

Why you should consider mediation to resolve environmental and land use permitting disputes

By Matt Strassberg, Green Mountain Environmental Resolutions

What would you do if you were gravely ill and your doctor gave you two treatment options? The first option would take a fraction of the time and money of the second option, and it would not preclude your ability to pursue the second option at a later date if the results were not successful.

If the second treatment option had the potential of costing hundreds of thousands of dollars, taking several years, and might not guarantee the result you wanted, I bet you would choose the first treatment option. In fact, you may even say the decision was a “no brainer.”

Likewise, if you were an attorney or engineer and your client was a party in a land use permit application, would you consider an option that costs a fraction of the time and money of litigation and did not prejudice your ability to pursue litigation if it was unsuccessful? If so, you should consider mediation.

Nevertheless, many applicants and opponents in environmental and land use permitting disputes do not seriously consider mediation and instead opt for litigation even though it is more costly and time-consuming and does not guarantee a successful result. This may be due to a lack of familiarity with mediation or a belief that expressing an interest in mediation may be perceived by opposing parties as a sign of weakness.

Although many practitioners have at least a passing familiarity with mediation, it may be helpful to provide background information to demystify the process.

Role of the mediator

The mediator acts as a neutral facilitator to assist the parties in reaching a settlement that is acceptable to them. The mediator does not represent any party and has no bias against any party or their position. Parties enter into agreements voluntarily. Agreements are never imposed on parties.

The mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will.

Mediation generally begins with a joint session to set an agenda, define the issues and ascertain the position and/or concerns of the parties. The joint session is usually followed by a separate caucus between the mediator and each individual party or their counsel.

This allows each side to explain and elaborate upon their position and mediation goals in confidence. Depending on the nature of the dispute and the dynamics of the mediation sessions, the mediator may alternate between joint and private sessions until the parties have resolved their differences, decided to reconvene for additional sessions, or determined that further mediation is no longer constructive.

Advantages of mediation

Mediation is a cost-effective method to resolve environmental and land use disputes. In a 1999 study of 100 U.S. land use cases, the Consensus Building Institute and the Lincoln Institute of Land Policy found that 86 percent of participants in some kind of assisted negotiation had a positive view of the process and almost 90 percent of those surveyed thought that assisted negotiation saved both time and money.

While opposing parties in environmental disputes typically disagree about almost everything, they uniformly agree that the time and money it takes to resolve a permit application through a final judicial appeal can be excessive and frustrating. More importantly, land use disputes often divide the community into opposing camps. Utilizing mediation in land use disputes builds bridges between the parties and defuses conflicts that inevitably arise.

Mediation also creates a more inclusive forum for all stakeholders to participate and talk about their real interests. In many

SPECIAL FEATURE

The Environmental Roundtable, a special feature of the Vermont Monitor, provides a forum for professionals in the environmental field to share nuts-and-bolts information, insights and experiences with other professionals. Contributions on subjects of interest to our readers are welcome.

disputes, the parties' real interests may not correspond to the issue where they have the best case from a legal standpoint.

For example, if neighbors oppose an applicant's proposed residential development, the neighbors might scrutinize the project, searching for any statutory requirements the project potentially fails to satisfy. In a hearing, the opponents would focus most of their resources on the legal issues where they are most likely to succeed. Thus, even if the neighbors were concerned about the density of a development and the impacts to a scenic meadow, the hearing would be dominated by the legal issues the neighbors raise, which may have nothing to do with their real interests.

Mediation, on the other hand, allows the parties to focus their discussions on the interests that are most important to them. If the neighbors' primary interest was preserving the scenic meadow and the developer's primary interest was the number of lots in the development and its secondary interest was developing large lots, the mediator would focus the conversation on those interests. Even though the parties may differ sharply on those issues, an agreement may be possible because the parties differ regarding which interests are most important to them.

A mediator can facilitate a discussion of “trading” across those issues to create gains for each other. For example, the neighbors may be willing to give a little on the density of the development, which is a secondary interest to them, in order to achieve their primary interest of preserving the meadow. Likewise, the developer may be willing to trade the size of lots, which is a secondary interest, in order to achieve its primary interest of selling a certain number of lots.

In mediations involving similar issues, parties have considered adjusting lot lines and lot acreage and buying the development rights. They have also considered land swaps, deed restrictions and permit conditions, tax advantages of land donations to

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non-profit organizations, and many other creative means to reaching a resolution that best satisfies each party's interests.

Mediation works because the goal is to reach a resolution that everyone can live with, not winning a lawsuit. Since the parties in a mediation session are discussing their interests that matter most to them, they are more likely to reach a satisfactory resolution. In light of these considerations, expressing an interest in mediation to the opposing party should not be construed as a sign of weakness, but a sign of common sense.

When is mediation appropriate?

Although mediation can assist parties in reaching settlement or at least narrowing the issues in most cases, it will not work in all scenarios. For example, it is not likely to work if one party is attempting to establish or expand a legal precedent or both parties zealously believe the interpretation of the law supports their positions. In those situations, an initial judicial determination may be necessary before any mediation sessions could be constructive.

If a party is not sure whether to pursue mediation, one option is to have a mediator perform a conflict assessment or initial screening to determine whether mediation or some other form of collaborative decision-making may help the parties resolve their differences. In a conflict assessment or initial screening, the mediator conducts confidential conversations with the parties to explore whether there is any common ground between the parties' initial positions, the willingness of the parties to consider alternative means to meet their interests, the parties desire to reach settlement and avoid litigation, and whether there are any barriers to using mediation. Without disclosing any confidential information, the mediator recommends whether mediation or some other form of collaborative decision-making would likely be constructive. Ultimately, the parties choose which avenue to pursue.

Types of mediation to consider

Should you decide to pursue mediation, the next step is hiring a mediator. While there are different schools of mediation, like facilitative mediation and evaluative mediation, any mediation has core concepts in common that include a neutral mediator and a voluntary and confidential process where the parties determine the outcome.

During what stage of a case is mediation most appropriate?

Mediation can help parties reach mutually satisfactory settlements at any stage of a dispute. Nevertheless, there are advantages and disadvantages to mediating a case during the pre-application stage, post-application pre-hearing stage, and appellate stage.

	Advantages	Disadvantages
Pre-Application Stage	Developer is most flexible because it has less of an investment in the current proposal.	Technical issues may be difficult to assess, especially to project opponents who may not yet have retained experts.
Post-Application Pre-Hearing Stage	Project becomes more tangible and issues become more focused with the filing of the application. Parties not yet likely entrenched in positions.	Parties may be busy preparing for hearings. Technical reports from experts may not be completed.
Appellate Stage	Decision may have clarified some issues, narrowed issues actively disputed, and served as a catalyst for further discussions.	Parties have already spent considerable time and invested substantial resources in the process and may now be completely entrenched in their positions. Parties may have also damaged relationships in litigation process.

In facilitative mediation, the mediator takes an active role in structuring and controlling the process to assist the parties in reaching a mutually agreeable resolution. However, the facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.

Evaluative mediation on the other hand, is based on the belief that mediators with expertise in the issues in conflict can help the parties reach settlement if the mediation gets "stuck" by confidentially assessing the weaknesses and strengths of their legal positions. Evaluative mediators believe that an objective "weather report" of a parties' likelihood of success in court could provide additional clarity that may make a settlement option more or less attractive compared to going to court. In evaluative mediation, the mediator controls the process and may also suggest solutions for resolving the conflict.

While there are differences in these approaches, many mediators use tools from

each school of mediation depending on the facts and circumstances of the dispute. In interviewing a mediator, it is important that the parties find a mediator that they believe will best assist them in resolving their dispute.

Until they actually participate in a mediation session, some lawyers and engineers may continue to question the value of mediation and whether it would be helpful in their particular case. When I was an attorney at the Environmental Board, I witnessed countless cases that would have benefited from mediation but instead ended up in protracted litigation. While I respect and value the importance of due process, every marginally controversial land use application need not take several years to wind its way through the appellate process at a tremendous expense to the parties. There is no question that mediation will not be able to resolve every environmental and land use dispute. But given the real possibility of reaching a resolution that all parties can live with at a fraction of the time and cost of litigation, mediation should be considered in every case.

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Mediation and the Environmental Court

The Environmental Court has recently been requiring mediation in a significant percentage of cases. Given the recent expansion of the Environmental Court's jurisdiction, mediation has the potential to play a role in preventing a backlog in the Environmental Court's docket. The Environmental Court's updated list of approved mediators will soon be available at the court.

Matt Strassberg is the director of Green Mountain Environmental Resolutions. He has over 20 years of environmental law and mediation experience. He has been trained and certified as a mediator through the Metropolitan Mediation Services program in Brookline, Massachusetts. Additionally, he received training in Advanced Mediation for Land Use Disputes through the Lincoln Institute of Land Policy and the Consensus Building Institute, both in Cambridge, Massachusetts.

Strassberg formerly served as an attorney with the Environmental Board where he advised the board and drafted opinions on Act 250 cases. Prior to the Environmental Board, he was an attorney with the Environmental Protection Agency. He can be reached at 802/496-3088.

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The *Vermont Environmental Monitor* is seeking Guest View pieces to appear in its monthly newsletter. Opinions on policy issues, interpretations of law, and explanations of technical practices are the sorts of items we seek.

Our ultimate goal is to be helpful to our readers, and guest writers can help shed light on a variety of topics.

If you are interested in writing a Guest View, please E-mail Editor Jake Brown at jfbrown@sover.net or give him a call at 802/223-0656.

Many thanks.

FOR THE RECORD

A summary of action on environmental matters taken by the Vermont Environmental Court, Environmental Board, and Vermont Supreme Court.

(Note: because of space constraints, it's likely that not all cases that have been decided in a given month are summarized in that month's issue. However, all cases from the three forums will be summarized over time. Also, since July 1, 2005, the Vermont Environmental Monitor has begun summarizing municipal zoning cases on appeal at the Environmental Court.)

Vermont Environmental Board

Re: Hale Mountain Fish and Game Club, Inc.—Declaratory Ruling #435

The Environmental Board ruled on August 4 that certain changes to a pre-existing fish and game club in Shaftsbury required an Act 250 permit.

At issue was whether the project is a preexisting development and if so, whether a substantial change has occurred since 1970 when Act 250 was passed.

The Board found that the project was a preexisting development, but that certain substantial changes to the project made since 1970 prevented it from being grandfathered, and therefore it required an Act 250 permit.

Those improvements included the installation of a new well and wastewater disposal system in 1983 without required health and environmental conservation approval; replacement of a garage and new, clay target storage trailer; and other improvements including pens, fencing, a culvert, and a portable toilet.

Three members of the Board dissented in the case, saying that they agreed a permit was necessary but that new and increased uses of the range also would have impacts on the area. Two other Board members dissented saying the range was grandfathered and does not need a permit.

Chair Patricia Moulton Powden, in her concurring opinion, said that "landowners with preexisting and post-1970 activities would be well advised to preserve and maintain records of pre- and post-1970 activities to avoid difficulties" like the one that arose in the case. "It may even be advisable for such persons to 'lock in' their preexisting status by requesting a jurisdictional opinion . . ."

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Vermont Environmental Court

Appeal of Wilkins Properties, LLC - Docket No. 176-10-04 Vtec

The Environmental Court denied an appellants motion for summary judgment in a case relating to a proposed subdivision in Milton.

The principal weakness in the appellants' argument was that the environmental court had not received copies of the original development review board decision, the court said.

The appellants had argued there were several procedural defects in the way the development review board rendered the decision. The court said it could not grant summary judgment on that issue for two reasons: first, it had not received a copy of the decision, and second, the court said it was charged with determining whether this application is meritorious, not whether the DRB acted improperly in rendering its decision."

The appellant had also argued that the DRB actions were deficient to the point of being a non-decision. They then argued that since there was, in practical effect, no decision within the 45-day statutory limit, the application should be deemed approved.

The Environmental Court disagreed, saying that the Vermont Supreme Court has ruled that the "deemed approved" provision should be strictly construed and that its purpose is to avoid indecision and protracted deliberations. The court also noted that it was undisputed that DRB did issue a decision within 45 days. (Judge Durkin)

Appeal of Berezniak - Docket No. 171-9-03 Vtec

The Vermont Environmental Court on July 7 denied an application for an affordable housing project in Burlington in large part because of limited parking in the area.

The case involved the proposed modification of an existing building that houses an electrical supply business, Burgess Electric, and the construction on the same parcel of a 27-unit affordable housing apartment building. The building would be named Roosevelt Apartments.

The applicants appealed from a decision of the Burlington Development Review Board.

The applicants had proposed to provide 21 off-street parking spaces to serve the apartment building. They proposed that tenants of the building be authorized to use the 11 spaces at Burgess Electric when that business is closed. The plan also called for the lease of 10 spaces at the Burlington Housing Authority.

The court noted that absent any waivers, 46 spaces would be required for the