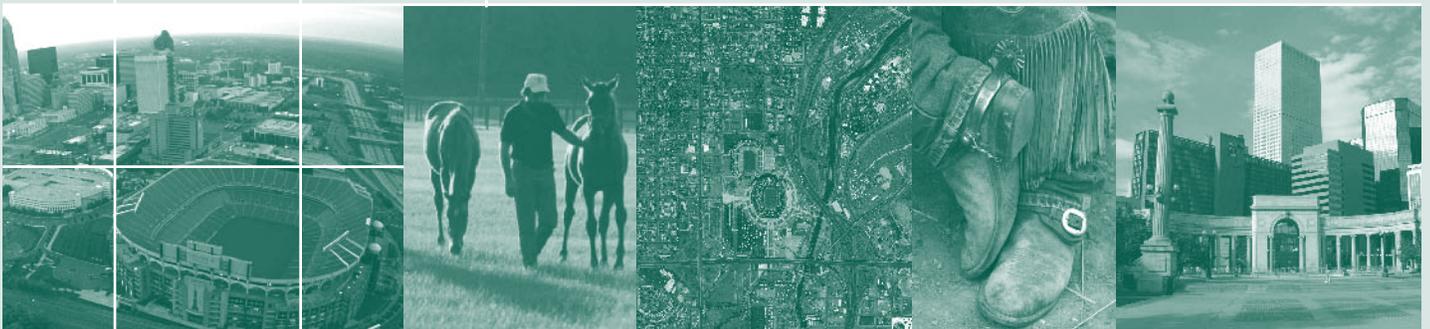


RESPONDING TO STREAMS OF LAND USE DISPUTES:

A SYSTEMS APPROACH



PRACTICAL STRATEGIES FOR PLANNERS,
DECISION MAKERS, AND STAKEHOLDERS

POLICY REPORT #5

PUBLIC POLICY RESEARCH INSTITUTE
THE UNIVERSITY OF MONTANA

AND

CONSENSUS BUILDING INSTITUTE



Responding to Streams of land Use Disputes
by Matthew McKinney, Sarah Bates Van de Wetering, and Patrick Field

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THE UNIVERSITY OF MONTANA

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October 23, 2007

Dear Friends and Colleagues:

We welcome the publication of *Responding to Streams of Land Use Disputes: A Systems Approach* as a significant contribution to the theory and practice of land use policy and decision making.

The Lincoln Institute of Land Policy has long conducted and supported research and practical applications on land use policy, decision making, and dispute resolution. This Lincoln Institute supported report advances the issues and themes that underpin a series of publications and programs on land use dispute mediation and negotiation produced by the Consensus Building Institute.

The full promise of interest-based, collaborative strategies is more likely to be fulfilled using the concepts and strategies for dispute resolution systems design featured in this report. As such, it will prove to be a highly useful, helpful guide for planners, planning board members, other civic officials, developers, and citizens and other stakeholders.

We hope you enjoy this well-researched, informative, and practical report.

Yours sincerely,

A handwritten signature in black ink that reads 'Armando Carbonell'. The signature is fluid and cursive, with the first name 'Armando' being larger and more prominent than the last name 'Carbonell'.

Armando Carbonell
Senior Fellow and Chair
Department of Planning and Urban Form
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P R E F A C E



The Public Policy Research Institute is an applied research and education center based at The University of Montana. Its mission is to foster sustainable communities and landscapes through collaboration, consensus building, and conflict resolution. To help achieve this mission, the Institute conducts action-oriented research and produces policy reports to inform and invigorate public policy, and to examine current issues in the use of collaborative methods to prevent and resolve public disputes.

To ensure that the policy reports are relevant, the Institute partners with appropriate organizations involved in public policy and public dispute resolution. Each policy report integrates scholarly research with the views and opinions of people interested in or affected by the topic. The Institute uses various means (such as interviews, surveys, and policy dialogues) to engage stakeholders in naming problems and framing options, and then supplements this understanding with the best available information and ideas in the appropriate

literature. In some cases, a policy report may serve as a catalyst for a multi-party dialogue or negotiation. In other cases, it may simply capture the status of a particular topic and provide a useful analysis of the past, present, and options for the future. The Institute carefully selects topics to address after consulting with citizens, leaders, and scholars, and determining its own interest and capability for addressing the topic.

Responding to Streams of Land Use Disputes: A Systems Approach is a work in progress. It is intended to provide ideas, support, and resources to local, state, and regional land use professionals and elected officials seeking to prevent and resolve land use disputes. The policy report provides advice about designing, administering, and evaluating such programs, as well as information about current programs currently throughout the country. We have made our best efforts to collect information on representative programs, but we anticipate that there are a number of initiatives that have not yet come to our attention. We welcome input and updates from readers, and will revise this report as we receive new information.

A special thanks to Kate Harvey (Consensus Building Institute), Sean Nolan (Pace University), and Ric Richardson (University of New Mexico) for their invaluable help in preparing this policy report.

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¹ Prior to this publication, the Institute produced a series of Collaborative Governance Reports and Montana Policy Reports. With this publication, the Institute is folding the two series together into a single series of Policy Reports.

INTRODUCTION

Land use planners and decision makers are increasingly using a wide range of collaborative methods to prevent and resolve differences between landowners, public officials, and other interested parties (see a menu of Collaborative Methods on page 3).² Two studies completed by the Lincoln Institute of Land Policy and the Consensus Building Institute in 1999 demonstrate that negotiation and mediation have effectively resolved land use disputes on an ad hoc, case-by-case basis.³

One of the most compelling challenges in preventing and resolving land use disputes is to move beyond the ad hoc use of negotiation and mediation, and anticipate and manage disputes by incorporating a wide range of collaborative methods into the land use decision-making process.

Building on these research findings, one of the most compelling challenges in preventing and resolving land use disputes is to move beyond the ad hoc use of negotiation and mediation, and anticipate and manage disputes by incorporating a wide range of collaborative methods into the land use decision-making process.

This policy report examines the degree to which collaborative methods are being integrated into the standard operating procedures of land use planning and decision making. It presents a conceptual framework to guide and evaluate the design of such programs, and it analyzes the key elements of 27 state and local programs, looking at such questions as who participates, what sorts of issues are addressed, when collaborative methods are used in the process, and how these methods are employed. Although data on the performance of existing programs are limited, we were able to gain some insight from a national policy dialogue convened in 2006. This report summarizes the participants' experience, along with commentary about the benefits of incorporating collaborative methods into land use planning and decision making. The report concludes with a set of ten "best practices" for designing and implementing land use dispute resolution programs.

The report also includes a section on literature and other resources referenced throughout the report, where interested readers may find more information on the theory and practice of dispute system design and related topics.

Supplementary material in the report's appendices provides the names of participants in the national policy dialogue (Appendix A), summaries of the state and local programs identified in this research (Appendix B), and a table detailing the collaborative opportunities throughout the land use process (Appendix C).

² See Henton, et. al., Collaborative Governance, in the Resources section at the end of this report.

³ See Susskind, et al., Mediating Land Use Disputes in the United States and Using Assisted Negotiation to Settle Land Use Disputes, in the Resources section.

A MENU OF COLLABORATIVE METHODS

Forums for Public Deliberation

One of the first steps in collaboration is to identify citizen preferences through forums for public deliberation. These types of public forums start by providing the best available information to citizens, and then facilitate the exchange of different viewpoints. The goal is to foster “informed input and advice.” Forums for public deliberation can also build working relationships and promote cooperation. Various tools and techniques have been used in small discussion groups as well as in large-scale meetings. Specific tools and links to more information include:

- 21st Century Town Meetings (www.americaspeaks.org)
- Study Circles (www.studycircles.org)
- Online Dialogue (www.ethepeople.org)
- Deliberative Polling (www.la.utexas.edu/research/delpol)
- Citizens Jury (www.jefferson-center.org)

Collaborative Problem Solving

Beyond gaining citizen input through deliberation and dialogue, another (more intense) form of collaboration involves organizations working together with government to find solutions to community problems, often on an ongoing basis. Collaborative problem solving usually involves actively engaging stakeholders directly in addressing specific issues. Specific tools include:

- Partnerships
- Policy Dialogues
- Negotiated Rulemaking
- Roundtables
- Joint Fact Finding

Multi-party Dispute Resolution

Proactive approaches to involve people through deliberation and collaborative problem solving do not always prevent land use disputes. Multi-party dispute resolution processes can be used when various stakeholders are headed toward, or locked into, a contentious dispute. Dispute resolution approaches bring together the interested parties, including government representatives, in discussions that begin with an attempt to enhance the participants’ mutual understanding of the problem and their different perspectives. This approach to collaboration seeks a mutually satisfactory agreement on a common problem through a process negotiation among participants. Specific tools include:

- Negotiation
- Facilitation
- Mediation
- Arbitration
- Dispute Systems Design

RESEARCH METHODOLOGY

In 2001, the Consensus Building Institute (CBI) initiated research into statewide statutes that encourage and support dispute resolution in the land use context. Students in the University of Montana's Natural Resources Conflict Resolution Program deepened this research in 2003 by completing a literature review and a preliminary survey of land use dispute resolution programs across the country. In 2005, the Public Policy Research Institute (PPRI) and CBI identified additional programs (and several that no longer existed) and new literature on the subject of land use dispute resolution "systems."

By "land use dispute resolution system," we are referring to any ongoing effort—in contrast to isolated, ad hoc responses—to prevent and resolve the stream of disputes that characterize many land use decisions. These systems or programs are based on the observation that land use disputes are chronic and inevitable, and thus there is a need to integrate collaborative methods into the standard operating procedures of land use decision making.

In the summer of 2005, the research team distributed a draft of this report to all the people contacted in the two phases of research, as well as to others identified as potential sources of information on land use dispute resolution systems. We presented the initial findings and conclusions at the 15th annual conference of the Rocky Mountain Land Use Institute in March, 2006. The input received at each step has helped improve the accuracy and completeness of the information in this report, and provided helpful insights on designing and administering land use dispute resolution programs.

In September of 2006, the Lincoln Institute of Land Policy hosted a national policy dialogue among program managers, scholars, and other people interested in creating land use dispute resolution systems. A list of the participants appears as Appendix A to this report. The policy dialogue's goals were to:

- Examine and refine the prescriptive framework for designing land use dispute resolution systems;
- Review the general findings of this research;
- Clarify the pros and cons of alternative programmatic functions and structures (e.g., who participates, what issues are addressed, when collaborative methods are used, how collaborative methods are used, and the authority of programs);
- Evaluate the performance of as many programs as possible;
- Identify the key ingredients to designing and administering land use dispute resolution systems, particularly as these "inputs" influence the performance of such systems; and
- Identify future areas for research, education, and policy development.

We appreciate the input from the participants in the national policy dialogue, and have integrated many of their comments into this final report.

By "land use dispute resolution system," we are referring to any ongoing effort—in contrast to isolated, ad hoc responses—to prevent and resolve the stream of disputes that characterize many land use decisions. These systems or programs are based on the observation that land use disputes are chronic and inevitable, and thus there is a need to integrate collaborative methods into the standard operating procedures of land use decision making.

STREAMS OF LAND USE DISPUTES

State and local governments face many challenges managing diverse public interests in land use planning and decision making. Although each parcel of land is unique, predictable issues arise when that land is the subject of a proposed development, change of use, or protective designation. Public officials bear an increasingly heavy burden of balancing competing claims of private property rights, economic imperatives, environmental needs, and social equities. Each decision involves multiple parties and technical and scientific uncertainties. Frequently the stakes are high and public sentiment is polarized.

For example, more than a decade ago the city of Missoula, Montana, adopted a growth management plan that included incentives for denser development within city limits to ensure a supply of affordable housing and to alleviate sprawl on the urban fringe. Although few members of the public objected to the plan when it was adopted, many residents rallied to object to the reality of clustered homes and new development in established neighborhoods. Members of a neighborhood preservation group demanded new protective ordinances and called for more responsive political leadership. At one point, the dispute flared at a city council meeting in which a council member was physically accosted outside the meeting by a citizen who objected to being referred to as a member of “that posse” of neighborhood activists.

Even today, several years later, planning meetings in Missoula are marked more typically by easily identified polarized factions than by rational discussion of a community vision for prosperous neighborhoods. The city recently announced the start of a multi-year overhaul of its zoning ordinance, kicked off with elected officials pleading with opponents of current practices to attend meetings and provide input. “You want to keep your neighborhood intact?” challenged one city council member, “You better start coming to these rewrites.”⁴ In Missoula, as elsewhere, land use disputes appear

to be inevitable, predictable, and ongoing.

Such disputes often take a turn toward personal invective. Not far from Missoula, a planning official in fast-growing Ravalli County, Montana, recently filed a grievance against a county commissioner for threatening that she’d better “watch her back” in a one-on-one meeting regarding development and floodplain issues.⁵ The county planner also filed a defamation lawsuit against the county commissioner and a local board of Realtors who ran an advertisement that questioned her character and accused her of using her regulatory authority as a “stick to beat the people with.”⁶ Reflecting this ongoing discord, planning and land use issues dominated the election of new Ravalli County Commission members in a June, 2006 election.

Other disputes arise predictably in communities undergoing change due to market forces that extend far beyond their boundaries. The expansion of “big box” stores (large retail outlets in blocky stand-alone buildings of 50,000-200,000 square feet) into



⁴ “Mayor Asks for Input on Zoning,” *Missoulian* (May 15, 2007).

⁵ Michael Moore, “Ravalli Official Sues for Alleged Threat,” *Missoulian* (May 25, 2007).

⁶ Matthew Frank, “Ravalli County Administrator Alleges Defamation, Sues Commissioner, Board of Realtors,” *Headwaters News* (May 24, 2007), http://www.newwest.net/index.php/topic/article/ravalli_county_administrator_alleges_defamation_sues_commissioner_board_of/C35/L35/#comments

small towns and suburban communities often prompts opposition by local retailers, labor activists, and others concerned about changing community character. Some communities have enacted statutes limiting the total square footage allowed for retail establishments; others have faced citizen initiatives asking for such restrictions. In a limited number of judicial decisions interpreting the legality of such limitations, courts have upheld a city's police power to enact store-size restrictions in order to protect its commercial district,⁷ but have cautioned that the city must articulate a reasonable justification for such a limitation.⁸

Court cases involving takings and property rights have challenged numerous local and regional approaches to land use planning and regulation. Some states have enacted statutes limiting local planning authority by requiring compensation when property values are diminished by statutory restrictions on development.⁹

Land use disputes often result in expensive court battles, personal resentments, and civic discord. Although state and local laws require public participation at several stages throughout the decision process, citizens do not often feel welcome or comfortable in formal hearings, or they are not aware of the potential impact of a proposal until it is nearly or already approved. As described in a recent article in the *Austin (Texas) Chronicle*:

The meeting was an exercise in cross talk, one that's been repeated time and again in Austin. Residents don't want (fill in the blank: an apartment complex, high-density retail, a big fat superduplex). The governing board, wrestling with the code on how to either consider or dump a particular proposal, lands on a process, and the residents leave the meeting angry and frustrated.¹⁰

⁷ Wal-Mart Stores v. City of Turlock, 138 Cal. App. 4th 273 (2006).

⁸ Hernandez v. City of Hanford, 137 Cal. App. 4th 1397 (2006), rev. granted.

⁹ See, e.g., Oregon's Measure 37, enacted in November, 2004, and codified at O.R.S. §197.352

¹⁰ Kimberly Reeves, "More Big Box Brawling," The Austin Chronicle (Jan. 26, 2007), <http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A439251>

By failing to understand the full range of interests at the outset (and it may be a question when the "outset" occurs), planners miss opportunities to engage in joint problem solving, and small differences in opinion can grow into major, seemingly intractable disputes.

Land use planning has evolved over the past century in an attempt to balance competing needs and to resolve these predictable and chronic disputes. The early model of technocratic planning emphasized efficient processes, giving a great deal of autonomy to professional planners who developed and implemented large-scale land use plans for urban areas. Later, as planners realized the inadequacies of this approach, they sought to provide a more open forum to hear from diverse interest groups in what has been characterized as the advocacy planning model.

As described in the policy report published by the Lincoln Institute of Land Policy in 2000, the most recent evolution of land use planning is represented by the collaborative model, which the authors describe as "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."¹¹

Of course, in reality, local land use planners incorporate some parts of each model in their daily decisions. Nowhere have planners or decision makers given up their professional autonomy or authority, and anyone attending a local public hearing on a land use issue can attest to the ongoing viability of opposition to one kind of land use change or another—ranging from purchasing open space with tax dollars to reacting to a proposal for a major, mixed used development.

Land use disputes are embedded in a specific context and typically are characterized by a number of factors that make them at least somewhat different than other kinds of public disputes. We have developed a partial list of both the context and characteristics of land use disputes. The sidebar on page 7 presents a partial list of the characteristics of land use disputes.

¹¹ See Susskind, et al., Mediating Land Use Disputes in the United States, in the Resources section.

CHARACTERISTICS OF LAND USE DISPUTES

- **Disputes involve physical place and space**
 - Land use decisions (and disputes) involve matters that ultimately are concrete, tangible, felt and seen. Traffic impacts, for instance, may be experienced every day.
- **Issues are deeply personal**
 - Many land use disputes involve deeply personal issues and feelings involving family, home, community, and identity.
- **Local control operates in the shadow of the court**
 - Local plans, local zoning, local decisions, local politics
 - Local boards may or may not be fully informed and experienced; many are volunteer and under resourced.
 - Process heavy (i.e., Did the Town properly give notice to the abutters about the pending action?)
- **Questions highlight the functioning of government**
 - Was the process fair?
 - Is the decision-making process efficient?
- **Decisions balance public versus private interests**
 - Debate about defining “property rights”
 - Full, complete, and unencumbered or
 - A bundle of rights, but if so, which ones does the citizen get to exercise?
- **Tensions arise between the “practical” and the “legal”**
 - What are my rights?
 - How do I just get this (whatever that may be) permitted and built?
- **Interests and values often clash**
 - I don’t want that house to be more than two stories, since it sits on the ridge and could block my view.
 - That house on the ridge offends my sense of the character of this place.
- **Decisions incorporate technical information, expertise, and uncertainty**
 - What will traffic look like once that project is built?
 - Can I trust that technical presenter?
 - How can I judge the validity of information from experts when I am not one?
- **Participants face questions of standing and representation**
 - Who has standing? Abutters, taxpayers, voters, issue advocacy groups, others?
- **Disparities in power are common**
 - Money (to lose or gain)
 - Legitimacy (local “NIMBY” homeowner versus “greedy” developer)
 - Information (technical expertise of proponent & “indigenous” knowledge of local intervenors)
 - Repeat play (experts who have years of experience before decision-making bodies) versus occasional or single play (an abutter who may in only get involved in one land use dispute and not know the rules, players, or process)

DISPUTE SYSTEMS DESIGN: A PRESCRIPTIVE FRAMEWORK

In recent years, the field of public dispute resolution has moved beyond the application of collaborative methods in isolated, ad hoc cases. People engaged in what is referred to as “dispute systems design” seek to design comprehensive systems for dealing not with just a single dispute, but the stream of disputes that often arise in nearly all relationships, communities, and institutions—so-called “chronic” disputes.

In *Getting Disputes Resolved*, William Ury, Jeanne Brett, and Stephen Goldberg identify three basic ways to resolve disputes: (1) reconcile the disputants’ underlying interests; (2) determine who is right; and (3) determine who is more powerful.¹² The “best” approach to resolve a particular dispute can be determined by considering these criteria:

- How satisfied are the stakeholders likely to be with the outcomes of a particular process?
- What is the chance that the issue will be resolved—and not recur—through one process or another? That is, how sustainable is the outcome likely to be?
- What are the likely costs—time, money, and emotional energy—of relying on one process rather than another?
- How will the use of one process over another impact the relationships among stakeholders?

These four criteria are interconnected. Dissatisfaction with outcomes may lead to the recurrence of disputes, which strains relationships and increases transaction costs. Based on these criteria, the core proposition of the theory of dispute systems design is that integrating interests (through various collaborative methods) is less

costly than determining who is right, which in turn is less costly than determining who is more powerful.

This does not mean that focusing on interests is always better than resorting to rights or power, but simply that it tends to result in greater satisfaction with outcomes, less recurrence of disputes, lower transaction costs, and less strain on relationships.

In light of this analytical framework, *Getting Disputes Resolved* goes on to present six principles of dispute systems design:

- Put the focus on interests;
- Build in “loop-back” procedures that encourage disputants to return to negotiation;
- Provide low-cost rights and power back-up procedures;
- Build in consultation before and feedback after;
- Arrange procedures in a low-to-high cost sequence; and
- Provide the motivation, skills, and resources necessary to make the procedures work.

Using this prescriptive framework, the range of collaborative methods described earlier provides the foundation for a more comprehensive “system” to prevent and resolve land use disputes. By combining opportunities for public deliberation, collaborative problem solving, and multi-party dispute resolution into the land use decision-making process, planners, decision makers, and others can create a more responsive system of governance, which in turn will likely improve land use decisions and land use.

Principles of Dispute Systems Design

- **Put the focus on interests;**
- **Build in “loop-back” procedures that encourage disputants to return to negotiation;**
- **Provide low-cost rights and power back-up procedures;**
- **Build in consultation before and feedback after;**
- **Arrange procedures in a low-to-high cost sequence; and**
- **Provide the motivation, skills, and resources necessary to make the procedures work.**

¹² See Ury, et al., *Getting Disputes Resolved*, in the Resources section.

The ideal system would start by trying to prevent unnecessary disputes by engaging people early and often throughout the decision-making process. Realizing that it may not be possible to prevent all land use disputes, the system would provide low-cost procedures to resolve disputes (e.g., negotiation, facilitation, and mediation) before moving to litigation and other rights- and power-based procedures.

The conceptual models presented in Figure 1 (p. 11) and Figure 2 (p. 12) offer two illustrations of what this ideal system might look like, and suggest several observations that are important to designing and implementing land use dispute resolution systems.

The incentive to negotiate is not necessarily well aligned with the likelihood of reaching agreement until just prior to a formal decision, suggesting that—while it may be valuable to build-in opportunities for collaboration and problem solving throughout the land use decision-making process—it is perhaps most compelling to provide such opportunities at or near the final decision step.

Figure 1 suggests that collaborative methods can be integrated into any and all steps of the land use planning and decision-making process. Upstream, at the start of the process, different collaborative methods can be used during pre-application conferences and prior to or simultaneously with formal public hearings with the planning board and decision-making body. Project proponents can potentially reduce the costs associated with detailed design, site planning, and legal work (including appeals) by informing, educating, and seeking the input and advice of neighbors and other stakeholders prior to submitting a formal application. This step allows the proponent not only to share his or her vision and plan, but also to modify that vision and plan based on the needs and interests of various stakeholders

Downstream, as the process moves forward, collaborative methods may be used prior to appeal and/or litigation. When project proposals don't see the "light of day" until the formal application process is underway, it is not uncommon for neighbors and stakeholders to actively oppose proposed developments. If opposition threatens final approval of a project, the interests of all parties –

including the decision-making body, project proponent, and other stakeholders—are perhaps best served by creating an opportunity to share interests, explore options, and seek agreement.

Figure 2 suggests that land use disputes arise in five stages, as indicated by the vertical lines on the figure: (1) community planning stage; (2) pre-application; (3) post-submission; (4) post-decision; and (5) legal and administrative appeals. As time passes (indicated by the horizontal axis below), the incentive for people to participate in some form of collaboration changes. The incentives to negotiate tend to be low at the start of a planning or decision-making process, and steadily increase as the issue or dispute moves through the land use decision-making process. By contrast, the likelihood of reaching an agreement is high at the beginning of the decision-making process, and then tends to decrease over time.

The incentive to negotiate is not necessarily well aligned with the likelihood of reaching agreement until just prior to a formal decision, suggesting that—while it may be valuable to build-in opportunities for collaboration and problem solving throughout the land use decision-making process—it is perhaps most compelling to provide such opportunities at or near the final decision step.

Figure 2 also suggests that the role of a process manager is less formal and intense early on in the process, and more formal and more intense as the parties become more polarized and the dispute becomes more intractable. The process manager may be an impartial third party such as a facilitator or mediator, or it might also be a professional planner, planning board member, or other official or nongovernmental person with the necessary credibility, legitimacy, and capacity to play this role



It is important to emphasize that not all land use disputes can or should be resolved by reconciling interests. The problem is that rights- and power-based procedures often become the forums of first resort, and are frequently used whether or not they are necessary or preferred. The goal in designing a more effective system to govern land use is to prevent and resolve most disputes by integrating interests, some by determining who is right, and the fewest by determining who is more powerful.

This approach to designing more effective systems to prevent and resolve land use disputes is experimental. While there has been some work on the merits of institutionalizing collaborative methods into natural resources and environmental policy, we believe that there is a tremendous need and value to promoting thinking as well as experiments along these lines.

More than two decades ago, Gail Bingham—a recognized expert on public dispute resolution—cautioned that “much remains to be learned about how to draft statutes that specify general procedures for negotiation, mediation, or arbitration of environmental disputes,” noting the difficulty in specifying in advance which parties belong at a negotiation table and which ground rules will foster productive work among various combinations of parties. Moreover, she noted: “It is also not clear what effect establishing specific rules has on parties’ incentives to negotiate in good faith or at all.”¹³

Similarly, Jonathan Brock concluded that “the design complexity, political controversy, and intersection with existing regulatory and administrative practices makes institutionalizing alternative dispute resolution mechanisms more difficult than using alternative dispute resolution to resolve individual site-specific disputes.”¹⁴

In a more recent analysis, the lead authors of this policy report reviewed alternative statutory models to prevent and resolve disputes in federal environmental law, suggesting a system of dispute resolution that would be mandatory in two senses: (1) it would require a step-by-step progression of the process; and (2) it would mandate the type of process.¹⁵ Such mandates would be experimental, but they are hardly untried, as exemplified by mandatory dispute resolution mechanisms in international law.

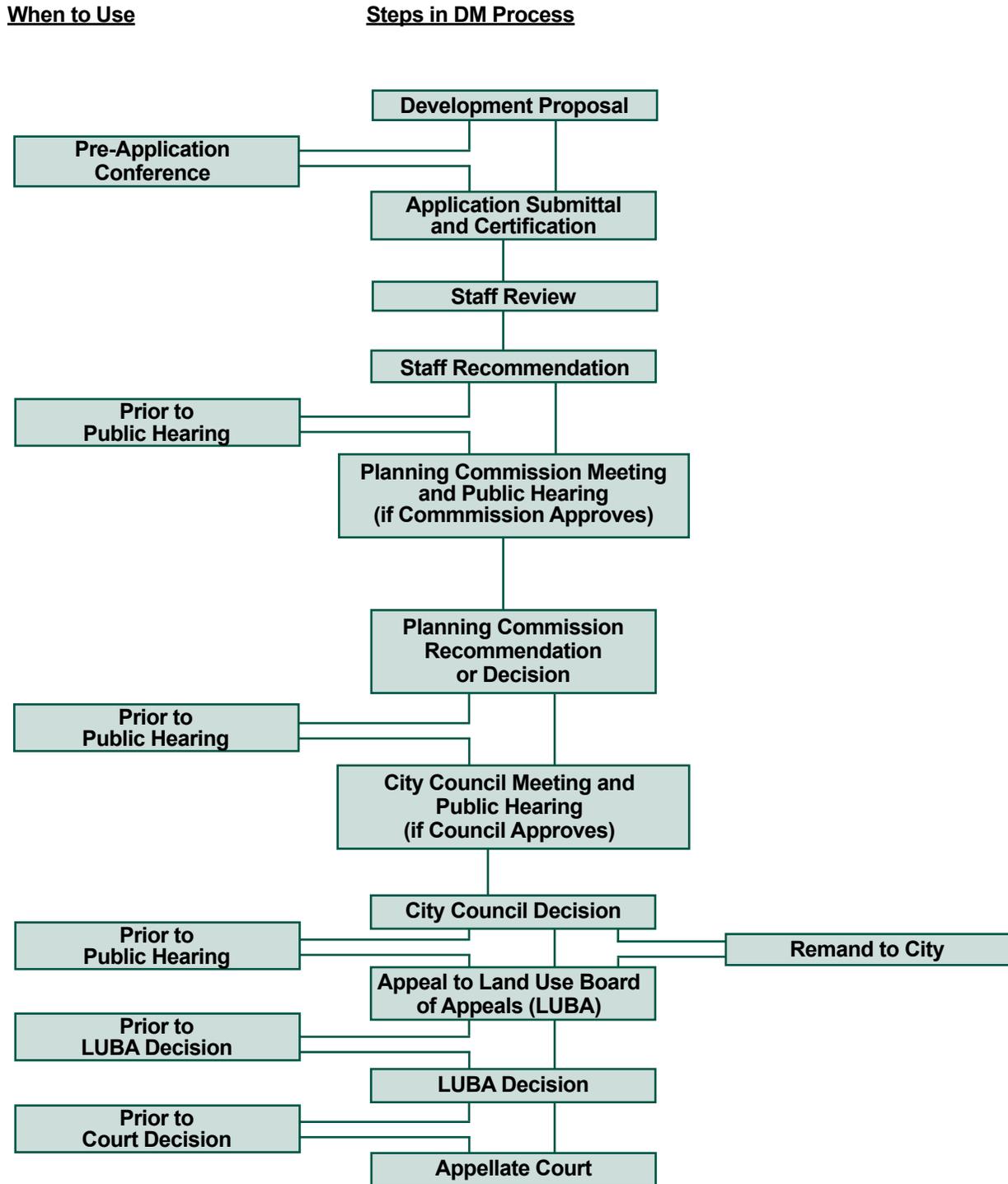


¹³ See Bingham, *Resolving Environmental Disputes*, in the Resources section.

¹⁴ See Brock, “Mandated Mediation,” in the Resources section.

¹⁵ See Van de Wetering & McKinney, “The Role of Mandatory Dispute Resolution in Federal Environmental Law,” in the Resources section.

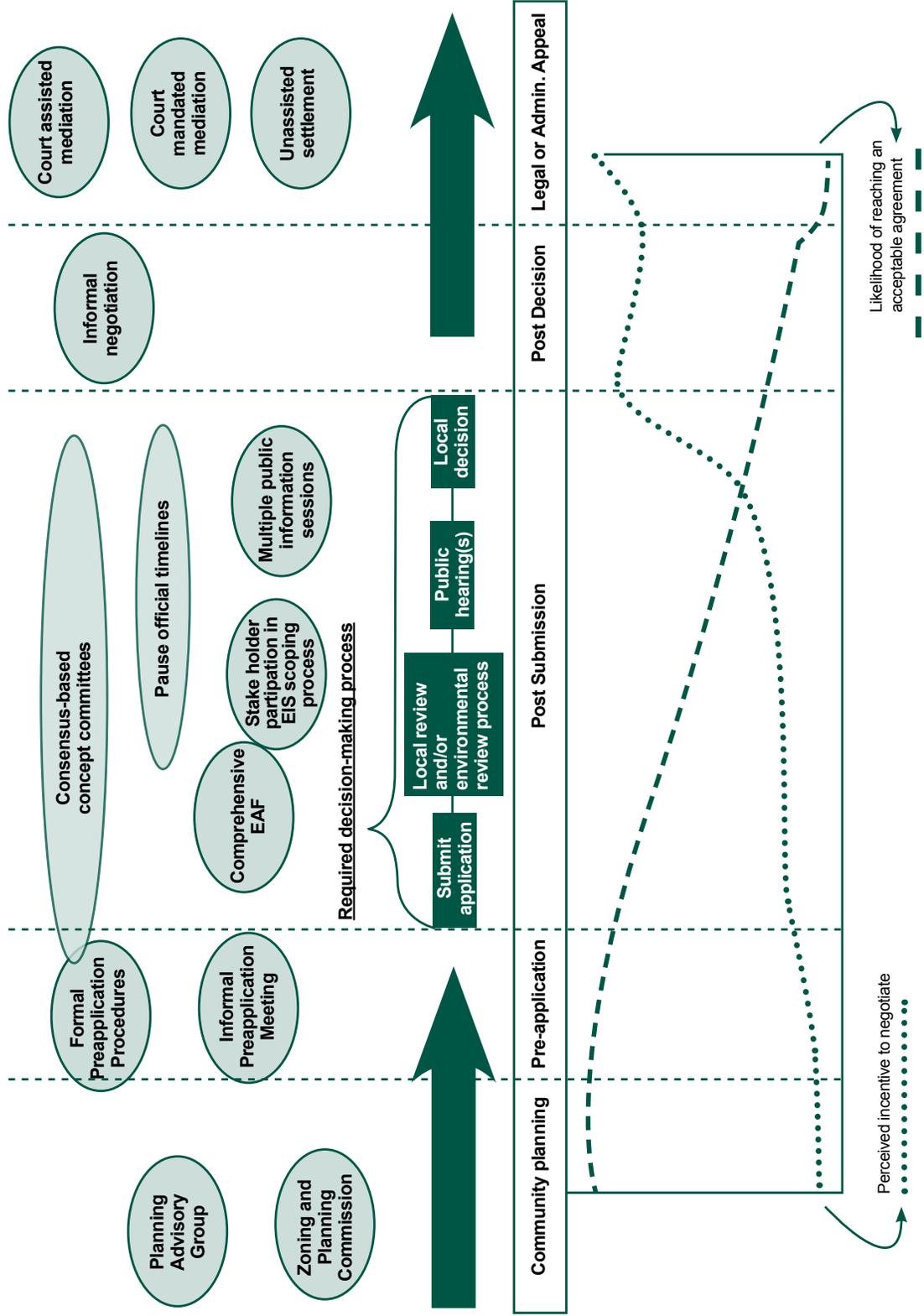
FIGURE 1:
OPPORTUNITIES TO INTEGRATE COLLABORATIVE METHODS
INTO THE LAND USE DECISION-MAKING PROCESS¹⁶



¹⁶ Oregon Dispute Resolution Commission, Collaborative Approaches to Decision Making and Dispute Resolution

FIGURE 2

INTERGRATING COLLABORATION INTO THE LAND USE DECISION-MAKING PROCESS



¹⁷ This figure adapted from Sean Nolan at Pace University

FROM THEORY TO PRACTICE

To better understand how the theory of dispute systems design can be put into practice, this section describes three land use dispute resolution programs in the United States and one in Canada. Appendix B provides short profiles of all the U.S. programs examined in this study.

► **PREVENTING DISPUTES IN ALBUQUERQUE**

In 1994, the City of Albuquerque created the Land Use Facilitation Program as part of the city's Alternative Dispute Resolution Office. The program provides land use applicants and affected residents the opportunity to identify, discuss, and resolve issues prior to the acceptance and implementation of land use decisions. The goals of the program are to:

- Promote the sharing of information through public dialogue;
- Identify issues early; and
- Promote collaborative problem solving among those directly involved in and impacted by local land use decisions.

The ADR Office contracts with local facilitators and provides free, voluntary services to city residents. Projects are referred to the program through several avenues, including the Office of Neighborhood Coordination, the Planning Department, an applicant, or an interested citizen.

Once a request has been made, a facilitator is assigned to the project. The facilitator calls stakeholders to determine interest in a meeting. If there is no interest, the facilitator generates a "No Facilitated Meeting Held" Report. If there is interest, the facilitator makes arrangements for the meeting, convenes the meeting, and generates a report identifying the interests and agreements as determined at the meeting. The report is distributed to the appropriate Planning Division, ADR Office, and Office of Neighborhood Coordination.

Over the years, the program has addressed infill projects (such as new apartment buildings and increased traffic); infrastructure systems (such as transportation, sewer, water, and drainage); and projects offering services that differ from traditional services and uses (such as big box

stores and new municipal buildings).

From 1994-2006 approximately 600 cases were referred to the program; however, this figure may be low, as statistics were not routinely kept prior to January of 2005. From January of 2005 to January of 2006, 114 cases were referred to the program. During that period program officials estimate an average settlement of 61.5 percent of the cases. Due to the broad and complex nature of cases referred, often cases are not entirely "settled," but generally progress is made on specifics issues within the case.

► **MEDIATING APPEALS IN CONNECTICUT**

In contrast to the City of Albuquerque's land use dispute resolution program—which tries to prevent disputes by facilitating communication, understanding, and agreement prior to a formal application being submitted—the Connecticut legislature enacted a statute in 2001 to encourage mediation during the appeals process.

Once an appeal is filed in Superior Court concerning any decision by a municipal zoning commission, planning commission, combined planning and zoning commission, zoning board of appeals, or other board or commission, one of the parties to the dispute may file a statement with the court expressing interest in mediation. A court-appointed mediator then determines if the other eligible parties are willing to engage in mediation. All of the parties must agree to mediation before it can go forward, and mediation must begin on the same day they notify the court they intend to try this option.

Other aggrieved parties not directly referenced in the appeal must obtain the court's permission in order to join the mediation. All time limits with respect to the legal action are tolled while the mediation is underway, subject to the mediation being renewed by written agreement of both parties after 180 days (subsequent extensions must be approved by the court).

Any party can end the mediation by withdrawing. At the end of the mediation, the mediator must file a report with the court, stating whether or not the dispute

was resolved. The parties share equally the cost of the mediation.

Apparently, fewer than 10 percent of the judicial cases involving land use are going to mediation under this program. According to Bill Voelker, one of the architects of this program, there are several obstacles to more widespread use:

- Commissioners are pressured to make quick decisions on land use matters;
- Planners do not understand how the program works, and thus cannot effectively advocate the mediation option;
- Project proponents (as well as citizens, to some degree) may hesitate to agree to mediation as it is a change from the traditional ways of doing business;
- Attorneys have not yet embraced the mediation option; and
- Courts are becoming more supportive, but are not yet pushing parties to use the mediation option.

As discussed in more detail in the next section, these are common problems in designing and administering land use dispute resolution programs.

► **IDAHO'S COMPREHENSIVE APPROACH**

In addition to programs that are exclusively focused on upstream (proactive) or downstream (reactive) attempts to prevent and resolve land use disputes, some programs take a more comprehensive approach. The state of Idaho, for example, passed legislation in 2000 enabling and encouraging mediation throughout the land use decision process.

Previously, development pressures in resort communities such as Sun Valley caused property values to rise quickly, which led developers and others to file lawsuits to appeal subdivision decisions with which they disagreed. By authorizing mediation as an alternative means to resolve these disputes, the state legislature attempted to curtail the growing roles that the courts were playing in the land use decision-making process.

Unlike the programs in Albuquerque and Connecticut, the Idaho statute allows use of mediation (or facilitation) at any point during or after the decision process. These alternatives may be requested by an applicant, an affected person, the zoning or planning commission, or the governing board. The governing board responsible for the planning decision must make these services available if requested.

If mediation is requested by the governing body or commission, then participation in one session is mandatory; otherwise participation is optional. Assuming that the governing board (typically a county) agrees to mediation, the governing board selects the mediator and pays for the first mediation session. After the first session, the applicant bears all costs for mediation. The state enabling legislation permits counties to enact their own land use mediation ordinance, which may allocate costs differently in the future.

If mediation occurs after a final decision, any resolution of differences must be the subject of another public hearing before the decision-making body. During mediation, any time limits relevant to the land use application are tolled. The mediation process is not part of the official record regarding the application.

To date, at least two cases have been addressed, one of which was resolved. According to one contact, Idaho's program is problematic for several reasons:

- An inherent tension exists between the public's right to participate and right to know and the need to ensure confidentiality in the mediation process. The option is either to take detailed notes of closed-door meetings, or keep meetings open and sacrifice privacy and possibly the ultimate success of the mediation.
- The enabling legislation is not detailed enough to be useful. The solution to this problem is either to amend the statute or enact more detailed ordinances addressing process (and when mediation should be used) at the county level. Thus far, the statute has not been effective at encouraging parties to use mediation to settle subdivision and zoning disputes.
- Mediation is used too late in the process, and should also be used at the policy level to prevent conflicts in the first place.

One positive and unintended consequence of the program is that when used, mediation has proven to be very effective at bringing all the stakeholders together and getting results. And even when mediation fails in terms of obtaining a formal settlement, positive benefits still accrue merely from opening the lines of communication. Idaho's program uses mediators that actually serve as facilitators. Although no specific qualifications for mediators exist, mediators typically possess neutrality, land use expertise, and familiarity with the issue in question.

► **A PROVEN PROGRAM IN ALBERTA¹⁸**

In 1998, Alberta Municipal Affairs requested the assistance of the Alberta Association of Municipal Districts and Counties and the Alberta Urban Municipalities Association to develop guidelines for an initiative that would promote the use of alternative dispute resolution methods, and mediation in particular, at the local government level. Their input and the support of the Alberta Arbitration and Mediation Society led to the creation of the Mediation Services Program.

In 1999 the Municipal Government Act (MGA)—legislation that defines the authority that municipal councils have to respond to issues in their jurisdictions—was amended to require that municipalities attempt mediation before making an appeal to the adjudicatory Municipal Government Board (MGB) on issues related to land use planning and annexation.

Subsequently the program has been expanded to include a Local Dispute Resolution component, which focuses on increasing a municipality's internal capacity to manage conflict, and a fact-finding service to supplement mediated negotiations.

The program focuses on three areas of work: (1) inter-municipal disputes; (2) building capacity of municipalities to handle local disputes; and (3) alternative dispute resolution training and education. A report on the program's first five years of operation provided the following summary of achievements:¹⁹

- **Inter-municipal mediations:** Mediation topics included annexation, regional cooperation, shared services, and land use planning.
- **Ongoing education initiatives:** Partnership with Alberta Agriculture, Food and Rural Development to conduct over 25 workshops ("Finding Agreement on Difficult Issues") at locations throughout Alberta.
- **Mentoring partnerships:** Working with representatives of the Alberta Association of Municipal Districts and Counties, the Local Government Administration Association, and the Alberta Rural Municipal Administrators Association to introduce the Peer Mentoring project.
- **Local dispute resolution:** Developing the Local Dispute Resolution Initiative in partnership with the Alberta Association of Municipal Districts and Counties, and the Alberta Urban Municipalities Association.
- **Presentations:** Numerous program presentations to groups from Canada and beyond to share information about alternative dispute resolution in the local government context.

The inter-municipal dispute resolution process begins when program local officials notify program staff members about a conflict. Program staff members meet with the conflicting stakeholders, first individually and then together, to assess the conflict—identifying the issues and determining if mediation is appropriate and whether the municipalities are amenable to pursuing mediation.

¹⁸ Information on Alberta's "Let's Resolve" program is available at <http://www.municipalaffairs.gov.ab.ca/mahome/ms/mediation/index.html>

¹⁹ See The Municipal Dispute Resolution Initiative in the Resources section.

If the municipalities agree to pursue mediation, they are referred to a roster of qualified mediators (endorsed by the Municipal Associations), although they are free to contract with any mediator. The program generally pays about one-third of the cost of the mediator's costs, and the municipalities are responsible for the other two-thirds.

Most inter-municipal disputes involve annexation proposals, but cases may also involve land use, financial sharing, shared and regional services, and water services.

In addition, municipal government officials approach program staff to express an interest in improving their municipalities' ability to resolve conflicts. Program staff members work with municipal staff, often forming a steering committee, to scope out the project and to hire a consultant who undertakes an assessment and works with the stakeholders to design new conflict

management systems. The provincial government allocates funding to municipalities to cover the costs of the assessment and system design work. Support is also provided, on a 50/50 basis to, implement and evaluate the new systems.

Between 1999 and 2006, the program assisted over 40 inter-municipal mediations involving over 100 municipalities. The issues dealt with during the mediation process have been wide and varied. While the initial impetus for the program was to give municipalities an opportunity to resolve disputes that would normally go to the Municipal Government Board, municipalities are now using the program to resolve a much wider range of disputes. Since the inception of the Local Dispute Initiative, Alberta Municipal Affairs and Housing has worked with 11 municipalities to design and implement new conflict management systems.



ANALYSIS OF CURRENT PRACTICE

Research conducted between 2003 and 2006 identified 27 land use dispute resolution programs — intentional efforts to move beyond the use of collaborative methods on an ad hoc, case-by-case approach and to integrate such methods into the standard operating procedures of land use decision making. Of these 27 programs, 20 are state-level programs (usually authorized by state statute) and 7 are local or community-based programs.

As described in more detail in Appendix B, several programs are no longer operational; information about them is included to provide the fullest possible range of learning opportunities. Because most land use decision making occurs at the municipal or county level—thus involving thousands of jurisdictions across the country—the programs included in this report are probably more representative than exhaustive.

The 27 land use dispute resolution programs are broadly distributed across different regions of the country. There is a larger concentration of programs in the West (11 programs) and the Northeast (9 programs). This particular distribution likely reflects the location of the primary researchers, and thus our familiarity with nearby programs. Six programs are in the Southeast, while we identified only one program in the Midwest.

Building on the advice of Ury, Brett, and Goldberg, the following analysis of existing land use dispute resolution programs begins by focusing on four diagnostic questions:

- *Who* participates?
- *What* types of issues are addressed?
- *When* are collaborative methods used?
- *How* are collaborative methods employed?

The answers to these questions—especially when compared to the two conceptual models presented earlier in this report—should begin to improve our understanding of how to design and administer effective land use dispute resolution programs.

In addition to these core questions, the following analysis also looks at:

- The role of statutory authorization; and
- The outcomes or performance of land use dispute resolution programs.

Distribution of Programs

State Programs

California
Colorado
Connecticut
Delaware
Florida (2)
Georgia (2)
Hawaii
Idaho
Maine
Massachusetts (2)
Minnesota
North Carolina
Oregon
South Carolina
Utah
Vermont
Washington

LOCAL PROGRAMS

Albuquerque, NM
Austin, TX
Baltimore, MD
Bozeman, MT
Colorado Springs/Denver, CO
Pace University LULA, NY
Warwick, NY

► WHO PARTICIPATES?

Land use disputes potentially involve a wide range of participants, including citizens, property owners, developers, environmental advocates, regulatory agency staff, and elected officials. In theory, the most effective way to prevent or resolve a multi-party public dispute is to make sure that all potentially affected parties have a seat at the table.²⁰

Of the 27 programs included in this study, 5 limit participation to government officials dealing with interagency or intergovernmental disputes, while 22 allow property owners, citizens, and regulatory bodies to participate. Court-annexed programs clearly define and restrict participation to directly involved parties (including determinations of standing, when necessary). Local programs aimed at resolving disputes early in the land use planning or decision-making process tend to be more inclusive.

The question of who should be allowed or encouraged to participate in a land use dispute resolution program depends, of course, on what issues or disputes are being addressed.



Who Participates?

Intergovernmental and Interagency

Colorado
Delaware
Georgia (2)
Minnesota

Property Owners, Citizen, Stakeholders, and Government Agencies

Albuquerque, NM
Austin, TX
Baltimore, MD
Bozeman, MT
California
Connecticut
Denver/Colorado Springs, CO
Florida (2)
Hawaii
Idaho
Maine
Massachusetts (2)
New York (2)
North Carolina
Oregon
South Carolina
Utah
Vermont
Washington

²⁰ See Susskind, et al., *The Consensus Building Handbook* in the Resources section.

► **WHAT TYPES OF ISSUES ARE ADDRESSED?**

The issues addressed by the identified programs cluster into four categories:

- **Site-specific Disputes:** Many land use disputes emerge over site-specific issues, such as revising a neighborhood plan, increasing density on a parcel of land, or requesting a change in land use. This category includes both private development and development initiated by a public body.
- **Comprehensive Planning and Growth Management:** Many disputes occur during the process of comprehensive planning and growth management—for example, landowners disagree with regulatory procedures and special conditions on permits; open space advocates dispute zoning proposals; and neighbors and developers object to redevelopment initiatives.
- **Interagency and Intergovernmental Plans:** Land use disputes are also the result of conflicts between agencies or among levels of government. For instance, a local infrastructure plan may be inconsistent with an adjacent jurisdiction's priorities or in conflict with a state growth management policy. Alternatively, a local planning ordinance or part of a proposed municipal land use plan may be at odds with a state agency plan or policy. Participants in the national policy dialogue pointed out that disputes between agencies sometimes more closely resemble site-specific disputes, with agency officials siding with different stakeholders.
- **Natural Resources and Conservation:** Many land use disputes focus on conservation issues. Often, local property owners or lease holders that use public land will raise concerns about land set aside for open space, wetlands, or conservation areas. State or regional initiatives to conserve habitat may be

opposed by property owners, and in some regions energy development raises conflicts with conservation groups and local citizens.

If you compare “who participates” with “what issues are addressed,” two important themes emerge:

- Programs that predominantly (or only) address interagency and intergovernmental disputes generally allow only government officials to participate in the process.
- In other cases, where programs address site specific disputes, comprehensive planning and growth management, and/or natural resource and conservation issues, it is more likely that a the wider range of stakeholders is allowed to participate.

The nature and frequency of the land use issues to be addressed should not only determine who should be involved, but when and how collaborative methods are used.

► **WHEN ARE COLLABORATIVE METHODS USED?**

Not surprisingly, different programs use collaborative methods at different times in the decision-making process. The most common application is during the appeals process, which may reduce the costs of resolving disputes relative to administrative hearings and litigation, but may not be the most effective way to prevent or at least mitigate some land use disputes. Many statewide statutes call for a “time out” for mediation on appeal and court-annexed programs deal with cases after filing but prior to trial.

Nine of the state statutes identified in this research either encourage or require mediation only upon appeal of a government body's land use decision. (In Washington, this concerns adoption of land use plans; in most other states the decision is specific to a

If you compare “who participates” with “what issues are addressed,” two important themes emerge:

- **Programs that predominantly (or only) address interagency and intergovernmental disputes generally allow only government officials to participate in the process.**
- **In other cases, where programs address site specific disputes, comprehensive planning and growth management, and/or natural resource and conservation issues, it is more likely that a the wider range of stakeholders is allowed to participate.**

particular development or land use change proposal.) None of these statutes requires or encourages any form of collaborative methods in the pre-approval or entitlement stage of the land use decision-making process.

In the case of California, the land use dispute resolution statute does not offer anything that did not already exist as a matter of local court rules. As a matter of policy, almost every County Superior Court in California requires mediation before the assignment of a trial date in any type of litigation. Given this requirement, most attempts to resolve land use disputes via mediation in California do not occur until after a lawsuit has been filed by an aggrieved party or stakeholder group.

Other programs, by contrast, allow and encourage the use of collaborative methods at any time during the land use decision-making process. Some focus on the planning process and employ collaborative methods only during the pre-application phase.

According to the prescriptive theory of dispute systems design, an ideal land use dispute resolution program would start by trying to prevent unnecessary disputes by engaging people early and often in (even prior to) the decision-making process. Various collaborative methods may be used, from simply encouraging the developer to hold a community meeting with abutters prior to formal application submittal, to offering qualified facilitators or mediators to help convene such meetings.

Realizing that it may not be possible to prevent all land use disputes, an effective system would provide low-cost procedures to resolve disputes before moving to litigation and other rights- and power-based procedures.

In Minnesota, for example, the land use dispute resolution statute seems to contemplate that disputants will start by trying to resolve their differences through mediation. However, if the dispute is not resolved after 60 days, it goes to binding arbitration before a panel selected by the parties and (if necessary) the state Bureau of Mediation Services.

Likewise, the Florida Land Use and Environmental Dispute Resolution Act provides that if the parties are unable to reach agreement through mediation with a special magistrate, that person is empowered to make a determination whether the challenged government action is unreasonable or unfairly burdens affected landowners. The agency with decision-making authority may accept, modify, or reject the magistrate's opinion.

When Are Collaborative Methods Used?

Planning Stage or Pre-Approval

Bozeman, MT

Delaware

Denver and Colorado Springs, CO

Florida Conflict Resolution Consortium

Georgia (2)

Hawaii

Minnesota

Appeal of Initial Decision

California

Connecticut

FL Land Use Dispute Resolution Act

Maine

MA Land Court Mediation

North Carolina

South Carolina

Vermont

Washington

Various Points in Process

(may include policy development, siting, and appeals)

Albuquerque, NM

Austin, TX

Baltimore, MD

Colorado

Idaho

MA Office of Dispute Resolution

Oregon

Utah

Warwick, NY

► **HOW ARE COLLABORATIVE METHODS EMPLOYED?**

Regardless of when collaborative methods are employed in the decision-making process, a number of elements appear with some regularity among the various programs:

- **Screen Potential Cases:** Some programs, such as the community-based program in Albuquerque, New Mexico, use a screening tool to select cases that appear to be most appropriate for facilitation or some other form of collaboration. In New Mexico, the staff examines pending cases before the Environmental Planning Commission and identifies those that may be contentious or result in appeals. The Vermont pilot project likewise provides an explicit expectation that cases will be screened before proceeding to facilitation and mediation. The Utah ombudsman reports that two-thirds of the inquiries it receives require no mediation services, but are satisfied by access to information about the laws governing land use and local government authority.

One question for future research is the degree of confidentiality that is appropriate to encourage settlement and, at the same time, does not infringe on the public interest and the need for transparent decision making.

- **Jointly Select Facilitators and Mediators:** In several programs, the parties jointly select a facilitator or mediator. In some cases, a mediator or facilitator may be suggested by one of the parties or the agency. In other situations, the program provides staff mediators or contracts with professional mediators and facilitators to provide services. Sometimes the state or local agency maintains a list of qualified mediators and facilitators, and parties select someone from that list.

One of the likely barriers to effective land use dispute resolution is easy access to affordable, qualified, readily available mediators and facilitators. The value of the Albuquerque, Denver, and former Austin programs is that they provide disputants immediate access to such professionals, without requiring the parties to sift through a long roster or to hunt the market for help.

- **Use Facilitators and Mediators with Land Use and Other Expertise:** In several states, such as Colorado, Idaho, and Vermont, the mediators must have expertise in land use planning, regulatory processes, and other qualifications to serve as a mediator or facilitator. The roster of facilitators and mediators maintained by the Colorado Office of Smart Growth is a good example of how to create a qualified list of impartial process experts. As a general rule, mediators knowledgeable of land use can be far more effective in helping parties communicate, understand each others' interests, and package agreements.
- **Share Costs:** In some cases, the parties to the disputes share in the costs of mediation and dispute resolution. These may include costs for professional services as well as cost incurred to convene meetings or file regulatory decisions.

In a few cases, the cost for facilitators or mediators has been paid for or subsidized by a government entity. Interestingly, the Vermont pilot program providing essentially free mediation among the district commissions resulted in very few mediations. This outcome has raised concerns from practitioners and others about whether such services are best provided by the state or the free market.

- **Delay the Regulatory Proceeding:** In some states and localities, the "regulatory clock" (deadline for pursuing legal action) is put on hold while the mediation or dispute resolution process is taking place. A formal statutory "time out" is offered to ensure that deadlines do not constrain the use of dispute resolution; this is typically accompanied by time limits to prevent an open-ended delay. Most often, the statute or rules guiding the process provide a clear time frame for the dispute resolution to take place.
- **Allow for Public Review:** Several programs require a public meeting to allow citizens and others a chance to review the outcome of the dispute resolution process. One question for future research is the degree of confidentiality that is appropriate to encourage settlement and, at the same time, does not infringe on the public interest and the need for transparent decision making.

► THE ROLE OF STATUTORY AUTHORIZATION

Participants in the national policy dialogue expressed significant interest in the value or role of statutory authorization. Several participants noted that statutory authorization helps build awareness, credibility, and legitimacy for using collaborative methods to prevent and resolve land use disputes. However, they concluded that without the necessary resources—typically staff and money—statutory authorizations often become symbolic gestures.

Several states have passed “supporting” language for dispute resolution in statutes guides land use. These include Idaho, California, and Connecticut. On first blush, the Idaho statute seems to provide the most comprehensive land use dispute resolution system. It mandates mediation if requested by any party, including the government, during or after the planning process. The prospect of using some form of collaborative methods during the planning process as well as after a decision is made captures the key elements of a comprehensive dispute systems design illustrated in Figure 1.

Where statutes assign more responsibility to a state agency, court office, program or other entity, statewide statutes seem to have somewhat greater impact.

Connecticut passed statutory language in 2001 to encourage mediation, primarily during the Superior Court appeals process. The statute provides for “tolling” (temporary suspension) of legal deadlines while mediation is underway, but constrains delay by not extending mediation beyond 180 days unless jointly agreed upon by all parties to the dispute.

California passed similar language encouraging mediation during the appeals process, and went further, by allowing the governor to establish a dispute resolution office to assist with conflicts among permitting authorities, state functional plans, state infrastructure projects, and local projects. However, the governor never established such an office, and the statute has since expired.

Georgia’s statute authorizes the Department of Community Affairs to provide mediation for planning and

growth disputes that cut across municipal boundaries. Maine’s statute allows for mediation after an aggrieved party has failed to obtain application approval, and mandates state agencies to participate in mediation when the court’s Alternative Dispute Resolution (ADR) Service requests their participation.

While admirable, it appears that these statewide statutes have resulted in few effective systems to prevent and resolve land use disputes. The California law was not renewed, and we were not able to identify any particular cases that arose from this law. The Connecticut statute has resulted in some mediated cases (which could have occurred anyway, so the cause and effect of the statute is hard to determine), but these represented fewer than 10 percent of the judicial cases concerning land use issues. The Idaho law has resulted in only a few mediated cases. In Georgia, very few mediations have resulted, in part probably due to the strong home rule tradition of the state and because most disputes are internal to a municipality rather than multiple jurisdictions.

In all of these cases, the general language of the statute, the lack of funding to support the use of collaborative methods, and/or the lack of a program or office to implement all contribute to very limited impact on the ground.

Where statutes assign more responsibility to a state agency, court office, program or other entity, statewide statutes seem to have somewhat greater impact.

Colorado’s statute requires collaboration prior to litigating certain planning disputes, but it applies only to government entities and does not compel private parties to engage in the process. While the scope of this statute is limited and arguably does not address the bulk of land use disputes—those initiated against a local agency as a result of some entitlement granted to a developer or the enactment of an ordinance—it provides a model to address disputes that cut across jurisdictional boundaries, such as city and county disputes over growth and annexation. The Colorado statute assigns responsibility to the Office of Smart Growth, which maintains a list of qualified mediators, provides that referral list to local governments, and offers general education on dispute resolution.

The Delaware statute embeds dispute resolution in the overall Planning Act and a state program known as Livable Delaware. The Office of State Planning Coordination, through various efforts, plays a dispute prevention role in early technical input and through steps in to facilitate resolution among various jurisdictions of some kinds of applications.

Florida's statute provides for a special magistrate to help resolve disputes between property owners and government regulators, especially concerning potential property rights infringements.

Oregon and Massachusetts created statewide dispute resolution offices (both of which have since been relocated to the state university system). In Oregon, the office worked with the Land Use Board of Appeals to get cases into mediation, and in some cases provided grants for funding the efforts. Now the Oregon Consensus Program receives monies from the Department of Land Conservation and Development to assess and provide land use mediation services across the state. For its part, Massachusetts helped the Land Court establish a court-annexed screening and mediation program that is now bid out by the court to program providers.

The South Carolina statute explicitly encourages landowners to pursue mediation to resolve claims against local governments. It appears that several counties in the state have subsequently adopted mandatory mediation programs.

There are few dispute resolution programs operating at the regional level, primarily because land use decision making in the U.S. typically does not happen at the regional level (except for transportation funding and prioritization through Municipal Planning Organizations or MPOs). The Vermont Act 250 statute established regional commissions to review local cases that meet certain criteria. The District Commissions have tried several different pilot mediation programs and currently are participating in a foundation-funded effort to screen and, if appropriate, mediate cases prior to the final hearing. The screening is mandatory, but participation in mediation is voluntary.

► **THE OUTCOMES OF CURRENT PROGRAMS**

It is difficult to obtain reliable statistics to compare the

success rates of the identified programs. Among the 27 land use dispute resolution programs identified in this research, only 9 provided data on the number of disputes resolved through negotiation, mediation, or some other collaborative method. The clearest conclusion from this limited information is that the majority of disputes were resolved when such methods were employed; programs reported success rates ranging from 60 to 80 percent. And, as participants in the national policy dialogue pointed out, parties often resolve their issues after mediation, even when the process itself does not result in a formal settlement. In some cases, the screening process itself serves an important function in identifying parties' interests and concerns, and facilitating productive conversations.

The highest reported success rate is that of Delaware, in which government agencies receive assistance resolving inter-jurisdictional planning conflicts. Of 60 cases referred to this program, all but one were resolved.

Of approximately 30 to 35 local land use disputes addressed annually by Community Mediation Concepts in Colorado, 80 percent result in settlements represented by written agreements among the affected parties. The Massachusetts Office of Dispute Resolution reports a similar rate of success with the environmental cases (including wetland permits) it considers. Massachusetts' Land Court mediation program has resolved 70 percent of the cases in which parties voluntarily agreed to participate in mediation after a mandatory screening process.

Albuquerque and Austin reported formal resolution rates around 50 to 60 percent, but noted that many more cases are resolved at various stages of the decision or planning process, not as an immediate outcome of the mediation.

Several programs (Oregon, Utah, and Vermont) reported such small numbers for mediation that it is difficult to draw broad conclusions about success. It is worth noting, however, that even in these small samples, more cases than not are resolved successfully when collaborative methods are employed.

In addition to these quantifiable outcomes, participants in the national policy dialogue identified a number of other valuable outcomes generated by land use dispute

resolution programs. In some cases, these advantages are aspirational, as participants noted many constraints that have prevented their programs from achieving their full potential.

- **Participants in a collaborative process typically emerge with a better understanding of their own and others' interests and concerns.**

Collaborative processes often increase understanding and clarity among affected parties because they bring them together in a constructive and structured way and allow for informal interaction and innovation. By contrast, typical public hearings tend to provide input only at the “end game” of decision making, limit conversation and dialogue, and encourage parties to take and hold firm positions rather than engage in dialogue and deliberation.

Participants in the national policy dialogue reported advantages to providing tools and processes that increase the understanding of affected parties so they may narrow, if not resolve, their disputes. Such a system can identify parties' interests and help them prioritize or define which are most important. Ideally, the process

provides tools and techniques to encourage parties to generate options and alternatives that might meet their interests—sometimes including options that would not be available through traditional rights- or power-based approaches.

- **Collaborative processes encourage the tailored solutions for particular cases.**

Collaborative processes help diverse parties craft outcomes that better meet a greater number of interests. For example, a typically designed big box store might emerge from a collaborative process with a more tailored, local design that fits in with the community and draws more customers because of its attractiveness.

- **Parties in a collaborative process are more likely to support and help implement a durable outcome.**

Effective systems increase diverse parties' participation in successful outcomes. This encourages outcomes that meet the interests of a greater number of parties, greater support for those outcomes, and thus easier implementation and long-term acceptance. The more affected parties that feel ownership of the outcome, the greater chance of long-term satisfaction.



- **Systematic use of collaborative methods may reduce litigation and concurrent costs.**

The most robust dispute resolution systems ensure that only the most appropriate cases make their way to court. This likely reduces legal fees and helps reduce the uncertainty that results from a long appeals process.

National policy dialogue participants urged the incorporation of collaborative methods into the larger land use planning and decision process, thus providing a more systematic approach to dealing with recurring, chronic disputes. It was suggested that these systems need to be sustainable and stable, providing appropriate support at every stage of the process. This requires a great deal of outreach and education to those who might use these methods, both within government agencies and among the general public.

- **This approach can improve governance and encourage a broader sense of community.**

A local government that regularly uses collaborative methods in its land use planning and decision processes should enjoy improved governance and stronger confidence in democracy. Stakeholders should feel more satisfaction with the overall planning and permitting process beyond and above any particular decision or outcome. Parties will have greater chances for early input, public deliberation, assistance with more focused conversations, and opportunities to prevent or resolve disputes before disputes become expensive (legal costs, relationships, and time).

Such systems encourage relationships, trust building, and informal dialogue among diverse stakeholders in the community over time rather than frequent litigation and distrust.

As a result of this process, parties should similarly feel a better sense of community. Citizens engage directly and early with their governing boards and decision makers. Developers and private property owners have multiple opportunities to address interests and tailor proposals to meet needs and desires before investing massive design or process costs. Relationships among diverse parties, built on multiple opportunities for input and engagement, increase a sense of functioning community.



Based on the analysis of current practice, along with input from participants at the national policy dialogue and the literature on dispute resolution systems design, we suggest the following best practices for designing and administering land use dispute resolution programs.

1. DIAGNOSE THE EXISTING SYSTEM

The process of designing a land use dispute resolution system should begin by diagnosing the existing procedures for preventing and resolving such disputes. This diagnosis should seek to answer the following types of questions:

- What are the current and recent issues in dispute?
- Who are the parties?
- How many disputes are there?
- How are the disputes being handled?
- What type of dispute resolution procedures are being used and with what frequency?
- What are the overall costs and benefits of these procedures?
- Why are particular procedures being used and not others?
- What functions are served by the different procedures?
- What obstacles limit the use of more collaborative approaches?

The answers to these questions should illustrate the type and number of disputes that any new program will have to handle in the future, a map of the existing dispute resolution procedures and their functions, and the obstacles to using more collaborative methods.

2. ENGAGE AFFECTED PARTIES IN THE DESIGN OF THE PROGRAM

This step will help create a sense of legitimacy, credibility, and ownership. A dispute resolution system will only be effective if people buy into it.

3. SEEK TO CREATE A COMPREHENSIVE PROGRAM

Ideally, a land use dispute resolution program should strive to address a range of issues during at least several stages in a permitting or planning process. This might include procedures to ensure early consultation between developers, staff, and abutters; facilitation assistance for public meetings or workshops; as well as mediation assistance should the case rise to more intense conflict closer to or during final decision making.

Comprehensive systems should also employ a variety of collaborative methods, such as screening, informal negotiation, facilitation, mediation, and fact-finding. In short, comprehensive systems should offer multiple points of intervention and multiple collaborative methods.

The two conceptual models presented earlier in this report provide two good examples of how this might be done, as do some of the existing programs. The Pace University Program in the Hudson River Valley began with intensive training of local officials, then building and supporting this network of local officials. This systematic training of numerous officials over time incorporated the principles of dispute resolution into local government, changing the culture of decision making.

In designing a comprehensive land use dispute resolution program, keep in mind the following principles (as explained earlier):

- Put the focus on interests;
- Build in “loop-back” procedures that encourage parties to return to negotiation;
- Provide low-cost back-up procedures; and
- Arrange procedures in a low-to-high cost sequence.

TOP-TEN BEST PRACTICES

1. Diagnose the Existing System
2. Engage Affected Parties in the Design of the Program
3. Seek to Create a Comprehensive Program
4. Be Selective and Choose an Appropriate Scale
5. Employ Proven Tools and Techniques
6. Link the Program to the Formal Decision-making Process
7. Provide the Necessary Motivation, Skills, and Resources
8. Conduct a Series of Pilot Projects
9. Make Services Affordable, Available, and Efficient
10. Evaluate, Learn, and Adapt

4. BE SELECTIVE AND CHOOSE AN APPROPRIATE SCALE

Successful programs need to be selective. Not all cases, stages, or parties are amenable to collaboration. For instance, mediation too early in a decision process—before issues and parties are clarified—would be of little use. A project that has generated absolute opposition by an entire, politically influential neighborhood is not likely to be helped through collaborative methods.

Effective programs should include an active screening component. For instance, in the Vermont program, screening of cases allows regional commissions (and the parties) to quickly ascertain at a reasonable cost whether a full mediation would likely be helpful and successful. Sometimes the mere act of screening will help the parties settle before mediation is initiated.

Several participants in the national policy dialogue raised this question in a slightly different manner, asking whether land use dispute resolution programs are more

or less effective depending on the scale at which it is applied.

Unless there are sufficient numbers of cases or applications that generate intense interest and/or conflict, there is not likely to be much (if any) need to integrate collaborative methods into the decision-making process. The most appropriate situations include:

- Courts with numerous, backlogged cases clearly have an incentive to create programs or systems that reduce case loads.
- Local boards and commissions with too many applications and too few resources (especially the time of many volunteer boards) may be seeking ways to reduce contentious decisions and to at least improve applications that strive to incorporate abutter interests early and hone outstanding issues or disputes.

In Vermont, the pilot program has been effective at the scale of the state court and District Commission. However, it has struggled to identify cases at the municipal scale, suggesting that for small to medium sized municipalities, formally designed systems may not be practical.

5. EMPLOY PROVEN TOOLS AND TECHNIQUES

As explained in earlier sections of this report, current programs have demonstrated the value of a number of tools and techniques to improve the effectiveness of any land use dispute resolution program:

- Screen potential cases;
- Jointly select facilitators and mediators;
- Use facilitators and mediators with land use and other experience;
- Share costs;
- Delay regulatory proceedings; and
- Allow for public review and comment.

For further details on these tools, see the previous section on “How are Collaborative Methods Employed?” on page 21.

6. LINK THE PROGRAM TO THE FORMAL DECISION-MAKING PROCESS

This prescription implies that the existing decision-making authorities must be willing to experiment with new ways of preventing and resolving disputes, and instill sufficient confidence in the parties that if they resolve their differences, the formal decision makers will do everything in their power to implement the negotiated outcome.

As a matter of design, it is important to determine whether negotiated agreements are binding or non-binding on decision makers, and what happens if an agreement is not reached through this approach.

7. PROVIDE THE NECESSARY MOTIVATION, SKILLS, AND RESOURCES

This practice focuses on the need to change the culture of decision making, and to make it easy to use collaborative methods as a regular part of land use planning and decision processes. Among other things, this may include the following:

- Enact statutes to authorize and encourage the use of collaborative methods to prevent and resolve land use conflicts.
- Clarify the rules governing collaborative processes, including who participates, how decisions are made, issues of confidentiality, the role of facilitators and mediators, and so on.
- Maintain rosters of qualified facilitators and mediators.
- Provide training and education to raise awareness, understanding, and capacity among potential disputants as well as aspiring facilitators and mediators.
- Provide financial resources and technical staff support to inform and invigorate efforts to prevent and resolve land use disputes.

Most successful programs include an education component. This may be as limited as a flyer and notice about mediation as an alternative during the wait period for court. Or the system may seek, over time, to incorporate collaborative values, principles, and tools into the thinking of those making decisions, as exemplified by the Pace University program in the Hudson River Valley. Given that land use decision making is already complex and that many parties are accustomed to doing business “by the book,” a transition to collaborative methods will require ongoing education and persuasion, particularly in the early life of programs.

8. CONDUCT A SERIES OF PILOT PROJECTS

Framing a new program as a “pilot project” can accomplish two important tasks. First, it allows participants to identify and eliminate obstacles in the system, minimize confusion and frustration, and build positive experience.

Second, it provides an opportunity to build political support for the program, a key ingredient throughout the life of a land use dispute resolution program. Any system, in order to survive and thrive, must be politically sustainable. That is, it needs to develop and maintain political support for its continued operation among decision makers, planners, and stakeholders.

The Denver program, for example, provides a direct service to elected city council members, helping them solve difficult land use problems. The program has built strong relationships with the city council, provides a direct service, and thus continues to be funded.

The Albuquerque program, in contrast, is embedded in city government and thus its efforts are indistinguishable from city administration. At the same time, by providing a direct service to abutters and developers, it has built political support. For example, during a budget crisis the city council considered cutting this program, but diverse interests came to its defense and preserved its budget and operations.

9. MAKE SERVICES AFFORDABLE, AVAILABLE, AND EFFICIENT

Because land use decision making is already expensive for proponents (consultants to hire, applications to complete, legal representation to retain) and because many abutters often have few resources, collaborative methods must be affordable. The Denver system contracts out to a non-profit to help manage costs. Utah hired a full-time ombudsman for cases across the state. The City of Albuquerque incorporates initial costs into its city budget (longer cases that required extensive mediation are paid for by the participants). Albuquerque also keeps costs down by training and utilizing already trained and experienced mediators from community mediation programs.

Given the permitting deadlines and the costs of time to proponents, it is important for the system to provide ready access to neutrals when that is part of the program. Asking parties to “go find a mediator” can be a significant hurdle to accessing such services. To provide access, some programs provide roster (Vermont) and some contract out to non-profits or trade organizations to provide neutrals (Massachusetts Land Court and the Denver program).

The system needs to be efficient in terms of time and money. Collaborative processes and methods should not unduly slow or make more cumbersome existing planning and permitting processes. Mediation or other collaborative methods could be used strategically by opponents of a proposal to delay decision making further: every day delayed is money spent by the developer and the status quo preserved. Thus, the system should include durations and deadlines for certain dispute resolution efforts. For example, one might “toll” regulatory/permitting deadlines for a case for 30 or 60 days, which could only then be extended with the full consent of the parties.

Processes embedded in the existing land use decision-making system must not be too costly. Participants will accept procedures such as pre-application meetings that add dollars and days only if they believe that this will save both time and money later (better applications are more likely to address community concerns early in the process). Process tools such as facilitators and mediators may also add cost, but should provide real value in terms of better meetings, better interest identification, and better resolution. At the same time, mediators and facilitators need to be accessible quickly and at a reasonable cost.

In short, land use dispute resolution programs must pass some reasonable cost-benefit test. In that likely qualitative test, benefits and costs should include non-monetary benefits, or “social capital” such as increased understanding, improved communication, and so forth.

10. EVALUATE, LEARN, AND ADAPT

Land use dispute resolution programs that provide for ongoing evaluation, feedback, and adaptation are more likely to be sustainable in the long term. Evaluation can meet a variety of needs.

First, evaluation of actions, cases, and outcomes can build ongoing appreciation for the success, value, and need for the program, especially when such programs are faced with budget or political threats.

Second, evaluation can ensure and improve quality. The Albuquerque program provides evaluation of all facilitators so that the city can judge the provision of services by its roster of neutrals and, adjust accordingly.

Third, ongoing feedback allows the program or system to adjust and refine as practice and experience grows and/or as circumstances change.

CONCLUSION

This policy report suggests that decision makers, planners, and other people interested in land use are slowly moving beyond the ad hoc, case-by-case use of collaborative methods to prevent and resolve land use conflicts. Across the country, there are a growing number of experiments to design ongoing systems to address the stream of land use disputes that characterize so many communities, regions, and states.

While the experiments to date are inconclusive, they nevertheless provide some insights on the best ways to design and manage a land use dispute resolution program. This empirical evidence also seems to validate the relevance of the prescriptive framework presented earlier in this report.

In the future, we hope to gather additional information on the performance of land use dispute resolution

systems or programs; examine the correlation between program function, structure, and performance; and identify future areas for research, education, and policy development.

We are also interested in helping create a learning network of practitioners and scholars to improve the theory and practice of land use dispute resolution programs. The participants in the national policy dialogue represent the start of such a network.

If you are interested in participating in this network, please let us know. We plan to work with the Consensus Building Institute and the Lincoln Institute of Land Policy to maintain a web site and internet-based communication tools that promote and support the learning network. We welcome your collaboration.



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APPENDIX A:

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PROFILES OF LAND USE DISPUTE RESOLUTION PROGRAMS

The following information reflects research begun in 2003 and updated in 2005. Given the limitations of the survey, this summary does not provide a comprehensive list or review of land use dispute resolution programs, but instead offers an overview of the variation in existing approaches. Each of the identified state and local programs includes available information on:

- Statutory or program foundation
- Program history
- Stage of planning process in which dispute resolution is authorized
- Administrative department or program hosting the program
- Description of the process
- Examples of program application
- Comments from administrators and participants
- Other information

Some states or localities with established or emerging dispute resolution systems are not reflected in this summary. The Public Policy Research Institute seeks both corrections to this information and any additional information on other programs. Please use the contact information at the end of this Policy Report to share further information.

CALIFORNIA

Statute: **California Land Use and Environmental Dispute Resolution Act**, Cal. Gov. Code, §§ 66030-66037

History: Enacted in 1994 (S.B. 517)

Planning stages: Applies to appeals filed in Superior Court concerning:

- public agency's approval/denial of any development project
- public agency's act/decision pursuant to California Environmental Quality Act
- public agency's failure to meet time limits for permits or subdivision maps
- imposition of fees related to development
- adequacy of general plan or specific plan
- decisions related to sphere of influence, urban service area, change of organization, or reorganization
- adoption of amendment of a redevelopment plan
- validity of selected zoning decisions
- validity of selected public utilities decisions

Responsible agency: Superior Court

Process: The court may recommend formal mediation, which is voluntary. There is no provision for distribution of costs. At the end of the mediation, the mediator is supposed file a report with the Office of Permit Assistance, which is charged with providing reports back to the legislature about the use of mediation in land use and environmental mediation. All time limits with respect to the legal action are tolled while the mediation is underway, subject to the mediation being renewed by written agreement of both parties every 90 days.

Examples: None reported

Comments: This statute expired on January 1, 2006. Our contact in California (the former head of the State Clearinghouse) reported that the Office of Permit Assistance was dissolved several years ago. He was aware of no mediations handled through California Superior Courts under this provision.

Other information: A.B. 857, enacted in 2002, and codified at Cal. Gov. Code § 65404, directed the governor to develop conflict resolution processes to resolve: (1) conflicting requirements of two or more state agencies for a local plan, permit, or development project; (2) conflicts between state functional plans; and (3) conflicts between state infrastructure projects. In addition, local agencies and project applicants may also request access to the conflict resolution process. According to our contact, the governor never created a dispute resolution office as described in A.B. 857.

COLORADO

(1) Statutory program: **Office of Smart Growth**, Colo. Rev. Stat. Ann. §§ 24-32-3209

History: Enacted in 2000 to establish the Office of Smart Growth (OSG) and to charge it with developing a program to assist local governments in resolving land use disputes short of litigation. The creation of the OSG was fueled by Colorado's rapid growth that has focused increased attention on the land use decision-making processes of local governments. Moreover, as local governments struggled to formulate and adopt policies to address growth, the public dialogue concerning when and where development should occur took on increased importance and grew increasingly contentious. In addition, as such disputes proved to be costly and time consuming, especially when litigation ensued, the legislature sought to provide alternative solutions to land use issues. The OSG is funded through the state's general fund.

Planning stage: For certain types of planning disputes, local government agencies are compelled by law to use ADR prior to undertaking litigation. Mediation can be either policy based or site-specific. However, the mediation process is designed to address conflicts between government entities, such as conflicts between growth management plans in bordering jurisdictions. The program does not directly address conflicts involving private landowners unless two or more governments disagree over an approval for a specific project.

Responsible agency: Colorado Department of Local Affairs, Office of Smart Growth, Intergovernmental Land Use Dispute Resolution Program

Process: The OSG maintains an online list of qualified ADR professionals with experience in local land use planning who are available to assist local governments in resolving land use disputes.²¹ To qualify for the list, mediators must have professional expertise in land use planning, zoning, subdivision, annexation, real estate, public administration, mediation, arbitration, or related disciplines. In addition, all ADR professionals must agree to abide by ethical standards and a code of conduct and to participate in continuing education. If the ADR professional is an attorney, the professional must also agree to abide by the Colorado Rules of Professional Conduct. The OSG also provides links to resources to assist local officials and staff in the land use mediation process.²²

Examples: None reported

Comments: The program has been in operation for three years. To date, 18 ADR professionals have met the criteria for inclusion and been added to the online list of mediators. The online nature of the program allows local government officials and staff to discretely search for an ADR professional in their area. OSG does not require local governments to provide notification if they are seeking to retain a mediator. While this protects the confidentiality of the local governments involved (important in many high-profile land use conflicts), it prevents OSG from keeping records on mediation outcomes and program successes. OSG periodically surveys the mediators on the list in an attempt to discern how many inquiries have come from the local government sector.

OSG has also been active in the education and training of mediators and local elected officials and staff in the area of land use disputes and conflict resolution. OSG has partnered with the Lincoln Institute of Land Policy and Consensus Building Institute, Inc. to offer multi-day mediation courses in Colorado. These courses have been offered three years running and consistently draw praise from both the ADR community and local governments.

(2) Local Program: Contract between Community Mediation Concepts (CMC) and the City of **Denver**,

²¹ See <http://www.dola.state.co.us/dlg/osg/adrmmediatorlist.htm>

²² See <http://www.dola.state.co.us/dlg/osg/resources.htm>

City of **Colorado Springs, Douglas County**, and some private development companies.

History: Initial agreement with the City of Denver initiated in 1998 to facilitate and mediate some of the simpler land use issues Denver faced. CMC's contractual agreements have expanded to other cities and private developers. The types of land use mediations have also involved more complex and contentious issues.

Planning stage: Initially the contracts called for mediation of land use variances and planned unit developments. Since 1998, the cities have called upon CMC to include more complex, contentious, site-specific issues. On average, CMC mediates or facilitates about 35 cases per year, with approximately 80 percent of those cases ending in signed agreements.

Responsible agency: Community Mediation Concepts, a private nonprofit organization which receives its operating budget through a variety of contracts with those needing conflict resolution and mediation services

Process: Land use referrals come from city council members, the Board of Adjustments, the Landmark Commission, and planners, who call CMC with a request to provide conflict resolution or mediation for a specific land use issue. CMC has recently started to develop relationships with key developers and attorneys, who also may refer cases. CMC meets with the referring individual to get initial background information, then sets up separate meetings with each interested party to better understand the issues and to discuss their concerns and issues. CMC then provides a very brief and general summary of the basic issues that were discussed and identified in these separate and initial meetings to all the parties involved. Next, CMC convenes a meeting of all the parties, the neighborhood representatives, and possible resource individuals. CMC also works with the parties to determine if additional informational resources are needed at the meetings, such as a specific planning individual, a specific funding source, etc. CMC then works with the informational resources to make certain they understand their role and are present at the meetings. Mediators run the meetings, manage the necessary communication between meetings, keep a tracking sheet, and provide a summary of agreements, issues, and concerns after each meeting. CMC provides an agreement or summary which the parties then rely upon to proceed in the city's process.

Examples:

- Union Boulevard. The city proposed significant improvement to Union Boulevard that would require utilizing public easement rights and taking eight feet from the front yards of three blocks of homes. Many of the neighbors were incensed. CMC met with the parties, worked the process, and arrived at a collaborative agreement that met the interests and needs of both the city and the neighbors.
- Old Denver International School. A developer bought the old school, intending to raze the site to build single-family homes. Three neighbors filed a Landmark application, effectively tying up the property and costing the developer significant money in process and time. This dispute was referred to CMC, which met with the parties, completed the process, and reached an agreement that is acceptable to both the preservationist and the developer. Next, they will proceed to the larger neighborhood.
- McDonalds restaurant and the neighborhood it proposed moving into were in a contentious fight. The situation was referred to CMC, which met, managed the process, and came to agreement on 25 of 26 issues.
- Target planned to build a new store a neighborhood which didn't want a "big box" store. CMC worked with five surrounding neighborhood organizations, the city, the developer, and Target to agree upon an acceptable development for the neighborhood.
- Marian House Soup Kitchen was redeveloping; they fed approximately 625 individuals a day throughout the year. The neighbors saw the redevelopment as an opportunity to "get them out." CMC facilitated and mediated with the city, downtown partnership, adjacent businesses, the neighborhood, police, parks & recreation, and Catholic Charities to come to a resolution that kept the soup kitchen where it was, developed it in a way acceptable to the neighbors, and resolved a number of other issues in the process.

Comments: Factors that CMC believes influence success or failure include: the requirement that all signed agreements become part of the formal planning decision; effective marketing of the mediation product; clear planning/zoning goals on the part of the government agency; and an investment by the government agency to seek solutions rather than quick fixes. CMC also notes that the main challenges facing land use mediation include: writing agreements that are enforceable; ensuring that all parties have a clear understanding of the issues; and finding good mediators. Evaluation of CMC work is considered an important element of the program, and CMC is currently working on an online evaluation tool.

CONNECTICUT

Statute: **Mediation of Appeals of Decisions of Planning and Zoning Commissions**, Conn. Gen. Stat. Ann. § 8-8; 22a-43

History: Enacted in 2001 to enable and encourage mediation to resolve inland wetland, zoning, and planning appeals. 2001 Conn. Legis. Serv. P.A. 01-47 (S.S.B. 1037). Despite initial concerns, the bill passed unanimously. According to the lead proponent, the legislators were convinced that mediation might provide a lower cost alternative to the 300 land use cases that are litigated every year in Connecticut.

Planning stage: Appeals filed in Superior Court concerning any decision by a municipal zoning commission, planning commission, combined planning and zoning commission, zoning board of appeals, or other board or commission. Mediation is also available for appeals from local decisions enforcing state dumping laws.

Responsible agency: Superior Court

Process: Parties to an appeal must file a statement with the court that the dispute may be resolved by mediation. Other aggrieved parties must obtain the court's permission in order to join the mediation. The eligible parties must agree to the mediation before it can go forward, and must begin mediating on the same day they notify the court they intend to try this option. All time limits with respect to the legal action are tolled while the mediation is underway, subject to the mediation being renewed by written agreement of both parties after 180 days (subsequent extensions must be approved by the court). Any party can end the mediation by withdrawing from it. At the end of the mediation, the mediator must file a report with the court, stating whether or not the dispute was resolved. The parties share equally the cost of the mediation.

Examples: None reported

Comments: According to our contact, fewer than ten percent of the judicial cases involving land use are going to mediation under this program. He identified several obstacles to more widespread use: (1) hard to get people to recognize a problem; (2) parties may hesitate to agree to mediation, as it is a change from the traditional ways of doing business; (3) courts are becoming more supportive, but are not yet pushing parties to use the mediation option; and (4) attorneys have not yet embraced the mediation option. He also mentioned that few land use planners understand how the program works, and he described the pressure upon commissioners to make quick decisions on land use matters as a disincentive to engage in more deliberative, participatory processes (although he said that parties could agree to extend the decision timeline if they wished to do so).

DELAWARE

Statute: **Delaware Planning Act**, Del. Code Ann. § 9102 supported by state program Livable Delaware.

History: Enacted in 2001. Del. 2001 Sess. Laws Ch. 43, S.B. 105; modified slightly in 2002 to increase the number of council members to 17. Livable Delaware, unveiled in March, 2001, is a positive, proactive strategy that seeks to curb sprawl and direct growth to areas where the state, counties, and local governments are most prepared for it with infrastructure investment and planning. The program helps coordinate state agency planning, resource management, and investments in order to support growth where it is appropriate and planned for, and to discourage

growth in inappropriate locations.

The Delaware Office of State Planning Coordination, working with a wide variety of partners within state and local government and from the private sector, drafted a revision of the Land Use Planning Act, also known as “LUPA,” which dates to the late 1970s. This revision, which passed the 142nd Delaware General Assembly and was signed into law as Senate Bill 65, updates and streamlines the LUPA process and provides more useful and timely technical input to the development community and to local government land use decision-making processes. The new process has come to be known as the Preliminary Land Use Service, or “PLUS.”

Planning stage: Dispute resolution may happen at any stage in the planning process; however, it frequently happens after plans have been submitted to the State Office of Planning Coordination for certain types of municipal projects outlined in Chapter 92 of Title 29 of the Delaware Code.

Responsible agency: The Governor’s Advisory Council on Planning Coordination is charged with facilitating dispute resolution among government jurisdictions when disagreements arise involving land use planning issues. Staff from the State Office of Planning Coordination serve on the Advisory Council. The Office also helps to implement the Livable Delaware initiative by managing the state’s PLUS process.

Process: Proposals seeking state certification are submitted to the State Office of Planning Coordination for review. Informal resolution of disputes over the proposal, including disputes between municipal actors or between municipalities and state agencies, may be pursued for 45 days after the proposal has been submitted. After 45 days, the dispute is referred to the state dispute resolution board for formal mediation.

Examples: Comprehensive land use issues, including land conservation and smart planning are issues that often arise in disputes, as well as disputes between jurisdictions regarding annexations.

Comments: Delaware is primarily a “home rule” state, but the state retains considerable control over land use policy. Thus, education about statewide land planning is essential to minimize disputes. Building good relationships with developers, public officials, and the legislature is also helpful and makes the process run more smoothly. In a small state like Delaware, it can also be difficult to find the right people to serve on dispute resolution boards; issues of neutrality are sometimes called into question.

FLORIDA

(1) Statute: **Florida Land Use and Environmental Dispute Resolution Act**, Fla. Stat. Ann. § 70.51

History: Enacted in 1995, as part of the “Bert J. Harris, Jr., Private Property Rights Protection Act,” Fla. 1995 Legis. Sess. Ch. 95-181, C.S.H.B. No. 863, and following a multiple-year study by the Governor’s Property Rights Study Commission, which recommended an informal, non-judicial “mediation-type” proceeding designed to resolve disputes between property owners and government regulators.

Planning stage: Administrative appeal of a “development order” of any state or regional government agency, including decisions granting, denying, or conditioning development permits and specific parcel rezoning. Before initiating the proceeding to review a local development order or local enforcement action, an aggrieved property owner must exhaust all nonjudicial local government administrative appeals if the appeals take no longer than four months.

Responsible agency: Special magistrate, agreed to by parties

Process: Mediation is handled by an appointed “special magistrate,” selected by the parties pursuant to statutory procedures. Hearings before the special magistrate are informal and open to the public. If the parties are unable to reach agreement through mediation, the special magistrate is empowered to make a determination whether the challenged government action is unreasonable or unfairly burdens the real property. The agency with decision-making authority may accept, modify, or reject the magistrate’s opinion.

Examples: In one case the developer of an affordable housing project requested a hearing and the

parties were able to work out a number of design changes that made the project more acceptable to the neighbors, with the assistance of the special magistrate.

Comments: Special magistrates, acting as mediators, have enabled parties to better understand each others' interests and work out creative solutions. In cases where the parties reach an impasse, the special magistrate becomes an arbitrator and makes a decision. If the property owner loses or if the government entity refuses to modify its decision the property owner's only option is to go to court, which the owner could have done in the first place without the cost of the hearing. This uncertain value of the special magistrate hearing process has been cited as one reason why there has been little use of this statute. The main impact of this statute has been on government decision making. It is broadly believed that agencies have been hesitant to deny permits or make zoning or plan changes because of the threat of a property rights challenge.

(2) Statutory program: **Florida Conflict Resolution Consortium**, Fla. Stat. Ann. § 1004.59 (formerly § 240.702)

History: The Florida Conflict Resolution Consortium (FCRC) was initially established following a gubernatorial study commission recommendation with an appropriation to Florida State University in 1987. In 1996, the legislature enacted statutory language stating that FCRC should "serve as a neutral resource to assist citizens and public and private interests in Florida to seek cost-effective solutions to public disputes and problems through the use of alternative dispute resolution and consensus-building." (Laws 1996, c. 96-416, § 16.) The legislature hoped that the use of ADR would assist in meeting the growing demand for better and more durable solutions to Florida's land use and other public policy issues.

Planning stage: Public policy development at state, city, regional, and in some communities, local levels.

Responsible agency: The Florida Conflict Resolution Consortium is based at Florida State University and has several offices across the state. For many years the FCRC received approximately \$500,000 annually from the state, providing core funding for the operation of the central office in Tallahassee and three regional offices. FCRC matched state funds with project funds, enabling it to add project staff and build greater capacity to respond to requests for assistance. Today, FCRC receives minimal state funding and splits the cost of dispute resolution processes with process participants. FCRC's mission is to bring people together to facilitate consensus regarding Florida's public policy issues. FCRC offers assistance directly or by referral to ADR professionals. In the aftermath of the post-9/11 budget crisis, FCRC's state funding was cut, and it now operates on project dollars only.

Process: FCRC works with state and local governments and other stakeholders on public policy issues by providing venues for public involvement, collaborative planning, conflict assessment and dispute system design, facilitation, and mediation services. FCRC also provides dispute resolution training, education, research, and evaluation services. FCRC focuses solely on public policy issues. FCRC staff members do most of the work themselves, occasionally partnering with about ten outside contractors.

Examples: FCRC assisted several statewide commissions to reach consensus on building codes, transportation planning initiatives, Everglades restoration, manatee protection, Florida panther protection, ecosystem plans, forest management plans, and environmental permitting. FCRC also completed an 18-month pilot project involving 36 mediation demonstration cases to encourage the use of mediation and negotiated rulemaking under the State's Administrative Procedures Act.

Comments: During the last five years FCRC has handled approximately 30 cases at any one time. Resolution rates are not currently tracked, as FCRC focuses on facilitating public policy discussions rather than settlements per se. Moreover, as the program manager noted, facilitation of major public policy issues rarely settles all issues for all time. For cases that are not resolved outside of the court, the court-annexed system resolves many of the matters at hand, but the underlying issues and problems with land use must be periodically revisited. FCRC reports increasing interest in developing systems for dealing with land use issues, at multiple levels of government. In response, FCRC is working to promote "upstream" change of organizational culture and better process design at the local level.

GEORGIA

(1) Statutory program: **Local Government Service Delivery Act**, Georgia Code Ann. § 50-8-7.1(d)

History: Enacted in 1989. Additionally, in 1997 Georgia General Assembly enacted the Local Government Services Delivery Strategy Act (HB 489) to provide a flexible framework for local governments and authorities to agree on a plan for delivering services efficiently, effectively, and responsibly; to minimize any duplication and competition among local governments and authorities providing local services; and to provide a method to resolve disputes among service providers regarding service delivery, funding equity, and land use.

Planning stage: Disputes arising between jurisdictions in the formulation of coordinated and comprehensive land use plans.

Responsible agency: Department of Community Affairs, which assists the Governor in encouraging, coordinating, developing, and implementing coordinated and comprehensive land use planning.

Process: The department is required to provide mediation services for growth strategies for siting and growth strategies disputes between jurisdictions. The department maintains lists of facilitators available to help resolve such disputes. Local governments that fail to participate in a mediation of a planning dispute may suffer sanctions, including a loss of planning certification and reduced state and federal funds. However, the demand for mediation between local governments appears limited, and mediation is almost never invoked. Under the Service Delivery Act, the Department of Community Affairs facilitates dialogue about land use issues but does not have the authority to change state or local land use decisions (see below).

Examples: None reported

Comments: While there appears to be little demand for mediation between jurisdictions, there is demand for processes to address disputes over service allocation (such as waste facilities). Georgia provides a statutory mandate for facilitated negotiated concerns about the siting of hazardous waste facilities (see Georgia Code Ann. § 43-1613), but this provision is not invoked frequently. Georgia is a “home rule” state, allowing local governments to exercise the majority of power over land use matters. Thus, the need may be greater for more local level dispute resolution processes. Education about such options will be essential.

(2) Statutory authorization: **Resolution of Land Use Classification Disputes**, Georgia Code Ann. § 36-36-11.

History: In 2004 the legislature amended the state Service Delivery Act to provide a mechanism “to resolve disputes over land use arising out of the rezoning of property to a more intense land use in conjunction with or subsequent to annexation in order to facilitate coordinated planning between counties and municipalities particularly with respect to areas contiguous to municipal boundaries.” Laws 2004, Act 443, § 18.

Planning stage: Initial zoning or rezoning of annexed property

Responsible agency: Joint responsibility between the municipality and the county

Process: If a county objects to a municipality’s proposed action, the municipality first has an opportunity to propose mitigating measures to address the county’s objections. If the parties cannot reach agreement on these measures, then either the governing authority of the municipality or the governing authority of the county may insist upon appointment of a mediator to help resolve the dispute. The party insisting on use of the mediator must bear two-thirds of the expense of the mediation; if the parties both demand mediation, they split the cost. The mediator has up to 28 calendar days to meet with the parties and develop alternatives to resolve the objections. If the objections are not resolved, either entity may request review by a three-member citizen review panel, which has up to 21 days to review the proposed mitigating measures and make its own recommendation for approval or denial of the proposed zoning. The municipality then may make its own decision to approve or deny the zoning application.

Examples: None reported

Comments: This program is not used often.

HAWAII

Statute: **Geothermal Resource Zone Management**, Haw. Rev. Stat. § 205-5.1.

History: Enacted in 1983

Planning stage: Permit application to develop geothermal resources

Responsible agency: County authority

Process: When considering a permit application for activities proposed within agricultural, rural, or urban districts, within which such proposed activities are not permitted uses pursuant to the county general plan and zoning ordinances, the county must conduct a public hearing on the proposed activity. Anyone who submits comments at that meeting may request mediation within five days of the hearing. The county authority may require the parties to participate in the mediation. The mediation, which runs for up to 30 days (unless extended by the county), is confined to the issues raised at the public hearing by the party requesting mediation. The mediator submits a written report to the county authority, which then makes its final decision on the permit application. If the county's decision is subsequently challenged in court, the mediator's written recommendation is part of the record.

Examples: None reported

Comments: The Hawaii legislature also has stated that one of the goals of its Coastal Zone Management Program is to "organize workshops, policy dialogues, and site-specific mediations to respond to coastal issues and conflicts." Haw. Rev. Stat. § 205A-(c)(8)(C).

IDAHO

Statute: **Local Land Use Planning Act**, Id. Code § 67-6510.

History: In 2000, in response to intense development pressures in ski communities such as Sun Valley, Idaho passed enabling legislation (2000 Idaho Acts Ch. 199, H.B. 601) authorizing land use mediation. Previously, development pressures caused property values to rise, which led to litigation associated with subdivision applications. The legislation passed by the State attempted to curtail land use decision making via the appeals process in the courts. Therefore, the legislature authorized mediation as an alternative decision-making tool.

Planning stage: At any point during or after the decision process, mediation may be requested by an applicant, an affected person, the zoning or planning commission, or the governing board. If mediation occurs after a final decision, any resolution of differences must be the subject of another public hearing before the decision-making body. During mediation, any time limits relevant to the land use application shall be tolled. The mediation process is not part of the official record regarding the application.

Responsible agency: The governing board responsible for the planning decision must make this mediation available if requested.

Process: If the mediation is requested by the governing body or commission, then participation in one session is mandatory; otherwise participation is optional. Assuming that the governing board (typically a county) agrees to mediation, the governing board selects the mediator and pays for the first mediation session. After the first session, the applicant bears all costs for mediation. The state enabling legislation permits counties to enact their own land use mediation ordinance, which may allocate costs differently in the future.

Examples: None reported

Comments: Idaho's land use mediation process focuses exclusively on site-specific issues. To date, two cases have been addressed, one of which was resolved through mediation. According to one contact, Idaho's program is problematic for several reasons. First, an inherent tension exists between the public's right to participate and right to know, and the need to ensure confidentiality

in the mediation process. The option is either to take detailed notes of closed-door meetings, or keep meetings open and sacrifice privacy and possibility the ultimate success of the mediation. Secondly, the enabling legislation is not detailed enough to be useful. The solution to this problem is either to amend the statute or enact more detailed ordinances addressing process (and when mediation should be used) at the county level. Thus far, the statute has not been effective at encouraging parties to use mediation to settle subdivision and zoning disputes. Finally, mediation is used too late in the process, and should also be used at the policy level to prevent conflicts in the first place.

One positive and unintended consequence of the program is that when used, mediation has proven to be very effective at bringing all the stakeholders together and getting results. And even when mediation fails in terms of obtaining a formal settlement, positive benefits still accrue merely from opening the lines of communication. Idaho's program uses mediators that actually serve as facilitators. Although no specific qualifications for mediators exist, mediators typically possess neutrality, land use expertise, and familiarity with the issue in question.

MAINE

Statute: **Land Use Mediation Program**, Maine Rev. Stat. Ann. 2 § 8, 4 § 18, 5 § 3331, and 5 § 3341.

History: Enacted in 1996, implementing the recommendations of a study commission. 1996 Me. Legis. Serv. Ch. 537 (H.P. 1188)(L.D. 1629)

Planning stage: A landowner who has "suffered significant harm as a result of a governmental action regulating land use" may apply for mediation after: (1) seeking and failing to obtain a land use permit, variance, or special exception from municipal government, and has exhausted administrative appeals; or (2) seeking and failing to obtain approval from state government for a land use, such that the landowner would be eligible to file for judicial appeal.

Responsible agencies: Superior Court and the Court Alternative Dispute Resolution Service

Process: State agencies are mandated to participate in mediation when requested by the Court ADR Service. The state provides the first four hours of mediation services for free, and then the participants share the cost. Within 90 days after the landowner files an application for mediation, the mediator must file a report with the court. The mediator is instructed to "balance the need for public access to proceedings with the flexibility, discretion and private caucus techniques required for effective mediation." Any agreement that requires government action is not self-executing. The landowner must submit the written agreement to the appropriate government agency, which then has the authority to reconsider its earlier decision as long as no statutory provision regarding the approval process is violated. The Land and Water Council is directed to report annually on the operation and effectiveness of the Land Use Mediation Program.

Examples: None reported

Comments: This program is used very infrequently. It may be because the process comes too late in the process; by the time mediation is an option, the applicant is already aggrieved and less inclined to try mediation. Maine also has a program to mediate disputes involving natural gas pipeline activities, enacted in 1999. Me. Rev. Stat. Ann. 5 § 3345. The Court Alternative Dispute Resolution Service provides the mediation services for this program as well.

MARYLAND

Local Program: **Baltimore City resolution**

History: During the fall of 2002, the Baltimore Department of Planning began to train staff in collaborative problem solving techniques. The informal program was funded by a grant from the Maryland Mediation and Conflict Resolution Office (an agency of the Maryland state courts system) in order to assist staff in addressing contentious land use decision-making processes. As originally conceived, the program was intended to assist planners by providing training on how to collaboratively find creative solutions to resolve contentious planning or development-related

conflicts, and creating a pool of in-house facilitators to mediate conflicts in parts of the city in which planners do not normally work. Funding cutbacks and organizational changes have resulted in the need for a new round of training and a reevaluation of the feasibility of having an in-house pool of facilitators.

Planning stage: Most conflicts involve site-specific conflicts, such as zoning issues and requests for permits that are objected to by neighbors.

Responsible agency: Baltimore Department of Planning

Process: Ad hoc dispute resolution

Examples: In 2004 the Department of Planning hired a facilitator to resolve a highly contentious dispute revolving around the revision of an urban renewal plan. The dispute had been going on for almost five years and came down to a battle between property owner/developers and property owner/residents over the issue of proposed height limits. The facilitator did extensive interviews with stakeholders as part of an assessment process and gave the Department several alternatives for resolving the dispute, including varying degrees of facilitation. The Department chose to manage the process on its own, with a highly proscribed schedule and process. The project remains contentious, but is nearing an end.

Comments: Since the program is in its infancy, data on the number of cases settled and the resolution rate are not available at this time. Assessing the program, our contact observed, "Overall, I would say that our hopes for the outcomes of these projects were perhaps a bit ambitious, but that we have benefitted...from an increase in facilitation skills and from our experience with the hired facilitator."

MASSACHUSETTS

(1) Massachusetts **Office of Dispute Resolution**, state statutory program under Mass. Gen. L. Ch. 7, § 51

History: MODR began in 1985 as a pilot project with funding in part from the National Institute for Dispute Resolution (NIDR) and the Boston Foundation, and was one of the first five state offices established in the country. After continued growth the agency was established by law in 1990 and is charged by statute to aid the three branches of government, municipalities, and other public institutions in the resolution of disputes. In September of 2004 MODR transferred its functions and personnel to the University of Massachusetts Boston (UMB) in order to operate as a university-based state dispute resolution program for the benefit of public agencies and citizens of the Commonwealth.

The program deals with issues including affordable housing development issues, land use matters, vocational service disputes, workplace labor/management disputes, agricultural disputes, and housing and employment discrimination complaints.

Planning Stage: At all stages.

Responsible agency: MODR is a state agency. In order to meet its annual operating budget and cover its expenses, MODR charges fees for its services, as provided for in its enabling statute (M.G.L. ch.7, s.51). Two types of fees are usually involved: (1) fees for MODR staff time in designing, coordinating, and providing services; and (2) chargeback fees for the work of MODR neutrals and consultants who provide services.

Process: MODR collaborates with several state agencies in the design and operation of ADR programs. These agencies regularly refer conflicts to MODR. For many years, MODR has been a consultant to the Superior and Land courts. Since 1987, MODR has worked with the Trial Court to design, implement, and administer a variety of ADR programs and to train court personnel.

Examples: MODR also convenes and manages large-scale mediations involving multiple state and federal agencies, environmental groups, and the public. Recent projects have included the mediated multi-party agreement regarding hazardous waste in the Housatonic River, where the parties included General Electric Corporation, the U.S. Environmental Protection Agency, the Massachusetts

Department of Environmental Protection, the City of Pittsfield, the U.S. Department of Justice, and others. Other recent projects have included the mediated multi-party agreement on the choice of technology for the cleaning up of what some consider the most contaminated hazardous waste site in the world, New Bedford Harbor. MODR also mediated a multi-party agreement to minimize the environmental impact of widening of Route 2A, adjacent to the national park in Lexington, MA.

Comments: MODR provides tools and resources that support effective and responsive government, including consulting, conflict assessment, facilitation, mediation, arbitration, training, and comprehensive dispute systems design. MODR works with a panel of neutrals, including mediators, facilitators, arbitrators, case evaluators, trainers, and consultants. MODR developed and implemented a comprehensive performance-based evaluation process for selecting its panel of mediators. From 1985-2002, MODR successfully resolved over 2,000 court-referred cases, with an overall settlement rate of 76 percent. Since 1985, MODR has handled over 300 environmental disputes in Massachusetts, including hazardous waste clean-up and cost allocation cases, wetlands development cases, facility siting controversies, and other land use disputes. MODR specializes in conflicts involving multiple parties, such as municipal, state, and/or federal agencies, and private parties. In all, 83 percent of environmental cases referred have moved forward to mediation, and 73 percent of these cases have settled. MDOR also solicits evaluations from all mediation participants, and estimates that they achieve an 80 percent response rate.

(2) Massachusetts **Land Court Mediation Program**, governed by Supreme Judicial Court Rule 1:18, Uniform Rules on Dispute Resolution

History: The Massachusetts Land Court was established in 1898 and holds jurisdiction over issues dealing with matters involving right, title, and interest in land. Since 1987, MODR has worked with the Trial Court to design, implement, and administer a variety of ADR programs and to train court personnel.

Planning stage: Post-litigation, pre-trial.

Responsible agency: A 24-member Standing Committee, chaired by a Superior Court Judge, advises the Court on alternative dispute resolution (ADR) standards and procedures provided by the Trial Court and on the implementation of ADR programs and services. The Governor and Legislature approve the ADR program's annual budget.

Process: The Land Court judges may refer parties to attend orientation session, where parties to a case and/or their attorneys receive information about dispute resolution services. At these sessions, third-party providers review the case to determine whether referral to a dispute resolution service is appropriate and, if so, which one. Since 2003, dispute resolution services have been provided by third-party, court-approved programs; prior to 2003, the judges offered that service themselves. There are currently three approved provider organizations, which are re-approved on a three-year basis. Each provider is allotted cases on a rotating basis.

Examples: None reported

Comments: Approximately 10 cases per month are recommended for mediation.

MINNESOTA

Statute: **Planning Dispute Resolution**, Minn. Stat. Ann. Chapter 572A History: Enacted in 1997. Minn. Laws 1997, c. 202, art. 6, § 4

Planning stage: Available for disputes concerning development, content, or approval of a community-based comprehensive land use plan involving a county and the office of strategic and long-range planning or a county and a city. An aggrieved party can file a written request for mediation any time prior to final action on a community-based comprehensive plan or within 30 days of a final action on such a plan.

Responsible agency: Bureau of Mediation Services

Process: The Bureau makes recommendations of qualified neutrals to provide mediation services, and makes recommendations to the parties for resolution of the dispute if it is not resolved after

30 days. If the dispute is not resolved in 60 days, it goes to binding arbitration before a panel selected by the parties and (if necessary) the Bureau of Mediation Services.

Examples: None reported

Comments: None

MONTANA

Local Program: **Contractual agreement** between the City of Bozeman and the Community Mediation Center (CMC)

History: The CMC has worked with the City of Bozeman to offer Facilitated Land Use Information Meetings and Facilitated Dialogue since 2002. For the first several years there was quite a demand and CMC's efforts were focused on facilitating resolution of disputes (or potential disputes) between developers, neighborhoods, and landowners. Applicants requested the service in order to exchange information with neighbors and receive early feedback on a potential project. Neighbors were able to learn about the application early and voice concerns in a neutral setting.

After the City hired a Neighborhood Coordinator, the demand for CMC's services dropped considerably. She is an effective "ombudsman" who now diffuses situations fairly routinely. Consequently, CMC recently revamped its agreement with the City and broadened it to allow for CMC to help with any type of dispute

Planning stage: As originally conceived, the land use facilitated meeting program offered free mediation early in the application review process. Only outcomes including areas of agreement were reported to the City of Bozeman. The City of Bozeman Commission retained full decision-making power over the application, and was not required to follow the recommendations of the facilitated meeting. Responsible agency: Community Mediation Center, a private nonprofit entity

Process: Varies; ad hoc mediation

Examples: CMC is currently facilitating a special Bozeman City-Public Library Taskforce which is trying to resolve a conflict that arose over the possible sale of land adjacent to a proposed library in an area many people had expected would become part of an existing linear trail and Lindley Park. CMC also has a new contract with Gallatin County to facilitate land use disputes, and is presently working with a New Zoning District Subcommittee established by the County Commission to come up with recommendations for better processes to create zoning districts.

Comments: These efforts continue to be ad hoc, rather than integrated into local ways of doing business. It is clear, however, in the present climate of rapid growth, that the resources of county government are not always adequate nor available to deal with the volume of needs for their services. Conflict is becoming part of the status quo and the Gallatin County Planning Department recently asked for some help in dealing with conflicts in a more systematic way.

NEW MEXICO

Local Program: **Land Use Facilitation Program**, Albuquerque

History: The Land Use Facilitation Program was established in 1994 to provide land use applicants and affected residents the opportunity to identify, discuss, and resolve issues prior to the acceptance and implementation of land use decisions. The Land Use Facilitation Program is one of several ADR programs under the Alternative Dispute Resolution Office, and was receiving \$50,000 annually from the city's general fund to pay for facilitators and other program costs. Currently it has a \$35,000 budget and offers free and voluntary services to City residents. The goals of the Land Use Program included: (1) promoting the sharing of information through public dialogue; (2) identifying issues early; and (3) promoting collaborative problem solving among those directly involved in and impacted by local land use decisions. The program has been modified in recent years, but continues to offer facilitation services at the outset of a land use application process. The program addresses issues including infill projects including new apartment buildings, increase traffic; infrastructure systems including transportation, sewer, water and drainage; and projects

offering services that differ from traditional services and uses including box stores and new municipal buildings

Planning Stage: Available early in the planning process, prior to application acceptance

Responsible agency: City of Albuquerque

Process: Project is referred to the ADR Office through several avenues: (1) the Office of Neighborhood Coordination; (2) a division of the Planning Department; or (3) an applicant, or a citizen expressing interest in a facilitated meeting. Then the ADR Office contacts the Facilitator Manager to assign a facilitator. The facilitator calls stakeholders to determine interest in a meeting. If there is no interest, the facilitator generates a "No Facilitated Meeting Held" Report. If there is interest, the facilitator makes arrangements for the meeting, holds the meeting, and generates a report identifying the interests and agreements as determined at the meeting. Finally the report is distributed to the appropriate Planning Division, ADR Office, and Office of Neighborhood Coordination.

Examples: Big box store disputes are common in this area.

Comments: The city contracts with a facilitator manager who manages the facilitator roster and referrals. The facilitator manager is not a city employee.

The integrity and skills of the facilitator is seen as crucial to the process, as all stakeholders must trust the facilitator and believe that their voices are heard in order for the program to be a success. Other variables that influence the success of the program include: (1) constant outreach and education to ensure appropriate expectations; (2) formal rules and regulations with clear guidelines and a well-defined process; and (3) a guarantee that participation does not preclude other legal remedies as the preservation of legal standing encourages all parties to participate more fully.

The Land Use Program encouraged developers to reach out to stakeholders in advance of filing applications, and shifted the planning dialogue from a micro-level focusing on specific project details to a broader, more sophisticated discussion of land use issues. In the future, the problems with the program could possibly arise if the city does not adopt an agreement reached by stakeholders participating at the grassroots level.

From 1994-2006 approximately 600 cases were referred to the program; however, this figure may be low, as statistics were not routinely kept prior to January of 2005. From January of 2005 to January of 2006, 114 cases were referred to the program. During that period the program estimates an average settlement of 61.5 percent of the issues raised by neighbors. Due to the broad and complex nature of cases referred, often cases are not entirely "settled," but generally progress is made on specific issues within the case.

NEW YORK

(1) Local Statute: **Land Use Mediation**, Town of Warwick Code § 164-47.5.

History: None identified

Planning stage: Available throughout planning process

Responsible agency: Mediation is provided by a private party, upon the consent of all parties of interest. The Town of Warwick may consent to share the costs of mediation, but is not obligated to do so.

Process: The law encourages the use of voluntary mediation in disputes between developers, homeowners, and other interested parties in connection with decisions made by the Town Board. The primary means of encouragement is the possibility of suspending time limits for permit approvals for the period in which mediation is taking place. The Town Board has discretion to suspend time limits for 60 days (this may be renewed indefinitely), upon public notice of the basis

²³ Bradford W. Wyche, "An Overview of Land Use Law in South Carolina," 11 Southeastern Env'tl L.J. 183 (Spring 2003).

of the dispute, the permit and/or approval being sought, the name of the party seeking the permit and/or approval, and contact information to allow others to become involved in the mediation process. The mediator has no power to impose a settlement or to bind the Town of Warwick to the terms of the agreement. Any settlement must be approved through the regular channels for obtaining a permit or approval.

Examples: None reported

Comments: None

(2) Local Program: **Pace University Hudson River Valley Program**, training offered through the Land Use Law Center at Pace University School of Law.

History: In 1994, the Land Use Law Center at Pace University School of Law completed an extensive study of the obstacles to sustainable community development in the Hudson River Valley, concluding that the principal need was for better informed leadership at the local level. The study led to the creation of the Land Use Leadership Alliance Training Program (LULA), which is available to mayors, legislators, planning and zoning board members, and other civic and private sector leaders. This four-day course teaches participants how to use land use law and strategies, conflict resolution, and community decision-making techniques to accomplish sustainable community development in the Hudson River Valley and the Tri-state Region. In 2005, the LULA was conducted outside the Hudson Valley in the Connecticut and New York's Finger Lakes Region.

Planning Stage: At all stages

Responsible organization: The program is coordinated by the Land Use Law Center of Pace University School of Law which partners with institutions in other regions to conduct the LULA.

Process: The LULA training team borrows from the extensive history of mediation and its applications to train local leaders to facilitate community decision making in several contexts: (1) establishing effective negotiation processes that involve all stakeholders affected by development proposals; (2) involving all interested parties in the adoption of improved zoning ordinances and other land use regulations; (3) involving all interest groups in preparing an updated comprehensive plan; and (4) negotiating inter-municipal agreements with neighboring communities to protect shared resources or to promote compatible development patterns.

Presentations and written materials introduce participants to over 50 land use techniques that are available to local governments in New York to shape and control land use patterns and create sustainable communities. Leaders are supported after graduation through a 450-page best practices manual, access to a 6,000-page web site, a telephone number to call to get answers to specific questions, help conducting local clinics on specific controversies, and periodic refresher conferences.

Examples: In April and May of 1999, a program was held for 13 communities in the Wappinger's Creek Watershed area of Dutchess County. Community leaders convened for a fifth day, agreed to establish an inter-municipal council, and submitted an application to the state for a \$250,000 grant to conserve shared watershed assets. The communities are still working together to address water quality issues throughout the entire watershed in a program that is serving as a model for other communities.

Comments: Over 100 local governments and institutions in New York and Connecticut have endorsed the program by official resolution. Over 1,000 leaders from nearly 200 communities in New York, New Jersey, and Connecticut have graduated from the 30 programs that have been conducted. As some evidence of the success of the program, over 84 percent of the participants ranked the program as excellent or very good, 73 percent of survey graduates said they used the skills learned in the program to adopt land use innovations.

²³ Large scale speculative issues are typically not good candidates. Issues with specifics tend to be the most negotiable

NORTH CAROLINA

Statute: **Prelitigation Farm Nuisance Mediation Program**, N.C. Gen. Stat. § 7A-38.3

History: Enacted in 1995, the program is designed to encourage and promote early resolution of disputes alleging the existence of an agricultural nuisance.

Planning stage: Unlike other statewide dispute resolution programs in North Carolina, this program is designed to operate before a lawsuit has been filed. In fact, mediation of such disputes is mandatory before a civil action can be brought alleging the existence of a farm nuisance in either superior or district court. Any case filed to a prelitigation mediation can be dismissed upon motion of either party.

Responsible agency: District court

Process: Not identified

Examples: Most cases mediated pursuant to this statute have involved hog farm operations. Entire communities have been involved in these disputes, alleging, among other things, offensive odors and groundwater contamination.

Comments: Mediation can be waived if requested in writing from all parties.

OREGON

Statute: Ore. Rev. Stat. §§ 197.805-197.855

History: The Land Use Board of Appeals (LUBA) was established in 1979. In 1989, the Oregon Legislature created the Oregon Dispute Resolution Commission (ODRC) to promote and foster dispute resolution programs within the state. Subsequently, the LUBA statutes were amended to provide that all parties to a LUBA appeal may at any time stipulate that the appeal proceeding be stayed to allow the parties to enter into mediation. ODRC's Public Policy Dispute Resolution Program assisted in getting LUBA cases into mediation and administered grants to pay for private mediation services. The grant funds were made available from the Oregon Dept. of Land Conservation and Development. In 2003, the Oregon Legislature abolished the ODRC and transferred its Public Policy Program to the Hatfield School of Government at Portland State University. It now operates as the Oregon Consensus Program (OCP).

Planning stage: Any time. Some work in the early stages of conflict, but most later in the conflict.

Responsible agency: The OCP is partially funded by the Oregon State Legislature. Additional funding comes from fees for services, agreements with agencies, foundation grants, and contributions from parties involved in various processes.

Process: OCP receives a biennium grant from the Department of Land Conservation and Development to assess and provide mediation services to land use cases across the state. Under this agreement, referrals from the Land Use Board of Appeals requesting mediation and/or dispute resolution services are sent to OCP. Other state actors who anticipate problems with a particular issue or process refer more ad hoc cases to OCP. OCP works with a roster of mediators, to whom it subcontracts case work.

Examples: None reported

Comments: OPC is working with actors at state, regional, and local levels to explore opportunities for dispute resolution into land use decision-making processes. OPC is working with community dispute resolution centers across Oregon to identify and assess land use, development, and other public disputes in their communities to develop an effective network across the state for assisting parties to collaborate on these issues. From 2003-2006, the program handled 66 projects, of which about 33 were land use cases. OPC provided technical advisory assistance to 13 of those cases, assessment services to 13, and facilitator services to seven cases. OPC is currently developing its own evaluation tool.

SOUTH CAROLINA

Statute: **South Carolina Land Use Dispute Resolution Act**, S.C. Code Ann. §§ 1-23-630; and 6-29-800, -820, -825, -830, -890, -900, -915, -920, -930, -1150, -1155, 1310-80

History: Enacted in 2003, S.C. S. 204, Sess. 115, 2003-2004. The primary intent, reportedly, was to encourage landowners to use mediation (rather than takings lawsuits) as the principal means to resolve claims against local governments.²³

Planning stage: Decision by board of zoning appeals, board of architectural review, or local planning commission

Responsible agency: Circuit Court

Process: After an adverse decision, a landowner may file a notice of appeal with the circuit court, accompanied by a "request for pre-litigation mediation." If the mediation is successful, the settlement must be approved by both the local legislative governing body and the circuit court before it becomes effective. If the mediation is unsuccessful, or if the reviewing bodies do not approve it, the landowner may appeal the decision in court. Mediation is informal, with a third party mediator facilitating face-to-face settlements between the parties. The mediator has no decision-making authority, but may guide parties toward settlement.

Examples: None reported

Comments: Several counties in South Carolina have adopted mandatory mediation programs, which may require mediation of landowner claims.

TEXAS

Local Program: **City of Austin Office of Dispute Resolution** (now defunct)

History: In 1997, the State of Texas passed legislation expanding existing ADR processes in the state to include municipalities. In 1998, the Austin City Council directed the City Manager to "evaluate the feasibility of a pilot program to provide mediation services for selected land use development projects" in order to better address contentious land use issues. As a result, a pilot mediation program was launched in 1999. Building on the pilot program's success, in 2002 the Austin City Manager created the Office of Dispute Resolution. This office was separate from other government agencies and was organized under the Office of the City Manager. The Office of Dispute Resolution (ODR) was eliminated in 2003 due to City budget constraints. The office dealt with zoning, neighborhood issues with the City of Austin, regulation negotiations and amendments, development plans, and issues involving public projects.

Planning Stage: In most cases Austin City Councilors or the Planning Commission referred cases to ODR, after permits or applications were contested by interested stakeholders. In other cases ODR proactively identified cases (both before and after they were contested) that it believed might benefit from mediation. Occasionally, parties to a disputed case would seek mediation by their own initiative.

Responsible agency: ODR's mission was to provide a responsive, neutral resource for conflict resolution services for public policy issues and activities. In practice, it served as the last resort before litigation. The program did not have its own line item in the City budget. The City Manager's Office (general fund) and the Electric Utility Fund paid the salaries of staff, while the Planning Office provided office space.

Process: After a case was either identified by or referred to ODR, internal staff, primarily the Senior Dispute Resolution Officer/ADR coordinator, initiated the mediation process. Outside facilitators providing services on a pro bono basis were also used, on occasion, to co-mediate cases. In other cases, the Senior Dispute Resolution Officer would assist selected city employees who had completed the 40-hour mediation training course to resolve disputes. In addition to its relationship with city officials and planners, ODR also collaborated with the Center for Public Policy Dispute Resolution at the University of Texas and the Travis County Dispute Resolution Center (a community-based organization).

²³ Bradford W. Wyche, "An Overview of Land Use Law in South Carolina," 11 *Southeastern Env'tl L.J.* 183 (Spring 2003).

Examples: None.

Comments: From August 1999-October 2003, the program mediated 36 cases, and 67 percent were resolved successfully (either through mediation or in the post-mediation stages). The program also provided conflict resolution services in 10 ad hoc conflict interventions, or requests to resolve inter-or intra-departmental conflicts as requested by directors of various Austin city agencies.

In addition to qualified mediators, the ADR coordinator identified the following as prerequisites for success: (1) screen conflicts prior to undertaking mediation to assess ADR applicability;²⁴ (2) keep stakeholders rather than their attorneys involved in the process; (3) maintain the support of technical staff; (4) ensure confidentiality for all participants; (5) select representatives carefully to avoid the formation of splinter groups; (6) guarantee the neutrality of facilitators; (7) confirm that all stakeholders are committed to negotiating in good faith prior to undertaking mediation; (8) develop a reliable funding stream; and (9) continuously work to inform constituents about available ADR services.

While successful in its efforts, ORD was disbanded in October 2003 during a period when the City of Austin was experience financial resource shortages.

UTAH

Statute: Office of the **Property Rights Ombudsman**, Department of Natural Resources. Utah Code, Section 63-34-13.

History: In 1997, the Utah legislature enacted legislation that created the Property Rights Ombudsman in the Department of Natural Resources. The office started with a one-member staff, but recently was able to raise enough money through fees and cost savings to hire an additional staff person. The Ombudsman's role is to assist state agencies and local governments in developing guidelines and analyzing actions around property rights issues. The Ombudsman also advises private property owners on takings claims against government entities and provides dispute resolution services, as appropriate, for disputes over takings, eminent domain, and the effect of local government regulation on the use and occupancy of real property.

Planning Stage: All stages, but often early in the process

Responsible agencies: Department of Natural Resources

Process: Citizens call the Ombudsman when they think that there might be a dispute over a land use issue. The Ombudsman researches the issue and the law surrounding the issue and offers non-binding advice about the issues. Generally this involves clarifying points of confusion and the issue's merit under existing law. Cases that do require additional consideration lead to extended conversations, meetings, and correspondence in an effort to reach a solution by mediation. A few cases lead to binding arbitration. Government agencies may also contact the Ombudsman to request advice on a land and property use. The fees for Ombudsman services range from \$0 to \$150 depending on the scope of services.

Examples: Issues to be resolved may involve construction projects, redevelopment actions, zoning, building permits, or regulations

- A landowner in an urban community had been flooded several times after a developer rerouted storm waters into a city-owned storm drain. The city refused to pay any compensation, although it appeared that the flooding would be permanent or inevitably recurring. After some discussion and negotiation, compensation was paid.
- A property owner desiring to build storage units was told that she could not have access to the roadway unless she granted an easement to her neighbor, allowing him continual access across her property to share the new access point. The Ombudsman expressed the opinion that the right to exclude others from ones property is a fundamental property right and compensation should be paid for the access easement. The government entity lifted the restriction and is evaluating its policies.
- A larger community vacated the public interest in an alley behind a group of homeowners but

²⁴ Large scale speculative issues are typically not good candidates. Issues with specifics tend to be the most negotiable

attempted to deed the entire alley to an industrial neighbor, leaving none to the residents on the other side even though they had fences running down the center line. The Ombudsman explained current Utah case law to the city involved and just compensation was paid since the alley had been conveyed to the city by a former owner, and not purchased with city funds. When public streets are donated to the city, they automatically revert back to the adjoining landowners when abandoned.

Comments: The Office of the Ombudsman receives an estimated 1,000 inquiries each year, most of which involve issues at the local level. The process is flexible and informal and has a low threshold to entry: citizens, often property owners can obtain advice for no charge or attend one of the Office's many low-cost/free workshops on land use issues. An estimated two-thirds of inquiries result in no contact being made with any government entity because the property owner's claim had no merit under existing law, the matter was otherwise not worth pursuing, or the caller simply wanted information and did not wish to press the matter further. About one-third of the cases proceed to a mediation process, with very few moving to binding arbitration.

The Office of the Ombudsman also proposes policy changes and guidelines to state and local governments on property issues; organizes conferences and workshops for land use professionals, property owners, attorneys, and civic leaders on relevant topics; presents at conferences and seminars on land use and property issues; and publishes materials for government officials and citizens on land use policies in the state of Utah.

VERMONT

Statute: Act 250 and Vermont Rules of Environmental Court Procedure, **Mediation Screening Pilot Program**

History: In 2001 Vermont enacted a Mediation Pilot Program (H.B. 475) to encourage mediation by offering a free day of mediation to parties in contested Act 250 land use permit applications. Few parties took advantage of the offer, and the program expired in 2004. Today, appeals of Act 250 permits, along with Agency of Natural Resources and other local government permits, proceed to the Vermont Environmental Court where they may be recommended for mediation.

Planning Stage: All stages. There are no requirements for applicants to meet with potential parties before an application is submitted, although some do. Many cases proceed to mediation after they are contested. Vermont's pilot mediation screening project at the initial hearing level and the Environmental Court's mediation program combine to create a multi-level comprehensive mediation program.

Responsible agencies:

(1) Local Zoning Permitting Bodies and Act 250 District Commissions:

Green Mountain Environmental Resolutions and the Consensus Building Institute are directing a two-year pilot project with the Natural Resources Board and participating local zoning permitting bodies to target appropriate cases for mediation by conducting mediation screenings on all contested applications. The recommendations whether or not to pursue mediation are not binding on the parties and the permitting bodies do not have the authority to order mediation. Should mediation be recommended, the parties are referred to the Environmental Court's roster of mediators.

(2) Vermont Environmental Court:

The Environmental Court hears appeals on zoning enforcement matters, Act 250 permit appeals, municipal approvals, water resource classification, and various types of permits. The Environmental Court has the authority to order mediation, and currently does so in about one third of the active cases in the appeals before them.

Process:

(1) Local Zoning Permitting Bodies and Act 250 District Commissions

After receiving notice of possible cases, GMER contacts participants in potential screening cases,

explains the screening process, and offers to conduct a free and voluntary mediation screening with a non-binding recommendation for mediation. Using a set of standard interview questions, GMER conducts brief confidential interviews with all case participants, where possible, to determine if mediation could help participants reach a mutually satisfactory settlement. The interview questions were designed to allow the evaluator to determine where the parties agree and disagree, which issues are priorities for each party, and whether there are any obstacles to using mediation. Using the mediation screening data and the screeners' professional opinion, GMER provides participants with a non-binding recommendation on whether a case would benefit from mediation. If mediation is recommended, participants are given a link to the Vermont Environmental Court's roster of mediators.

(2) Vermont Environmental Court:

All cases scheduled to appear in the Environmental Court are eligible for potential mediation. Environmental Court judges conduct pre-trial conferences with all case participants to determine if mediation could help participants reach a mutually satisfactory settlement. A formal part of Environmental Court proceedings, the pre-trial conferences allow the judges to identify relevant issues, where the parties agree and disagree, and whether there are any obstacles to using mediation. Judges use their professional opinions to make decisions about subsequent use of mediation. If mediation is ordered, participants are given a list of Vermont Environmental Court's roster of mediators. The roster is furnished only as a convenience; the parties are free to hire any mediator they want.

Comments: This pilot project is ongoing. Results will be made available in summer 2007.

WASHINGTON

Statute: Growth Management Act, Wash. Rev. C. § 36.70A

History: Enacted in 1990

Planning stage: Appeals filed on local and county land use plans

Responsible agency: Growth Management Hearing Boards provide an overview function by ensuring that city and county plans and land use policies are in compliance with the state's GMA.

Process: The Growth Management Hearing Boards clarify the substance and intent of the GMA whenever appeals are filed on local and county land use policies. On average, the three boards handle approximately 30 cases annually. The boards include provisions for mediating appeals brought before them. One of the boards resolves more than 15 percent of its issues through mediation.

Examples: None reported

Comments: Unintended problems facing the GMA Hearing Boards include the erroneous perception that the Board: (1) does not defer to local government decisions (the board will defer unless the GMA has been violated); (2) discourages public participation (the board actually requires such participation); and (3) writes and implements land use plans (the board does not have this authority). The GMA Boards have also been criticized because the governor appoints board members, rather than members being appointed by the state senate. However, the board members appointed by the Governor must be experts in the field of land use planning and one must be a former local government elected official to ensure that appointees fully understand the complexity of the land use issues at hand.

APPENDIX C: THE ROLE OF COLLABORATION IN LAND USE DECISIONS²⁵

Stages of Process ²⁶	General Characteristics of Stage	Role of Process Manager ²⁷	Incentive to Negotiate ²⁸	Likelihood of Success ²⁹
Community Planning	<p>The earliest stage of the process before there is significant investment in any proposals.</p> <ul style="list-style-type: none"> • Multiple parcels • No clear proposal • Multiple or unknown decisionmakers • Multiple jurisdictions • Minimal public awareness of possibilities 	<p>The process manager can take a variety of roles depending on the intensity and complexity of the situation. The process manager will work with a convener and the group to clarify a purpose and define a process. The more the convener and the parties are willing to invest, the more the process manager can get involved.</p>	<p>While the neutral has the most freedom to help the parties identify areas for mutual gain, there may not be sufficient incentive to negotiate on behalf of all the parties. Parties often need a deadline or an impending decision to be willing to invest time, energy, and resources involved.</p>	<p>High due to several factors, particularly the following:</p> <ul style="list-style-type: none"> -the neutral has the greatest flexibility to identify mutual gains -most parties have not taken public positions, and -investment in a particular proposal is limited.
Pre-application	<p>A legitimate applicant with proposal that is likely to be submitted in the near future.</p> <ul style="list-style-type: none"> • Proposed plan is reasonable under existing regulations/laws • A limited number of known decision makers • Some public awareness of project • Applicant's investment may be considerable. 	<p>The process manager still has great flexibility to work with the parties. He/ she can become heavily involved in the negotiations or less so. The level of involvement will depend on the commitment of the convener and parties.</p>	<p>The incentive is typically low at this stage. Several factors will increase or decrease the incentive such as the:</p> <ul style="list-style-type: none"> -likelihood of an application -intensity of the project -history of the site(s) -characteristics of the community 	<p>If the parties have sufficient incentive to participate at this stage the chance of reaching an agreement that meets a considerable number of the parties' needs and interests is very high.</p>
Post Submission	<p>A legitimate applicant has submitted a formal proposal to a decision-making body.</p> <ul style="list-style-type: none"> • This stage consumes the most time • Official procedure and timelines control process • Some states may have environmental review procedures to follow • The decision-making body(s) is/are identified • Opponents and proponents are identified as public positions are stated • Applicant's investment is significant as the application process evolves 	<p>Since the official process has begun, the process manager must be cognizant of the legal timelines. Despite these constraints, a process manager can be used very effectively to supplement the legal procedures with consensus based techniques. Most states' laws have provisions that allow for the legal process to include assisted negotiations. At this stage a process manager should take a very active role in the negotiation.</p>	<p>The incentive rises considerably as the parties move through this stage. As the official process progresses, parties invest more time and resources into the proposal or the opposition. In addition, they may start to realize that the official process is not well equipped to address and meet all of their needs and interests.</p>	<p>The opportunities for success become narrower, but are still considerable. The fact that parties become further entrenched in positions, invest more resources, and behave in ways that damage relationships makes the neutral's task slightly more difficult. If the neutral gets involved earlier, the chances of success are greater. If the neutral is not involved until the end of the official process, his/her ability to assist the parties can be curtailed.</p>
Post Decision	<p>At least one decision-making body has made a final decision on the application.</p> <ul style="list-style-type: none"> • Project is approved or denied in part/in full • Investment by all parties is considerable • Opponents are now required to invest considerable resources 	<p>After the official process produces a decision, the process manager is once again free to work with the parties on forming a process to meet their needs. However, the parties and the neutral should be cognizant of how the statute of limitations could impact any legal appeal of the local decision.</p>	<p>Generally, incentive to reach an agreement after the decision is higher than before the decision. If the decision is unsatisfactory to all parties, the parties can use a neutral to help them find a suitable alternative. If one party is less satisfied than the other, they may convince the prevailing party to negotiate on some of the issues in exchange for not filing a legal appeal.</p>	<p>A final decision tends to limit the subject matter in a negotiation to the particular decision that was issued. While the areas for agreement may be somewhat narrower, the decision can help to clarify the issues and improve the likelihood of reaching an agreement.</p>
Legal or Admin. Appeal	<p>A legal challenge to a local decision has been filed in court</p> <ul style="list-style-type: none"> • Judge may strongly suggest mediation • Parties may have the option to choose a court-appointed neutral or chose one from the private sector. • In most cases a judge will suspend the proceedings while the parties try to reach an agreement. 	<p>The process manager will work with the parties who have legal standing to help them reach agreement on the issues identified in the court papers. The process manager is likely to rely on a variety of techniques such as caucusing and one-text agreement approach to identify areas of agreement. The process manager will primarily use techniques of a mediator to help the parties reach agreement.</p>	<p>Now that the parties are in court, faced with paying for lawyers and consultants, and the possibility of an unfavorable decision incentive to negotiate through mediation is highest.</p>	<p>Opportunities for agreement at this stage are possible within the context of the legal challenges. The likelihood of success at this late stage is somewhat limited. At this point, a neutral's ability to help the parties has been impacted by the violence that usually occurs in the traditional decision-making process. Once the parties have reached this stage they have damaged their relationships, undermined the trust that is important to collaborative approaches, and they are strongly committed to their positions.</p>

²⁵ Prepared by Sean F. Nolon, Director, Land Use Law Center, Pace University School of Law.

²⁶ This chart adopts a very broad view of the land use process. Accordingly, the process begins in the "Community Planning" stage long before the official approval process is implicated and ends with the legal or administrative appeal stage when a local decision is challenged in a court of law.

²⁷ This column describes when a neutral should provide facilitation services or mediation services. As a general trend, the neutral's ability to serve as a facilitator diminishes as the process progresses and the need to serve as a mediator increases as the decision-making process progresses. As explained earlier in this report, a process manager may be an impartial third party such as a facilitator or mediator, or it might also be a professional planner, planning board member, or other official or nongovernmental person with the necessary credibility, legitimacy, and capacity to play this role.

²⁸ This column shows how the incentive to negotiate is low in the beginning stages and increase as the process progresses. This is mainly due to the fact that parties have not given adequate consideration to the limitations of the traditional process and are hopeful that they can use it to meet their highest goals.

²⁹ This column shows that the likelihood of success is great in the beginning stages of the process because the options for building agreement are greater. As the process progresses, the range of solutions diminishes and the neutral's ability to help the parties become more limited. While there is always room for agreement that can be facilitated by the involvement of a neutral, the ability of that agreement to meet as many interests as possible diminishes in later stages of the process.



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