues become more complex, it is difficult for public officials to find ways to balance the contending forces of environmental protection, economic development and local autonomy. This Guidebook offers step-by-step advice on assisted negotiation based on a study of local land use disputes in 100 U.S. communities between 1985 and 1997. It answers frequently asked questions about why and how to use assisted negotiation, the risks and obstacles often involved, and issues in hiring a professional mediator or facilitator. Brief case studies illustrate particular steps in the negotiation process, and resource information includes an annotated bibliography and lists of organizations and state agencies that offer dispute resolution services.

"Resolving Land Use Conflicts through Mediation: Challenges and Opportunities"

David Lampe and Marshall Kaplan

1999, 94 pages, $14.00. WP99DL1

This working paper contains eight case studies of mediation efforts to resolve land use conflicts. It was completed by the Institute for Policy Research and Implementation at the University of Colorado at Denver, with the support of the Lincoln Institute and in concert with the Consensus Building Institute. The cases describe the context and substance of the conflicts and the different approaches used by the mediator to resolve the conflict. Lessons learned about mediation are summarized in the introduction and in the lessons-learned section of each case study. Mediation is perceived as a net plus by most parties to these conflicts, but there is no single approach that fits all situations. The case studies define the variables generating the success of various mediation efforts and suggest that more work needs to be done to clarify the roles of mediators and facilitators.

Dispute Resolution Websites

American Bar Association, Section on Dispute Resolution
www.abanet.org/dispute

Consensus Building Institute
www.cbi-web.org

International Association for Public Participation
www.pin.org

Mediation Information and Resource Center (MIRC)
www.mediate.com

Policy Consensus Initiative
www.agree.org

Program on Negotiation, Harvard Law School
www.pon.org

Society of Professionals in Dispute Resolution
www.spidr.org

Endnotes

1. For more information on the use of consensus building techniques during the 1970s and 1980s, see Bingham (1986). For more recent examples, see Susskind, McKearnan and Thomas-Larmer (1999).
2. Reps (1992).
3. Branch (1983): 28.
4. Boyer (1983): 79.
5. Fainstein and Fainstein (1994): 4.
6. Burchell and Steinlieb (1978): 69.
7. Hartman (1974): 71.
8. Susskind and Ozawa (1984): 9.
9. Kaiser and Godschalk (1995): 18.
10. Even so, there are certain circumstances in which mediation is inappropriate—particularly when constitutionally defined rights are at stake or setting a precedent is important. See Susskind and Cruikshank (1987).
11. The distinction between interests and positions is explained further in Fisher, Ury and Patton (1991).
12. A number of sources present information about case studies: Godschalk (1994); Dukes (1990); Crowfoot and Wondolleck (1990); Huelsberg (1985); Talbot (1983); Bacow, Wheeler, and Susskind (1983).
13. Susskind and Secunda (1998): 38.
14. For more information on the use of technology in consensus building, see Ozawa (1991).
15. Susskind and Secunda (1998): 37.
16. Amy (1987): 68.
17. Bingham (1986): xxvi.
18. Amy (1987): 76-77.
19. Ibid. 228.
20. Ibid.
21. Ibid. 80.
22. Forester (1987): 312.
23. See CBI website (www.cbi-web.org) for a copy of the questionnaire used in this study. See Lampe and Kaplan (1999) for case studies.
24. Sipe (1998): 282.
25. See the "Negotiated Rulemaking Act of 1990" and Susskind, Babbitt and Segal (1993): 59-65.
26. See "Alternative Dispute Resolution Act of 1998," 105-315. Litigants in all civil cases will be required to consider the use of ADR, and courts must provide litigants with at least one ADR process including, but not limited to, mediation, early neutral evaluation, mini-trials, and arbitration. Moreover, every district must designate an employee or judicial officer who is knowledgeable in ADR practices to implement and evaluate its ADR program.
27. The two acts are the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), which was amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, and the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969.
28. See Executive Order No. 12278 (1991); Executive Order No. 12988 (1996); and Moberly (1998).
29. Information about state offices of dispute resolution was obtained from a report prepared for the Policy Consensus Institute by Jill Purdy. See PCI's web page at www.agree.org.
30. SPIDR Guidelines—reprinted in *Consensus* 34: 7.
31. SPIDR Code of Ethics (from SPIDR website—www.spidr.org)
32. Ibid.
33. Forester (1987): 303.
34. Examples include the Massachusetts Office of Dispute Resolution, the Montana Consensus Council, the Florida Conflict Resolution Consortium, and the Oregon Dispute Resolution Commission.
35. Tonkin and Swanson (1998): 2.
36. Ibid.
37. Ibid.
38. "Resolving Land Use Disputes: A Discussion Paper for Suggested Legislation," Montana Consensus Council, Draft of July 22, 1998.
39. Moss (1997).

BIBLIOGRAPHY

Bibliography

Administrative Dispute Resolution Act of 1990, Public Law 101-552, 104 Stat. 2736

Administrative Dispute Resolution Act of 1996, Public Law 104-320, 110 Stat. 3870

Alexander, E. R. 1992. *Approaches to Planning*. Philadelphia, PA: Gordon and Branch Science Publishers.

Alternative Dispute Resolution Act of 1998, Public Law 105-315

Amy, D. J. 1987. *The Politics of Environmental Mediation*. New York, NY: Columbia University Press.

Bacow, L., M. Wheeler, and L. Susskind. 1983. *Resolving Environmental Regulatory Disputes*. Cambridge, MA: Schenkman Publishing Co.

Bingham, G. 1986. *Resolving Environmental Disputes: A Decade of Experience*. Washington, DC: The Conservation Foundation.

Blackburn, J.W., and W.M. Bruce. 1995. *Mediating Environmental Conflicts*. Westport, CT: Quorum Books.

Boyer, M.C. 1983. *Dreaming the Rational City*. Cambridge, MA: MIT Press.

Branch, M. 1983. *Comprehensive Planning: General Theory and Principles*. Pacific Palisades, CA: Palisades Publishers.

Burchell, R.W., and G. Sternlieb. 1978. *Planning Theory in the 1980's*. New Brunswick, NJ: Center for Urban Policy Research.

Bush, R., and J. Folger. 1994. *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition*. San Francisco, CA: Jossey-Bass.

Campbell, S., and S. Fainstein, eds. 1996. *Readings in Planning Theory*. Malden, MA: Blackwell Publishers Inc.

Carpenter, S., and W.J.D. Kennedy. 1988. *Managing Public Disputes*. San Francisco, CA: Jossey-Bass Publishers.

Crowfoot, J., and J. Wondolleck. 1990. *Environmental Disputes: Community Involvement in Conflict Resolution*. Washington, DC: Island Press.

Cullingworth, B. 1997. *Planning in the USA: Policies, Issues, and Processes*. New York, NY: Routledge.

Dorius, N. 1993. "Land Use Negotiation: Reducing Conflict and Creating Wanted Land Uses." *APA Journal* 59(2): 101-106.

Dukes, F.E. 1990. *Conflict: Practice in Management, Settlement, and Resolution*. New York, NY: St. Martin's Press.

Dukes, F.E. 1996. *Resolving Public Conflict: Transforming Community and Governance*. New York, NY: St. Martin's Press.

Eaton, T. 1993. "Negotiating Dispute Resolution." *Architects' Journal* (March 3): 39-40.

Erber, E. 1970. *Urban Planning in Transition*. New York, NY: Grossman Publishers.

Executive Order No. 12278, 56 Federal Register 55, 195 (1991)

Executive Order No. 12988, 61 Federal Register 4, 729 (1996)

Fainstein, S., and N. Fainstein. 1994. *City Planning and Political Values: An Updated View*. Working Paper no. 72, New Brunswick, NJ: Center for Urban Policy Research.

Faludi, A. 1973. *A Reader in Planning Theory*. Elmsford, NY: Pergamon Press.

Fisher, R., W. Ury, and B. Patton. 1991. *Getting to Yes: Negotiating Agreement Without Giving In, 2nd ed*. Cambridge, MA: Houghton Mifflin.

BIBLIOGRAPHY

Forester, J. 1987. "Planning in the Face of Conflict: Negotiation and Mediation Strategies in Local Land Use Regulation." *APA Journal* 53(3): 303-313.

Forester, J. 1989. *Planning in the Face of Power.* Berkeley and Los Angeles, CA: University of California Press.

Gans, H.J. 1968. *People and Plans.* New York, NY: Basic Books.

Godschalk, D. 1972. *Participation, Planning, and Exchange in Old and New Communities: A Collaborative Paradigm.* Chapel Hill, NC: Center for Urban and Regional Studies.

Godschalk, D. 1994. *Pulling Together: A Planning and Development Consensus Building Manual.* Washington, DC: Urban Land Institute.

Hall, P. 1992. *Urban and Regional Planning.* New York, NY: Routledge.

Hartman, C. 1974. *Yerba Buena: Land Grab and Community Resistance in San Francisco.* San Francisco, CA: Glide Publications.

Healey, P. 1997. *Collaborative Planning: Shaping Places in Fragmented Societies.* Vancouver, BC: UBC Press.

Huelsberg, N. 1985. *Successful Negotiation in Local Government.* Washington, DC: International City/ County Management Association.

Innes, J. 1994. *Planning Through Consensus Building: A New View of the Comprehensive Planner.* Berkeley, CA: University of California at Berkeley.

Kaiser, E.J., D.R. Godschalk, and F.S. Chapin. 1995. *Urban Land Use Planning.* Chicago, IL: University of Illinois Press.

Krueckeberg, D.A. 1994. *The American Planner.* New Brunswick, NJ: Center for Urban Policy Research.

Krumholz, N., and P. Clavel. 1994. *Reinventing Cities: Equity Planners Tell Their Stories.* Philadelphia, PA: Temple University Press.

Lake, L. 1980. *Environmental Mediation.* Boulder, CO: Westview Press.

Lampe, D., and M. Kaplan. 1999. "Resolving Land Use Conflicts Through Mediation: Challenges and Opportunities" (Working Paper WP99DL1). Cambridge, MA: Lincoln Institute for Land Policy.

Levy, J.M. 1997. *Contemporary Urban Planning.* Upper Saddle River, NJ: Prentice Hall.

Mandelbaum, S.J., L. Mazza, and R.W. Burchell. 1996. *Explorations in Planning Theory.* New Brunswick, NJ: Center for Urban Policy Research.

Mnookin, R., and L. Susskind. 1999. *Negotiating on Behalf of Others.* Thousand Oaks, CA: Sage Publications.

Moberly, R. 1998. "Introduction—Dispute Resolution in the Law School Curriculum: Opportunities and Challenges." *Florida Law Review* 50(4): 584-585.

Montana Consensus Council. 1998. *Resolving Land-Use Disputes: A Discussion Paper for Suggested Legislation (Draft).* Helena, MT.

Moss, D. 1997. "Evaluating the Use of Mediation to Settle Land Use Disputes: A Look at the Provincial Facilitator's Office of Ontario." Masters thesis submitted to the Department of Urban Studies and Planning, Massachusetts Institute of Technology.

Mueller, C. 1997. "Negotiated Rulemaking: A Tool for State Environmental Agencies." Masters thesis submitted to the Department of Urban Studies and Planning, Massachusetts Institute of Technology.

Needleman and Needleman. 1974. *Guerrillas in the Bureaucracy.* New York, NY: John Wiley and Sons, Inc.

Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969

Ozawa, C. 1991. *Recasting Science: Consensual Procedures in Public Policy Making.* Boulder, CO: Westview Press.

Ozawa, C. 1999. "Making the Best Use of Technology." *The Consensus Building Handbook.* Thousand Oaks, CA: Sage Publications.

BIBLIOGRAPHY

Rabinovitz, F. 1989. "The Role of Negotiation in Planning, Management, and Policy Analysis." *Journal of Planning Education and Research* 8(2): 87-94.

Reps, J. 1992. *Making of Urban America: The Story of the Development of City Planning in the United States.* Princeton, NJ: Princeton University Press.

Rodwin, M. 1982. "Can Bargaining and Negotiation Change the Administrative Process?" *EIA Review* 3(4): 373-386.

Ross, R. 1975. *Advocate Planners and Urban Reform*. Chicago, IL: University of Chicago.

Scott, M. 1969. *American City Planning Since 1890*. Berkeley, CA: University of California Press.

Sipe, N. 1998. "An Empirical Analysis of Environmental Mediation." *APA Journal* 64(3): 275-285.

Society of Professionals in Dispute Resolution. 1997. "Best Practices for Government Agencies." *Consensus* 34: 5-7.

Susskind, L. 1995. "Resolving Disputes the Kinder, Gentler Way." *Planning* 61(5): 16.

Susskind, L. 1997. "Mediating Multi-party Public Policy Disputes." *Martin Institute News* 7(2): 1-4.

Susskind, L., and the Consensus Building Institute. 1999. *Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials.* Cambridge, MA: Lincoln Institute of Land Policy.

Susskind, L., E. Babbitt, and P. Segal. 1993. "When ADR Becomes the Law: A Review of Federal Practice." *Negotiation Journal* 9(1): 59-75.

Susskind, L., and J. Cruikshank. 1987. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes.* New York, NY: Basic Books.

Susskind, L., P.F. Levy, and J. Thomas-Larmer. 2000. *Negotiating Environmental Agreements: How to Avoid Escalating Confrontation, Needless Costs, and Unnecessary Litigation.* Washington, DC: Island Press.

Susskind, L., and S. McKearnan. 1999. "Evolution of Public Dispute Resolution." *Journal of Architecture and Planning Research* 16(2).

Susskind, L., S. McKearnan, and J. Thomas-Larmer. 1999. *The Consensus Building Handbook.* Thousand Oaks, CA: Sage Publications.

Susskind, L., and G. McMahon. 1985. "The Theory and Practice of Negotiated Rulemaking." *Yale Journal on Regulation* 3: 133-165.

Susskind, L., and C. Ozawa. 1984. "Mediated Negotiation in the Public Sector: The Planner as Mediator." *Journal of Planning Education and Research* 4(1): 5-14.

Susskind, L., and J. Secunda. 1998. "Environmental Conflict Resolution: The American Experience." In *Environmental Conflict Resolution,* ed. C. Napier. London, UK: Cameron May.

Syverud, K. 1997. "ADR and the Decline of the American Civil Jury." *UCLA Law Review* 44(6): 1935-1945.

Talbot, A. 1983. *Settling Things: Six Case Studies in Environmental Mediation.* Washington, DC: Conservation Foundation.

Tonkin, E., and P. Swanson. 1998. "Should Agencies Mediate Their Own Disputes?" *Consensus* 37: 2.

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