

CONSENSUS BUILDING INSTITUTE

**Study on the
Mediation of Land Use Disputes**

List of Key Findings

**Prepared for the
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Introduction

About the Study

Throughout 1995-97, the Consensus Building Institute (CBI) conducted an unprecedented qualitative and quantitative evaluation (to analyze and assess efforts to mediate land use disputes) of the use of assisted negotiation in local land use disputes throughout the United States over the past 10 years. CBI staff undertook confidential interviews with approximately 400 key participants in 100 cases. The cases covered six types of land use disputes: natural resource management (24); infrastructure design (20); development and growth (18); comprehensive plan (16); facility siting (16); environmental cleanup (6). (see table #1)

The cases were geographically dispersed throughout the United States. We clustered the cases into 5 regions: Pacific Coast (29); Rocky Mountains (15); South (13); Midwest (11); and North (32). (see map)

Interviewee responses were analyzed according to their profession (owner/developer, local official, regional official, tribal official, activist, etc.) and their role (regulator, proponent, opponent, mediator) in the mediation.

With this information, CBI will be able to provide public officials with insight into what they are likely to encounter when and if they use assisted negotiation to resolve various types of land use disputes.

Key Findings in Short:

- Government officials tend to initiate mediation.
- Respondents in all four categories (project developers, environmentalists, regulators, and mediators) all viewed the mediation process quite positively.
- Mediation serves all parties' interests.
- Even if cases are not settled, mediation allows significant progress to be made in resolving conflicts.
- Mediated settlements are on the whole creative, stable, and sufficiently implemented.
- Professional neutrals play an important role.
- Negotiation costs less and takes less time.

Summary of Key Findings

- Most cases were referred to mediation from other processes (71%).
- Many mediation cases are initiated because of dissatisfaction with the traditional system (cost and time required, lack of communication, poor planning, poor outcomes, and cynical view of government).
- Most mediated cases were initiated by government officials, especially at the state level (78%).
- The most common type of obstacles encountered in the mediation process are tension among stakeholders (52%), especially distrust among parties and entrenched positions. Technical planning issues are also relatively common.
- Mediators have many strategies to overcome the mentioned obstacles.
- Most interviewees have a positive view of mediation (86%). Interviewees from comprehensive planning and environmental cleanup cases, especially, had a favorable view of mediation. Government officials view mediation more favorably than opponents and proponents.
- The majority of interviewees from unresolved cases (64%) thought mediation helped make significant progress, including reaching minor agreements, improved relations, clarification of issues and interests, and expanded knowledge.
- Most interviewees thought their settlement served both their own (92%) as well as all parties' (86%) interests.
- Most interviewees thought the mediator was important (85%).
- Most interviewees thought they could not have reached agreement without the mediator (80%).
- Most interviewees thought the mediation process cost less and took less time than alternative processes (81%).
- Most interviewees thought their settlement was well or sufficiently implemented (75%).
- Most interviewees thought their settlement was more stable than what they could have achieved through other processes (69%) - almost a quarter of them didn't know.
- Most interviewees thought their settlement was creative (88%).
- The findings indicated above hold true for all four categories of survey respondents, and all six types of cases with only slight variations in the responses by region.

Mediation

71% of respondents stated their case was referred to mediation from another process. (see chart #1)

When asked the reason for pursuing mediation, interviewees mentioned being dissatisfied with the traditional system. The most commonly stated weaknesses of the current (traditional) system are:

- Cost and time of litigation
- Lack of communication in public involvement activities (ineffective traditional public involvement activities)
- Plans that collect dust (community master plans are not known to the public)
- Approved decisions that are poor outcomes (rigid and narrow decisions)
- Disheartened public (cynical view of government by public)

Prior to the mediation process, 57% of respondents stated they had a favorable view of mediation compared to other options they had to pursue their interests. 29% didn't know and only 3% had an unfavorable view. (see chart #2)

Local officials (72%), federal officials (76%), and mediators (72%), in particular, had favorable views of mediation. (see chart #3)

Most respondents in all roles, land use types, and regions viewed mediation favorably. Especially respondents in infrastructure design (64% in settled cases, 70% in unsettled cases) viewed mediation favorably. (see chart #4 & 5)

Of the respondents that answered the question, 69% stated no attorney was involved in their case and 31% did. (see chart #6)

The Process

Initiators

78% of the mediated cases were initiated by government officials at different levels (although especially at the state government level). (see chart #7) Even in disputes among private parties, public officials often suggested to use assisted negotiation when they got involved through regulatory process. Our interviews suggest that these government officials had learned assisted negotiation through their hands-on experiences, seminars, and initiatives by other government departments.

Obstacles

In all assisted negotiations, the participants faced difficult obstacles. Three broad categories (and 18 sub-categories) of obstacles were identified to achieving a good settlement using negotiation: tension among stakeholders; procedural obstacles; and issue and substance obstacles. 52% of respondents mentioned tension among stakeholders as their primary obstacle, including distrust among parties (15%) and entrenched positions (12%). 28% mentioned procedural obstacles and 20% mentioned issue and substance obstacles, including technical planning issues (11%). (see chart #8)

It was noted that by far the most common obstacle was the intense distrust of fellow participants generated by previous litigation or earlier attempts to resolve the dispute politically.

Role of Mediator in Overcoming Obstacles

There are many strategies that mediators used to overcome the identified obstacles. A summary of these strategies include:

Distrust Among the Parties:

- Have the neutral represent the process to the press.
- Focus the parties on common goals, not past history.
- Have informal times such as coffee breaks or a group lunch to allow participants to get to know each other away from the negotiating table.

Difficult Personalities:

- Meet one on one with participants.
- Establish ground rules to ensure common courtesy and respect.
- Use role playing exercises to teach more effective communication.

Value Conflicts:

- Recognize the credibility of different views.
- Hold educational workshops.
- Use maps or other graphics to outline concerns in a value neutral format.

Lack of Experience with Consensus Building:

- Explain why the parties are gathered and the roles of the neutrals and other participants.
- Provide training to all participants.
- Present case studies of similar processes that have dealt with similar issues.

Technical Issues:

- Explain all technical terms and acronyms.
- Focus on building a database and forecasts that parties agree on.
- Consider the use of one set of outside experts to review data or collect data for disadvantaged participants.
- Break complex issues into smaller parts.
- Consider options over different time frames such as short-term, medium-term, or long-term.

Perception of Strong BATNA:

- Get parties to imagine their worse case scenario.
- Suggest that the parties consider the long-term benefits and long-term relationships at stake.
- Educate stakeholders about other sources of power that might change other parties' BATNA.

Evaluation of the Process

Most survey participants, not including the mediators, had a positive view of assisted negotiation: 86% of participants viewed the process either very favorably (46%) or favorably (40%). (see chart #9)

Even respondents from the cases that were not settled, 31% of those respondents viewed the process as either very favorable (12%) or favorable (19%). (see chart #10)

100% of respondents from environmental cleanup cases viewed their mediation experience as “favorable” (55% favorable and 45% very favorable). Respondents from comprehensive planning cases as well tended to evaluate their experience highly favorable. 91% of these respondents viewed the process as very favorable (66%) or favorable (25%). Stakeholders in development and growth disputes tended to evaluate their experience a little more negatively. (see chart #11)

There were a few instances in which the parties felt that assisted negotiation did not produce a good outcome, certainly not one that justified the time and effort involved. For the most part, disputes involving growth and development generated less positive reactions from developers and property owners. Some project proponents see assisted negotiation as a burdensome step in the regulatory process that increases costs.

Government officials were more inclined to view the process favorably. We found that 94% of them viewed the process favorably (62% very favorable, 32% favorable) as compared to proponents or opponents 82% of whom viewed the process favorably. (see chart #12)

A higher number of tribal officials (100%); elected rep. (95%); county officials (92%); state officials (92%); and federal officials (90%) viewed the process favorably. Abutters had a relatively high unfavorable rating of the process (44%). (see chart #13)

Assisted negotiation received more very favorable reviews from the interviewees in the Pacific Coast regions (59%). This region also has a higher rate of settled cases (67%). (see chart #14)

The Settlement

Settlement

Nearly two-thirds (61%) of the respondents stated that their disputes were settled (7% actually stated that their case was settled but that litigation still ensued). (see chart #15) Even in unsettled cases (39%), participants thought that the dialogue helped. Of the participants who thought their dispute remained unresolved, 64% thought that the assisted negotiation process had helped the parties make significant progress toward resolution of the conflict. (see chart #16)

The participants stressed that even when a complete settlement wasn't achieved, some issues were resolved, relationships were enhanced, political and interpersonal attacks were avoided, public confidence in the working of government was increased, and useful information was gathered that made it easier to define and understand the questions that were unresolved.

In many cases, responses were inconsistent among stakeholders. Mediators and government officials tended to consider that a dispute was settled more often than other parties.

78% of respondents from comprehensive planning cases stated their case was settled, which is by far the highest success rate for any type of land use conflicts examined by this study (even though 3% stated that litigation still ensued). Only 40% of respondents from environmental cleanup cases stated their case was settled, although 56% did state that significant progress was made. Similarly, although only 55% of respondents from natural resource cases stated their case was settled, 31% stated that their non-settled cases made significant progress. 65% of respondents from infrastructure design cases stated their case was settled. 14%, however, stated that litigation still ensued after the settlement. (see chart # 17)

Interests Served

92% of respondents whose cases were settled strongly agreed (49%) or agreed (43%) that their own interests were well served by the settlement their group had reached. (see chart #18)

86% of respondents whose cases were settled agreed (51%) or strongly agreed (35%) that, in general, all parties' interests were met by the settlement. (see chart #19)

Progress Attained

We asked the respondents from the unsettled cases that had made significant progress to elaborate on what progress they thought was actually made. We analyzed their responses and identified four major benefits (see chart #20):

- 33% mentioned minor agreements - Even in difficult situations, informal and partial agreements were reached. Minor agreements were used as a basis for starting future negotiations.
- 23% mentioned improved relationships -- One of the neutral's tasks is to restore relationships and bring stakeholders to the table. Even if a final agreement could not be reached, parties become more willing to respect their differences.
- 22% mentioned clarification of issue and interests -- Even if the negotiation did not bear fruit, the process helped participants understand what the other side really wants and clarified issues that could be addressed in other occasions.
- 12% mentioned expanded knowledge -- Through joint fact finding, stakeholders shared technical or scientific information needed to resolve a dispute. This process helped participants avoid advocacy science. Even if a case could not be settled, a shared understanding of the problems was built up over the negotiations.

23% of respondents of unresolved cases with significant progress reported that relations were improved as a result of their participation in a mediation process. In a selective number of cases, improved relationships allowed the parties to (1) avoid misunderstandings because communication had been enhanced, (2) rework their agreements at a later time when new information or new circumstances arose, (3) avoid subsequent disputes or resolve them more easily because the parties had a new model of how to work things out and a higher level of trust.

Implementing the Settlement

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

- 77% said they reached an agreement regarding how to implement and/or monitor their settlement. (see chart #21)
- 75% thought their settlement was implemented very well (41%) or sufficiently (34%). (see chart #22)
- 69% thought their settlement was more stable than what they probably could have reached through another process such as litigation or administrative appeal. 23% didn't know. (see chart #23)
- 88% stated that their settlement was creative (it produced the best possible outcome for all sides given what they know now). 12% did not think it was creative. (see chart #24)

Importance of the Mediator

85% of respondents thought the mediator was crucial (60%) or important (25%) in achieving agreement among the parties. Only 4% thought the mediator was not important. (see chart #25)

91% of respondents in settled cases thought the mediator was crucial (67%) or important (24%). Remarkably, 75% of respondents from unsettled cases thought the mediator was crucial (49%) or important (26%) as well. (see chart #26)

In general, participants thought the facilitators and mediators made an important contribution to the quality of the dialogue and the effectiveness of the settlements that emerged. In fact, 80% of respondents thought they could not have reached an agreement without the assistance of a neutral professional. (see chart #27)

Time and Cost of Mediation

81% of respondents that answered this question thought that their negotiation process consumed less time and money than they thought would have been the case had they pursued litigation or administrative appeals. Only 5% thought mediation cost more and took more time. (see chart #28)

91% of respondents thought the process cost less and 85% thought the process took less time. (see chart #29)

Only 25% of regional officials thought the process took less time and cost less. 50% of them thought the process took more time and cost more. Another 25% thought it cost more and took less time. (see chart #30)

100% of respondents from environmental cleanup disputes thought the mediation process took less time and cost less compared to other alternatives. 94% of respondents from facility siting disputes thought the same as did 90% of respondents from development and growth, 82% from comprehensive planning, 80% from natural resource management, and 64% from infrastructure design disputes. (see chart #31)

In general, participants thought that assisted negotiation took less time and cost less than confrontational strategies. However, fewer stakeholders in the infrastructure design disputes shared this view. One possible explanation is that most of the infrastructure projects examined had to be taken through other public involvement processes and were under tight budgets. These constraints might have made assisted negotiation appear less efficient in the minds of some participants.

Land Use Disputes and Mediation

Mediation should be used when:

- the dispute is local
- importance of outcome to each participant is high
- issues are clear and specific
- relevant laws are flexible enough to permit a negotiated settlement
- the dispute is between administrative bodies/multi-jurisdictional disputes
- it is started at an early stage of conflict, before going to public hearings
- people do not have sufficient knowledge
- actual decision makers are willing to participate
- there is mistrust
- there is no inherent danger to life/safety

Mediation should not be used when:

- precedent setting is important
- participants do not recognize other side's rights
- participants have reached a full stalemate
- payment for the process is only coming from one side
- the process is used as a means to delay real action or create an illusion that something is being done

About the Consensus Building Institute

The Consensus Building Institute (CBI) is a not-for-profit organization created by leading practitioners and theory builders in the field of dispute resolution. CBI serves public agencies and private sector clients worldwide by providing dispute resolution services, training in negotiation and consensus building techniques, and evaluative research. Since 1993, CBI has worked in 11 countries and 28 states to provide consensus building advice and assistance to more than 100 agencies, corporations, and associations. We have played a key role in helping to build the intellectual capital in the dispute resolution field through our pioneering work on global environmental treaty-making, documentation of "best practices" in the dispute resolution field, joint training in negotiation, design of simulations and other advanced training techniques, and the mediation of multi-party, multi-issue public disputes. CBI is associated with the Public Disputes Program of the Program on Negotiation at Harvard Law School and the Environmental Policy Group at the Massachusetts Institute of Technology.

For more information on the Mediating Land Use Disputes Project, please see our website (address below), or contact CBI Senior Associate, Mieke van der Wansem, tel: 617-492-1414, ext. 19, or email: mieke@igc.org.

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