Using Focus Groups to Build Community and Improve the Use of Mediation in Your Practice Area

King County Bar Association
Alternative Dispute Resolution Section Meeting and CLE

November 17, 2010

by
Courtney A. Kaylor
McCullough Hill, PS
701 Fifth Avenue, Suite 7220
Seattle, Washington 98104
(206) 812-3388

Courtney A. Kaylor is a partner in the Seattle law firm McCullough Hill, PS. Courtney’s practice focuses on land use law and alternative dispute resolution. She can be reached at (206) 812-3388 or courtney@mhseattle.com
I. BACKGROUND

The King County Bar Association ADR Section, along with the Washington State Bar Association ADR Section, initiated a series of “focus groups” to discuss the use of mediation in specific practice areas. To date, the focus groups have included family law, collaborative law, commercial law, land use law and others. This presentation is based on the experience of the Land Use Mediation Focus Group.

II. FORMATION OF THE GROUP

Purpose/Goals

The first step in forming a focus group is to define its purpose and goals. This drives the scope, structure and product of the group. The purpose and goals of the Land Use Mediation Focus Group are purposefully broad. Land use development affects people directly, evokes strong emotion, and is something people in the community must live with permanently. Because of these characteristics, land use disputes seem tailor made for resolution through mediation. But, mediation is rarely used in land use matters. The purpose of the Land Use Mediation Focus Group is to examine the status of mediation in land use cases, the reasons it is underutilized, and to recommend strategies to improve the use of mediation in these cases.

Selecting Members

Factors to consider in selecting focus group members are expertise in the focus group practice area, perspective, interest, and availability. The Land Use Mediation Focus Group members all practice exclusively, or primarily, in the area of land use. The members include those in practice for many years as well as some relatively new lawyers. The members represent the diverse client perspectives in land use disputes: property owners and developers, cities and counties (including hearing examiners), and citizens groups. The members are self-selected for interest and availability. The initial group was entirely composed of lawyers, but the group is interested in expanding to include other interested parties, such as elected officials and land use planners, who play a large role in land use matters.

Focus groups also require a skilled and experienced moderator. Alan Alhadeff serves as the moderator for the Land Use Focus Group.

A goal of 8-12 participants at each meeting provides a diverse discussion while allowing each person the opportunity to participate during the allotted time. In order to achieve this attendance level, the focus group should have more than 12 members, since not all members will be able to attend every meeting.

Meeting Topics

The focus group must have questions or topics for discussion. Since mediation is not commonly used in the area of land use, and there is no significant existing information on the subject, the questions presented to the Land Use Mediation Focus Group were
intentionally broad, such as, “What is the current status of mediation in land use, and why?” At the outset of the group, we identified the topics that would be discussed at each meeting and shared these with the group. This allowed members to thoroughly discuss the topic at hand, knowing that other topics (such as methods to encourage the use of mediation) would be addressed at subsequent meetings. This also gave the participants a sense of direction and forward momentum.

Duration of Focus Group

The duration of time during which a focus group meets varies depending on the intent of the focus group and the availability of its participants. Focus groups can be open ended or have a set duration. The Land Use Mediation Focus Group had an initial life of six months (with monthly meetings, for a total of six meetings). We felt this limitation was necessary to attract participants who would not have been willing to make an open-ended commitment. This limited duration also helped to establish a framework for the discussion.

III. OPERATION OF THE GROUP

Meeting Format

The focus group should open with an introduction by the moderator and a presentation of the question/topic for discussion. The group should conclude on time with thanks to the participants and a summary of any next steps. The format for discussion by the participants may vary.

In the Land Use Mediation Focus Group, on the suggestion of our moderator, we primarily used a “dialogue” format, with each participant commenting on the question/topic in turn while the others listened. We typically had time for at least two rounds of dialogue. This format generally worked well. In addition, since the participants were not accustomed to the dialogue format, some focus group meetings were conducted as an informal discussion.

In-person focus groups are the ideal, since face-to-face discussion allows for better communication. However, we found that some participants were unable to attend in person because of scheduling constraints. Accordingly, we provided a call-in number by which participants could attend by telephone. Some members took advantage of this option, although most continued to attend in person.

Some communication (primarily relating to meeting summaries and scheduling) occurred by electronic mail. There are also numerous web sites that facilitate group discussions. To date, the Land Use Mediation Focus Group has not used this technology, although it may do so in the future.

Length of Meetings

Focus group meetings must be long enough to allow a meaningful discussion but must also respect the value of participants’ time. The Land Use Mediation Focus Group met once for two hours each month. This allowed a sufficient amount of time for a reasonably thorough discussion, with each member to contributing to the discussion more than once. The
discussion always ended because the time was up, not for lack of contributions. On the other hand, some members may have found the time commitment burdensome.

Scheduling Meetings

Focus group meetings can be one-time, recurring on a regular basis, or scheduled from time to time depending on the participants’ schedules. For the Land Use Mediation Focus Group, we attempted to schedule the meetings on a regular basis so they would recur on the same day each month. This provided certainty to the participants and allowed some to incorporate the meeting into their schedules. We did not attempt to schedule each meeting around all participants’ calendars. This task was simply too daunting given the number of participants. Ultimately, not all participants were able to attend each meeting, but a core group of participants were able to attend most meetings.

Meeting Records

At a minimum, the moderator or a designated participant should take detailed notes of the participants’ input at the focus group, so that the group’s work is preserved. This is what has occurred at the Land Use Mediation Focus Group meetings. Other options which we have not used, but which may be beneficial, are the use of a “white board” to collect input during the meeting or the preparation and circulation of meeting minutes.

IV. PRODUCT OF THE GROUP

Focus Group Product

The product of a focus group may vary from simply raw data for use by others to specific recommendations for action by the group members or others. The Land Use Mediation Focus Group was formed to examine the status of mediation in land use cases, the reasons it is underutilized, and to recommend strategies to improve the use of mediation in these cases. Therefore, the product of the group included conclusions and recommendations on these topics. The Land Use Mediation Focus Group’s written recommendations are attached to these materials. The most significant product of the focus group was not these written recommendations, however, but was the creation of a dialogue and community interested in the promotion of mediation in land use cases.

Next Steps

A focus group may conclude when its one- or multiple day sessions are complete or may generate ideas for additional focus groups or other work. In the case of the Land Use Mediation Focus Group, the members determined that the initial six-month time frame was not sufficient to achieve the goals of the group. The group agreed to conclude “Phase I” with written strategies and recommendations. Group members then shared those with interested parties and organizations outside the group. The group has now reconvened (with additional members) for “Phase II,” which will include development and implementation of a work plan for 2011 for improving the use of mediation in land use matters.
I. Introduction

In early 2010, the King County Bar Association Alternative Dispute Resolution Section formed a Land Use Mediation Focus Group to examine the role of mediation in land use disputes. Land use disputes include disputes relating to private development proposals, a city or county’s adoption of zoning regulations, annexations, and public infrastructure projects.

The Focus Group is composed of land use attorneys and hearing examiners representing a wide range of interests in the land use community, including developers, property owners, local jurisdictions and community groups. The group has met on a monthly basis and has held a total of six meetings, as of August 2010. The Focus Group has discussed the following topics:

- What is the current role of mediation in land use practice and why?
- What factors should be considered in determining which issues are appropriate for mediation?
- What strategies and incentives does the group recommend to encourage the use of mediation?

II. Findings

Mediation is used infrequently in land use matters. Barriers to the use of mediation include difficulty in identifying parties, the procedural requirements of land use law (including land use permitting processes and open public meetings requirements), the significance of delay in the permitting process, distrust between the parties and the lack of mediators with substantive expertise in this area.

Nevertheless, mediation can provide a valuable tool for the resolution of land use disputes. Land use disputes are costly and time consuming for all parties. Mediated agreements reduce the cost and delay associated with administrative and judicial appeals. They also allow the resources otherwise devoted to conflict to be put to better use, to produce a project with higher quality design and increased environmental protection, or a regulation that better serves the interests of all stakeholders.

III. Strategies

The Focus Group has identified several strategies and incentives for encouraging land use mediation. These are many and varied, ranging from raising awareness of this option to making legislative changes to land use laws. The group believes several of these strategies are viable but that raising awareness should be pursued as a first step. The group has identified a number of methods for raising awareness, including compiling a list of land use
mediators, making presentations to interested groups, and coordinating with other alternative dispute resolution and land use organizations.

IV. Short-Term Recommendations

The group has developed the following recommendations for the remainder of 2010:

- Compile a list of persons with basic mediation training and land use expertise with an interest in providing mediation for a moderate fee. Alan Alhadeff has agreed to be the “keeper” of this list. A document describing the list is attached.

- Give presentations on land use mediation to a variety of different groups, including but not limited to the WSBA Environmental and Land Use (ELUL) Section (CLE scheduled for 9/16/2010), Association of Washington Cities (AWC), Washington Cities Insurance Authority (WCIA), Washington State Association of Counties, Washington State Association of Municipal Attorneys, Washington Association of Prosecuting Attorneys, Hearing Examiners Association of Washington (conference on October 14-15, 2010), Washington Association of Planning Directors, and Master Builders.

- Coordinate with Dispute Resolution Centers (DRCs), particularly the Kitsap County DRC, regarding providing mediator with land use expertise to assist in land use cases. Kitsap County recently mandated mediation for some types of Hearing Examiner land use cases.

- Coordinate with the State Bar ELUL and ADR Sections and County Bar Real Property, Probate & Trust and ADR Sections.

- Coordinate with Department of Commerce. The Department has developed a list of mediators for Growth Management Hearings Board cases and may be able to assist with outreach and potential legislation.

V. Long-Term Recommendations

- Consider drafting a model ordinance that would allow individual jurisdictions to adopt appropriate mediation schemes (including criteria, timeframe, who mediates, who pays, whether mediation is mandatory or voluntary).

- Consider working with a local jurisdiction with a strong mediation program (such as Bellevue) on a land use mediation pilot program.

- Consider potential legislative amendments to (1) provide risk of attorneys fees if mediation is not used; (2) allow change in prior government decision on project to implement settlement agreement; (3) provide tax credit or other financial incentive for developers who participate in mediation; (4) impose time frames for mediation to reduce concerns about delay; (5) allow “fast tracking” for projects participating in early mediation.
VI. Next Steps

Implement short-term recommendations in 2010. Based on input, develop a work-plan for 2011.
RESOURCES FOR LAND USE MEDIATION

Mediation in Land Use Matters
Mediation can provide a valuable tool for the resolution of many land use disputes. Land use disputes are costly and time consuming for all parties. Mediated agreements reduce the cost and delay associated with administrative and judicial appeals. They also allow the resources otherwise devoted to conflict to be put to better use, to produce a project with higher quality design and increased environmental protection, or a regulation that better serves the interests of all stakeholders. Yet, the use of mediation in land use matters is rare.

WSBA/KCBA ADR Focus Group
The Washington State Bar Association and King County Bar Association Alternative Dispute Resolution Sections have formed a Focus Group to examine the role of mediation in land use disputes. The Focus Group has identified the scarcity of trained mediators with land use expertise as one barrier to the use of mediation in land use matters. As a result, the Land Use Mediation Focus Group is compiling a list of land use practitioners interested in serving as mediators.

Mediator Qualifications
Mediators will have at least 40 hours of basic mediation training. Basic mediation training is available from a number of providers, including the University of Washington Professional Mediation Skills Training (http://www.law.washington.edu/clinics/mediation), government sponsored dispute resolution centers (see the training resource list on the Washington Mediation Association web page, http://www.washingtonmediation.org/organizations.html) and private mediators, including Alhadeff & Forbes (http://www.mediationservices.net/training_services.html).

In addition, mediators will have significant experience with land use disputes. Land use disputes include disputes relating to private residential, commercial or industrial development proposals; the adoption or amendment of comprehensive plans, zoning, critical areas regulations or shoreline regulations; annexations; and public infrastructure projects.

There are a number of other types of disputes that relate to property but are not considered land use disputes by the Focus Group because they are primarily about the payment of money. These disputes include, for example, who should pay for the cleanup of contaminated property, whether a builder is liable for construction defects, or whether a government entity charged too much in development fees. While real property disputes, such as those involving boundary lines or easements, are often matters that would benefit from mediation, they are not considered land use disputes by the focus group because they do not primarily involve land use permitting or legislation.

Contact
If you are interested in serving as a land use mediator, please contact Alan Alhadeff at alan@mediationservices.net or (206) 281-9950.