

# Conflict Resolution Techniques for the Land Use Dispute Mediator

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## I. Introduction

Land Use matters create the most universal, contentious and difficult types of disputes. These disputes have the same basic problems and components in most regions and countries. Such controversies sometimes arise due to public objections or concerns concerning the operation or clean-up of an existing or past use. These types of matters often begin with involvement of local municipal officials, and later proceed to court if an acceptable resolution is not reached. In controversies involving new proposals, whether for a hydro-electric dam, manufacturing plant, call center, homeless shelter, mobile phone tower or nuclear reactor, disputes almost always arise concerning whether the proposed use should be approved, modified or rejected completely. Local or regional public officials will be asked, like Solomon, to weigh the proposal in light of competing issues such as economic development, environmental protection, long term land planning, and the expressed interests of local residents.

Companies (or individuals) who are owners of existing sites or applicants for new uses are often greeted with pitchforks and torches, and face dealing with elected and appointed officials who are often torn between economic development, sound land use planning, and the desires of their constituents.

Mediating such matters is a relatively new field, and involves particularized problems. This paper identifies the nature of such disputes, points out a number of ways in which they are different from many other types of mediation tasks, and suggests some particularly important tools for mediating Land Use matters.

## II. Anatomy of a Land Use Dispute

Land Use disputes typically begin in one of several ways. If the proposal is by a non-governmental entity, either an application for approval is filed with the appropriate governmental authority, or the proponent of the project begins to meet with members of the public. Sophisticated proponents may hire a public relations firm to begin a “quiet” campaign long before the project is unveiled.

If the project is a public one, such as a road, dam, or prison, the government may simply announce the chosen location, or may hold public hearings in advance of announcing a final

location. Whether public or private, disputes typically arise as soon as a location is proposed or announced. Major areas of dispute often include objections regarding traffic, environmental impact, aesthetics, safety, infrastructure capacity, and overall change in character of the area.

Those in opposition to a project may form a civic group centered on their opposition, begin a media campaign, and meet with elected representatives. Proponents may do the same. The opposing sides may meet, although in very contentious matters compromises are not common. By the time such matters get to their first “official” public hearing, the sides are dug in, hours of testimony result, and the process results, after what may be many hearings, in a win for one side and a loss for the other. Litigation may then commence.

### III. How are Land Use Disputes Different?

Land Use disputes typically have an extraordinarily high emotional quotient. Almost nothing riles people up more than what they perceive to be a threat to their property. Unlike many “business” disputes or private tort claims, almost every Land Use dispute requires the balancing of public and private interests. For example, communities desire mobile phone service, but few people want a mobile phone tower anywhere near them.

Perhaps the biggest difference between Land Use disputes and many other types of disputes is in the critical task of identification of the parties. By their nature, land use matters defy clear identification of interested parties. Attempting to define such parties gives rise to numerous questions, including:

- Are residents within a certain area “interested parties,” or, as the common term is used, “stakeholders?”
- How about business owners? Renters?
- Should adjoining owners be given a greater say than those farther away, even though such an owner might have a different position than his neighbors, and could sell his property the next day?
- What about those who chose not to participate in negotiations? Can they later challenge the result?
- Can those who participated challenge it as well?
- Who can speak for, and potentially enter into agreements for the identified stakeholders?
- Are such agreements binding if litigation results?

- How can such agreements be translated into public action by the legislative or appointed body charged with approving or rejecting the proposal?
- Will such bodies be found to have impermissibly ceded their authority in such matters?

Land Use disputes also involve issues that defy simple quantification or consensus. They can include objections or issues regarding:

- Aesthetics of the project
- Neighborhood change
- Cultural values and choices
- Environmental considerations
- “Quality of Life”
- Appropriate use of public resources
- Appropriate distribution of burdens/benefits as between local/regional/national needs
- “Good” development v. “Bad” development
- Traffic impacts
- School impacts
- Economic competition or lack thereof

Land Use disputes also often include participation from various special interest groups that may advocate on behalf of issues such as:

- Endangered or threatened fauna and/or flora
- Groundwater recharge
- Flooding
- Wetland preservation

- Noise pollution
- Air quality
- Water quality
- Public transportation
- Wastewater discharge
- Historical preservation
- Open space preservation
- Trail system establishment

#### IV. **Basic Tasks in Land Use Mediation**

Given all the issues raised above, what's a poor Land Use mediator to do? In Land Use disputes, mediation is often, although not exclusively, suggested initially by the municipality charged with decision-making authority over the proposal. Typically, it is the professional planning staff, often besieged by both sides in the controversy, which turns to mediation as a possible resolution. Land Use mediation is often undertaken "in house" by the corporate participant in such matters. Either the attorney for the applicant becomes a type of mediator, or the corporation brings one in.

Professor Lawrence Susskind, in his report with the Consensus Building Institute, Using Assisted Negotiation to Settle Land Use Disputes, (Lincoln Institute of Land Policy, 1999) identifies the main tasks of the mediator of a land use dispute as follows:

1. Identifying stakeholders
2. Bringing them to the table
3. Managing meetings
4. Meeting with the press
5. Conducting shuttle diplomacy
6. Preparing a draft agreement

Other than “identifying stakeholders,” which is a somewhat unique challenge, shared perhaps only by environmental litigation in its complexity, the most difficult role of the successful Land Use mediator is in helping the parties identify the true issues. While it will not come as a shock to most attorneys to hear that people do not always say what they mean, this seems to be especially true in Land Use matters.

The successful mediator in this area must have sufficient experience to read between the lines.

**What you hear:**

This building is historically valuable and should be preserved.

**What it might really mean:**

I am terrified about what will replace it.

**What you hear:**

This proposed building is ugly and doesn't fit the neighborhood.

**What it might really mean:**

It will drive down my property values.

**What you hear:**

Townhouses will drive down my property values.

**What it might really mean:**

The people who might live there won't look like me.

**What you hear:**

This proposal is too big for the site.

**What it might really mean:**

I'm worried about traffic.

Getting to the real issues – as with any mediation – is critical if there is to be any chance of a negotiated resolution.

## V. Tools in the Toolbox

### 1. True Neutrality

To repeat: very little gets people as riled up as a perceived threat to their property. Are you a local called in to mediate? Can you mediate with absolute impartiality a dispute that may affect your own community?

### 2. Perceived Neutrality

While you may in truth be impartial, if one or both of the parties believe you to be biased, you will not be effective.

### 3. Listen

How do you figure out what the “real” issues are, so that you can begin to explore whether a negotiated resolution is possible? Provide enough time to let the sides talk to you. Ask questions. Have enough substantive experience with Land Use matters to be able to read the tea leaves. Land Use mediations are time and meeting intensive.

### 4. Get to Know the Property and the Neighborhood

The old saying about real estate lawyers is also true for Land Use mediators: if your shoes aren't muddy, you are on your way to committing malpractice. Visit the property. Walk every inch of it. Walk the adjoining properties if you can get permission. Drive all minor and major access and collector roads.

#### 5. Know the History of the Property

Assemble a history of the use of the parcel. Be familiar with its historic use and current use. Does it currently provide employment for a large number of people? Is a current or prior owner hated by the neighbors for some reason unrelated to the property?

#### 6. Keep the Sides Apart

By the time a mediator is called in for a Land Use matter, it is almost a certainty that there have been meetings featuring pitchforks and torches. Shouting has probably occurred. Both sides have probably made incendiary comments to the press, thereby assuring that the press will write more stories, providing more opportunities for all sides to be quoted saying unpleasant things about each other.

Shuttle diplomacy is key. While an initial meeting with all of the parties in the same room is the ideal way to explain the rules and begin to build necessary trust in the mediator's neutrality, such meetings must be undertaken with care, and may be counterproductive if tempers are already frayed.

#### 7. Impose a Gag Rule

As part of an agreed set of ground rules, an agreement that the parties will not discuss the proposed Land Use matter, or the mediation, with the press is critical. Nothing will defeat a possible negotiated solution quicker than an ill-timed quote in the paper, be it the New York Times or the local rag.

## 8. Prepare for Unrepresented Parties

It is common for both the community members and interest groups to be unrepresented in Land Use Disputes. It is also possible that the project proponent may not have or bring counsel, or may be “represented” by an engineer or architect.

## 9. Get it in Writing

If an agreement is reached, reduce it to writing. It is in crafting the agreement that you will complete the negotiations, or discover that the deal the parties thought they had is no deal at all.

## 10. Remember the Government

No Land Use matter can ultimately be “settled” without the participation of the zoning and subdivision authorities. While the planning staff may be your initial contact in the matter, the ultimate “say” in whether a negotiated solution is implemented is in the hands of the elected or appointed officials charged with approving the project. If they are elected, the parties may want to involve such officials in the mediation process.

## 11. Expect to be Surprised

I have been told that mobile phone towers are “definitely” used for mind control, and that children under age six will “certainly” perpetrate graffiti in a residential neighborhood if a school is approved. Be prepared for high tempers and irrational behavior.