Current Issues in Land Use Mediation: Pursuing Mediation *To Do, or Not to Do*

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CURRENT ISSUES IN LAND USE MEDIATION

By

Victor P. Filippini, Jr.*

I. Pursuing Mediation: To Do, or Not to Do

For any type of litigation, there is always wisdom to assess whether mediation offers a reasonable chance for a prompt resolution of the dispute. When disputes revolve around *principal* (money) rather than *principle* (zoning policies), mediation often can be quite effective. But negotiating principles is not often fruitful, as principles often are less easily compromised. Moreover, even if a zoning authority evaluates its chance of success in a zoning lawsuit to be low, there may be a benefit for the zoning authority to let the litigation play out so that it can (i) demonstrate to its constituents that it "fought the good fight," and (ii) blame the ultimate outcome on the courts.

Nevertheless, there are potential benefits to mediating a land use lawsuit. Should the parties succeed in reaching a resolution, it can provide the parties with certainty regarding what is to develop. The mediation agreement can address other issues beyond what is at issue

in the lawsuit. Thus, mediation has the advantage of avoiding future litigation over other development approvals that may be needed.

On the other hand, a resolution through mediation might be criticized as a "backroom" deal – especially if there were opponents to a development that appeared at the zoning hearing but did not participate in the litigation. Because mediation of land use disputes often do involve fundamental policy matters, sunshine laws impede the ability to have all decision-makers present during a negotiation. This does not undermine a mediation, but it may prolong it.

Other issues can complicate a mediation effort. For example, a mediated result still must abide procedural due process requirements in formalizing a result. If care is not taken, a mediated result can suffer from fatal procedural defects. *See Martin v. City of Greenville*, 54 Ill. App. 3d 42 (5th Dist. 1977). Moreover, because mediation of a lawsuit rarely brings all of the parties to the table, there will remain other "chairs" for opponents to throw in the way of any outcome.

In some respects, because of the myriad issues that are part of a development, mediation may be a very clumsy tool for achieving a successful resolution. On the other hand, because zoning can properly be viewed as a formalized negotiating process for private property and public interests, *see* Richard F. Babcock, *The Zoning Game* at 8 (Univ. of

Wisc. Press 1966), mediation could serve as an ideal tool for resolving disputes and bringing clarity to issues that are often muted in the spotlight of a public process.

II. Mediation Strategies

So when confronted with the question of whether pursuing mediation is a good idea or a bad idea, the answer is a resounding "yes" – depending on the issues and the circumstances surrounding the mediation.

Perhaps as important as anything is selecting a mediator who understands the land use process and has an appreciation of the challenges facing both developers and local zoning authorities. A trained land use-focused mediator can not only help the parties identify the critical issues, but the mediator can prod the parties to look at other ways to effect the outcome pursued in the litigation.

For the parties, a key step in pursuing a successful mediation is to identify where the bottom lines are. A developer may have as its chief concern achieving a financial outcome for the property. This may be achieved by maximizing units, reducing costs, creatively financing components of the development, or obtaining incentives that might be outgrowths of the development. Although some of these avenues are not

worth pursuing in the context of a contested zoning hearing, they may be useful to introduce as part of a mediation.

In contrast, a local zoning authority may need to preserve certain zoning standards; those standards could be focused on the parcel in question, or such standards may be less relevant for the proposed development than in the context of setting a precedent. Alternatively, the outcome at the local zoning hearing may have been heavily influenced by a group of activated constituents – and those constituent voices may be quieted by other taxpayers when the locality is faced with potentially expensive litigation. Whatever the driving forces, they should be identified for purposes of pursuing a successful resolution through mediation.

Importantly, the mediation is far less constrained than the local zoning hearing process or litigation. When a zoning petition is filed, local zoning authorities are in a reactive position and must consider the proposal that a developer chooses to pursue or to litigate. *See* Filippini, *LULU* at 23. Likewise, the parameters of any lawsuit are likewise formed by the scope of the zoning hearing itself.

Because mediation is less constrained, the parties have the opportunity to think outside the box. Non-zoning elements of the development process can be introduced. Solutions can be found in more places, such as providing financial incentives or restructuring the uses or

density on a parcel (or even perhaps offering development opportunities for another parcel that a developer might control). These are all matters that can be effectively raised in a mediation that would not have been appropriate in the initial zoning hearing or in the litigation itself.

Here again, a skilled land use mediator can be invaluable. Understanding the tools that can be employed to effect a development outcome cannot be gainsaid. Moreover, if the mediator has experience on both the regulator and developer sides of land use matters, such mediator can be help both sides of a dispute understand the pros and cons (and even the ins-and-outs) of different development and economic development tools.

Although it is customary for any mediation to conclude with a written agreement, it is even more significant in a land use mediation. Not only must the various elements of the negotiation be memorialized, but the parties and mediator will need to navigate the required procedural steps to appropriately approve the outcome, which can often be as significant as the substantive elements. In many respects, a mediation agreement in a land use dispute will have many similarities to an annexation agreement. *See* D. Mandelker, D.C. Netsch, P. Salsich, J. Wegner, and J. Griffin, *State and Local Government in a Federal System*, at 100-101 (7th Ed. 2010).

To be sure, to complete a successful land use mediation may take longer than most mediations. It may require the parties and the mediator to "roll up their sleeves" to effect a successful outcome. But the mediation process will almost certainly take less time and cost less money than litigating to the bitter end. Moreover, by having the parties act through the mediation agreement, the certainty of a final outcome should benefit both the zoning authority and the developer.