

**MEDIATION: A NEW WAY TO RESOLVE LAND USE DISPUTES
IN THE ERA OF SMART GROWTH**

Michael R. Christopher, Esq.
WAPA/WI-ASLA
2010 Annual Conference
March 4, 2010
Creating Resilient and Healthy Communities

I. BACKGROUND.

A. Wisconsin Comprehensive Planning Law.

1. Commonly known as Wisconsin's Smart Growth Law became fully effective as of January 1, 2010.
2. The law requires that if a town, village, city or county engages in official mapping, subdivision regulations or zoning, these actions have to be consistent with the communities' comprehensive plan.
3. Among other goals, the Smart Growth law was intended to promote regional cooperation in building relationships with neighboring communities.
4. However, even though most comprehensive plans incorporate the rhetoric of regional cooperation, the reality of how communities are going to work together often lacks details.
5. Key issues such as locating transportation corridors and metropolitan-wide sewer facilities, the type of development envisioned and the preservation of farmland are often big-ticket issues that are not confronted on a regional basis in comprehensive plans.
6. The result is often litigation.

B. The Role of Mediation.

1. Mediation is an excellent way to foster and detail how regional cooperation can be used in a particular situation.
2. Mediation is a voluntary informal process of dispute resolution. A person who is not a party to a dispute and is neutral in relation to it, assists two or more parties in settling a dispute.

3. The mediator's role is to establish, with input from the parties, the negotiation process and to assist the parties in resolving the substance of their dispute.
4. The mediator does not function as a judge or as an arbitrator and does not render decisions. It is a "bottom up" process not "top down."
5. The key issue in mediating land use disputes is often balancing the need to maximize local control, which is a strong land use ethic in Wisconsin, with the need to foster regional cooperation.
6. A "successful" mediation is one where all of the parties believe that they have negotiated a result that is better than what they could otherwise have obtained. Often, successful mediation processes result in settlements or recommendations that include solutions which are different from those that were proposed by either party initially.

II. THE USE OF MEDIATION IN LAND USE DISPUTES.

- A.** Since the advent of Alternative Dispute Resolution ("ADR") as contained in Wis. Stats. Sec. 802.12 about 16 years ago, its most popular use is in family law and in civil litigation. However, conflicting comprehensive plans or a complex land use decision are conflicts order made for mediation. Mediation is a new approach to resolving land use disputes that makes sense, particularly with the full implementation of the Smart Growth law.
1. Mediation can be a crucial vehicle to resolve land use disputes and can be a flexible proactive tool to avoid future disputes.
 2. Mediation offers the following advantages:
 - Cost savings.
 - An opportunity to separate facts from emotions, leading to improved communications.
 - Encouraging creative problem solving.
 - Improved community relationships.
 - Proactive planning.

III. HOW DOES MEDIATION WORK TO RESOLVE A LAND USE DISPUTE?

- A.** Disputes between parties can generally be categorized in one of three ways. They can revolve around distribution of something of value, repairing of a damaged relationship or reaching a mutually acceptable solution to a shared problem.
1. The first category is identified with distributive negotiations. It is generally about who owes what to whom and why.

2. In a transformative negotiation, communications focus on the parties' relationship and how the parties interact with each other.
3. In an integrative negotiation, the tendency is to focus on the parties' needs and interests.

B. Land use disputes usually follow the integrative or interest-based negotiation approach.

1. Finding common interests is often central to a "successful" mediation. A more expansive view of both resource use and self interest is critical to achieving a successful negotiation process in land use.
2. Solutions need to be found that satisfy the important needs of both parties.
3. Integrative negotiations require the parties to identify and understand their mutual problem, to bring their interests to the surface, to generate possible solutions and to choose one solution from the available options.
4. This requires the parties to focus on their primary interest and set aside their less important concerns and desires that do not have to be satisfied to reach an agreement. It is often helpful in the integrative negotiation process to place the negotiators on the same side of the table.
5. In an integrative negotiation, there must be a free flow of information so that the parties' respective interests can be revealed. Interests include positive and negative objectives, needs, desires, concerns and fears.
6. Interests must be prioritized into needs and wants. Needs are more important and usually must be satisfied before an agreement can be reached, whereas wants may be traded or given away.
7. In an integrative negotiation process, the use of the private caucus method of mediating should be minimized.

C. A case study.

1. For example, imagine a mediation occurring when a developer submits a proposal for development that is consistent with one municipality's comprehensive plan, but is inconsistent with the goals contained in the extraterritorial portions of a comprehensive plan of an adjoining municipality. At the same time, some neighbors vehemently oppose the proposed project due to a perception that the development is not consistent with maintaining the rural character of the municipality.

2. This example points to a common thread in land use disputes, namely, the fact that there are multiple stakeholders which can complicate the mediation. However, a creative mediator can use the fact that there are multiple interests to achieve a creative consensus.
3. It is essential however, that the disputing parties in the above example are committed to resolving the controversy without protracted litigation. An experienced mediator must get the parties to agree to that up-front.
4. It is often helpful to have each party consider what the least desirable outcome would be for them if mediation were to be unsuccessful.
5. In this hypothetical, the mediator needs to be trained in dispute resolution techniques, must be knowledgeable about the legal and policy issues involved in a land use controversy and needs to be sensitive to local political realities, since political considerations are often central to land use disputes.

IV. CONCLUSION

Mediation can be a crucial vehicle to resolve land use disputes and can be a flexible, proactive tool to avoid future disputes.

“So long as the great majority of men are not deprived of either property or honor, they are satisfied” - Niccolo Machiavelli.

Were he alive today, Machiavelli would likely view ADR as a means of helping people preserve some degree of both their property and honor – something that the court system often cannot accomplish.