

Pace University
DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

10-15-2008

Bill Would Encourage Effective Dispute Resolution


John R. Nolon

Elisabeth Haub School of Law at Pace University, jnolon@law.pace.edu

Jessica A. Bacher

Elisabeth Haub School of Law at Pace University, jbacher@law.pace.edu

Follow this and additional works at: <http://digitalcommons.pace.edu/lawfaculty>

 Part of the [Dispute Resolution and Arbitration Commons](#), [Environmental Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

John R. Nolon & Jessica A. Bacher, Bill Would Encourage Effective Dispute Resolution, N.Y. L.J., Oct. 15, 2008, at 5, <http://digitalcommons.pace.edu/lawfaculty/663/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

**Land-Use Mediation:
Bill Would Encourage Effective Dispute Resolution**

Written for Publication in the New York Law Journal
October 15, 2008

John R. Nolon and Jessica A. Bacher

[John Nolon is a Professor at Pace University School of Law, Counsel to its Land Use Law Center, and director of its Kheel Center on the Resolution of Environmental Interest Disputes. Jessica Bacher is an Adjunct Professor at Pace University School of Law, Senior Managing Attorney for the Land Use Law Center, and Director of its Real Estate Law Institute.]

Abstract: Many of the processes involved in traditional local land use review procedures involve two or more adversarial parties arguing their position with little to no consideration for the other party's interest, and no regard for mutually beneficial outcome. This article describes a proposed New York law that would promote the use of mediation to supplement the traditional process. The article discusses studies geared towards testing the effectiveness of mediation, gives a review of out of state mediation legislation, as discusses corresponding court decisions. Finally, the article concludes with a review of the traditional roles of lawyers in the process, and identifies how mediation legislation will affect the role of lawyers.

Land Use Mediation Bill Passes the Senate

Since 2001, the New York State legislature has considered adopting a land use mediation bill. The bill has passed the Senate four times, including S. 3232 on May 9, 2008. This legislation would add section 99-v to the General Municipal Law and would apply to all towns, villages, and cities outside New York City. The Senate bill authorizes the use of mediation to supplement, not replace, land use review procedures the results of which would not bind or limit the discretion of local boards that adopt zoning, approve subdivision and site plan applications, and issue special use permits, but not variances.

The bill was introduced by Senators Winner, Rath, Stachowski, and Valesky at the request of the Legislative Commission on Rural Resources. The Introducer's Memorandum in Support of S. 3232 notes that the bill builds on the success of the New York State Community Dispute Resolution Centers Program within the Office of Court Administration and a successful land use mediation pilot project conducted in the Hudson River Valley. It is aimed at the soaring legal fees associated with complex land use litigation and the congested court

dockets. The Memorandum references with favor legislation adopted in other states permitting mediation to resolve land use matters.

The local land use approval process for projects of any size often costs the applicant significant sums of money, involves only indirect contacts among interested parties, and provides little opportunity to develop creative, win-win solutions. For most significant development proposals, the process is lengthy, inflexible, and frustrating. The outcomes are unpredictable and relationships among those involved are more often damaged than strengthened. Nonetheless, during the journey of a development proposal or rezoning petition through the local approval process, critical interests of many stakeholders in the matter are expressed, heard, considered, and disposed of via a decision rendered by a voluntary board of local citizens. The legal procedures for these decisions are designed to ensure due process, not to result in the best possible resolution for the parties and the community.

Although thought of as objective adjudications by administrative bodies, land use decisions, in fact, are extended and awkward negotiations that resolve, if not satisfy, each participant's interests. When land use decisions are seen in this light, efforts to make them more productive, satisfying, and efficient negotiations seem worth exploring. Legislation, like S. 3232 that encourages and guides the use of more effective deliberations is critical, particularly with regard to high-stakes development proposals.

Mediated processes not only avoid costly future litigation, but also make the administrative decision-making process more efficient and beneficial. Local boards will still be required to make independent, fact-based decisions, but where they are informed by an agreement of the principal contestants - one based on clear facts contained in the agreement - they are likely to be grateful for the accompanying decline in tensions and to carefully consider it in formulating their own determination.

Recent efforts to use mediation methods to improve results in the local land use review and approval process are promising. Mediation has been used in recent years as a method of building consensus regarding rezonings and project approvals. It has been encouraged by legislation in other states and sanctioned by New York courts.

Studies and Pilot Projects

The Consensus Building Institute and the Lincoln Institute of Land Policy undertook a study in 1999 of mediated land use disputes.¹ The study, based on interviews with participants in 100 cases in which a professional neutral assisted in the resolution of a land use dispute indicated that 85% of participants had a

¹ Mediating Land Use Disputes: Pros and Cons, L. Susskind, M. van der Wansem, & A Ciccarelli, Lincoln Institute of Land Policy (2000).

positive view of assisted negotiation. These conclusions are borne out in New York in Farm Bureau reports of favorable results under the authorized agricultural mediation program, its use by the Adirondack Park Agency in a recent Tupper Lake controversy, positive results resolving neighborhood disputes over land use by the Community Dispute Resolution Centers Program, and by the adoption of land use dispute mediation as a priority policy of the American Planning Association.

The Land Use Law Center conducted an experiment in the Hudson River Valley testing the willingness of parties to participate in the mediation of controversial land use proposals and its effectiveness. In the study, applicants for planning board approval of projects participated in a process that paralleled planning board deliberations and involved all relevant stakeholders. Participants were invited to form a “concept committee” to determine whether, with the assistance of a trained neutral, they could reshape the developer’s approval to better meet the interests of the community, while still satisfying the developer’s business objectives.

While mediation can be used in many situations, our concept committee experiment revealed a number of factors that increase the possibility of reaching agreement:

- The municipal decision-making body has endorsed the process;
- All the interested parties are willing and able to negotiate in good faith;
- The parties are willing to try to achieve a consensus agreement;
- The process is as inclusive as possible;
- A deadline for action exists; and
- Funding is shared among the participants.

In the opinion of the stakeholders, the concept committee experiment was a success. In interviews following their participation, they reported that, even where full agreement was not reached, they thought the process and the result were improved. The participants stated that the traditional land use decision-making process can seem complex and confusing and (particularly with controversial projects) seldom yields results that truly meet the interests of any party. Concept committees, like all mediated processes, are more understandable and often more productive because the parties themselves are involved in creating the ground rules for the decision.

Legislation in Other States

Land use mediation of various types is authorized by statute in about two dozen states. Mediation may be authorized for very specific issues such as regional impact development projects, border disputes between local governments, or decisions on land use applications. The point at which mediation is encouraged or required varies under these laws from early in the development approval process until after a project decision is made and litigation

has been initiated. At least twelve states² offer some type of mediation or dispute resolution service to assist parties who mediate in the land use decision-making context.

Seven states have statutes that recognize and define a mediation procedure for land use disputes between a private individual and a government body.³ These procedures are voluntary and arise in the context of land use permit applications. The greatest distinction among statutes authorizing mediation of land use applications is the point at which mediation is allowed. In Maine and Florida, mediation is authorized after a final decision on the application is rendered, and in California, Connecticut, and Oregon mediation is not expressly authorized until after a court action has been filed. Three states, Idaho, Pennsylvania, and Hawaii,⁴ provide for mediation once an application for a land use proposal is submitted for approval; that is, before a final decision is rendered on the application.

Court Decisions

The Court of Appeals sanctioned informal, voluntarily, multi-party negotiations by a local planning board in *Merson v. McNally*.⁵ The issue in *Merson* was whether a project that, as originally proposed, involved several potentially large environmental impacts could be mitigated through project changes negotiated in the early environmental review process mandated by the State Environmental Quality Review Act (SEQRA). The agency involved was the planning board in the Town of Philipstown. The owner of a mining site submitted a full Environmental Assessment Form to the planning board as required by SEQRA along with a special permit application to conduct mining operations. In an unusual move, the board conducted a series of open meetings with the project sponsor, other involved agencies, and the public. As a direct result of the input received at these meetings, the applicant revised the project to avoid any significant negative impacts. The planning board then issued a negative declaration, finding that the project, as now configured, would not adversely affect the environment.

The Court of Appeals found that the planning board had conducted an “open and deliberative process” characterized by significant “give and take.” It described the planning board’s actions as “an open process that also involves other interested agencies and the public” rather than “a bilateral negotiation

² CO, DE, GA, ME, MN, NJ, NY, OR, PA, UT, VT, and WA.

³ CA, CT, FL, ID, ME, OR, and PA. Utah and Virginia have dispute resolution procedures but are not included in the count because Utah’s statute is purely for takings claims, and Virginia’s statute was only adopted in 2002 legislation and so far there are no codified statutes that utilize such process.

⁴ Hawaii’s statute is unique in that it allows a private person to participate in the mediation as a party. It is listed as a regional planning statute because it applies specifically to applications for geothermal development, and not to development proposals in general.

⁵ 90 N.Y.2d 742 (1997).

between a developer and lead agency.” The Court found that the changes made in the proposal were not the result of conditions imposed by the planning board but were, instead, “adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies.” In short, the planning board had mediated an effective multi-party negotiating process that met due process requirements. Subsequent New York cases followed the lead of the Court of Appeals in its *Merson* decision.⁶

Challenges for Lawyers

In our experiment with concept committees, we found that the resistance of lawyers representing the applicant, municipality, and contestants was a principal barrier to proceeding. They, after all, are familiar with the scripted decision-making process of administrative bodies such as planning boards. They know that courts will uphold administrative agency decisions if they are based on substantial facts on the record. The legal obligation of lawyers for the contestants, viewed in this limited fashion, is to ensure that facts favorable to their client’s position are placed on the record and to argue persuasively from those facts to convince the board to favor their client’s position. Faced with these competing tensions, the lawyer for the land use board reflexively focuses on ensuring that all of the legally required steps are taken, time periods respected, and substantive due process standards followed.

In the context of a professionally-mediated negotiation, the lawyer’s role changes. This is unexplored terrain. Facts are used to explain the true interests of the stakeholders; the best interests of all parties are presented and considered; a process is followed that attempts to accommodate the interests of all; options to the proposal that add value and expand favorable choices are solicited and considered; and communications are designed to build consensus rather than advance one position over others.

The lawyer’s clients, too, are familiar with the traditional process. Without being advised of the benefits of mediated proceedings, clients who are contestants truly may want a fierce advocate, armed with favorable facts, battling to win the case. In many cases, the traditional approach may be adequate because the proposal may not be controversial or is so controversial that a negotiated settlement is impossible, or because the board is inclined to favor the client for political or other reasons.

We have found, however, that the traditional land use decision-making process regarding controversial projects is stacked against the applicant and the community’s best interests. Because the preliminary review process is lengthy, those who are concerned about the proposal’s impacts have no right to

⁶ See *Village of Tarrytown v. Planning Board of Village of Sleepy Hollow*, 741 N.Y.S.2d 44 (2d Dep’t 2002); *Waste Management of New York v. Doherty* 700 N.Y.S.2d 494 (2d Dep’t 1999); see also *Hoffman v. Town Board of the Town of Queensbury*, 680 N.Y.S.2d 735 (3d Dep’t 1998).

participate in the process until they receive notice of the public hearing and then they have only the right to be heard, sometimes for just a few moments. This builds resentment and heightens opposition, not only to the project, but also to the ineffective process. Because the process does not build trust, take time to explore the interests – rather than just the positions – of the stakeholders, and involve parties in productive, win-win oriented conversations, the community is often deprived of a better decision and better land uses.

We point out to lawyers that, for practical if not ethical reasons, they should inform their clients about the possible consequences of the traditional decision-making process and that there are alternative processes available, such as forming a concept committee or retaining a mediator to help. Section 1.4(b) of the American Bar Association's Model Rules of Professional Conduct states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Section 1.2(a) states: "A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued." Where there appear to be advantages to using mediation and the client's interest may be better served by such a process, the objectives of the client are clearly implicated by the choice of process. At a minimum, attorneys should become familiar with this alternative means of handling land use proposals and provide clear and unbiased information to their clients about how mediations can be structured and the pros and cons of agreeing to them.⁷

Conclusion

Against this backdrop, S. 3232 can be better evaluated. Through this legislation, the legislature, as it has done often in the past, encourages contestants and municipal boards to explore the use of a new decision-making technique. Such efforts give needed new techniques legitimacy. After the legislature adopted a modest mandatory training bill, agencies offering training reported a doubling of attendance of planning and zoning board members at their sessions. Training was possible before the training law was adopted, but the law boosted positive efforts. This is how needed change happens. The planning community's attention was focused on training, involved agencies responded, local board members sought good training forums, and a success is underway.

S. 3232 could have a similar galvanizing affect on the planning community and provide much needed encouragement to the legal community. Given the built-in resistance among lawyers for contestants and boards, among the

⁷ The language of the Model Rules does not clearly require lawyers to allow clients to decide whether and how to pursue ADR. See Robert F. Cochran, Jr., *Educating Clients on ADR Alternatives*, *Los Angeles Lawyer*, (Oct. 2002); *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Committee Proposal and Other Professional Responsibility Standards*, 28 *Fordham Urb. L. J.* 895 (2001).

contestants and board themselves, and the unfamiliarity of both groups with the mediation process, state legislation takes on a catalytic role. It affirms an effective process that, when employed in the proper context and properly managed, can produce better results for the parties and the community. Mediation can be done under existing state law, but few board members, planners, and lawyers know where those legal provisions are and that mediation is available as a useful supplement to the land use process.

By describing mediation as an option that supplements the traditional process the bill respects local officials and participants in the process to determine when it should be used. Experimentation in land use regulation has been furthered by decades of a consistent state legislative policy to place broad and flexible authority in the hands of localities and to trust them to use it wisely. S. 3232 will launch a much needed state-wide experiment with the potential to develop a variety of successful decision-making processes that other land use boards can evaluate and adapt to their unique circumstances.⁸

⁸ The Kheel Center on the Resolution of Environmental Interest Disputes at Pace University School of Law, in conjunction with the City Bar Association, is holding a day-long CLE Program to examine this topic and the role of lawyers in the resolution of environmental interest disputes. For more information visit: www.law.pace.edu/kheel.