

Cal American Planning Association Article
Planning and Alternative Dispute Resolution
By Doreen Liberto-Blanck, AICP, MDR©

I recently spoke with a well-known lawyer/planner about incorporating dispute resolution techniques into the local land use and environmental processes. The person smiled and said that all one needs to understand dispute resolution and negotiation is to read **Getting to Yes** by Roger Fisher and William Ury. **Getting to Yes** is an excellent book on how to negotiate, but other forms of dispute resolution are available to address planning conflicts. This article will discuss reasons for conflict in the planning process, and the successful alternative dispute resolution techniques that are available to public and private sector planners to address contemporary planning conflicts.

Since the City Beautiful Movement began in the late 1800s, the planning process has become increasingly complex and controversial. Frustration and conflict develops with any complex system. All seasoned planners have personal true stories about the public hearing from hell or the weeklong deposition. Planners are exposed to countless aggressive acts during public hearings and at the public counter. Recently, a community development director had to be escorted out of the city council chambers by police because 600 people attending the public hearing were angry that planning staff had recommended approval of a shopping center that included a Wal-Mart store. Planners in the private sector also encounter the wrath of the public during public hearings. Unfortunately, many planners may discover they are unprepared to handle irate and irrational individuals. Historically, undergraduate and graduate planning programs did not include classes on dispute resolution. Therefore, planners must learn dispute resolution techniques through painful trial and error. Why are public conflicts concerning planning projects, so emotional and adversarial, and what may we do as planners to benefit all parties involved?

Reasons for Conflict in the Planning Process Public Arena

1) **Conflicts Concerning Planning Projects are Complex**. In **Managing Public Dispute**, Susan L. Carpenter and W.J.D. Kennedy outline several reasons why public conflicts are complex. First, public conflicts involve complicated networks of interests and multi-stakeholders. New parties are emerging during the evolution of a public conflict. For example, a planner may believe that she has resolved the concerns expressed by a neighbor regarding a proposed housing tract only to have new questions and concerns expressed later by new parties. Additionally, many times the parties involved in a public conflict are groups or organizations, and

©Doreen Liberto-Blanck, 2003

not individuals. This makes it more difficult to resolve a conflict because decisions may have to be made by a board of directors, not one individual.

Public conflicts involve different governmental decision-making procedures. For example, just when a planner believes sufficient funding is available to build a much-needed interchange, another public agency interjects that the interchange is not their top priority and State funding will not be made available. The financial inability to construct the interchange alters the timing of the general plan buildout, and may prevent critical economic development projects from going forward.

Carpenter and Kennedy point out that public disputes cover wide-ranging issues that place great importance on technical information. How many times have you thought a traffic report would resolve questions about congestion, only to have another traffic expert generate new information which conflicts with the original report? The new report may pose new questions and shed doubt on the original report, and delay a decision on a planning project. Additionally, public disputes involve strong-held values. An example includes restrictions placed on building on wetlands with the property owner stating such action is a taking under the U.S. Constitution.

2) **The Public Is Angry**. Intense public anger and lack of trust in government and business leaders and institutions are creating more lawsuits filed on planning projects and generating highly charged public hearings. We planners can no longer simply label angry people opposing a proposed development as "a bunch of NIMBYs." According to the book, **Dealing With An Angry Public**, authors Lawrence Susskind and Patrick Field state that the public is angry because, *"Business and government leaders have covered up mistakes, concealed evidence of potential risks, made misleading statements, and often lied."* Their book provides countless examples of such behavior. The authors cite a 1992 study conducted by the University of Michigan. Researchers asked Americans how much, and how far, they trusted their government in Washington. In 1966, 76% responded that they trusted their government most of the time. In 1992, the same questions were asked and only 28% of the people questioned responded positively about their government. Susskind and Field state that, *"In anger, citizens have turned against their governing institutions and the individuals who represent those institutions."* That includes planners working for public agencies. Since local government is readily accessible to the public, local officials receive a preponderance of the public's anger, often in an irrational form. I remember being blamed by angry applicants for the national recession of the early 1990s because of a planning department recommendation to the planning commission for denial of their project.

3) **Rapid Change and Competing Interests.** Rapid change and competing interests also fuel the increased conflict. The State Department of Finance estimates that California's current population is 36 million, and projects it will increase to 46 million people by the year 2020. In the recent past the State's rapidly increased population has stressed the State's limited natural resources, placed a financial strain on the needed construction and maintenance of infrastructure to accommodate the growing population, and driven up the cost of housing.

With the rapidly growing population demanding increased public services, coupled with limited ways to generate public funds, local government has little choice but to depend on growth for financial survival. Conflicting feelings regarding new developments have created an explosive situation where emotions run high, with verbal abuses and physical assaults becoming more common at public meetings. The tug of war between the growth industry, who view land as a commodity to be developed to meet the needs of a bulging California population, and slow growth proponents, who view land as a resource to be protected for future generations, will only become more intense in the years to come.

Planners are in the trenches everyday working on projects that will change a community, for better or worse, depending on the public's perception. Planners need to become familiar with the many helpful techniques in the dispute resolution toolbox to resolve, or minimize the growing number of conflicts in the planning process.

Dispute Resolution Techniques

Alternative Dispute Resolution, or ADR, in public conflicts provides planners a range of techniques to address controversy. ADR can be defined as, *“Any process or processes voluntarily agreed to and used by stakeholders to resolve disputed issues in a controversy without litigation.”*

The California Governor recently signed AB 857 that addresses urban sprawl. A component of the bill requires the Governor to develop a dispute resolution process to resolve certain State agency policy conflicts. With the competition for natural resources, ADR has become an important module in the planning process. There is a desire by the planning profession to identify a variety of methods to resolve conflict without provoking tempers or creating the stage for costly litigation. This interest was evident at the recent State American Planning Association Conference held in San Diego. Two sessions were conducted on dispute resolution techniques. The sessions called “Mediation for Planners” and “Negotiating Effectively Between Planning Agencies, Citizen Groups and Developers” were well attended with people standing in the hallway attempting to listen to the speakers.

Conflicts are less likely to fester and harden into more complex and contentious issues if they are identified and addressed early in the planning process. Using ADR to resolve land use and environmental controversy is in its formative stages in California. Nationally, forms of ADR have been used in large-scale land use and environmental projects for years. The Federal Government utilizes ADR to achieve consensus on a variety of public policy issues, including rulemaking. The U.S. Institute for Environmental Conflict Resolution was created by the 1998 Federal Environmental Policy and Conflict Resolution Act to help resolve environmental conflicts that involve federal agencies or interests. Several States provide guidance to local planning agencies on how to use ADR to resolve conflicts. For example, the State of Florida has the Office of Dispute Resolution that encourages the use of ADR in environmental and land use conflicts by local government. Florida adopted the Dispute Resolution Act in 1995. The act allows property owners to request a public and informal hearing by an independent mediator, or special master,¹ if they believe land use regulations are onerous.² The California Mediation and Resolution of Land Use Dispute Act references using mediation as part of a litigated issue but does not address using ADR in pre-litigated planning controversies. Clearly, dispute resolution is preferable to the court system.

Whether working on Federal or local public policy issues, there are a number of ADR techniques that planners can use to help minimize conflict, and relieve community and personal stress. Most planners probably use several of these methods without considering them ADR. Different ADR methods will be used based on the situation. The following ADR techniques are the more common ones that can be used when confronting a disagreement.

1) **Avoidance**: Many disputes are resolved by one or more parties avoiding an issue. For example, a difficult applicant submits a site plan in which a proposed house is one foot into the required sideyard setback. The front counter planner knows that this applicant argues about every issue and consumes a great deal of time claiming staff “picks” on him. The planner has pending planning commission staff reports that are due within 2 days, and a dozen new development permits to review. His supervisor stated in the planner’s last performance evaluation that too much time is spent scrutinizing small details. The planner can ignore the one foot sideyard

¹ A special master as defined in Florida’s Rules of Civil Procedure is a member of the Bar. However, the Dispute Resolution Act does not require the special master to be an attorney. The requirements under the Dispute Resolution Act are that the person must be a resident of Florida, have expertise in mediation, and experience in land use and environmental processes.

² Martin R. Dix, Richard P. Lee and Alicia M. Santan, “Land Use and Environmental Dispute Resolution: The Special Master,” *Florida Bar Journal* (November 1995).

setback inconsistency by rationalizing that it is too time-consuming to argue with the applicant about the need for a variance and no one will notice the discrepancy; or require the applicant submit new plans to meet the required setback. The planner makes the decision to overlook the setback and avoid a potential conflict with a very difficult applicant. Of course, if the planner's supervisor, an adjacent neighbor or other interested party finds out that the zoning code setback has been intentionally ignored, future conflict with the public could be looming. Avoidance of conflict should not be taken lightly because if used at the inappropriate time, a climate for a greater dispute could be possible.

2) **Informal Discussion and Problem Solving:** Most disagreements are resolved informally in a relatively short period. In the above scenario, rather than ignore the site plan's inconsistency with the zoning ordinance, the planner informally mentions at the front counter that the site plan shows the house within the required sideyard setback and a correction is needed, or the planning commission must approve a variance. The applicant may choose to acknowledge the discrepancy and move the house, submit a variance application or enter into a confrontation with the planner. However, this is a difficult applicant who feels that staff arbitrarily selects his projects to scrutinize. How the issue is presented to the applicant during the informal discussion is critical. Using good communication skills by depersonalizing the conversation, watching body language (e.g., no smirks or rolling eyes) and clearly explaining that the zoning code applies to all projects, the applicant may be more willing to comply with the request without a confrontation.

3) **Negotiation:** Planners participate in negotiation on a daily basis. Negotiation is defined as communication between two or more people to plan transactions and resolve conflict, such as between planning staff and a developer regarding project details.

In the above scenario, the planner has asked the difficult applicant to comply with the required sideyard setback but the project proponent argues that the zoning code allows for an *average* setback, and therefore, a one-foot deviation is acceptable. If there is room for discretion, the planner and the applicant may begin the "Negotiation Dance." The Negotiation Dance is a process of give and take until both sides are satisfied, or a deadlock develops leading to other forms of dispute resolution such as litigation.

4) **Collaboration/Facilitation:** Facilitation consists of coordinating individual or group discussions and interactions designed to focus on relevant issues and collaborate solutions. A

facilitator manages a meeting through helping to establish ground rules, preparing an agenda, maintaining positive dialogue, and offering suggestions to assist in the group to successfully meet its goals. Planners working on general plans, specific plans and other long-range projects are probably most familiar with collaboration and facilitation. This technique is more appropriate when multiple stakeholders are involved.

5) **Mediation:** Mediation is a voluntary process in which a neutral third party assists the disputing parties in coming to a mutually agreed settlement. Mediation has traditionally been used in complex environmental and land use issues, such as the distribution of environmental clean up cost or location of hazardous waste sites. However, it can also be used to resolve development permit disputes and general plan and specific plan preparation. For example, a consultant has been hired by a city to prepare a Main Street Specific Plan. After using collaboration and formulating a land use plan, it is clear there are still outstanding issues that could be challenged in court or create political consequences. When the Main Street Specific Plan is taken to the city council, the consultant could recommend that the council consider mediation before reviewing the Specific Plan to determine whether the remaining issues can be resolved by a neutral third party. This option is especially attractive if there appears to be potential for significant legal issues that may end up in court after council action. Rather than spend many thousands of dollars in litigation costs, the local jurisdiction should consider.

I have heard several consulting planners say they “mediate” while working on planning projects. In most situations, the planner is actually “facilitating” and not mediating. In the above scenario regarding the Main Street Specific Plan, the consulting planner ethically should not be the mediator because there is a conflict of interest. First, the consultant cannot be neutral since they have been working on the project for months and have preconceived notions about what to recommend to the city. Remaining neutral as a hired consultant can be difficult. Planners have a responsibility to represent their client’s best interest. The AICP Code of Ethics and Professional Conduct states, “*A planner owes diligent, creative, independent and competent performance of work in pursuit of the client's or employer's interest.*”

Second, the consultant may not have the skills of a trained mediator. A successful mediator:

- understands the psychology of communication;
- knows how to reframe negative statements and ask thought provoking questions to create a safe environment for adversaries to work together on

mutually beneficial solutions;

- uses tactics to bypass positions and identify hidden interests;
- is acquainted with the laws regarding mediation; and
- has the knowledge to use other mediation techniques needed to resolve significant conflicts.

Third, there may be confidentiality issues when practicing certain types of mediation. This is especially true if an issue is being litigated. The California Evidence Code provides significant confidential protection for those involved in mediating litigated cases. Conversations told to a mediator by a disputing party during a litigated case are to be held in strict confidence, unless agreed to otherwise. It is unclear whether conversations told to someone acting as a mediator on a prelitigated planning dispute would be considered confidential, if the project is later litigated. Mediators participating in prelitigated public mediation must understand the California Brown Act (which requires open meetings of specific actions), and the California Public Records Act, (which guarantees the public right to certain government documents). Since the area of neutral mediation in the planning profession is developing, it is important to confer with a jurisdiction's legal counsel to determine which information must be made public and whether any information may be considered confidential.

In summation, there is a need for increased use of Alternative Dispute Resolution in the local planning process. With increased awareness of ADR's many benefits, there is no doubt that it will become an effective tool successfully used by all land use professionals. As one planner stated to me, *"As the development/non-development environmental gap widens and groups become more polarized, alternatives to litigation will become necessary."*