

Why you should consider mediation to resolve environmental and land use permitting disputes

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What would you do if you were gravely ill and your doctor gave you two treatment options? The first option would take a fraction of the time and money of the second option, and it would not preclude your ability to pursue the second option at a later date if the results were not successful.

If the second treatment option had the potential of costing hundreds of thousands of dollars, taking several years, and might not guarantee the result you wanted, I bet you would choose the first treatment option. In fact, you may even say the decision was a “no brainer.”

Likewise, if you were an attorney or engineer and your client was a party in a land use permit application, would you consider an option that costs a fraction of the time and money of litigation and did not prejudice your ability to pursue litigation if it was unsuccessful? If so, you should consider mediation.

Nevertheless, many applicants and opponents in environmental and land use permitting disputes do not seriously consider mediation and instead opt for litigation even though it is more costly and time-consuming and does not guarantee a successful result. This may be due to a lack of familiarity with mediation or a belief that expressing an interest in mediation may be perceived by opposing parties as a sign of weakness.

Although many practitioners have at least a passing familiarity with mediation, it may be helpful to provide background information to demystify the process.

Role of the mediator

The mediator acts as a neutral facilitator to assist the parties in reaching a settlement that is acceptable to them. The mediator does not represent any party and has no bias against any party or their position. Parties enter into agreements voluntarily. Agreements are never imposed on parties.

The mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will.

Mediation generally begins with a joint session to set an agenda, define the issues and ascertain the position and/or concerns of the parties. The joint session is usually followed by a separate caucus between the mediator and each individual party or their counsel.

This allows each side to explain and elaborate upon their position and mediation goals in confidence. Depending on the nature of the dispute and the dynamics of the mediation sessions, the mediator may alternate between joint and private sessions until the parties have resolved their differences, decided to reconvene for additional sessions, or determined that further mediation is no longer constructive.

Advantages of mediation

Mediation is a cost-effective method to resolve environmental and land use disputes. In a 1999 study of 100 U.S. land use cases, the Consensus Building Institute and the Lincoln Institute of Land Policy found that 86 percent of participants in some kind of assisted negotiation had a positive view of the process and almost 90 percent of those surveyed thought that assisted negotiation saved both time and money.

While opposing parties in environmental disputes typically disagree about almost everything, they uniformly agree that the time and money it takes to resolve a permit application through a final judicial appeal can be excessive and frustrating. More importantly, land use disputes often divide the community into opposing camps. Utilizing mediation in land use disputes builds bridges between the parties and defuses conflicts that inevitably arise.

Mediation also creates a more inclusive forum for all stakeholders to participate and talk about their real interests. In many

SPECIAL FEATURE

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disputes, the parties' real interests may not correspond to the issue where they have the best case from a legal standpoint.

For example, if neighbors oppose an applicant's proposed residential development, the neighbors might scrutinize the project, searching for any statutory requirements the project potentially fails to satisfy. In a hearing, the opponents would focus most of their resources on the legal issues where they are most likely to succeed. Thus, even if the neighbors were concerned about the density of a development and the impacts to a scenic meadow, the hearing would be dominated by the legal issues the neighbors raise, which may have nothing to do with their real interests.

Mediation, on the other hand, allows the parties to focus their discussions on the interests that are most important to them. If the neighbors' primary interest was preserving the scenic meadow and the developer's primary interest was the number of lots in the development and its secondary interest was developing large lots, the mediator would focus the conversation on those interests. Even though the parties may differ sharply on those issues, an agreement may be possible because the parties differ regarding which interests are most important to them.

A mediator can facilitate a discussion of “trading” across those issues to create gains for each other. For example, the neighbors may be willing to give a little on the density of the development, which is a secondary interest to them, in order to achieve their primary interest of preserving the meadow. Likewise, the developer may be willing to trade the size of lots, which is a secondary interest, in order to achieve its primary interest of selling a certain number of lots.

In mediations involving similar issues, parties have considered adjusting lot lines and lot acreage and buying the development rights. They have also considered land swaps, deed restrictions and permit conditions, tax advantages of land donations to