SMALL PARCEL ZONING CHANGES AND MEDIATED NEGOTIATION

by

NICOLE R. FAGHIN

B.A., University of Washington

(1981)

SUBMITTED IN PARTIAL FULFILLMENT

OF THE REQUIREMENTS OF THE

DEGREE OF

MASTER OF CITY PLANNING

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

February 1986

Signature of Author_____
Department of Urban Studies and Planning
January 30, 1986

Certified by_____
Michael Wheeler
Thesis Supervisor

Accepted by_____
Phil Clay
Chairperson, Departmental Graduate Committee

SMALL PARCEL ZONING CHANGES

AND MEDIATED NEGOTIATION

by

NICOLE R. FAGHIN

Submitted to the Department of Urban Studies
and Planning on January 30, 1986
in partial fulfillment of the requirements for
the Degree of Master of City Planning.

ABSTRACT

In this thesis I propose an alternative process for resolving zoning disputes - mediated negotiation - to be used within the framework of the current zoning administrative process.

In the first part of the paper I examine the nature of the current zoning administrative process. A case study of a zoning dispute in Arlington, Massachusetts demonstrates problems of the traditional zoning process. Specific characteristics of the process that may create controversies include; 1) the lack of direct communication between all parties, 2) the adversary nature of interactions, 3) the lack of representation of all interested parties, 4) the inability of parties to search for mutually satisfactory solutions, and 5) the difficulties of addressing the full range of issues of concern.

In the second part of the paper I propose a process called mediated negotiation to address the deficiencies of the traditional zoning administrative process identified in the first part. A neutral third party assists parties with an interest in the zoning dispute to meet together to search for a mutually satisfactory resolution. I develop a model for mediation which address the problems in the traditional zoning process. This model includes; 1) inclusion of all parties, 2) information sharing, 3) improving relationships, and 4) managing of the discussions by an outsider. A case study of a mediated zoning dispute in Blacksburg, Virginia demonstrates the value of this model.

There are several legal and political constraints on the use of mediation in the zoning process. Legal constraints may influence the style and scope of the mediation sessions, the mechanisms for enforcing agreements, and the nature of the participants.

The institutionalization of the model may be impeded by existing power imbalances in the administrative process, the conceptualization of mediation in partisan terms, and a

hesitation of potential participants to engage in an unfamiliar process.

Thesis Supervisor: Michael Wheeler

Title: Visiting Professor, Department of Urban Studies and Planning

SMALL PARCEL ZONING CHANGES AND MEDIATED NEGOTIATION

TABLE OF CONTENTS

INTRODUCTION

This paper raises the question of whether the use of mediated negotiation could improve the current administrative process for small parcel zoning changes, ensuring fairness and efficiency in the decision making process. To answer this question I first review the current system to discover where there are deficiencies in the process. Then I propose mediated negotiation for addressing these deficiencies. This paper offers one particular perspective on potential changes in certain aspects of the zoning administrative process; I do not suggest other possible revisions in the zoning process, which in many cases functions relatively well. I suggest mediated negotiation as a voluntary option that works within the existing statutory structure of the traditional zoning process.

In her recent article "Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy", Carol Rose describes the nature of small parcel land use decisions as a matter of "deal making" between local government officials, citizens and developers.(1) She describes local land use regulations as a series of piecemeal efforts on the part of local governments to regulate land uses for small parcels of land. Such decisions, in contrast to the wide ranging policy decisions of master plans and major rezoning, affect only a few individuals with specific interests in the regulations. Assigned to the task of determining these changes, locally

appointed or elected bodies serve as a "mediator" between developers and irrate citizens.(2) The Rose article concludes that if, in fact, these decisions are made on an ad hoc, piecemeal basis, then the process should be designed to ensure fairness.

Rose recognizes that land use decisions are very local in their nature, requiring a high degree of interaction between local citizens and the decision-making body.(2) But because a local government official may feel concerned about issues of "separation-of-powers," a process overtly encouraging greater participation and interaction between local government and citizens could run counter to these notions. Meanwhile, the current quasi-judicial proceedings, though intended to provide due process, are limited as a forum in which parties may exchange information and ideas.(4) Rose proposes a mediation model as a way to resolve conflicts over local land use disputes.(5) A mediation model "attempts to assure due consideration...through hearing from interested parties and attempting to arrive at an accommodation acceptable to them within the framework of larger community norms."(6) Rose suggests mediation is a better means for achieving fairness and efficiency in land use decision-making.

Where Carol Rose ends her discussion, this paper begins.(7) What are the possibilities for using mediated negotiation to resolve zoning disputes? What problems will be solved? What are the shortcomings of the process? Chapter One analyzes current practices. This chapter presents an overview of the Massachusetts Zoning Enabling Act prescribing

the process of rezoning, and the granting of variances and special use permits (conditional uses). The high degree of interactions between developers, public officials and community members becomes evident through the administrative steps of filing an application for zoning relief, review of the application by public officials, public hearings, and making the final decision.

In Chapter Two, to demonstrate the nature of ad hoc discussions in the administrative process, I will present a case study of a rezone request in Arlington, Massachusetts. This case will explore the nature of conflicts arising throughout the administrative process and describe how different actors respond within the statutorily prescribed steps mentioned above. The analysis suggest how problems develop because of the nature of the interactions among parties.

The next part of the paper will focus on the potential for applying mediated negotiation in the zoning administrative process. Chapter Three contains a discussion of the theories and "nuts and bolts" of mediation as an alternative dispute resolution technique. This discussion establishes generic steps to apply in order to mediate a zoning dispute. It will demonstrate how this technique brings together important parties in a dispute to share information, explore a wide variety of alternative solutions, create a durable agreement, improve the efficiency of the process and improve relationships between the parties.

Chapter Four analyzes the strengths and weaknesses of mediation as a way to improve the administrative process described in the first part of the paper. A case study involving a request for special permits at a shopping center in Blacksburg, Virginia is the basis of the discussion. Early in the administrative process government officials proposed mediation as a way to resolve a conflict which could have become a major community conflict and a long legal battle. A critique of the mediation effort points out important factors of the technique which overcome many of the limitations of the traditional process.

The fifth chapter explores some legal implications of mediated negotiation of small parcel zoning decisions. The two major issues discussed are 1) what legally sanctioned mechanisms exist to place restrictions on rezones, special permits and variances, and 2) what are the legal implications of government officials participation in the negotiation process.

Finally, Chapter Six examines political considerations that could arise from efforts to institutionalize this technique. One method for institutionalization described in this paper is the enactment of a state enabling legislation. Efforts to enact legislation in Pennsylvania and Rhode Island illustrate some of the barriers that might be encountered.

In conclusion, I propose a model of the zoning administrative process that would involve the use of mediation. Although not always appropriate, I suggest this model could be useful to overcome some process deficiencies of

the traditional zoning process demonstrated by the Arlington case in Chapter Two. Given certain political and legal constraints, this model could provide an important tool in the zoning process to address issues of fairness and efficiency.

CHAPTER ONE

ZONING PROCEDURES: AN OVERVIEW

Efforts to rezone small parcels of city land often cause community-wide conflicts. A developer wishing to rezone a parcel of land where there is no as-of-right to build, must apply for permission with the local government and follow through a statutorily defined process. Throughout this process the developer interacts with the local government and parties with an interest in the zoning decision. This section describes four major steps in this process; 1) filing of the application, 2) review of the application, 3) public hearings and 4) making a decision. While opportunities exist within the structure of these different stages for discussions among parties, these required interactions tend to widen the gap of misunderstanding and force the participants to adopt adversary positions. In this section I will highlight some of the major problems that arise in each of these stages and have the potential for creating controversies. I examine the four steps described above for rezones, special permits and variances.

A. FILING AN APPLICATION

The first administrative step is the filing of an application. The process for rezones is slightly different than for special permits or variances. These differences will be described below.

Rezoning (or amendments to the local zoning code) is a

"legislative matter." Technically, a developer seeking to change the existing zoning on a parcel of land must submit a proposal - in the form of an ordinance - to the city council. Fashioning such an ordinance often requires a high degree of interaction between the developer and local officials. When community responses may be negative to the proposal, the developer may choose to approach concerned citizens to ask their opinions. The developer may also spend a great deal of time meeting with council members to learn their reactions to the proposal prior to a formal filing.

An application that has not been reviewed by local officials before submission by local officials faces the likelihood of rejection. In an article describing the process of amending a zoning ordinance in Massachusetts, two land use attorneys suggest that the formula is "one part procedure to nine parts politics."(1) That is, procedural requirements such as submitting proposals to the proper authorities for review within the statutory time frame cannot be overlooked, but the failure to meet with interested parties may lead to denial of a request.

The procedure for variances and Special Use Permits (i.e. conditional uses), unlike zoning amendments is administrative (rather than legislative) in nature. These types of permits are decided by approval officials, often a zoning board of appeals, who sit as judges. Like rezones, political considerations play an important role in these decisions as well. Applicants often approach city planners, members of the planning board, (each of whom may issue recommendations to the

zoning board), and community groups in an effort to win their support for proposed projects. The zoning board of appeals, appointed by the mayor, may use this information while applying standards of the local ordinance to the specific property to determine whether to grant the request.(2) In some communities, planning boards are authorized through the local zoning ordinance to hold preliminary review sessions with the developer prior to formal submission of an application.(3)

B. REVIEW OF APPLICATIONS

The second stage in the zoning process is the review of applications by government officials. Once the city receives a formal rezoning application, the clock begins to wind down. Within 14 days of filing, an ordinance must be submitted to the planning board for review.(4) Within 65 days, the council must hold a public hearing on the application.(5) For rezoning as well as for variances and special permits, the decision-making body must take a final vote within 90 days following the public hearing.(6) In all, city officials must review, comment and vote on an application within six months.

A proposal may require additional public review by numerous offices and boards.(7) Each may be required to hold separate meetings and issue a separate report. In order to meet the six months deadline for a highly complex proposal, decisions may be made in haste, important parties may be excluded from the process, or delays may be imposed by government officials (at great cost to the applicant).

Initial consideration of a proposed zoning amendment begins with the Planning Board. This board, charged with reviewing all local zoning decisions, reviews each application to ensure adherance to the local master plan or city growth policies.(8) Often times the Planning Department, acting as staff to the Planning Board, provides an initial status report on the proposal.(9) The Planning Board reviews such recommendations at a public meeting. At the same time the Board may also invite comments from the public and the applicant.(10) Such meetings may be the first opportunity for the community to respond to a proposal and raise objections.

This report from the Planning Board to the City Council is merely advisory.(11) The recommendations of the Board often reflect the goals of the Mayor or the Planning Department. The reactions of the Council may depend on the relationships between individual council members and the Mayor. Recommendations may be rejected or disputed. Council members may also find the recommendations do not reflect sufficient attention to the interests of their constituents. By taking a stand, council members reinforce the adversary nature of the rezoning process.

A local zoning ordinance may also require petitions for special permits to be submitted to various municipal agencies for review. These agencies' recommendations, including the board of health, the planning board or department, the city engineer, and the conservation commission, may help the decision-making body develop a more complete understanding of

the impacts of a proposed plan.(12) In some jurisdictions, final permit approval is contingent upon receipt of recommendations from these other agencies. Reviews by these agencies are typically in the form of hearings and often are the first opportunity for a public airing of objections to a proposed project. Developers present their proposals while members of the public and various boards respond by voicing their concerns.

Often, political infighting between boards will deepen the conflict over a proposed project. While the planning board may express concern over one aspect of a project, their concern may be disregarded by the zoning board which may have its own set of concerns. For example, while a planning board may evaluate a development proposal from a long range planning perspective, the zoning board may be concerned with immediate development.

The permit review period provides a developer with a chance to engage in ad hoc discussions with all concerned parties. However, the typical administrative process may provide a limited context for disputing parties to resolve their differences. Public meetings may provide a forum for airing of differences but often are an inappropriate forum for seeking resolution of conflicts. The meetings, sponsored by the reviewing body, allow the developer to clarify the proposal and allow the officials to accept comments from the community. At these meetings each party may merely state concerns with the proposal. Thus, parties may be limited in their ability to directly interact with one another to hear

concerns and seek solutions. In some circumstances, rather than address issues immediately, the Board may simply take note of the issues raised, later discussion among themselves the importance of each comment.

C. PUBLIC HEARINGS

Following the review period, permitting bodies are required to hold their own public hearings. These formal meetings satisfy the constitutional requirements of due process allowing affected parties an opportunity to comment on proposed projects.(13) There are three purposes for public hearings: 1) to inform decision makers of public opinion on policy issues; 2) to acquaint decision-makers with specific facts concerning affected property; and 3) to give property owners an opportunity to comment on decisions concerning their land. (14)

Theoretically, the hearing should be used to improve the decision-maker's understanding of the problem. However, like other public meetings, a hearing often becomes a political "showdown." Council members have discussed the proposal with the planning board, constituents and even the developer. Neighbors, violently opposed to a project, may come to the hearing and demand the permit be denied because it will adversely affect their neighborhood. At the same time, other community members may come (often at the request of the developer) to speak in favor of the project, praising the quality and sensitivity of the design. Thus, by the time a hearing arrives, there is little new information yet to learn.

Notice requirements determine, in part, the characteristic of the audience attending a public hearing. In theory, rezoning is a legislative matter for which due process standards are not guaranteed to affected individuals.(15) By law, notice of public hearings for rezoning are only required in a local newspaper of general circulation and posting in city hall. Consequently, the audience may represent a limited spectrum of the community.

In contrast, public hearings for special permit and variances require much more rigid notice standards to satisfy due process requirements. Courts believe decisions affecting the aggrieved parties should be made following strict procedural due process requirements because granting a special permit or variance affects specific individuals.(16) The 1930 case of Kane v. Board of Appeal of Medford(17) illustrates the importance of compliance with notice standards in Massachusetts. The decision states that "Such full notice [shall be provided] as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair presentation and consideration of all aspects of the proposed modification."(18)

In addition to postings and publications, notices for public hearings for special permits and variances must be mailed to "parties in interest" as defined by statute.(19) Masssachusetts law designates six different parties: the petitioner, abutters, owners of land directly opposite on a public or private street, abutters within 300 feet of the

project, the planning board of the city, and the planning board of every abutting city or town. Parties in interest are clearly defined as those individuals with a real property interest or city planners.

As may be expected, neighbors are most likely to attend variance and special permit hearings. On the other hand, rezone hearings are often attended by organizations who monitor local development issues. Neighbors may only learn of a rezone through citizens groups, the developer, or by watching notices in the local paper. While there are individuals who religiously attend public hearings, those who may also be affected by the decision, yet not considered a "party in interest" (in a strict legal sense) may never know about such hearings, thus losing their chance to comment.

In the case of special permits and variances, the hearing may be the only opportunity for public comment. Where the decision-making body adheres to strict procedural guidelines, presentations may be structured to hear first from those in favor, then from those opposed to the project. The developer may only be allowed to respond to criticisms in a formal rebuttal. This format allows very little interaction between the parties and no opportunity to explore alternatives that might resolve their differences.

The use of attorneys by either the developer or community groups changes the nature of the communication among the parties. Developers will often leave presentations to their attorneys. As a result, information presented for the record may be what lawyers consider important. The attorney may

answer questions put to the developer to ensure no statements are made that could later be used as damaging evidence should the decision be appealed. The presence of the attorney may enhance a communication gap among the parties - the developer, decision-making body and community members - since the parties do not address each other and major concerns for the individuals may be submerged by "legally important" ones.

Citizens or community groups opposed to a proposal may also have the resources to have a lawyer present their case. Again, aware of the importance of creating a defensible record, the community attorney may enhance the adversary nature of the proceedings by concentrating only on those issues with significant legal ramifications. Meanwhile, real concerns of the neighborhood may never be aired. For example, rather than stressing community concerns about the impact a project might have on property values, an attorney may focus on the failure of the proposed zoning amendment to conform to the jurisdictional comprehensive plan.

D. MAKING A DECISION

Following the public hearing, the board makes a final decision. Rezones are decided upon by city councils or elected officials. Variances and special permits, in contrast, are granted by an appointed body, either the zoning board of appeals or a designated public body such as a specially appointed special permit board.

In accordance with due process requirements for administrative decisions, permit granting authorities must

accompany decisions for variances and special permits with reasons. These findings of fact, based on evidence entered onto the record at the public hearing, are intended to ensure decisions are not made in an arbitrary fashion.(20)

By statute, the decision-making bodies are required to issue a decision within a given time period; in Massachusetts it is three months after the hearing.(21) During this period the Board may call back the applicant to discuss details of the proposed project. Often the developer may be required to submit additional information, including detailed site plans or engineering studies. If in the course of these discussions major alterations are made to the initial proposal, a new hearing may be held affording the public an opportunity to comment on the changes.

For rezoning, a new hearing must be held if the decision-making body fails to vote on the amendment in the required time period.(22) Therefore, developers encourage timely decisions in order to avoid further delays in their project. In contrast, special permits or variances are deemed approved if no final decision is made within the specified time.(23) In these case the pressure is on the municipality to act.

E. ANALYSIS

The different parties in a zoning dispute interact from a very early point in the administrative process. In fact, discussions may begin long before the formal filing of an application. Ad hoc, informal discussions may lead to agreements between the developer, community groups and local

governments. Other times these interactions may spur controversies. Such controversies may lead to unstable outcomes, major community disruptions, long litigation battles, or growing distrust among the parties. Ad hoc interactions may create controversies because 1) there is a lack of direct communication among all the parties, 2) the adversary nature of typical administrative procedures, 3) the lack of representation of all interested parties, 4) the inability of parties to search for mutually satisfactory solutions and, 5) the difficulties of addressing the full range of issues of concern.

Using a process in which some of these characteristics could be overcome (or at least addressed) is one way of trying to avoid what may become controversial outcomes of the zoning process. In the current administrative process parties rarely have any opportunities to meet in non-adversary settings to discuss issues. The developer may meet separately with numerous public agencies and community groups. However, rarely do all interested parties meet together to discuss solutions for conflicts. Citizens attend meetings hosted by public boards or agencies. Yet the structure of these meetings may limit the ability of the parties to discuss ways of resolving conflicts.

The structure of interactions at public meetings and public hearings tends to amplify rather than resolve adversary relationships. Meetings are conducted so that each "side" has an opportunity to comment. By calling for those in favor,

then those opposed, public officials delineate the sides in a conflict and encourage parties to advocate their positions.

The notice requirements for public meetings and public hearings may not adequately identify "stakeholders" or those with a real interest in a dispute. Abutters may receive notice about a variance or special permit, but may never learn about the proposed rezoning of a small parcel of land in their neighborhood since notice of hearings on rezones are not mailed directly to abutters or neighbors. Information of an opportunity to comment may only appear on official bulletin boards or printed in local papers under official notices. Thus, comments may not be received from those who may be directly affected by the outcome of a decision.

Solutions may be generated by one group: the decision-making body acting in the interest of all the affected parties. The weight of problem-solving rests with that group which must try to balance competing interests. Other times, the ability of the developer to lobby the proper individuals may influence decisions.

In cases where notices of an upcoming public hearing do not reach all interested parties, these individuals may never have an opportunity to raise important issues. Decision-making bodies may wish to address their own interests. Often, lawyers representing developers or community groups will seize upon attention-grabbing issues while more important concerns of the parties receive little, if any, attention. Thus, the decisions may inappropriately or inadequately reflect concerns of parties.

The zoning administrative process may fail to provide a structure in which all interested parties can participate directly to address their concerns. The current system may be adequate to resolve some conflicts, but at other times, the system leads to inefficient and inadequate interactions. Decisions resulting from such interactions may become highly controversial in that the interests of some parties may be addressed, while others are neglected. The following chapter documents the problems of interactions in the zoning process.

CHAPTER TWO

CASE STUDY: ARLINGTON, MASSACHUSETTS

The following case illustrates the procedural steps involved in filing a rezoning application, participating in a review by local authorities as well as public hearings, and accepting the decisions made by a public body. I evaluate these stages demonstrated in this case study to draw general conclusions about faults in the zoning administrative process. This case study does not necessarily typify all zoning administrative processes; rather it illustrates some of the potential problems resulting from the nature of the interactions among parties in some zoning processes.

The case examines a proposed rezoning in Arlington, Massachusetts, a town of 60,000 north of Boston, over proposals for developing an old garbage dump. A local developer submitted a plan to build 260 condominium units on an eighteen acre site owned by multiple different parties. The zoning approval process ignited community interest in maintaining the land for a park and stimulated a heated debate among public official, members of various public boards, residents and the developer.

Community interest in the reuse of the Arlington landfill site dates back to the early 1970's. At that time the town studied a series of development options for the site. Prior to this, between 1960 and 1970, the town had entered into an agreement with the private owners and had used the site as a landfill. By 1969, with the site filled to capacity, the land

reverted to the original owners. In 1972, the Arlington Redevelopment Board, Arlington's Planning Board and Redevelopment Agency, undertook a study to determine development potential for a public facility on the site.(1) In 1974, members of Town Meeting rejected a proposal to use the site for the town yard (a place to store snow plows and town equipment).(2) At that point the Redevelopment Board reevaluated the opportunities to use the site and, with the agreement of the Board of Selectmen, the Redevelopment Board put on hold all public development proposals concerning the landfill. The two boards took the position that the land should remain vacant unless it could be assembled by a developer and dealt with as a single development project.(3)

Community interest in the site continued through the years. In 1976, the Department of Planning and Community Development issued a report outlining a series of development alternatives. The report highly recommended using the site for public open space, although it also noted a medium density apartment complex might also be appropriate.(4) After the study was released, the town took no affirmative steps towards development of a public park or recreational facility. The town thwarted various private attempts (including proposals by the owners themselves) to develop the parcel because of an inability to assemble the separate parcels from the multiple owners.(5) Consequently, the large open space became, by default, an eye sore as the local junkyard.

A. FILING THE APPLICATION

After almost a year of private meetings with town officials and citizens, a local developer finally submitted a petition for rezoning the site.(6) Familiar with the property, the developer, an Arlington resident, conducted preliminary studies of the site in 1970, proposing it for development as a shopping center. This proposal never progressed beyond the conceptual phase. Returning to the town in the spring of 1984, the developer presented a new site proposal for residential development.(7) His plan covered the entire 18 acres with 279 garden style apartments surrounded by parking on the perimeter and a wall to enclose the entire development.

From his first interaction with the town, the developer identified potential items of conflict. In the spring of 1984 the town planner, who met initially with the developer, emphasized that the town would be unwilling to rezone the land on a piecemeal basis although they would be willing to consider a project involving the entire 18 acres. He also indicated there would be a strong community interest in a portion of the site being developed for public use. In response to these suggestions, the developer acquired additional adjacent parcels to increase his total project acreage. This led to creation of a new site plan retaining the same number of units but including an area for public open space.(8)

The developer also met with community groups to determine their concerns with the proposal. Primarily, neighbors

worried about increases in traffic in their neighborhood, the impact on an already overused sewer system, and the change in the nature of their single family neighborhood with the construction of apartments and townhouses.

Not until late January 1985, did the developer formally file a petition to rezone the property. His petition proposed to increase the zoning from single family to a higher density to allow construction of garden apartments and townhouses. In accordance with statutory requirements, the Board of Selectmen included the proposal on the warrant for Town Meeting in March 1985. Two months remained for various boards to review the petition and for the Redevelopment Board to hold a public hearing and issue its recommendation to the Town Meeting.

From the beginning, the developer recognized the need to comply with community requests. The advice of the town planner indicated that an unwillingness to respond to public concerns could lead to denial of the rezone by town meeting or later denial of a special permit by the Redevelopment Board. The developer sought ways to work with the town to incorporate their concerns into the final plan. He established a rapport with the various parties, indicating he would be willing to be flexible in order to gain their support.

B. REVIEW OF APPLICATION

Immediately following submission of the application, the developer asked for a preliminary review session with the Redevelopment Board. This body would not only issue a recommendation to Town Meeting, but would later be the

decision-making body for any special permit requests. At this meeting in early February, the developer asked for a response to his plan. The board members offered numerous suggestions and raised concerns related to the dangers of toxic waste on the site, developer responsibility for problems resulting from development, aesthetics of the site plan, and inclusion of open space.(9)

Recognizing the importance of the Redevelopment Board's opinion, the developer immediately addressed each of the issues raised at the review session. After the meeting, the developer met with a member of the board, an architect, to design a new site plan. The new plan reduced the number of units, mixed garden style apartments with townhouses, reduced the amount of surface parking, added trees and shrubs as a buffer around the perimeter, and showed an area for open space.

Prior to the public hearing the developer organized individual meetings with neighbors, members of Town Meeting, and the Conservation Commission in which he elicited other reactions to the site plan. Neighbors expressed concern about drainage and flooding onto their property, building heights, and the level of density. The Conservation Commission emphasized its concerns about potential impacts on wetlands and rejected the developer's suggestions that he would create "new" wetlands to compensate for construction on the existing area. Members of Town Meeting, among other things, objected to a wall around the project which they felt created an

exclusive community that would alienate neighbors.(10) Throughout this review period, the developer tried to respond to the concerns of the neighbors and public officials by altering his site plan. During a two month period he offered three different plans, each responding to issues raised at the public meetings.

Upon commencement of the zoning process, the developer hired as his counsel a local attorney. As a past member of the Arlington Board of Selectmen the attorney understood local politics. Familiar with some of the techniques of mediation and dispute resolution, the attorney tried to apply these principles during the various meetings with public officials and neighbors. At each meeting he made lists of comments by the audience and tried to respond immediately by altering the plans to incorporate their ideas.(11) He also tried to include important parties (particularly board members) in the design process. Most important, he tried to establish trust between the parties and the developer; he continuously stated the willingness of his client to respond to community interests.

These efforts lacked an important ingredient - the ability to bring all the parties together at one general meeting where no one party would be in control. Separate meetings had the potential to generate further distrust. Parties did not know what might be discussed at the other meetings. Meanwhile, the developer continued to change his site plan.

C. PUBLIC HEARING

In early March, the Redevelopment Board held its public hearing to review the rezoning request. Notices went out to abutters as well as to all concerned local agencies and planning departments of neighboring towns and cities. Counsel for the developer presented the proposal at the public hearing. After briefly describing the project, he proceeded to address each of the problems raised by different parties at each of the earlier meetings. He concluded with an assurance to the public that the developer intended to be responsive to community needs. Following the developer's presentation, community members commented on the proposal. Major concerns raised at the hearing focused on traffic impact, wetlands protection, and the neighborhood's status as a single-family area. When there were no more questions or comments, the Chairman of the Board formally closed the public hearing and indicated that the Board would take the request under advisement.(12)

A week later, at its regular meeting, the Redevelopment Board issued a recommendation supporting the rezoning on certain conditions. In their words, "this area should be rezoned by town meeting in order to provide an opportunity for more detailed plans and specifications leading to the improvement of this blighted area."(13) The board recommended rezoning from R-1 (single family detached dwellings) to the higher density R-5 (single-family detached dwelling, duplex house, three family dwelling, townhouses, and apartment houses). The developer's original petition asked for an even

higher density. The Board rejected that request because they wanted to guarantee that the nature of the project would not change once a less restrictive rezone came into effect. As the Chair of the Redevelopment Board commented, if the project should fall apart after rezoning, the land could be subdivided and two family and three family properties could be developed on the site.(14) Therefore, the Board added the condition to the recommendation; that zoning be restricted to townhouses and garden apartments and prohibited for any other uses.

The Board also wrote into the recommendation a warning to the developer; even after rezone approval, public officials or neighbors could still have an impact on the project. The Board noted that the developer would be required to submit much more indepth studies of the project to satisfy community concerns.(15) This qualified support for the project signaled to the community, other public boards, and the developer that the review process had not ended. While the developer received a green light to proceed, the community would still be able to influence the nature of the project. The Redevelopment Board formally submitted this recommendation to Town Meeting members before the final vote.

The close of the public hearing signified the end of face-to-face interactions between neighbors, board and developer until the Town Meeting three weeks later. Community members could only wait and hope the recommendations by the Board would incorporate their comments and concerns. The format of the hearing did little to encourage the parties to

interact and explore their concerns further. The developer had opportunities to respond to questions and comments, but concerned parties were not made a part of the decision-making process. In addition, as the meeting was run by the Redevelopment Board, those in attendance were bound by the Board's procedural process. In effect, comments made to the Board seemed to encourage parties to develop adversary positions and coalitions.

D. MAKING A DECISION

Unbeknownst to the developer, a final crucial conflict emerged after the Redevelopment Board hearing and prior to Town Meeting. It was revealed that the Parks and Recreation Commission had hoped to use the open space promised by the developer as a soccer field. Without a firm committment from the developer to provide useable open space, certain individuals vowed to block approval of the project. The most vocal parties let their opinions be known to the Redevelopment Board and Board of Selectmen. These individuals complained bitterly of being left out of the decision-making process. Although they had received a formal notice and had been given a chance to comment on the project at the public hearing, they failed to act.(16) The developer had never met directly with any members of the Parks and Recreation Commission while preparing the site plan.

After long and emotional testimonies for and against the project, by a narrow margin, Town Meeting members voted down the zoning request. Following the meeting, the developer and

his counsel interviewed those who had opposed the amendment to discover what issues had not been addressed. At this point the issue of the soccer field surfaced. Members of the Parks and Recreation Commission had effectively lobbied other members of Town Meeting to oppose the rezone until they received a guarantee for use of the open space as a soccer field.

Subsequently, the developer was given a second chance on the amendment. Before the close of the meeting, one member who voted against the amendment called for reconsideration of the issue, a procedural move allowed under Massachusetts Town Meeting by-laws.(17) The new vote, set for 3 days later, gave the developer time to meet with the opposition to develop a compromise.(18)

With little time left, the parties reached agreement.(19) At the second town meeting, the developer presented his proposal with a public statement of his commitment to public open space. Out of a total of 2.75 acres of proposed open space, he promised 1.5 acres would be developed for recreational purposes. The language of the original amendment was not altered; the developer merely made a verbal promise to appease his opposition. That evening, a two-thirds majority of Town Meeting members voted approval of the requested zoning amendment.(20)

Two major faults in the process stand out as possible reasons for the petitioners initial failure at Town Meeting. In the first place, the developer inaccurately assumed he had spoken to all the important and influential parties and

addressed their concerns. He knew nothing about the Parks and Recreation Commission's concerns until it was almost too late. Had there existed better channels of communications among the parties, the developer could have included this party earlier in discussion to avoid a potentially serious conflict.

A second problem stems from the lack of understanding by Town Meeting voting members about petitions for rezones. They were asked to address the issue of whether or not the zoning on that piece of land should be altered from the stated zoning ordinance. Instead, the members seemed to address the issue of whether or not they approved of specific aspects of a project to be developed on that site; an issue addressed through the special permit process. This distinction between these two issues complicated the ability of Town Meeting members to make a decision.

In Arlington, the permit process for a project like the one in this case involves two steps; rezoning (these requests are decided by Town Meeting), and special permits (these are granted by the Redevelopment Board). Some communities have overcome this dual decision process by designating a single public body as the decision-makers for both zoning processes. Thus, votes on one issue automatically affecting the second issue are not artificially separated when the overall decision concerns a specific project. In Arlington, however, the dual system complicates and prolongs the decision-making process.

E. ANALYSIS

By examining the way in which specific process issues

were addressed in the Arlington, I draw general conclusions about faults in the zoning administrative process. First I examine issues of fairness and efficiency. Later I will discuss other aspects of the process; whether crucial parties are included; whether important information is shared among the parties; and whether the process enhanced relationships among the parties.

1. Fairness and Efficiency

To evaluate the Arlington rezone case study, it is necessary to question whether the process led to a fair and efficient result? To answer this question, I begin by looking at what each party expected expected. The developer hoped to receive a quick decision that would grant the zoning approval and pave the way for the next step, the special permit process. Town officials wanted to encourage private development of the entire parcel yet retain a certain portion for public open space. Neighborhood residents wanted a project with a minimum negative impact on their neighborhood but which would be an improvement over the current junkyard. The Parks and Recreation Commission wanted to be sure the rezone would guarantee them space for recreational purposes.

The final approved rezone addressed some but not all of the interests of these parties. The developer received his rezone, town officials received a guarantee of 1.5 acres open space, the Parks and Recreation Commission received a verbal commitment to recreational space and the abutting residents were guaranteed an opportunity to influence the nature of the

final project as it moved into the special permit process.

However, these results did not indicate success in the overall permitting process. One month later the parties confronted one another again in the special permit process. Over the next few months it became clear that the rezone approval had not addressed many of the concerns of the major parties. In fact, the conflicts among the parties reemerged with greater intensity. When the developer retracted his commitment to recreational space, members of the Parks and Recreation Commission and the Redevelopment Board threatened to use court action to enforce the promise.

The problems which arose in the special permit process raise questions as to whether the initial decision to rezone the property was arrived at in a fair and efficient manner. Based on the controversies which emerged in the special permit process, I believe there were serious flaws in the rezone process. The original amendment seemed to inadequately address concerns of both the neighbors and the Parks and Recreation Commission. Consequently, serious stumbling blocks emerged in the special permit process which dragged on for another five months with delay. Although the Parks and Recreation Commission and neighborhood residents generally supported the proposal to use the vacant land, they did not approve of specific aspects of the proposal and wanted their interests included in the plans.

What happened throughout the months of meetings and hearings that led to this less than satisfactory result? It

is my thesis that there are deficiencies the process which tend to encourage conflicts. I will support this by examining various process considerations; whether important parties are included, whether information is shared, whether the process encourages efforts to seek mutually satisfactory agreements, and whether ongoing relationships are improved.

2. Including Parties

Inclusion of important parties to the dispute is an important process issue. If parties are left out of the process they may feel their interests and concerns have not been addressed. Therefore, they may challenge a decision which may lead to a lengthy litigation process. In Arlington, the developer and his counsel tried very hard to identify and meet with all parties which could potentially be affected by the decision. The failure to identify the members of the Parks and Recreation Commission nearly upset the entire rezone process and set the stage for the ensuing battles for the special permit process.

3. Sharing Information

Once all parties have been brought into the process it is essential for parties to share information in order to form a stable agreement. The structure of the meetings held by the public board and the developer made it difficult for the parties to learn about each others concerns and search for mutually satisfactory solutions to the problems. For example, had the developer met with neighbors, the Parks and Recreation representatives, and local officials in a joint meeting, he

may have discovered a way to join the interest in useable space with attention to the neighbors concerns for retaining the quality of their neighborhood.

Instead, at the public meeting, the Redevelopment Board sat as the authority reviewing all comments. The Board gave the public a limited opportunity to raise questions and make comments. At the community meeting, the neighbors aired their concerns but never directly confronted the public officials. Sometimes these meetings generated overlapping or conflicting problems. At one meeting the developer learned of the neighbors concern about a playfield in their neighborhood which might turn into a youth "hangout" for drinking. At another meeting the Parks and Recreation expressed their interest in a soccer field. This left the developer in a precarious position of trying to satisfy competing interest without alienating the parties.

Efforts made earlier in the review process to identify all the important parties and bring them together at the same time and place could have eliminated the growing controversy. This lack of true interaction between the parties resulted in two problems. First, the parties developed even stronger positions at each of these meetings which enhanced adversary rather than problem solving relationships. Second, there were no opportunities for the parties to develop mutually agreeable solutions. By meeting only with one board member (the architect), the developer's revised site plan responded to board concerns, and not necessarily community ones.

4. Continuing Relationships

The formation of ongoing relationships is another process consideration. It was important for the Arlington developer to continue to interact with the various parties. As noted by the Redevelopment Board, approval of the rezone had no bearing on approval of the special permit process. During review of the permit review application, relationships developed in the rezone process came into play. Those who had been included earlier joined the efforts to work out new proposals. Those who were left out or felt their interests were not addressed distrusted the parties and continued to block the project.

Arlington represents a single isolated case. While every development dispute and zoning debate is different involving different parties, issues and concerns, there are common aspects of the administrative process which may be identified. These process issues provide a basis for understanding where problems may lie in the current zoning administrative process. These problems may include: the exclusion of important parties, the lack of or access to information and, the lack of a forum for enhancing relationships between potentially adversary groups. The remainder of this paper identifies procedural innovations that respond to these potential in the current administrative process.

CHAPTER THREE

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION TECHNIQUE

Traditionally, parties resort to ad hoc negotiations, like the ones described in the Arlington case, or lawsuits to resolve controversies over zoning. But these processes may fail to produce fair and efficient result. For example, a negotiated agreement between a developer and local government may be successfully challenged in court by a neighborhood group not included in designing the agreement. Alternatively, a developer may file a law suit for denial of a permit that results in a judgment against a developer. Thus, a project involving considerable time and money may be derailed. Alternative procedures to improve the quality of decision-making may address some of the problems with the current processes that lead to unsatisfactory results.

With ever greater frequency developers are engaging in ad hoc negotiations with both local governments and community groups over development proposals.(1) That is, zoning is not a passive administrative process in which developers apply for approval of a project that conforms to defined standards set forth in a zoning manual. Today, projects are much more complex. Since the 1970's local governments have imposed more rigid land use regulations as the amount of developable land diminishes. At the same time, those with the power to make zoning decisions have invented new ways to encourage development while retaining control over the regulatory process. Examples of such zoning devices include Planned Unit

Developments, floating zones, and Transfer of Development Rights.(2) As a result, developers and local governments negotiate agreements on a case by case basis that are then enforced through the zoning process. The conditions added to the Arlington rezone exemplify this trend.

This process of negotiation allows an exchange between the public and private sectors. Local governments may now use the regulatory process to influence details of a development project. Developers have discovered that cooperation with the government may lead to shorter administrative processes, less delays, and less risk of litigation.(3)

But, interactions between government and developer must also account for community groups who may have strong political clout and affect the outcome of a decision. Neighbors, like the ones in Arlington, will be directly affected by approval of a development project. Other citizen groups may have interests in the site such as with the Arlington Parks and Recreation Commission and their interest in a community soccer field. An agreement reached between a local government and developer that does not address the concerns of these other parties may become very controversial. At the public hearing, opposition may be very vocal and influence the opinions of the decision-makers to deny a zoning request. Alternatively, once approved, community groups may file suit to halt a project.

Thus, developers have discovered the importance of working with the community to ensure support for a project.(4)

Techniques used by individual developers range from slick publicity campaigns to organized meetings with the community to discuss the project and discover controversial issues for the neighbors.(5) Meetings conducted by the developer in Arlington exemplify the concept meeting with community members. In an Urban Land Institute handbook called Working with the Community: A Developer's Guide, the authors state that "the aims of these early efforts should be to educate the community about the project, to identify critical issues, and to offer the chance to work out issues before they erupt at hearings."(6)

But often times these discussions fail to address the concerns of community groups. Citizens are excluded from the actual decision-making process; they merely comment on a finalized agreement. In Arlington the developer and Redevelopment Board worked closely to design new site plans which the community groups responded to but did not help to create. Because they were not directly included in the process, issues of concern were not incorporated into the plans. In that case, the developer could address major concerns at the last moment and save the proposal. But in other circumstances there may be no opportunities for a final compromise.

Dissatisfied with a decision by the local permit granting authority or city council, parties will frequently turn to the court system for redress. In their book Environmental Dispute Resolution, Wheeler and Bacow describe how decisions in environmental cases rendered by a judge tend to be of a "win -

lose" nature and emphasize the procedural rather than substantive merits of a dispute.(7) Neighbors who are dissatisfied with proposals for a nearby shopping center, for example, may win their case in court on a procedural issue, such as failure to provide adequate notice of a public hearing, when the real issue is community concern over traffic impacts. Whether parties use litigation to effectively stall a project, gain permission to proceed, or set a precedent, a legal decision does little towards resolving a conflict such as how to mitigate traffic congestion from a new development.

A. DEFINITION OF MEDIATION

Ad hoc negotiation and litigation as models for dispute resolution are sometimes inadequate for addressing the problems they set out to resolve. Meanwhile, the structure of the zoning process could be enhanced in various ways to improve both the quality of communication and durability of an agreement. In recent years, a wide spectrum of techniques have been proposed and instituted by those with an interest in more effective and efficient means to solve conflicts.(8) This paper will focus on one of these methods, mediation.

Mediation is a form of negotiation where a neutral third person assists the parties in a dispute.(9) It is defined by John McCrory in his article "Environmental Mediation- Another Piece for the Puzzle," (10) as "one of several mechanisms available to disputants who wish to use a neutral to assist in achieving settlement." Important elements of mediation according to Lawrence Susskind are the ability to create an

outcome that is 1) considered fair by all the parties to the dispute, 2) reached in an efficient manner, and 3) remains stable after the negotiations are completed.(11) Crucial to such a result is the mediator whose most important characteristics include 1) a potential to maintain procedural flexibility unavailable to judges or decision-makers that may change with each new situation, 2) an ability to encourage communications between parties without violating ex parte rules or impairing confidentiality, 3) an ability to communicate with parties and make substantive suggestions for resolution of the dispute.(12)

Mediation offers a structured approach to what currently occurs in an ad hoc fashion during the zoning process of small parcels. With this technique important parties are identified and brought together face-to-face in a neutral atmosphere to explore interests and concerns. This could address the inadequacies of the hearing process by including all groups in the formulation of a decision. The mediator helps the developer, citizens groups, and local government officials focus on substantive areas of the conflict in order to move beyond traditional negotiating methods of positional bargaining or "horse-trading." The parties will search for creative solutions for a development dispute that address multiple interests instead of a "win" for one party and a "lose" for another.(13)

B. GENERIC STEPS IN MEDIATION

Each development dispute will be different - the issues

and parties both change - and the decision-making process should be flexibile to respond to these changes. Mediated negotiation would provide a framework for this type of interactions. The mediator helps establish working relationships among the parties and assists in creation of procedural guidelines for joint exploration of alternative solutions to conflicts. An example of the application of mediation in zoning disputes may be drawn from the Arlington case study. Recommendations issued by the Redevelopment Board to Town Meeting could have been developed from a negotiated agreement. Prior to the public hearing, the developer engaged in multiple meetings with numerous parties involved in the dispute. Applying the principles of mediation, an individual acting as mediator could have played an important role in bringing together parties, identifying issues and concerns, and maintaining good channels of communications between the parties.

As a result of recent efforts to mediate public sector disputes, Lawrence Susskind developed a theory of mediation that identifies three standard phases of activities: 1) pre-negotiation, 2) negotiation and concensus-building, and 3) post-negotiation.(14) These steps will be applied below to interactions in a zoning dispute.

1. PHASE ONE

The first phase involves defining the parties and issues at stake and developing the procedural groundrules and structure for the actual negotiation sessions.(15) A mediator

is chosen to help those parties who are identified as important stakeholders to set an agenda, develop groundrules for the proceedings, train parties in techniques of negotiation and gather together information that will assist the parties to develop a joint solution.

a. Identify the Issues

The first step should be an identification of a potential conflict in a land use decision. Those who hear the requests first will be the town planner or the planning board (or Redevelopment Board in Arlington). When a controversial proposal crosses their desks, these parties could be the ones to initiate a mediation effort. The planner in Arlington received information from all the different parties about their concerns. When he saw the concerns of the neighbors may conflict with the plans of the developer, he could have proposed mediation. Alternatively, at the preliminary meeting of the Redevelopment Board, the members could have suggested the developer engage in mediation before trying to submit a proposal.

b. Choose a Mediator

The next step would be to appoint a mediatior. Many questions arise as to who would be appropriate in the role of mediator in land use disputes. A frequent recommendation is for a member of the local planning staff to be trained for this part.

In some cases it would be very useful and important for

the planner to be the neutral party. As a staff person, the planner often takes a neutral stance in disputes between the developer and the planning board, zoning board or community group. She may be the party to initiate discussions and suggest alternative solutions to problems. At other times the planner loses her neutrality. Where the planning staff prepares a recommendation on a proposed project for the planning board, once an opinion is given by that office, the planner will no longer appear neutral to other parties. When questioned about his role, the Director of Planning in Arlington, believed he should recommend interactions between the developer and citizens, but he would not participate in discussions as a mediator if it might jeopardize his appearance of neutrality for the different parties.(16) In some circumstances it may be more appropriate for a member of the planning board to act as mediator in disputes. A board member may be able to maintain a neutral position and not be perceived by either the developer or community groups as taking "sides."

An alternative would be the use of an outsider as mediator. Someone from outside the community who is trained in mediation skills and understands the zoning process and land use issues may be better able to maintain an appearance of neutrality and thereby capable of developing the confidence of all the parties.(17) If hired by one party or another, neutrality may be lost as other parties may believe the mediator is biased in favor of the hiring party. Frequently, the mediator will be chosen by consensus of all the the

parties to ensure mutual acceptance.

A number of organizations around the country offer professional mediation services. The trained mediators will charge a fee for their services which may range from simply facilitating at the actual negotiating sessions, to actively participating in organizational details and information gathering for the sessions. The individual playing the role of mediator may be determined based on the type of dispute, the important parties to be involved in the mediation effort, and the appearance of neutrality of that individual in that role.

c. Identify the Parties

Once the mediator is chosen, the important parties in the dispute should be identified and contacted about participation in the mediation effort. A good place for a mediator to begin in zoning decisions would be with the planning department, members of the planning board and the developer. After discussions with these parties, the mediator may start to recognize who should be included in the negotiations. For example, a mediator in Arlington would have contacted members of the Redevelopment Board, members of the Board of Selectmen, neighbors, the Director of Planning and other public agencies involved in the development process. Representatives from the different interest groups would have been asked to join the negotiation.

The mediator should continue to identify important parties throughout the process. Arlington demonstrates the

importance of this ongoing search. When the Parks and Recreations Commission confronted the Redevelopment Board, a mediator would have identified this group and its concerns as important to the process. Therefore, either members of the Commission would have been drawn into the discussions, or their major concerns would have been addressed by those parties directly participating in the negotiations.

d. Develop Procedural Guidelines

A mediator should meet with the participating parties to develop procedural guidelines and an agenda for the process. In Arlington, rather than setting up separate meetings for different groups, the mediator would try to bring together the major parties at one session to discuss issues and concerns. Thus, instead of the Redevelopment Board holding a public meeting where the developer and community groups are "attendees", a meeting would be held with representatives from each party; the developer, community groups, Board of Redevelopment, Board of Selectmen, Parks and Recreation Commission and all other identified parties. At the first meeting the parties could become aquainted with one another and discuss the important issues to be addressed during future sessions.

The parties may also decide at this first meeting to impose a time limit for the negotiations. It could be mutually agreed that if the negotiations do not produce a result within a specified time, the proposal would revert back to the traditional process where the public board makes a

decision. So, for example, if the parties decide to meet once a week for six weeks and at the end of the sixth week they have not formulated an agreement, the Planning Board may continue with its evaluation of the proposal and send a recommendation to the final decision-making authority.

2. PHASE TWO

During the second phase, parties engage in trading consessions and commitments.(18) Some of the techniques suggested at this point include the development of a single negotiating text, an identification of underlying interests, and a packaging of these interests into mutually satisfactory agreements. This leads to the development of a final negotiating text.

At the negotiation session with a mediator, the parties would share with one another their interests and concerns about the project. All the parties would be asked to help form a mutual list of concerns to be addressed during the course of the negotiations. In these sessions the parties may begin to see overlapping issues and areas for compromise. Had this approach been used in Arlington, the developer would have heard about the different views about the use of public space; those who wanted a soccer field and those who preferred unused open space. In this environment he could begin to make suggestions and receive immediate responses to his proposals. Together the parties could have generated a site plan incorporating the various concerns of the different groups. Thus, a series of mediated sessions could be used to develop

an agreement with conditions where the parties negotiate the details of the conditions.

3. PHASE THREE

During the final phase of mediated negotiations the agreement is implemented.(19) At this juncture, an agreement between the parties must be incorporated into an administrative process to become binding on the parties. Monitoring of the implementation process is also important at this stage.

After an agreement is reached between the negotiating parties, the administrative process may be resumed. Following the statutory guidelines, the application would be filed and a public hearing would be held to allow a presentation of the negotiated agreements followed by public comment. In Arlington, the proposal would have come before the Redevelopment Board at their public hearing. Their support could have led to acceptance of the proposal at Town Meeting. Once approved by the decision-making body, the negotiated agreement becomes the zoning decision binding upon the developer and incumbent upon the local government to enforce through their regulatory process. For example, if a mediated agreement in Arlington had created a rezone with the conditions of restricted types of development and 1.8 acres of open space, the developer would be required to show the public space on the site plan before the municipality would grant final permits to begin construction. In addition, any future requests to build on that property would be bound by the

restrictions of the negotiated agreement.

C. FUNDING A MEDIATION

An issue concerning use of mediated negotiation is the ability to fund such a process. A majority of mediation efforts in the environmental field have been funded through private grants from foundations. In other circumstances where grants or government funding for mediated negotiations do not exist, parties may be required to contribute for expenses. The major expenditures for the effort include the cost of the mediator's time, travel expenses, costs for legal assistance where necessary, costs for technical assistance, and costs for the participants time when individuals leave work to attend negotiating sessions or engage in phone conversations related to the negotiation at work.

Finding an equitable way to divide the costs where no outside funding exists may be one of the greatest barriers to pursuing mediated negotiation as an alternative method of dispute resolution. The parties may often feel their limited resources are better spent on litigation. Familiarity with the court system leads people to avoid taking chances on new techniques where the outcome may only lead to a later court challenge.

Each party finds a reason why they should not be responsible for the costs. A local government may perceive their role as advisory and the real dispute lies between the developer and the citizens. They may also claim their limited resources would be more wisely spent in other ways of greater

importance, particularly where there is no guarantee litigation will be avoided. Neighbors or citizen groups rarely have any resources and even where funds may exist, the groups believe the responsibility lies with the developer who has the resources and who is ultimately responsible for the problem. The developer may feel the idea of citizen participation should be a government role and any efforts to include citizens should be government funded.

Promoters of mediated negotiations in other fields have found a variety of funding sources. Large scale environmental disputes have frequently relied upon grants from private foundations interested in financially supporting mediation efforts. Annexation mediation in Virginia employs an equitable distribution of costs between the parties to the dispute. In addition, the legislature established a fund to assist in costs for mediation, now a legally recognized technique for resolving annexation disputes between municipalities.(20) A mediation effort to create a downtown plan for Denver, Colorado divided the costs between two major parties to the dispute while other parties contributed their time and in-kind donations such as supplies and use of spaces for sessions.(21) The success of these different parties to fund the efforts suggests there are numerous types of opportunities for funding of mediated zoning disputes.

D. ANALYSIS

Mediation provides a technique to improve the process of resolving land use conflicts. The technique addresses many of

the weaknesses in the Arlington rezone case. Involvement of the mediator helps to identify and include important parties in the process. The parties may improve the efficiency of discussions by agreeing upon a structure and time limit for sessions. Important issues are addressed by all the parties in one session. All parties have equal opportunities to raise concerns and propose solutions to the conflict. Thus, in a mediated negotiation the parties work together to produce a mutually satisfactory proposal. Also, this process allows the parties to develop ongoing relationships and channels of communications. The following chapter further explores each of these characteristics in the context of a mediated negotiation of a local development dispute.

CHAPTER FOUR

USING MEDIATION IN A ZONING DISPUTE: BLACKSBURG, VA.

In this chapter I will review a successfully mediated land use dispute. It demonstrates the value of mediation in the zoning process. In 1983, in the small university town of Blacksburg, VA., a development dispute erupted when a local developer applied for zoning approval to build a car wash, gas station, and convenience store. The proposal reopened old conflicts between the developer, residents and town officials - neighbors disliked the impact of the commercial development on their residential community and the town disliked the impact of increased congestion on an already busy thoroughfare. Within the statutorily prescribed rezoning process, town planners, the developer and concerned citizens met several times over a five week period with a mediator to create a binding settlement which was satisfactory to all the parties, and subsequently approved by the local permit granting authority.

A. FILING THE APPLICATION

In 1979, the site in question was purchased as part of a Planned Unit Development (PUD) that included thousands of renter and owner-occupied homes and a commercial center.(1) The PUD owner sold the commercial parcel to a developer who built a complex with a grocery story, specialty shops and restaurant.(2) Conflicts arose over this initial development when neighbors demanded adequate landscape buffering between

the stores and their homes. Although initially amenable to the residents' requests, the developer reneged on his promises. Many residents then charged that town officials had failed to hold the developer to his committments.(3) No actions were taken by the town to enforce the earlier agreement and the neighbors tired of demanding performance by the developer.

Three years later in 1983, with the center facing financial difficulties, the developer proposed additions to the development of a car wash, gas station, and convenience store in order to attract more customers.(4) These new requests rekindled the old debates. Abutting neighbors balked at the idea of a late night gas station and convenience store. They feared these alterations would create all night traffic congestion, noise, and bright lights at night.(5) Town officials objected to the proposed curb cuts for the site which they felt would aggravate traffic problems on the congested throughfare. They also raised concerns about vehicular circulation on the site, the economic feasibility of the proposed development, and design issues related to the gas station.(6)

All building permits and permits to change the hours of operation for the shopping center site required approval of both the town Planning Commission and the Town Council.(7) Therefore, in order to proceed with construction, the developer needed to file his plans through a statutory process. Once permit requests were filed, the permit would be as follows: The Planning Commission would hold a public

hearing and then issue a recommendation on the project to the Town Council. The Town Council would then consider the recommendation, hold another public hearing, and vote on the proposal.(8) Recognizing the town's reluctance to approve the permits, the developer threatened to sue in order to proceed with the development.(9)

The town considered several alternatives over resolving the growing conflict. The Town Planning Director suggested using mediated negotiation to reach an agreement by consensus. He had learned about the dispute resolution technique at a recent conference and thought it would be applicable in this situation.(10)

Although the developer had a legal right to develop commercial uses on the property, the town maintained the authority to deny building permits and changes in hours of operations. Nevertheless, the town knew their authority to restrict hours of operation through the zoning process rested on questionable legal grounds that could be challenged in court. Usually municipalities may not impose restrictions on hours of operation through zoning regulations.(11) Therefore, they hoped to resolve the conflict in a way that would improve their rapport with the neighbors while finding a solution to satisfy the developer and avoid the expensive and time consuming process of litigation.(12)

On the other hand, the developer knew that by threatening to take legal action he might be able to push the town towards granting approval of the permits. However, he did not want to

destroy possibilities for a continuing relationship with the town. In addition, a court judgement in his favor and completion of the new additions would cause friction with the neighbors who represented an important part of his customers.(13)

Neighbors let it be known they intended to stand up for their rights this time. They wanted assurance from the town that there would be no further development difficulties on the site. They recognized litigation would not necessarily include them in the decision-making process - an important issue becaue that would allow them to have more say in the future of the site.(14)

B. REVIEW PROCESS - MEDIATION

Realizing that the key parties were interested in trying to solve their dispute through mediation, the town Planning Director contacted two mediators from the Institute for Environmental Negotiation, a non-profit organization at the University of Virginia, who agreed to assess the potential for a negotiation effort.(15)

As a first task, the mediators identified the important parties in the dispute.(16) After several discussions with residents, the Planning Director and the developer, the mediator discovered that four major groups were involved - the town Planning Director, representatives for the neighbors, the commercial developer, and the PUD Associative Board.(17) This final party represented the PUD developer and the 6,000 residents of the development. Through a deed restriction for

the shopping center, the PUD Board retained final approval over all new development. This Board had already rejected preliminary proposals for the commercial site and could potentially veto the developer's plans even if approved by the town.(18)

Next, the mediators asked each of the parties in Blacksburg to choose representatives to participate in an organizational meeting. The president of the neighborhood association and his board chose three members, the shopping center developer appointed his project manager, and town government chose the chair of the Planning Commission, the Director of Planning, and the planner responsible for issuing the approval. The PUD developer came to the first meetings to represent the PUD association and later replaced himself with a staff member.(19)

Due to the various parties' apprehensions about engaging in the negotiation process, the mediators helped the parties draft a "participation agreement" that set conditions for the sessions that would follow.(20) The town agreed that even if negotiations substantially revised the site plan, the developer would not be required to file a new application. The developer agreed to negotiate plans for all three remaining undeveloped commercials parcels instead of limiting discussions to the one parcel containing the new development. The neighbors agreed to publicly support any agreement generated by the negotiations. The PUD Association agreed to make a good faith effort to negotiate for the needs of the entire PUD development, not just for the residential portion.

The parties all signed this statement of mutual agreement.(21)

With the participation agreement in place, each party in the mediation had a different reason for continuing with the effort. While the Blacksburg developer felt he should not be required to discuss his development plans with the neighbors, he also realized his participation in the negotiation could speed up the permit approval process, saving him both time and money. The town could forsee a long court battle with a high probability of defeat and a major committment of resources for litigation. For the neighbors, the negotiation provided their opportunity to take an active part in formulating policies to govern future development of the site.(22)

During the first meeting the parties agreed to logistical groundrules to govern all further sessions. They decided to limit the sessions to a five week period - a restriction that coincided with the deadline for the Planning Commission to issue its approval of the permit.(23) Each team presented its individual concerns and together the group tried to find ways to "package" issues and compromise in different areas. The parties discovered some issues could be addressed immediately, while the more difficult areas were left for later discussions.(24)

At the end of the five negotiation sessions, each one usually two or three hours in length, the parties agreed to a 12 point settlement. Among the points of agreement, the residents and representatives for the PUD developer agreed to speak in support of the proposed development before the

Planning Commission and Town Council. The town agreed to amend the town zoning ordinance to conform with areas of agreement reached through the negotiation. The town also granted the requested traffic revisions for the site. In return, the developer agreed to reduce the size of the car wash, maintain specific hours of operation, and add buffers to shield the abutting neighbors from the new development. Furthermore, he agreed to a five year moratorium on requests to extend hours of operation.(25)

C. PUBLIC HEARING AND THE DECISION-MAKING PROCESS

Next, the developer submitted the negotiated settlement to the proper chain of authorities for their approval. The approval process involved two parts. The first step required an issuance of a recommendation by the Environmental Quality and Land Use Subcommittee of the full Planning Commission.(26) The parties jointly presented the signed negotiated settlement at the public meeting and spoke in favor of the process by which they had an agreement. After receiving approval of the Subcommittee, the plan went on to its second step - review by the full Planning Commission. As required by statute, the Commission held a public hearing to elicit community response to the proposal. Later, the Commission issued a recommendation in support of the project to the Town Council. At their next meeting the Town Council unanimously voted approval of the project.(27)

Although the Planning Commission approved the agreement and sent on a recommendation to Town Council, support was not

unanimous. In fact, members of the Commission felt excluded from the agreement and sought to stall its approval. In the final vote of the subcommittee, two favored the proposal, one opposed and one abstained. Additionally, the town manager did not support the final agreement.(28) One of the mediators commented that this lack of support came from a failure to maintain ongoing communication between those involved in the process and other Commission members and town officials. The mediator suggested that a different composition of the town mediating teams and better channels of communication might have corrected this flaw.(29)

An ad hoc negotiation between the town and developer in Blacksburg would have left out the community groups who may have in turn filed suit to challenge the town's decision. Consequently, a successful court challenge would have upset any agreement reached between the developer and town. By contrast, the mediated agreement drew together support from all the participating parties. The Blacksburg mediators ensured this cooperation through their "participation agreement" and signatures on the final agreement, and later by orchestrating a joint presentation to the Planning Commission.

In Blacksburg the specific nature of the agreements led to assurance of implementation. The approved zoning agreement, legally binding on that parcel included the specific conditions developed in the mediation sessions. Also, to enforce the restrictions on hours of operation the town revised the zoning ordinance. Different techniques may

be used to ensure compliance. One of these, private covenants recorded in municipal land records, has been used to enforce an agreement and bind it with the land. Although usually not policed for compliance, a covenant will be binding in a court of law if there is a breach in the agreement.(30) Another technique is to make statutory changes based on the agreement as in the Blacksburg Agreement.

D. ANALYSIS

I use this case study to explore the value of mediation in the zoning administrative process. At first glance it may not seem obvious that the Blacksburg process improved upon the traditional procedure as characterized by the Arlington case study. Indeed, in both cases the developer received his permit approval, the local government protected its interest in public improvements (in Arlington it was public open space, and in Blacksburg it was control over traffic patterns on the major thoroughfare), and the community groups felt their interests were addressed by the agreements. The outcome in Blacksburg, however, proved much more stable. The parties in Blacksburg jointly presented the agreement to Town Council where they received unanimous approval and ultimately saw the project built. By contrast, the shakey rezone agreement in Arlington fell apart during the special permit process. In order to salvage it the parties formed new alliances, made compromises, held numerous new negotiations and faced the threat of ending up in court.

Although it may be difficult to draw generalizations from

two case studies, there are lessons that can be learned from both the Blacksburg and Arlington cases. In Blacksburg the parties engaged in a process, mediated negotiation, which in many ways addressed the deficiencies evident in the Arlington example.

If the Blacksburg case, in contrast with Arlington, demonstrates an improvement of fairness and efficiency in the zoning process, what occurred in Blacksburg that was missing in Arlington?

1. Efficiency

The Blacksburg mediator brought the parties together in a series of five meetings to develop an agreement. Within three months the developer had his permit and all the parties felt satisfied with the result. By contrast, the ad hoc negotiation and series of separate meetings held in the Arlington case, (which may have been required given the controversial nature of this project), drew out the process over a period of nine months for the rezone and special permit processes combined. Negotiations may have satisfied some but not all of the parties. Those who were left out might have felt their only option to alter the decision was to file suit. Had the developer or community group taken legal action against the town, litigation could have lasted a least six months - and more likely over a year. Not only would there have been an increased delay to the development, the costs of legal fees for all the parties would have been extensive.

2. Fairness

Fairness is more difficult to quantify than efficiency. For the sake of this discussion I will focus on whether the contents of the mediated agreement addressed the interests of each party. The negotiated agreement in Blacksburg not only addressed the major concerns of each participant, but it also demonstrated how the parties worked together to find mutually satisfactory solutions.

Another strong indicator of fairness in the Blacksburg case was that all the parties came before Town Council and jointly lobbied for final approval. Had interests not been adequately addressed, the parties may not have been willing to show unified support for the proposal. Furthermore, the lack of criticism from the community at the public hearing may suggest important concerns were addressed. By contrast, as soon as the developer began the special permit phase in Arlington, controversies reemerged and those parties which felt excluded from the earlier "agreement" tried to block the project.

To understand the important differences between the Blacksburg and Arlington cases, I turn to the process considerations identified in Chapters One and Two and evaluate how mediated negotiation addressed each one. These considerations were; whether the process included important parties, whether the parties shared information to produce results, whether the process encouraged the parties to seek mutually satisfactory agreements, and whether the parties developed ongoing relationships.

3. Included Parties

The first issue, including important parties in process of creating an agreement, is an important part of the mediation process. In the Blacksburg case, it was the mediators who discovered a fourth important party - the PUD Association - to be included in the negotiation. Excluded from the process, this party had the authority to undermine any agreement reached between the other parties. Therefore, drawing them into the discussions was critical to the outcome. The mediators recognized the need to include this fourth party. At their suggestion, the other parties agreed to include the PUD.

In a traditional zoning process without the assistance of a mediator it may have been much more difficult for the participating parties to identify this fourth party. For example, no one in Arlington took the initiative to include the Parks and Recreation Commission in discussions. Concerned primarily with finding a solution, the affected parties often cannot stand back from the process to evaluate issues such as identifying groups which may be missing from the discussions. More importantly, the parties may not feel they have the authority to make such a decision. When a mediator is present, she often has the express authority to take the necessary actions to identify and include important parties.

4. Packaging Isues with Shared Information

The second and third important processes in Blacksburg were the ability of the parties to share information and to

"package" interests to seek a mutually satisfactory agreement. During the meetings the parties presented their primary areas of concern. With the assistance of the mediator they tried to find overlapping issues.(31) For example, the residents informed the group of the importance of restrictions on hours of operation in the back portion of the site. The developer, less concerned with the back area, wanted extended hours in the front areas near the highway.(32) By discussing hours of operations for the two areas simultaneously, the parties found a solution that addressed both concerns: creation of two zones for hours of business.(33)

Ad hoc discussions between the developer and the town may not have resulted in such a creative response to the problem. For example, the developer in Arlington made special efforts to meet with different parties, discover their concerns, and incorporate these issues into his plans. Since there were no established forums in which parties could listen to each others concerns, the site plans could not satisfactorily resolve competing interests. Likewise, had a party appealed the decision, the finding of a judge would have accepted or rejected the developer's plan as proposed; there would have been little if any community imput.

5. Improved Relationships

The final process issue is whether the parties improved their relationships with one another. As demonstrated by the Blacksburg case, this is particularly important when the parties must continue to interact in the future. The parties

faced the potential of confronting similar issues when the developer began development of his remaining parcel. As a result of the mediation effort, the parties felt comfortable meeting together to resolve their differences. In addition to the developer's improved rapport with the local government and neighbors, the Planning Department developed a system to improve notification to community groups of potentially controversial land use decisions, and the community established a working relationship with the local authorities in order to work together on future land use issues.(34) Thus, in this case mediation improved relationships between parties who needed to continue to interact with one another over time. Providing an environment to develop these relationships had an important impact on the nature of immediate and future interactions among the parties.

By contrast, the traditional process, as represented in the Arlington case, encourages adversary relationships, and discourages joint problem solving. By the time the Town Meeting took place in Arlington, various factions had already taken strong positions on the zoning amendment. Although they had definite interests in the project, members of the Parks and Recreation Commission had never directly confronted the developer about their interest in a soccer field. Later when the special permit process began, these various parties had isolated themselves into separate groups - the Redevelopment Board, the neighbors, and the Parks and Recreation Commission - each with separate and competing interests in the project.

During heated meetings of the Redevelopment Board to discuss the special permit proposal, the groups' distrust for one another and unwillingness to work together became obvious. Had the parties been able to meet in a neutral, non-adversary environment during the earlier stages, they may have been able to transform this hostility into constructive problem solving.

6. Representation

There are other important aspects of mediation that respond to deficiencies in the traditional zoning process. First, those who were present at the mediation in Blacksburg returned to their constituents to keep them informed of the decisions made at the mediation sessions. This process allowed a small group to carry information from larger groups to the discussion table to be sure the negotiating parties addressed important concerns. The traditional process provides limited opportunities for searching out issues and maintaining contact between constituents and representatives of these groups. For example, in the Arlington case, those neighbors who met directly with the developer spoke about their concerns, but no system existed for the developer to find out concerns of other neighbors.

7. Framework

Second, the mediation provided a framework for problem solving among the parties. Of importance was the set of jointly developed groundrules. These rules included; a description of issues to be addressed by the group during the

negotiations, a recognized time limit for discussions, a restriction against press or outsider participation, an agreement to share all written communications among parties with all other participants, and an agreement that all parties would publicly support and explain the agreement. Each of these rules, difficult if not impossible to administer in the traditional process, facilitated the parties in their efforts to find a mutually satisfactory agreement. In the Arlington case, the parties at the Redevelopment Board hearing interacted within the guidelines of the Board's procedures. When the developer sponsored meetings with the community, he determined the agenda for the discussions. Neither of these situations could be considered "neutral" for the participants.

8. Funding

An outstanding question is the ability and willingness to fund such an effort. In the case of Blacksburg, a grant covered all the expenses of the meetings and the mediators efforts. The Virginia Environment Endowment offered the grant to promote the concept of mediation and use Blacksburg as a test case. However, grants and government funding are limited.

Costs of mediation may be limited to covering the expense of the mediator's time and travel expenses. In the Blacksburg case, the mediators spent about 16 days in sessions and preparation for meetings.(35) In other cases, the negotiations may require much more time by the mediator, and greater expenses for production of technical information. As

mentioned in Chapter Three, the parties may not be willing to expend their limited resources on a process that does not guarantee an outcome. One source of funding may be the creation of government matching funds where the local government contributes a portion and either foundations, grants or the parties pay the balance of the costs. Alternatively, the parties may agree to an equitable division of the costs. The mediator's expense, when a consultant is used, could be divided by non-government parties while the local government offers technical assistance without charge. Another possible cost reducing technique would be to train staff members in mediation techniques and make these services available for parties in a negotiation. Thus, costs of the effort could be minimized. The major expenses after the mediator's time would be for the acquisition of technical information, such as reports or studies, and materials for the sessions.

In conclusion, the Blacksburg case study seems to be one example in which mediation provided a useful mechanism by which to resolve zoning conflicts. However, this example may not necessarily apply to all other zoning disputes. There are valuable lessons to be earned, though, particularly by identifying specific aspects of the process used in Blacksburg as compared to the process in Arlington. This comparison demonstrates how potential restrictions on problem solving in the traditional zoning process could be overcome by the use of a mediator.

The important difference between the Blacksburg and the Arlington processes is the presence of the neutral individual, the mediator, meeting with parties in dispute in a forum structured to encourage problem solving. Specific aspects of this new process explained by the Blacksburg case could address deficiencies in the traditional procedures as exemplified in the Arlington case. Furthermore, as a result of using these techniques, it may be possible to improve both fairness an increase efficiency of zoning decisions. However, there are many obstacles in the way of mediation being applied on a constant basis in zoning. Some of these obstacles, political and legal, are addressed in the following two chapters.

CHAPTER FIVE

LEGAL ISSUES

In this chapter I explore legal questions that might arise concerning the use of mediation in the zoning administrative process. In particular, I address two questions; 1) what legally sanctioned mechanisms exist to bind parties in a negotiated agreement for a rezone, special permit or variance, and 2) what are some legal restrictions on the participation of local government officials in a mediation session; what are the implications of the Massachusetts Open Meeting Law and ex parte contacts between government officials and parties in a zoning decision.

Developing an understanding of these and other legal issues may be critical to further the idea of mediation as an innovation in the zoning administrative process. An important reason for this investigation is that participants may be hesitant to engage in a process where the legal ramifications are unclear. This section begins to address some of these issues.

A. POWER TO GRANT CONDITIONS

A critical question about mediated negotiation is whether an agreement can be enforced. Are there ways to legally require performance? In the zoning context, once the parties agree through the mediation process that a parcel of land will be used in a specified way with certain restrictions, there needs to be a mechanism to enforce that decision.

This section explains one such tool - the use of

conditions - that currently allows local government officials to tailor approved amendments or permits for the specific project. A condition is technique by which local governments may restrict the use of private property. For example, a developer may request a special permit to erect a building on a parcel. The local government may restrict the height of the structure or require special signage or open space around the building. These restrictions may be enforced through a "condition" to granting of the permit.

In the traditional model, the conditions are usually designed by the government officials, perhaps after discussions with the developer or community groups. Arlington exemplifies this trend. After conducting a public hearing, the Redevelopment Board proposed restrictions to be placed on the final approved amendment.

The product of a mediated agreement could produce conditions and restrictions to be attached to rezones, special permits and variances. In contrast to the traditional zoning process, a mediation effort would create conditions through joint efforts to find a mutually satisfactory result. In a mediation conditions are arrived at through compromises and "packaging" of issues and concerns as described in Chapters Three and Four. The Blacksburg agreement represents this process. The parties worked together to draft the agreement which the Town Council ultimately approved as the special permit with conditions. In that agreement, all the parties mutually devised conditions, such as the five year moratorium

on new development.

The nature of conditional approvals as an enforcement mechanism and the implication for mediated agreements is the subject of this section. The purpose of such a discussion is to demonstrate how aspects of a mediated agreement can be legally binding on a landowner. It is important to note, though, that I do not address all the other ways in which the parties may bind themselves to an agreement. Instead, I suggest some standards and restrictions that should be considered when fashioning a mediated agreement.

The use of "conditions" is different for rezones than for special permits and variances. I will start with a discussion of special permits and variances, and then address rezones.

1. Special Permits and Variances

Conditions are frequently attached to special permits and variances. In fact, the Massachusetts General Laws on Zoning specifically states that special permits may "impose conditions, safeguards and limitations on time or use."(1) And variances may "impose conditions, safeguards and limitations both of time and of use, including the continued existence of any particular structures but excluding any conditions, safeguards or limitations based upon the continued ownership of the land or structures to which the variance pertains by the applicant, petitioner or any owner."(2)

Courts have issued opinions supporting the right of municipalities to attach conditions to variances and special permits in order to mitigate the impact of a project on a

community. A Maryland court described a board's power to limit exceptions such as variances so as "to mitigate the effect upon neighboring property and the community at large."(3) But the conditions must be reasonably related to protections of public health, safety and welfare and may not contravene the purpose of the zoning ordinance.(4)

The authority to impose conditions is not unrestricted; certain categories of conditions are invalid under Massachusetts Law. The Massachusetts Zoning Law states that any condition placed on a variance relating to ownership will be invalidated.(5) That is, a variance could not be granted based on continued ownership of property by a particular person. Additionally, a variance may not be granted with conditions that exempt an owner from real estate taxes.(6) But the law is silent about such restrictions on special permits.(7) Conditions with "undefined standards" will be invalidated.(8) In other words, conditions must be explicit on the face of the permit although further approval of certain details may be required. For example, a condition that a water situation "must be arranged to the satisfaction of all concerned"(9) was invalidated. But a condition requiring plans and signs be approved by the Planning Board and Board of Appeals was upheld.(10)

Conditions attached to a special permit or variance may cover broad areas and issues. There are some guidelines that should be kept in mind to create a legally defensible condition. Some general standards applied by the courts to determine the validity of a condition are whether: 1) it

offends provisions of the zoning ordinance, 2) it requires illegal actions, 3) it is in the public interest, 4) it is reasonably calculated to achieve some legitimate objective of the zoning ordinance, 5) it is unnecessarily burdensome on the landowner, and 6) it is clearly defined for the landowner.(11) Often a municipal zoning ordinance contains within it specific requirements for conditions on special permits or variances that must be followed.(12)

A mediated negotiation could produce conditions such as the ones approved in a traditional zoning procedure. That is, once the parties produce the agreement, it could become part of the approved permit. It may be important for the negotiating parties to keep in mind the standards listed above. If the parties agree to a condition that fails to meet these standards and the permit is approved, and then challenged by a disgruntled party (perhaps an unidentified party in interest), a court may invalidate the permit based on the impermissible conditions. The ideal circumstances would be generation of a permit that would be mutually agreed upon, thus minimizing chances of appeals.

2. Rezones

Rezones with conditions create different problems from special permits and variances. Not all jurisdictions acknowledge a practice of placing restrictions on a zoning amendment. Massachusetts allows a limited form of "conditions" - for example, in the Arlington case the amendment restricted the types of structures within the

approved new zone to townhouses and garden apartments.

Local governments retain the authority to alter zoning ordinances through legislative actions.(13) That is, a zoning ordinance may be amended by a city coucil vote as a reflection of changed conditions in a community.(14) However, rezones of small parcels may involve particular parties, limited facts, and bear little relationship to policy considerations for large parcel rezones.(15) Indeed, a zoning ordinance may be amended in response to a specific development proposal - the Arlington case demonstrates this type of a rezone. Generally, the rezone states the changes granted from one type of use to another. For example, the Arlington rezone approved a rezone from a single family neighborhood to a higher density - an apartment district. In some cases, a city council may approve restrictions on the specific types of structures allowed on the property. The Arlington rezone specified only townhouses or garden apartments, and no duplexes, or two and three family dwellings. However, restrictions relating to specific details of a project, such as requirements for open space, may not be legally attached to a rezone in many jurisdictions.

In recent years some courts have acknowledged a practice by municipalities called "contract rezoning." Contract rezoning is a process by which a local government enters into a private agreement with a developer either by covenant, deed restriction, or contract.(16) As a result of these "contracts" a government exacts a promise from the developer in exchange for its agreement to grant a rezoning.

Not all courts have accepted this practice. These agreements have been challenged as illegal "spot zoning."(17) Courts have held these zoning amendments violate the legislative mandate of uniform zoning conditions throughout a district.(18) Additionally, conditions attached to rezones have been challenged on the basis of allowing local governments to "bargain away their police power."(19) In the 1971 case of Allred v. City of Raleigh, the court invalidated a rezone restricting property to specific regulations on the ground that a municipality is engaged in legislating, not contracting."(20) The conditioned rezone was invalidated.

In contrast, some state courts, for example, New York and California, have explicitly embraced the notion of "contract rezones."(21) Justifying the practice, the California Court held that "the power to impose conditions on rezoning furthers the well-being of landowners generally, promotes community development and serves the general welfare."(22) In that case, conditions attached to the rezone required the property owner to install street improvements around the project as a condition of rezoning.(23) In Maine, a statue permits a municipality to include in its comprehensive plan provisions for conditional and contract rezoning.(24)

Although Massachusetts does not specifically acknowledge the practice, the courts have recognized the right to impose special conditons through private convenants.(25) In the case of Sylvania v. City of Newton,(26) the Board of Aldermen approved a zoning amendment where conditions were set forth in a private deed attached to a proposed option agreement that

gave the City the option to purchase the property from the owner. According to the option agreement, the owner would abide by the conditions pending purchase by the City. When the landowner challenged the agreement, the court recognized the restrictions as a private agreement between the parties and not in conflict with the laws for rezoning. The Court held "it does not infringe on zoning principles that, in connection with a zoning amendment, land use is regulated other than by the amendment."(27) In addition, the court acknowledged that it was a proper activity of the local officials to participate in the negotiations of the private agreement.(28)

A mediated negotiation of a rezone could produce an agreement like a contract rezone that would restrict use of the land in certain ways. For example, had the parties in Arlington engaged in mediation, it is possible they would have agreed that the land be restricted to certain types of development with a certain amount of land dedicated to public open space for recreational purposes. This agreement, (similar to what the Redevelopment Board issued in their recommendation), then could have become the proposed zoning amendment. It would look similar to a contract rezone in that the parties create a "contract" with one another. The difference between the mediated contract and a traditional "contract rezone" lies in the process of generating the agreement. In the traditional process the developer, local government official and community groups may engage in ad hoc

negotiations attempting to reach an agreement. Mediation provides a structured environment in which a mediator assists the parties to identify all important parties, issues and concerns and find mutually satisfactory ways to resolve conflicts.

In the state of Massachusetts mediated agreements of rezones would be somewhat restricted, because the courts do not acknowledge the practice of contract rezone. A rezone petition from a mediated agreement can only specify the types of buildings or relate only to that which is allowed under the local zoning ordinance. Requirements that land be left open may not be included in the amendment; it may be necessary to effectuate these agreements through private covenants between the parties. For example, in the Sylvania case, the private agreement included restrictions on the limit of the foor area for the building, setbacks of certain amounts, open space of a sepcified size, a buffer zone, restricted numbers and types of signs, limited types of uses for buildings, and establiment of a traffic pattern.(29) A negotiated agreeement may have many of these elements. As in the Sylvania case, the zoning regulations must be separated from the restrictions when submitted to the council for approval.

In those states acknowledging the practice of "contract rezoning," mediated agreements may be more specifically tied to the zoning amendment. That is, the agreement itself may be voted on by the legislative body considering the amendment. The standard used by courts to review contract rezones when challenged by one party or another, is to determine whether

the conditions are intended to prevent adverse impacts on the community.(30) In addition, courts look at the reasonableness of the rezone itself, the effect on the adjacent properties, the benefit to the public welfare and the reasonableness of the conditions.(32) Those conditions meeting these standards have been upheld in the past. For example, in the New York case of Collard v. Village of Flower Hill,(32) the court upheld a rezone with conditions that all construction on the site would be subject to approval by a board of trustees. The court found these conditions reasonably related to the public interest and could be considered to be within the "spirit" of enabling legislation.(33)

In conclusion, it is already an established fact that governments use conditions on rezones, special permits and variances to enforce particular use of land. Massachusetts courts acknowledge this practice for variances and special permits, but allow only limited qualifications on rezones while acknowledging the practice of engaging in private "contracts." When developing agreements, parties attempting to negotiate a zoning conflict may wish to consider some of these standards and restrictions suggested in this chapter to determine what a court might consider valid. It is also important to explore what other mechanisms may exist for enforcement that are not addressed in this paper.

B. GOVERNMENT PARTICIPATION IN NEGOTIATED AGREEMENTS

The second section of this chapter examines some of the restrictions placed on participation of local government

official in mediated negotiations of zoning disputes. As suggested in earlier chapters, a mediated land use dispute should include the developer, the representatives of neighborhood interests and representatives from the local government.(34) Problems may arise though when local government officials engage in the negotiation process.

This section looks at issues affecting three different levels of government officials who would be potential participants in a negotiation: planning staff, members of the Planning Board (this also includes other municipal boards and commissions), and members of the Zoning Board of Appeals or City Council (i.e. the decision-making body). I address two issues which may affect their participation; 1) sunshine, or open meeting laws, and 2) ex parte contacts. I address only these two issues although there are many others that should be considered. One major issue that should be noted but is not addressed in this paper is whether a mediated negotiation could replace a public hearing and satisfy due process requirements. I have based by discussions of mediation on a model in which the final negotiated agreement would be submitted to the permit granting authority or decision-making body who would hold a public hearing and issue a determination on the proposal. Different legal issues arise from the two different models. However, my discussion is limited to issues applicable to the second model as set forth in this paper.

1. Sunshine Laws

A negotiation session may be affected by the

Massachusetts Open Meeting Law, sometimes referred to as the "sunshine" law.(35) The law states, "all meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section."(36) The term "meeting" is defined in the section as "any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered."(37) A governmental body includes every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted.(38)

The issue of whether the Open Meeting law applies to mediated negotiation is important because of the nature of the interactions during the sessions. Often times the key to a mediation session is the ability of the parties to develop a trust in one another in order to make suggestions or compromises without fear it would not be held against them. Open meetings, attended by press or parties who may not have a direct interest in the conflict (as identified by the mediator) may have two competing effects on negotiations. On the one hand, the presence of outsiders may stifle the willingness of participants to offer potentially valuable information and take risks. Therefore, if the Open Meeting Law applied to mediated negotiations, parties might be

hesitant to participate. On the other hand, open sessions and the increased public exposure may ensure the parties continue to act in good faith throughout the process. Thus, "closed sessions" may not always be appropriate for mediation sessions.

In a 1981 case, the Massachusetts Appeals Court specifically applied the Open Meeting Law to zoning boards. The Massachusetts court invalidated a special permit to build residential condominiums in Yaro v. Board of Appeals of Newburyport(39) because the zoning board made a determination in a closed session without a record of the meeting.

Participation of a staff member in mediated negotiations would not trigger requirements for the Open Meeting Law. The Open Meeting Law does not apply to meetings held by staff members as defined by statute.(40) In actuality, planning staff members may have little, if any, legal restrictions on their participation in a mediated negotiation. As advisors or technical assistants to planning boards, staff members constantly enter into discussions with developers and generate proposals for conditions to be presented to the decision-making body.(41)

The Open Meeting law does not specifically address the issue of negotiation sessions involving members of zoning boards, planning boards or city councils. Yet the law may be invoked where a majority of a board or council participates in a negotiation.(42) When a majority of the board or council members are present it may be mandatory to issue notice of the meeting, and allow the public to attend the sessions. If the

results of the negotiating group submitts its agreement to a decision-making body for final approval, then the meetings at which the conditions are negotiated are only interim steps and not final decisions and thus may not be subject to Open Meeting Laws. In addition, a session attended by only one member of the board would not constitute a quorum of the governmental body and the requirement for open meetings would not apply. If negotiation sessions are construed as the final decison-making process, the courts may require the sessions be open to the public with proper notice even though a minority of the planning board participates. Thus, it is how a negotiation session is characterized in the decision-making process by the courts that may determine whether to apply the Open Meeting Law - and not the authority of the participants.

2. Ex Parte Contact

Agreements resulting from mediated negotiations involving members of a board of appeals or city council could be challenged on the basis of ex parte contacts. A challenge of "ex parte" contact may be made when communications between a decision-making body and the petition applicants or other potential parties in a negotiation have not been presented for response to all who are parties to the decision. Unfairness arises when the views of one party come before the board under circumstances which deprive the opposing party of the opportunity to know what was presented and to respond to it.(43)

Zoning boards should be the "impartial judges" of a

zoning decision; participation by a board member in the formulation of conditions for a special permit or variance may therefore lead to challenges of ex parte contacts. problems.(44) Members of a city council are not held to as strict a standard, because, noted in Chapter One, decisions by city councils on zoning amendments are considered legislative rather than adjudicative, and thus standards of due process are not as strict as for zoning board procedures. But in recent years, the trend towards consideration of rezones as a quasi-judicial decison has increased the need for greater due process standards.(45) This higher standard may lead to challenges of unfairness as a result of participation by council members in mediation sessions.

In traditional zoning cases, courts may invalidate decisions of boards or councils where it finds that individuals in a decision-making capacity obtained information or contacts which have not been made available to all parties to respond. Yet an Oregon court acknowledged that placing information on the official record could satisfy the "impartiality" requirements. On a request for a variance in Peterson v. Lake Oswego,(46) the city council discussed a petition with members of the planning commission and the applicant library board. Although the variance was denied, the court held that "if ex parte communication does take place, it must be placed on the public record to enable interested persons to rebut the substance of the communication." (47)

A recent case exemplifies the need to allow all parties an opportunity to rebut the substance of ex parte contacts. A Maine court vacated a denial of a subdivision application by the town planning board where the board invited opponents of the proposal to assist in preparation of findings of facts necessary to support the board's denial.(48) No other parties, including the developer or any proponents, received notice of the meeting. The Supreme Court held that the fact-finding process itself may conclusively determine one's property rights, and that ex parte participation in that process clearly violated the developer's constitutional rights.(49)

If the standards of Peterson v. Lake Oswego(50) apply, the court may have upheld the decision in the Maine case had all parties received an opportunity to comment on the proposal. Thus, presentation of a negotiated agreement at a public hearing prior to a final decision may satisfy requirements for full disclosure of the ex parte contact.

In a negotiation session, challenges of ex parte contacts by a dissatisfied party can potentially invalidate a proposal. To guard against such a contention, all sessions of the negotiations should be entered onto the public record to allow all parties equal access to the information. Courts would then decide whether all parties received a full and fair opportunity to challenge the information from the negotiation session.

Ex parte as an issue could be eliminated if a mediation is properly structured so that parties in the negotiations

include all those with an interest in the decision, allowing each the opportunity to respond to any and all agreements. In fact, this is the central notion of mediation; parties respond directly to one another throughout the process to address issues in conflict. If all parties are present throughtout the sessions, the issue of ex parte should not arise at a later stage, i.e. at a zoning board or city council hearing. Ideally, by the time of a hearing, all the parties have examined all the issues.

C. ANALYSIS

Neither of the two legal issues discussed in this chapter pose serious obstacles to the use of mediated negotiation for zoning disputes in Massachusetts. Yet it is important for those using mediated negotiation to be mindful of them. By paying attention to certain guidelines, participants can reduce the chances that their actions will lead to serious legal complications.

With respect to the ability to enforce the agreements, zoning laws already exist which serve as a framework for mediated negotiations. Mediated negotiations for special permits or variances could produce a set of conditions that could be legally binding on the landowner as set forth by statute.

Conditions for variances and special permits must comply with some general standards. Conditions must: 1) conform with the zoning ordinance, 2) be reasonably related to the public interest, 3) not be unduly burdensome to the landowner, 4) not

related to ownership of the property, and 5) be clearly defined on the face of the permit. Where local zoning ordinances provide guidelines for conditions, these must also be considered.

Under existing Massachusetts law, an agreement made through a mediated negotiation of a rezone cannot be submitted to a city council or other decision-making body for approval. Only the specific request for a change of zoning could be submitted as a zoning ordinance. Meanwhile, the parties can agree to certain restrictions that would be binding through the use of private covenants.

Mediation sessions may be subject to the Massachusetts Open Meeting Laws under certain circumstances and depending on certain interpretations of the law. At present it is unclear how the law would apply to negotiations. If a court determines that "meetings" include sessions where only one or two members of the board or council are present, or that negotiations are considered convening of government bodies, then the Open Meeting Law would apply.

The final legal issue, ex parte contacts, may pose a problem for both council and zoning board member participation in mediation sessions. Ex parte problems may be minimized by making a public record of the sessions. In addition, if a mediation session includes all interested parties, and those who might potentially challenge the agreement are present throughout the process, there might be no violation of due process rights.

CHAPTER SIX

POLITICAL IMPLICATIONS OF CHANGE

This chapter explores one aspect of institutionalizing mediation in the zoning process. This discussion is offered more to give a flavor of the politics of institutionalization rather than a scholarly analysis of the ways in which to promote widespread use of mediation.

There are many different ways in which mediation could become a regular part of the zoning process. As a few examples, local governments could choose to adopt such procedures on a voluntary basis, zoning laws could be altered through legal challenges to mediation efforts, or states could adopt enabling legislation. The use of legislative means, or state action, to legitimize the process is discussed in this chapter. A statewide ordinance acknowledging the practice of mediation is one possible channel for institutionalizing mediation.

In this chapter I describe a proposed mediation ordinance and then examine the political actors who supported and opposed the legislation. The discussion explores the views of developers, zoning administrators, local officials, environmentalists and members of the League of Women Voters, all of whom took an active interest in the concept. Their ideas and opinions may help those who are interested in promoting the concept of mediation to recognize potential political barriers to implementation.

In the past three years, efforts have been made in two

states to incorporate a mediation option into comprehensive bills to revise their state zoning acts. In these two states, Rhode Island and Pennsylvania, legislation was introduced which awaits initial committee review. As the issue is complicated, misunderstood, and not a high priority for many legislators, the legislation has not progressed far in either state.

Pennsylvania instigated the first mediation effort. Aware of the ongoing attempts to refashion the state zoning legislation, staff from the Brandywine Conservancy Environmental Management Center, a Pennsylvania organization providing environmental assistance in land use planning and management to four counties surrounding Philadelphia, drafted the language for mediation legislation.(1) Familiarity with the use of mediation to resolve environmental disputes led the authors to believe site - specific land use disputes could also be resolved with the same technique. As the two major authors of the legislation noted, "there is general agreement that the mediation process is more `manageable' and has a greater chance of success if the dispute and the parties are easily defined and limited in scope. Considering these factors together, it appears local land use disputes would be logical candidates for mediation."(2) Parties in Rhode Island involved in updating their zoning enabling act took the same language proposed in Pennsylvania and lobbied for its inclusion in their new zoning act.

A. LANGUAGE OF PROPOSED LEGISLATION

The proposed legislation defines mediation as a voluntary negotiating process "in which parties in a dispute mutally select a neutral mediator to assist them in jointly exploring and settling their differences, culminating in a written agreement which the parties themselves create and consider acceptable."(3) The ordinance designates mediation as appropriate for special exceptions, variances, zoning amendments, and subdivision appeals. It must be voluntary and should not replace any existing procedures. It may not be initiated or participated in by either the planning board or zoning board of appeals. The option should not be interpreted as an expansion or limitation of any municipal police power or modification of any principle of substantive law. Also, protection for participants from future litigation is established under a clause stating that offers or statements made in the mediation sessions, excluding the final written mediated agreement, are not admissible as evidence in any subsequent judicial or administrative proceedings.(4)

The bill lists seven fundamental issues to be addressed by all the mediating parties. These terms and conditions are:

1. Funding mediation;

2. Selecting a mediator who, at a minimum, shall have a working knowledge of municipal zoning and subdivision procedures and demonstrated skills in mediation;

3. Completing mediation, including time limits for such completion;

4. Suspending time limits otherwise authorized in this Act, provided there is written consent by the mediating parties, and by an applicant or municipal decision - making body if either is not a party to the mediation;

5. Identifying any additional important parties and

affording them the opportunity to participate;

6. Subject to legal restraints, determining whether some or all of the mediation sesssions shall be open or closed to the public; and

7. Assuring that mediated solutions are in writing and signed by the parties, and become subject to review and approval by the appropriate decision - making body pursuant to the authorized procedures set forth in the other sections of this Act.(5)

The language of the bill presents municipalities with a voluntary system to be used to resolve frustrating and time consuming land use disputes. The option does not try to replace any existing standards nor change the law. Rather, municipalities are granted an option to fashion a negotiation appropriate to each new situation.

B. OPINIONS OF PROPONENTS AND OPPONENTS

A draft of the proposed legislation circulated throughout the community in Rhode Island and generated a wide variety of responses. Respondents included a staff member from Rhode Island League of Town and Cities, (the major promoter of the concept), builders, realtors, the State Association of Zoning Boards of Appeals, planners, lawyers, developers, and environmentalists.(6) These parties formed four major interest groups concerned with rewriting the existing zoning enabling act; 1) the development community, 2) local government officials, 3) environmentalists, and 4) "good government" concerns. Their reactions may well reflect general attitudes towards mediation and barriers to enactment of such a legislative amendment.

The Building Association, representing builders,

developers, and general contractors, did not favor the mediation option.(7) This development community voiced two major concerns. First, the concept has not been clearly defined and demonstrated to prove its purpose. In the abstract, mediation appears as one more way for local governments or citizen groups to stall development projects. They resented the many existing layers of hearings and bureaucratic red tape which added great expenses for delays to the project cost. Any legislation increasing the number of hearings or adding additional delays would be opposed by this coalition. Therefore, chances are slim for gathering support of a proposal that appears to slow down what is already considered an administrative nightmare for developers.

A second concern with mediation for the development community revolves around identification of participating parties. Although case law provides some guidelines, it is difficult to predict and identify parties with "legitimate" interests in a dispute. Developers fear a negotiation process as described in the proposed legislation would broaden the scope of developer responsibility with the effect of increasing rather than decreasing the amount of conflicts.

Vocal opposition to the mediation proposal came from the Zoning Board Association.(8) As the final authority for variances and special permits, zoning boards play a significant role in directing the course of development in a community. The zoning boards may encourage development and may do so in opposition to community development schemes proposed by local planning staff and elected officials.

Proposals for legislation that would limit this local decision-making authority are rebuffed by the Zoning Board Association. This group perceived mediation to be a detraction from their present authority to judge zoning disputes. They felt developers currently engaged in "negotiations" and no formalized process should be necessary. If a developer failed to "do his homework" by way of responding to municipal and community concerns, then the petition should be denied by the board.

City and Town councils generally favored revisions to the zoning statute.(9) Some local officials perceive zoning as a major tool for promotion of economic development for their communities while others use zoning for growth control. Where officials wish to promote changes for their community, they object to their lack of control over the current zoning process. Final decisions by zoning boards for variances or special permits may conflict with development goals of local officials. In response to this conflict between local authorities, Rhode Island courts now hear a growing number of cases filed by local town or city councils challenging decisions of local zoning boards. Local officials would support the concept of mediation if it provided an opportunity for their interests to be addressed in the decision-making process.

The League of Women voters, representing a "good government" position, are major supporters of zoning revisions and the mediation option.(10) The League recognizes a need to

change the current zoning act. The overwhelming discretion of zoning boards is one of their major concerns. League members believe locally appointed boards abuse their power in making zoning decisions. That is, they believe decisions should be based on a comprehensive plan or in accordance with an overall legislative scheme. They feel zoning boards all too often bypass these plans to approve projects. The League advocates for a state appeal system of local zoning decisions to provide greater consistency in decisions throughout the state. They also promote greater citizen participation. For the League, the mediation option could improve citizen participation while addressing the issue of zoning board abuse of discretion.

Environmental groups favor any revisions to the zoning ordinance with the effect of improving their access to the system.(11) Many groups feel the current process restricts their ability to use zoning to protect the environment. Mediated negotiation has become an important tool to the environmental community in other types of disputes - siting a power plant or retaining open space for a park are two examples.(12) The technique has allowed these groups greater access to the decision-making process. Applied to zoning, mediation could improve the limitations of current citizen participation at public hearings. The traditional process may provide the opportunity to be heard, but does not guarantee community interests will be addressed. Nevertheless, environmentalists retain a healthy skepticism for any process, including mediation, that could potentially perpetuate their current exclusion from discussions or lead to their co-

optation.

C. OBSTACLES TO IMPLEMENTATION

One of the major obstacles to passing legislation seems to be the lack of familiarity with the concept. Most people hear the term "negotiation" and think of the traditional positional bargaining techniques. Experiments to use mediated negotiation have not received sufficient attention to publicize the technique. Unfamiliarity with the idea of a third party intervenor is compounded by a lack of confidence in the concept of "consensus building" or collaborative problem solving which plays an important role in mediated negotiations.

In order to promote the concept to different groups, there is a need for specific examples. To overcome the skepticism of local officials, developers, citizen groups and other interested parties, sponsors of the concept must be able to turn to successful cases of mediated zoning disputes, such as the Blacksburg case, to illustrate the technique. Without test cases to prove the effectiveness of the concept, promoters have no product to sell.

A second major obstacle to legislative enactment is the nature of the power balance in zoning decisions. Legislation delegates the authority for decision-making for a special permit and variance to the zoning boards or other locally appointed lay boards. Although the boards are appointed by mayors or town officials, the elected officials retain no control over board decisions. As long as zoning boards retain

an unrestricted authority, they will be hesitant to approve of any system diminishing that power.

According to proponents of the Rhode Island legislation, the building community seems to form a strong coalition with some zoning boards against any process that restricts development. This coalition represents economic development which, in the present political climate, receives strong support from state legislators. Mediation is perceived as a stumbling block to development, another layer of governmental red tape and is therefore an unpopular concept.

On the other side of the power balance lies community groups who lack the political clout of developers. Community groups may perceive legal redress as an effective tool to thwart development. Feeling as though they can adequately address their concerns in this manner, these groups may be reluctant to support a reorganization of the power structure and implementation of a new decision-making process where they can no longer identify the "enemy" or they become part of the process.

To gather support for legislation, a new coalition must be built. If zoning boards are abusing their discretionary power, this should be challenged. Local governments, citizen groups, and even developers should demand a new alliance of power to ensure fairness and consistency of decisions. A new coalition could attempt to shift the importance away from quantity of development to quality of process and therefore quality of development throughout the state. Such a strategy

could at the same time promote economic development and improvement of the existing procedures. Mediation should be presented to all parties as the vehicle for increasing the efficiency of the system and a cost saving device for developers with controversial projects. Thus, by addressing the major concerns of political alliances affecting legislative decisions, the prospects could be realized for enactment of a mediation option.

Party politics are a third major obstacle to legislative enactment of a mediation option. Pennsylvania supporters and sponsors of the zoning bill find their Democratic coalition receives little attention in a Republican chaired Senate Committee. Planning and zoning issues are traditionally categorized as "Democratic" issues. In a strong partisan envirionment, new zoning legislation, and mediation in particular, may receive little attention unless the issue may be construed as "Republican." This problem could be addressed in the same manner as realignment of the power structure. Promotion of zoning, and mediation as a part of that process, as a means for developers to pursue their development rather than as a governmental system to delay projects could elicit greater support from Republican and pro-development legislators.

This chapter identifies political barriers that may be encountered by legislative efforts to promote mediation in the zoning process. The major roadblocks, based on the experiences in Rhode Island, appear to be the politics of local government decision-making bodies and the strength of

the development community to effectively control legislation impacting their interests. Promoters of the concept may want to address such issues as how local governments might need to change the weight given to appointed administrative bodies and issues of power that could arise from such efforts. Likewise, the development community may need convincing that the process will enhance their ability to engage in their occupations in order to gain their support for mediation legislation. Mediation as a concept and the language of the proposed legislation is a long way from satisfying these two critical interest groups. Nevertheless, acknowledging the existence of these barriers is the first step towards overcoming them.

CONCLUSION

In this paper I have explored the idea of mediation as a way to address deficiencies in the zoning administrative process. Current administrative procedures sometimes fail to ensure fairness and efficiency in the decision-making process. I have examined specific aspects of the zoning process that tend to increase the likelihood of conflicts. I then propose mediated negotiation as a technique to overcome deficiencies in the current zoning system.

Zoning decisions are prone to controversy. No matter what may be the final decision, someone will be affected by the results. And where these affected parties feel excluded from the decision-making process conflicts will often arise.

The zoning process encourages the parties to interact with one another to try to resolve differences (as demonstrated by the Arlington case study in Chapter Two). Public meetings or public hearings can be used to serve the function of airing differences. Sometimes the developer takes the initiative to contact parties concerned about a project to work through conflicts, a tactic used by the Arlington developer. Other times the developer negotiates directly with the local government, promising certain actions in exchange for the granting of a permit.

Some aspects of the administrative process, whether it be for a request for rezoning, special permit or variance, exacerbate conflicts among the parties with an interest in the outcome of a decision. In this paper I have identified five

weaknesses of these interactions that can cause conflicts; 1) a lack of direct communication between all the parties, 2) the adversary nature of interactions, 3) the lack of representation of all interested parties, 4) the inability of parties to search for mutually satisfactory solutions to their differences, and 5) the difficulties of addressing the full range of disputed issues.

The structure of the current zoning administrative process provides few, if any, opportunities to address these weaknesses. I suggest that mediated negotiations could address each of these deficiencies. The model for such an approach retains elements of the traditional zoning process but adopts other innovations. In this model, when the local government receives applications for zoning changes, either petitions for rezones, or requests for special permits and variances, a determination is made about the nature of the conflict. A staff member may suggest mediation to a developer where concerns can be identified. Alternatively, a developer or community group may propose mediation where they see an opportunity for the parties to resolve their differences. The process would be entirely voluntary and agreed upon by all the parties. Also, a mediator would be chosen by the parties.

The parties would engage in a series of mediation sessions in which the mediator assists the parties in identifying their concerns and interests. Then the group would try to resolve conflicts by "packaging" a new proposal. If an agreement is reached, the results would be submitted to

the decision-making body with the authority to issue determinations on that type of a request. A public hearing hearing would be held and a decision would be rendered. The final zoning decision would incorporate the mediated agreement.

This model for the zoning process responds directly to problems inherent in the traditional zoning procedure. The mediated negotiation creates a neutral environment in which parties in a conflict may search for a mutually satisfactory resolution to a conflict. Important aspects of the mediation process include the ability to 1) include all parties in interest in the problem solving process, 2) share information between the parties in efforts to "package" concerns, 3) provide a framework in which the parties can discuss these issues, 4) provide a mechanism to ensure representation for all interests and concerns in the outcome of the decision, and finally 5) encourage the parties to communicate directly with one another so as to develop relationships for future interactions.

The traditional zoning process provides a legal framework for enforcement of some types of mediated zoning agreements. In Massachusetts, the Zoning Act acknowledges the practice of granting permits with conditions for both variances and special permits. Local zoning ordinances may even provide specific guidelines for these restrictions. Restrictions could be generated as a result of a mediated negotiation and then submitted to the permit granting authority as the conditions to be attached to the special permit or variance.

Under current Massachusetts law, conditions for rezoning resulting from a mediated negotiation could not be submitted for approval by the decision-making body (although permissible in other states). Instead, the agreement for specific restrictions might be enforced through private agreements. Massachusetts courts would not invalidate a zoning amendment granted in conjunction with such private covenants, deeds or other private contracts.

The Massachusetts Open Meeting Law may affect the nature of a mediation session. The courts have not specifically addressed this issue regarding negotiations. When a local government official participates in the negotiations, the Open Meeting Law may require the public be informed and invited to the sessions. The law might also be interpreted to apply only for meetings officiated by a majority of a governing body. Where only one member of that body is a participant in meetings, and the purpose of the session is to develop an agreement among all the parties, the Open Meeting Law may not apply.

Problems may arise from participation in mediation sessions by members of a zoning board of appeals, city council, or a member of any final decision-making authority. Their participation may lead to challenges of ex parte contacts, a basis for a court to invalidate a proposal. One way to avoid such a problem would be to restrict government participation to members of the planning staff or planning board. However, members of zoning boards or city and town

councils may be important parties in the mediation sessions. Certain precautions could minimize the risk of ex parte challenges. First, the parties and the mediator must ensure all parties or interests in the zoning decision are represented in the mediation sessions. All participants must have full and fair opportunities to challenge any information reported at the sessions. Second, accurate minutes from the sessions should be entered onto the public record at the public hearing of the decision-making body.

Politcal questions arise when considering the possibility of using mediation on a regular basis. Critics believe mediation could disturb the power balance of public bodies and private interests. Some actors might be unwilling to yield to a system that they perceive would diminish their power or their ability to influence the decision-making process. The lack of familiarity with the concept of mediation heightens the suspicions of these individuals.

Mediation would improve access to the decision-making process where parties are directly involved in devising an agreement. Participants would help tailor the outcome to some their interests while seeking compromises on others. In the model proposed in this paper, the decision-makers would not lose their authority to render a final decision. In fact, their authority might remain unchanged. Final decisions of a zoning board of appeals upon a negotiated agreement may be less likely to be challenged where the decision is created and supported by all the interested parties.

Cost, both in terms of time and money, may dampen wide

spread use of mediation in the zoning process. Often there is little, if any, extra funding to pay for mediation services. Even where costs are cut by use of mediators who are staff members of the local government, parties may not be willing to invest extra time to attend the sessions. They may religiously attend public meetings and hearings regarding a project of interest. However, they may be unwilling to commit their time to a voluntary process which does not guarantee a favorable outcome. Over time, wider useage and greater acceptance of the process may lead to more creative solutions to funding problems and more willingness to participate. For instance, if local governments wish to promote use of the technique, they may become more willing to train staff members as mediators. Parties who recognize the potential for improving the decision-making process by their participation in a mediation effort may be more willing to spend time and money on negotiation sessions.

As local governments, developers and community groups become more frustrated by current land use practices, they may be more willing to explore process alternatives such as mediated negotiation. Experimentation with the technique will generate greater understanding of how to improve the process. Likewise, there is a great need to explore how to overcome some of the legal, political and economic barriers to the use of mediation in the zoning process. Further research could demonstrate the importance of this process as a way to address deficiencies in the current zoning administrative process.

ATTACHMENTS

A. PARTICIPATION AGREEMENT, BLACKSBURG MEDIATION

B. NEGOTIATION GROUND RULES, BLACKSBURG MEDIATION

C. FINAL AGREEMENT, BLACKSBURG MEDIATION

ATTACHMENT "A"

(3)

INSTITUTE FOR ENVIRONMENTAL NEGOTIATION
CAMPBELL HALL, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE 22903
TELEPHONE (804) 924-1970

2-11-83

William Issel
Division of Planning
Town of Blacksburg
300 South Main Street
Blacksburg, VA

George Lester
Lester Development Corporation
P.O. Box 4784
Martinsville, VA 24112

Richard Stock
Haymarket Square Homeowners' Association
2828 Wellesley Court
Blacksburg, VA

Dear Sirs:

As a follow-up to our discussions with each of you (or your representative) on February 9th, we are using this common letter to describe the conditions which we think are requisites to useful negotiations over the proposed additional development of the commercial center of the Hethwood P.D.R. in Blacksburg, Virginia.

We believe successful negotiations can be undertaken if the following conditions are acceptable to each party.

The Haymarket Square Homeowners' Association will:

1 - agree to negotiate within a limited time frame, i.e. by April 1, 1983,

2 - appoint two or three negotiators who are representative of the Haymarket Square Homeowners' Association as a whole,

3 - make a good faith effort to negotiate its needs for the commercial center, but also acknowledge the developer's needs for the commercial center and to seek joint gains.

4 - testify before the Town of Blacksburg in support of a development alternative if agreed to by April 1, 1983.

The Town of Blacksburg will:

1 - allow the substitution of an alternative development plan up until April 1, 1983, without requiring the developer to repeat stages in the Town's approval process which the developer's pending application has already passed.

The Lester Development Corporation will:

1 - participate in at least four joint meetings with representatives of Haymarket Square Homeowners' Association, and the Town of Blacksburg's Planning Staff,

2 - make a good faith effort to negotiate its basic needs for the commercial center, with an open mind as to how these needs might be met,

3 - consider the future development of all three vacant parcels in the commercial center and not just the one for which their application is now pending,

4 - if, through the negotiations, an alternative development plan has been agreed to by all the parties by April 1, 1983, withdraw the January 18, 1983, proposal for development of the service station and related facilities and substitute for the January plan the alternative plan.

We are, by separate communication, inviting the Hethwood Foundation to participate in the negotiations if they find the following conditions acceptable. They will:

1 - negotiate within the limited time frame, i.e. by April 1, 1983,

2 - appoint representatives to negotiate on behalf of the Hethwood Foundation as a whole,

3 - make a good faith effort to meet the needs of the Hethwood Development as a whole, while recognizing also the needs of the developer and the needs of the Haymarket Square residents,

4 - serve as active participants in the negotiations and express the full range of concerns they have over the development of the commercial center.

In view of the limited time period in which the proposed negotiations would take place, we request that you advise us by February 16, 1983, as to whether or not the conditions stated above are agreeable to you. If all parties agree to the process, we would expect to arrange for a first meeting during the week of February 21, 1983, and to be back in touch with you with specific details.

We look forward to hearing from you by February 16th.

Sincerely,

A. Bruce Dotson
Acting Director

Douglas M. Frame
Senior Associate

11 February 1983

cc: Hethwood Foundation
DMF: sdp

ATTACHMENT "B"

(4)

Negotiation Ground Rules

re

Hethwood Village Shopping Center Development
3/~~2~~3/83

1. The focus of the negotiations is to seek agreement on development of the Hethwood Village Shopping Center which will be both financially successful and an asset to the neighborhood.

2. The following organizations are recognized as the negotiating stakeholders and may be represented by up to three negotiators each:

Lester Development Corporation
Haymarket Square Homeowners Association
Hethwood Foundation
Snyder-Hunt Corporation
Town of Blacksburg

represented by same negotiators in effect

3. The Institute for Environmental Negotiation will assist the stakeholders as facilitators and mediators.

4. Recognizing the limited time frame for seeking an agreement (prior to the scheduled March 28, 1983 meeting of the Blacksburg Planning Commission panel) all stakeholders have agreed to negotiate together in good faith in at least four meetings (two more after March 1, 1983).

5. No uninvited guests nor representatives of the press will be permitted in the negotiations.

6. Negotiators may consult with their constituencies, but will not discuss the details of the negotiations with outside parties. Any written communication between stakeholders will be provided promptly to all other stakeholders and to the mediator.

7. If, at the conclusion of the mediation, all parties agree on a solution then all parties shall be willing to express their support and to explain it to others.

8. Place and time for each meeting will be announced at the conclusion of each preceeding meeting.

ATTACHMENT "C"

March 23, 1983
(as revised March 28, 1983)

Mr. William Issel
Director of Planning
Town of Blacksburg
300 South Market Street
Balcksburg, Va. 24060

Ms. Lelia Mayton
Haymarket Square Homeowner's
Association
2803 Wellington Court
Blacksburg, Va. 24060

Mr. Gary Smith
Lester Development Corporation
P.O. Box 4784
Martinsville, Va. 24112

Mr. Richard Moore
Hethwood Foundation
100-G Houndchase at Hethwood
Blacksburg, Va. 24060

Dear Friends:

Pursuant to the negotiation process set forth in our letter to your organizations of February 11, 1983, this letter records the agreement reached among you on March 22 on the development of remaining portions of the Hethwood Village Shopping Center in Blacksburg, Va.

1- The negotiators representing Haymarket Square Homeowner's Association and the Hethwood Foundation agree to speak in support of this agreement and to explain their reasons therefore when it is considered by the Planning Commission and the Town Council of Blacksburg.

2- The developer agrees to submit the stipulated agreements in this letter as part of the site plan proposal currently pending before the Town and to make necessary applications to the Town to have the provisions of this agreement apply to other parcels of the Hethwood Village Shopping Center.

3- The Town agrees to consider an amendment to it PDR ordinance to permit commercial uses compatible with the residential character of the area. Haymarket Square Homeowner's Association, Hethwood Foundation and the developer agree to support that ordinance change.

4- For the out parcel whose long axis parallels Hethwood Boulevard, permitted uses shall include institutional, financial or office activities.

5- The Town agrees to provide the Haymarket Square Homeowner's Association with mailed copies of Planning Commission agendas on a regular basis in accordance with Town practices for agenda mailings.

The Institute is affiliated with The Division of Urban and Environmental Planning in the School of Architecture at the University of Virginia, and funded by a grant from The Virginia Environmental Endowment.

6- A convenience store, a gas station and a car wash of five bays (with the positioning of the car wash to be worked out between the developer and the town to enhance vehicular flow) shall be supported by all parties to the negotiation.

7- A curb cut in Price's Fork Road at the location shown in site plan A shall be supported by all parties to the negotiation. The cut shall permit access and exit, but with left turns prohibited in both cases.

8- There shall be a prohibition on further curb cuts on Price's Fork Road and Hethwood Boulevard.

9- Two zones for hours of business shall exist which shall be separated by a line running down the access road from Hethwood Boulevard and extending through the existing buildings of the shopping center.

In areas north of this line, in the two existing shops north of this line, and in any future shops north of this line hours shall be as follows:

Monday through Saturday	6:00 a.m. - Midnight
Sunday	11:00 a.m. - 8:00 p.m.
Sunday Restaurants only	8:00 a.m. - 10:00 p.m.

In areas and shops to the south of this line:

Monday through Saturday	8:00 a.m. - 10:00 p.m.
Sunday	12:00 Noon - 8:00 p.m.

The car wash and vacuum machines need not be disconnected during off duty hours. Car wash and vacuum hours shall be posted as well as no trespassing signs for off duty hours. Lights (other than security) shall be turned off during non duty hours.

10- The developer agrees not to seek and the Town agrees not to approve changes in the hours of business for the Shopping Center as described in no. 9 above for a period of 5 years from the Town's approval of the gas station/conveneince store/car wash development.

11- Lighting for the Convenience store, gas station and car wash shall be installed so as to shine downward and not toward the South. Lights over the vacuum pumps shall be at a maximum of 8 feet from ground level.

12- A berm and screening shall be installed on the Southern boundary of the gas station/convenience store/ car wash parcel of such height as to screen car headlights

We request each of you to go over this letter and to relay any comments to us as soon as possible.

As agreed at Tuesday's negotiation session, we will all meet together in the Municipal Building at 4:00 p.m. Monday March 28 to deal with any necessary revisions and clarifications in advance of the 5:00 p.m. Planning Commission Committee meeting.

Sincerely,

A. Bruce Dotson
Assistant Director

Douglas M. Frame
Senior Associate

ABD:DMF:mab

FOOTNOTES

INTRODUCTION

1. 71 Land Use Planning 837, 884 (1983).

2. Rose describes boards who determine variances as "mediators" between disputing citizens. When city councils rezone individual parcels of land, their actions begin to resemble those of a zoning board of appeals. 71 Land Use Planning 837, 857-863 (1983).

3. Ibid., at 869.

4. Ibid.

5. Ibid., at 887.

6. Ibid., at 894.

7. I have not attempted to address in this paper many important issues raised by Rose. She focuses on the need to reevaluate the entire zoning process. By contrast, I develop a model that would function within much of the existing administrative process.

CHAPTER ONE

1. Robert W. Mack, Martin R. Healy, and Jonathan M. Bockian, "Procedures for Obtaining Variances and Special Permits," Practical Answers to Everyday Zoning Problems, (Boston: Massachusetts Continuing Legal Education, 1983) Chapter 10, p. 39, footnote 90.

2. Frank Schnidman, Stanley D. Abrams, and John J. Delaney, Handling the Land Use Case, (Boston: Little, Brown and Co., 1984) p. 98.

3. Brookline Zoning By-laws. Section 5.09(c)(2) Environmental Impact and Design Review for Special Permits.

> "Prior to formal submission of an application to the Building Commissioner pursuant to this Section, the applicant shall consult with the Planning Director and the Building Commissioner or their designees to determine whether such an application involves a major project with the potential for substantial environmental impact on the community. If the proposal is deemed by either official to

be a major impact project, then the following procedural requirements shall be completed prior to the filing of an application with the Building Commissioner:

> (iii) The Planning Board shall review these materials at a regular Planning Board meeting and shall issue an initial report to the applicant within three weeks of the preliminary meeting. Once the basic environmental aspects of the proposal are review by the Planning Board, the applicant may proceed with a formal submission to the Building Commissioner."

4. Massachusetts General Laws Annotated (MGLA), c.40A, Sec.5. "Change of Zoning Ordinances or By-laws."

5. Ibid.

6. Ibid.

7. Schnidman, Abrams, and Delaney, Handling the Land Use Case, p.119 and p.129.

8. Ibid., p. 93.

9. Ibid.

10. David P. Reis, and Alexander A. Randall, "Procedure for Amending a Zoning Ordinance or By-Law," Everyday Zoning Problems, c.3, p.19.

11. Ibid.

12. MGLA, c.40A, sec.11.

13. James R. Kahn, "In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions", 6 Hastings Constitutional Law Quarterly 1011, 1041 (1979).

14. Ibid.

15. Schnidman, Abrams, and Delaney, Handling the Land Use Case, p. 101. However, an argument may be made that where a municipal legislature rezones a small parcel of land, affecting just a few owners, the action is quasi-judicial, requiring higher due process standards. See Kahn, "In Accordance with a Constitutional Plan, 6 Hastings Con. Law Quarterly, 1011 (1979).

16. Schnidman, Abrams, and Delaney, Handling the Land Use Case, p.103.

17. Kane v. Board of Appeals of Medford, 273 Mass. 97, 104 (1930).

18. Ibid.

19. MGLA, c.40A, sec. 11.

20. Schnidman, Abrams, and Delaney, Handling the Land Use Case, p. 192. The authors suggest four basic elements should be contained in the findings:

1) Are the findings fairly, clearly, and adequately stated?
2) Are they derived from evidence contained in the record?
3) Are they consistent with applicable law?
4) Will they support the decision relative to the applicable administrative standard (substantial evidence, preponderance of evidence, or clear and convincing evidence)?

21. MGLA, c.40A, sec.5 for Zoning Amendments, and sec. 9 for Special Permits.

22. MGLA, c.40A, sec.5.

23. MGLA, c.40A, sec.9 for Special Permits, and sec.15 for

CHAPTER TWO

1. Arlington Redevelopment Board, Report to Special Town Meeting, March 25, 1985.

2. Ibid.

3. Ibid.

4. Ibid.

5. At two different times, owners of larger parcels within the 18 acre site approached the Redevelopment Board with requests to rezone their property. On both occasions the Board denied the requests. Conversation with Alan McClennen, Director of Planning, Town of Arlington, Mass., November 5, 1985.

6. Conversation with Alan McClennen, October 7, 1985. The petition was filed with the town at the end of January, 1985.

7. Conversation with Alan McClennen, October 7, 1985.

8. Conversation with William Grannan, representing Anthony Magri, developer of Reeds Brook site, July 26, 1985.

9. Minutes from Redevelopment Board Meeting, February 11, 1985.

10. Conversation with William Grannan, July 26, 1985.

11. Ibid.

12. Minutes from Redevelopment Board Public Hearing, March 4, 1985.

13. Arlington Redevelopment Board, Report to Special Town Meeting, March 25, 1985.

14. Minutes from Redevelopment Board Public Hearing, March 4, 1985.

15. Arlington Redevelopment Board, Report to Special Town Meeting, March 25, 1985.

16. Conversation with Alan McClennen, October 7, 1985.

17. Minutes from Town Meeting, March 27, 1985.

18. Conversation with William Grannan, July 26, 1985.

19. Ibid.

20. Minutes from Town Meeting, April 1, 1985.

CHAPTER THREE

1. In a recent handbook published by the Urban Land Institute, a series of case studies in cities around the country document efforts by developers to fashion agreements with local governments and community groups. Working with the Community: A Developer's Guide, (Washington, D.C.: Urban Land Institute, 1985).

2. Carol Rose, "Planning and Dealing: Piecemeal Land Controls as a Problems of Local Legitimacy," 71 Land Use Planning 837, 879, 1983.

3. Working with the Community, p.4.

4. Ibid. Chapter Three, "Establishing a Positive Image for Development."

5. Ibid. Chapter Four, "Gaining Support for Individual Projects."

6. Ibid. p. 63.

7. Lawrence Bacow and Michael Wheeler, Environmental Dispute Resolution, (N.Y.: Plenum Press, 1984), p. 18.

8. This continuum is described in an article by Lawrence Susskind and Denise Madigan entitled "New Approaches to Resolving Disputes in the Public Sector", The Justice System Journal, vol. 9, no. 2 (1984). 1) Unassisted Negotiation, 2) Facilitated

Policy Dialogue, 3) Collaborative Problem Solving, 4) Passive or Traditional Mediation, 5) Active Mediation or Mediated Negotiation, 6) Non-binding Arbitration, 7) Adjudication. Other theorists apply different categorizations of these techniques. See for example, Eric Greeen, "A comprehenisve Approach to the Theory and Practice of Dispute Resolution," 34 Journal of Legal Education 245 (1984); Frank Sander, "Varieties of Dispute Processing," 70 Federal Rules Decisions 79, (1976); or Marks, Johnson, and Szanton, Dispute Resolution in America.

9. Lawrence Susskind and Denise Madigan, "New Approaches to Resolving Disputes in the Public Sector," The Justice System Journal, vol.9, no. 2 (1984).

10. 6 Vt.L.R. 49, 52 (1981).

11. Susskind and Madigan, "New Approaches", p. 182.

12. 6 Vt.L.R. 49, 52-56 (1981).

13. The theory of searching for "wins" for all the parties in the dispute is explained in Getting to Yes: Negotiating Agreement Without Giving In, by Roger Fisher and William Ury. (N.Y.: Penguin Books, 1981) p. 21.

14. Susskind and Madigan, "New Approaches," p.184.

15. Ibid., p.184.

16. Discussions with Alan McClennen, Director of Planning, Town of Arlington, July 1985.

17. In his article "Mediation Theory and Practice," 6 Vt.L.R. 85 (1981), Joseph Stulberg describes three important features of a mediator: the mediator must 1) understand the constraints upon all of the parties, 2) must be able to understand the substantive issues at stake, and 3) must be neutral with regards to the outcome. Neutrality is an important key. As Stulberg explains, "if the mediator's job is to assist the parties to reach a resolution, and his commitment to neutrality ensures confidentiality, then, in an important sense, the parties have nothing to lose and everything to gain by the mediator's intervention." (p.96).

18. Susskind and Madigan, "New Approaches," p. 186.

19. Ibid., p. 186.

20. Interview with Roger Richman, Director of Public Mediation Services, Inc., mediator of Virginia Annexation Dispute, April 1985.

21. Interview with Director of Planning for City of Denver, participant in Downtown Plan Mediation, May 1985.

CHAPTER FOUR

1. Interview with Bruce Dotson, Assistant Director, Institute for Environmental Negotiation, University of Virginia, Charlottesville, Mediator for Hethwood Village Shopping Center Negotiation, May 30, 1985. Also, material for this case study is based in part upon a description of the mediation by B. Dotson, "Who and How? Participation in Environmental Negotiation," Environmental Impact Assessment Review, vol. 4, no.2, 1983 p.203.

2. Interview with Mike Chandler, former Chair of Blacksburg Planning Commission, member of Town team in Hethwood Village Shopping Center Negotiation, July 12, 1985.

3. Interview with Bruce Dotson, April 19, 1985.

4. Ibid.

5. Interview with Mike Chandler, July 12, 1985.

6. Interview with Mike Chandler, July 12, 1985. Letter from T. Harrington, Land Development Coordinator, Town of Blacksburg to B. Dotson dated February 3, 1983.

7. Interview with Bruce Dotson, April 19, 1985.

8. Ibid.

9. Interview with Mike Chandler, July 12, 1985.

10. Interview with Bruce Dotson, April 19, 1985.

11. See Deville Homes, Inc. v. Micahaelis, 201 N.Y.S.2d 129 (Sup. 1960); Schlosser v. Michaelis, 18 A.D. 2d 940, 238 N.Y.S.2d 433 (1963).

12. Interview with Bruce Dotson, April 19, 1985.

13. Ibid.

14. Ibid.

15. Ibid.

16. Ibid.

17. Ibid.

18. Ibid.

19. Ibid.

20. See Attachment 1; "Participation Agreement" from B. Dotson and D. Frame to W. Issel, G. Lester, and R. Stock, February 11, 1983.

21. Ibid.

22. Interview with Bruce Dotson, April 19, 1985.

23. See Attachment 2; Negotiation Ground Rules, March 3, 1983. Also interview with Mike Chandler, July 12, 1985.

24. Interview with Bruce Dotson, May 30, 1985.

25. See Attachment 3; Final Negotiated Agreement, March 23, 1983.

26. Interview with Bruce Dotson, April 19, 1985.

27. Ibid.

28. Ibid.

29. Ibid.

30. Frank Schnidman, Stanley Abrams, and John Delaney, Handling the Land Use Case, (Boston: Little, Brown and Co. 1984) p.124.

31. Interview with Bruce Dotson, May 30, 1985.

32. Ibid.

33. See Attachment 3: Final Agreement.

34. Interview with Mike Chandler, July 12, 1985.

35. Interview with Bruce Dotson, May 30, 1985.

CHAPTER FIVE

1. Massachusetts General Laws Annotated (MGLA), c.40A, section 9. For example; Shopper's World, Inc. v. Beacon Terrace Realty, Inc., 353 Mass. 63 (1967), (restrictions place on cinema); Garvey v. Board of Appeals of Amherst, 9 Mass. App. Ct. 856 (1980), (condition of termination of permit for parking in the event that nearby lot ceased to be used for commercial purposes); Board of Appeals of Dedham v. Corporation Tifereth Israel, 7 Mass. App. Ct. 876 (1979), (conditon that private way not be used).

2. MGLA, c.40A, section 10.

3. Baylis v. City of Baltimore, 148 A.2d 429 (1959).

4. Rathkopf, Arden and Daren, The Law of Zoning and Planning, (New York: Clard Boardman Co., Ltd., 1985) vol. 3, section 40.02.

5. MGLA, c.40A, section 10. See also, Huntington v. Zoning Board of Appeals of Hadley, 12 Mass. App. Ct. 710 (1981).

6. Assessors of Dover v. Dominican Fathers Province of St. Joseph, 334 Mass. 530 (1956).

7. MGLA, c.40A, section 9. See also, Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148 (1977) (even if grant of special permit may be made personal, grant is based on land, not the applicant)

8. Balas v. Board of Appeals of Plymouth, 13 Mass. App. Ct. 995 (1982).

9. Weld v. Board of Appeals of Gloucester, 345 Mass. 376 (1963).

10. Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147 (1976).

11. Rathkopf, vol.3, section 40.03.

12. For example, see the City of Cambridge Zoning Ordinance, section 10.44: "In action upon special permits the special permit authority... in order to preserve community values, may impose conditions and safeguards deemed necessary to protect the surrounding neighborhood, in addition to the application requirements of this ordinance, such as, but not limited to, the following:

a) Front, side, or rear yards greater than the minimum required by this ordinance.
b) Screening of parking areas or other parts of the premises from adjoining premises or from the street by specified walls, fences, planting, or other devices.
c) Modification of the exterior features or appearance of the structure.
d) Limitations of size, number of occupants, method of time of operation, or extent of facilities.
e) Regulation of number, design, and location of access drives or other traffic features.
f) Requirement of off-street parking or other special features beyond the minimum required by this or other applicable codes or regulations.
g) Control of the number, location, size and lighting of signs."

13. MGLA, c.40A, section 5.

14. See James R. Kahn, "In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions", 6 Hastings Constitutional Law Quarterly 1011 (1979).

15. Carol Rose, "Planning and Dealing", 71 Land Use Planning 837, 862 (1983).

16. Rathkopf, vol.4, p.27 - 45.

17. Allegations of spot-zoning assume that the rezoning 1)benefits particular landowners rather than a community as a whole, and 2) undermines the uniformity of standards upon which comprehensive zoning depends. Rathkopf, The Law of Zoning and Planning, section 27.05 (2)(b).

18. Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971), (court ruled special conditons could not be imposed on single tract of land that were not equally applied to other parcels in the zone) See also Collard v. Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818 (1981) (although conditional zoning generally valid, ordinance held invalid because conditions and rezoning were clearly for personal benefit of applicant).

19. Municipalities cannot enter into contracts that limit their legislative power and duties. Where rezoning includes conditions that have not come before the public at a hearing, or limit the authority of future legislatures to validly regulate the parcel in question, or exact money in change for a grant of rezoning, courts will invalidate the ordinance. Rathkopf, The Law of Zoning and Planning, section 27.05(2)(a).

20. Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971).

21. Rathkopf, vol.4, p.27-45.

22. Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal Rptr. 872 (1969).

23. Ibid.

24. 1982, Maine Laws, ch. 598.

25. Sylvania Electric Products,Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962).

26. Ibid.

27. 344 Mass. at 434, 183 N.E.2d at 122.

28. 344 Mass. at 436, 183 N.E.2d at 123.

29. 344 Mass. at 431, 183 N.E.2d at 120.

30. Rathkopf, vol.3, section 3.

31. Rathkopf, vol 4, section 27.05(3).

32. 52 N.Y.2d 594, 421 N.E.2d 818 (1981).

33. Ibid.

34. See Chapter Three for a discussion of parties in mediated negotiation.

35. MGLA, c.39, sections 23A and 23 B.

36. Ibid.

37. MGLA, c.39, section 23A.

38. Ibid.

39. 410 N.E.2d 725, 10 Mass. App. 587 (1980).

40. MGLA, c.39, section 23A.

41. In Arlington, the Director of Planning drafted the rezone ordinance with conditons for the Redevelopment Board, who the altered the wording before recommending the approval of the ordinance to Town Meeting. The Director also described his duties to include the writing of first drafts of conditions for special permits to be approved by the Redevelopment Board. From interview with Alan McClennen, October 7, 1985. See also Frank Schnidman, Stanley D. Abrams, and John J. Delaney, Handling the Land Use Case, (Boston: Little, Brown, and Co., 1984) p. 107, 124, 147.

42. MGLA, c.39, section 23A, definition of "Quorum."

43. McQuillan, Eugene, The Law of Municipal Corporations, vol.8A, section 25.262.

44. See James R. Kahn, "In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions", 6 Hastings Constitutional Law Quarterly 1011 (1979).

45. Ibid.

46. 574 P.2d 326 (1978).

47. Ibid., at 331.

48. Mutton Hills Estates, Inc. v. Town of Oakland, 468 A.2d 989 (Me.1983).

49. Ibid.

50. 574 P.2d 326 (1978).

CHAPTER SIX

1. Wendy Emrich and David Sweet, "Mediation Option included in Revision to Pennsylvania's Municipal Planning Code," Environmental Impact Assessment Review, vol. 4, no.2, 1983.

2. Ibid.

3. Proposed Senate Bill No. 1168, General Assembly of Pennsylvania, Session of 1983.

4. Ibid.

5. Ibid.

6. Discussion with Rick Keller, formerly staff at Rhode Island League of Towns and Cities, July 21, 1985.

7. Based on discussions with Jim Sloan, general counsel for Rhode Island Builder's Association, August 8, 1985, and Rick Keller.

8. Based on discussions with Steve O'Conner, Treasurer of Rhode Island Zoning Board Association, August 15, 1985, and Rick Keller.

9. Based on discussions with Rick Keller, and Dan Varin Director of Statewide Planning for Rhode Island, July 21, 1985.

10. Based on discussions with Liz Head, member of Rhode Island League of Women Voters, August 8, 1985, and Rick Keller.

11. Based on discussions with Rick Keller.

12. See Alan Talbot, Settling Things, Six Case Studies in Environmental Mediation, (Washington, D.C.: The Conservation Foundation, 1983).

BIBLIOGRAPHY

Bacow, Lawrence, and Wheeler, Michael, Environmental Dispute Resolution, New York: Plenum Press (1984).

Dotson, Bruce, "Who and How? Participation in Environmental Negotiation," Environmental Impact Assessment Review, vol. 4, no.2 (1983).

Emrich, Wendy and Sweet, David, "Mediation Option included in Revision to Pennsylvania's Municipal Planning Code," Environmental Impact Assessment Review, 4, no.2 (1983).

Fisher, Roger, and Ury, William, Getting to Yes: Negotiating Agreement Without Giving In, New York: Penguin Books (1981).

Green, Eric, "A Comprehenisve Approach to the Theory and Practice of Dispute Resolution," Journal of Legal Education 34, 245 (1984).

Kahn, James R., "In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions", 6 Hastings Constitutional Law Quarterly 1011 (1979).

Mack, Robert W.; Healy, Martin R.; and Bockian, Jonathan M., "Procedures for Obtaining Variances and Special Permits," Practical Answers to Everyday Zoning Problems, Boston: Massachusetts Continuing Legal Education (1983).

McCrory, John, "Environmental Mediation - Another Piece for the Puzzle," 6 Vermont Law Review 49 (1981).

Rathkopf, Arden and Daren, The Law of Zoning and Planning, New York: Clard Boardman Co., Ltd., (1985).

Reis, David P., and Randall, Alexander A. , "Procedure for Amending a Zoning Ordinance or By-Law," Everyday Zoning Problems, Boston, Massachusetts Continuing Legal Education (1983).

Rose, Carol, "Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy," 71 Land Use Planning 837 (1983).

Schnidman, Frank; Abrams, Stanley D.; and Delaney, John J., Handling the Land Use Case, Boston: Little, Brown and Co. (1984).

Stulberg, Joseph, "Mediation Theory and Practice," 6 Vermont Law Review 85 (1981).

Susskind, Lawrence and Madigan, Denise, "New Approaches to

Resolving Disputes in the Public Sector", The Justice System Journal, vol. 9, no. 2 (1984).

Talbot, Alan, Settling Things, Six Case Studies in Environmental Mediation, Washington, D.C.: The Conservation Foundation (1983).

Working with the Community: A Developer's Guide, Washington, D.C.: Urban Land Institute (1985).