

The Benefits of Mediating Real Property Disputes



Stephen J. MacGillivray, Esq.
Pierce Attwood LLP, Providence
Chair of the RIBA Alternative
Dispute Resolution Committee

...there is an additional danger that the further parties progress into the litigation process, the more likely they are to become prisoners to the “sunk cost fallacy” – the tendency to follow through on an endeavor if we have already invested time, effort, or money into it, whether or not the current costs outweigh the benefits.”

Happy neighbors are all alike; every unhappy neighbor is unhappy in their own way.¹ This is because disputes over real property are as unique as the property and parties involved. These matters present a multitude of legal and personal interests. They have the potential to cause enormous disruption to commercial interests as well as landowners’ lives and their peaceful enjoyment of their property. They often result in protracted litigation, including follow-on lawsuits and appeals. Most notably, disputes over property and land use can engender emotion well in excess of that warranted by the monetary value at stake.

These same qualities, (uniqueness, multiple interests, high emotion, etc.) make property disputes better suited to resolution through mediation than most other types of civil disputes. Below, the benefits of mediation that apply particularly to real property disputes, including land use disputes, are discussed. Following that, three hypotheticals are used in an attempt to illustrate these benefits.

Benefits of Mediation for Property and Land Use Disputes

The benefits of mediating that particularly apply to a real property dispute are the following:

1. **Multiple Opportunities For Success** – In general, settlement of litigated cases is driven by risk management. Rational litigants analyze a settlement offer by comparing it to the best and worst outcomes without a settlement. These are often referred to as BATNA and WATNA (Best Alternative to a Negotiated Agreement and Worst Alternative to a Negotiated Agreement). With land disputes, the diversity of possible outcomes makes predicting the results of litigation, and therefore risk, significantly more difficult. At the same time, the number of interests (legal and personal) and possible outcomes provide the mediator and the parties with a multitude of opportunities for developing a solution that maximizes each party’s utility and satisfaction. For this reason, compared to cases where the parties are only fighting over one variable, such as how much money is owed, real property disputes have a greater chance of reaching a negotiated resolution.
2. **Speed/Cost** – An early, negotiated settlement

obviously provides the parties with a speedier more cost-effective resolution compared with litigation. Moreover, there is an additional danger that the further parties progress into the litigation process, the more likely they are to become prisoners to the “sunk cost fallacy” – the tendency to follow through on an endeavor if we have already invested time, effort, or money into it, whether or not the current costs outweigh the benefits.

3. **Finality** – With land disputes, the present litigation may not be the end of the story. Land disputes are notorious for generating multiple appeals and follow-on litigation. With mediation, the parties control the outcome and can address multiple issues that have arisen, or may arise in the future. Accordingly, mediation presents a higher likelihood of finality and reduces the chances of continued conflict.
4. **Parties Have Their Say** – Property disputes make people crazy with emotion. A primary cause of this high emotion is the feeling of powerlessness associated with the perception that a party’s interests and concerns are not being heard. Whether they are objectors to a new development, or neighbors in a boundary dispute, people contesting their real property rights want to have their interests recognized and understood. In a joint session or in private meetings with the mediator, mediation affords the parties an opportunity to explain their point of view, their frustrations, and their underlying interests, which in many cases are different from their pled claims for relief. A skilled mediator allows the parties to vent and, most importantly, to reveal where their underlying interests may overlap with their opponent’s.
5. **Possible Reconciliation** – Related to the benefit of finality, mediation also provides a greater opportunity for reconciliation. Property litigation is often a zero sum game that leaves one or both of the litigants embittered. Lingering

The Bar Journal assumes no responsibility for opinions, statements, and facts in any article, editorial, column, or book review, except to the extent that, by publication, the subject matter merits attention. Neither the opinions expressed in any article, editorial, column, or book review nor their content represent the official view of the Rhode Island Bar Association or the views of its members.

FLORIDA LEGAL ASSISTANCE



Marc J. Soss, Esquire

Estate Planning
Probate Administration
Probate Litigation
Elder Law
Corporate Law
Real Estate Closings

(941) 928-0310
mjs@fl-estateplanning.com
www.fl-estateplanning.com

**IF YOU WANT TO
PRACTICE LAW,
WITHOUT WORRYING
ABOUT YOUR BUSINESS...**

YOU'RE IN LUCK.

As a Rhode Island Bar Association member benefit, Red Cave Consulting provides **FREE** business management consulting services for Rhode Island attorneys. Red Cave has consulted with 3000+ law firms in the past 10 years. Put our experience to work for you.



CALL: (617) 398-7181
EMAIL: JARED@REDCAVELEGAL.COM

Or visit the Bar website's Law Practice Management page to get started.

animosity reduces future enjoyment of property or, in the case of commercial interests, can cause continued and potentially unprofitable ill-will.

Three Hypotheticals

These benefits become more apparent when considered in the context of three specific hypothetical property disputes discussed below: i) a boundary dispute, ii) a family jointly-owned property; and, iii) a land-use/permitting matter.

I. The Boundary Dispute

A New Owner from out of state buys a vacation home in a well-established neighborhood with an excellent view over his Neighbor's property. Armed with a Class I survey, he visits his Neighbor to inform her "in a neighborly way" that a portion of her driveway and screening plantings are actually on his side of the property line. New Owner tells Neighbor that he wants to install a wood fence on the property line, but that he wants Neighbor's consent and input first. Neighbor is shocked and tells New Owner that the trees and driveway have been there the entire eight years that she has owned the property and perhaps longer. Neighbor is angry that New Owner wants to change things that "have worked well for everyone for so long." She does not consent. New Neighbor says he will regrettably have to move ahead without her consent. Both hire attorneys. They exchange legal letters. New Owner files a quiet title action and Neighbor counters with statutory and common law claims based on prescriptive rights.

On the ground, a passive-aggressive border war of minor incursions and nasty looks ensues. In the courts, lawyers take discovery, file motions, and advise their clients that dispositive motions are unlikely to succeed. New Owner cannot understand how a court can ignore a Class I survey. Neighbor refuses to let the new part-time resident push her around destroying her access and diminishing her privacy in the process. Hearts harden.

Litigation Outcome – Neighbor cannot meet the evidentiary burden to establish prescriptive rights. The Court directs her to remove her plantings and a portion of her driveway. She complies but ceases to maintain her side of the boundary. She plants trees in the middle of her property that eventually obstruct New Owner's view.

Mediation Outcome – In mediation, the parties meet in joint session. Although tensions run high, both indicate a common interest in having marketable title and creating an attractive boundary line that provides a degree of privacy for both sides. New Owner expresses his desire to maintain his view and Neighbor needs a driveway. In separate sessions, the mediator explores these interests with each party. Various means for accommodating these interests including easements, licenses, exchange of land for money and others are discussed. The mediator assists each side in recognizing the legal hurdles they face and asks them what are their best and worst case scenarios absent settlement. In the end, the New Owner grants Neighbor an easement to accommodate her plantings and driveway. They split the cost of fence, the style and height of which is agreed upon. Neighbor grants New Owner a sight easement preserving the view corridor. Based on terms agreed upon in writing prior to leaving the mediator's office, the parties' attorneys work

together, with a title attorney and a surveyor, to finalize the settlement and address any future needs of both parties.

II. Jointly-Owned Family Property

Dad and Mom pass away leaving the family summer home (the “Big House”) on two and one-half acres in an R40 zone to their three adult children (the “Children”).² At first, the Children share the property, each taking a portion of the year, and often staying at the Big House together. A few years pass and the interests of the children begin to diverge.

Child One has moved to the town where the Big House is located. He spends much of the year “housesitting” the property and using his limited handy man skills to “maintain” the Big House. He does not have the resources to help pay for real estate taxes but he wants to keep the house and be compensated for his maintenance efforts by the other children.

Child Two has had a family, lives an hour away, and wants to keep the Big House and have all three Children contribute equally to taxes and the cost of a professional property manager. Child Two loves the Big House and wants everything to stay the same as Mom and Dad planned. Child Two hopes to pass the Big House on to her children someday.

Child Three also loves the Big House but has moved to a foreign city and has few opportunities to use it. He might be able to live with the status quo except that the benefits to him simply do not justify the ever-increasing costs. Worse, he is agitated by what he sees as Child One’s abuse of the situation. He thinks it would be healthier for all involved if they all just bought their own vacation homes and he asks his siblings to consider selling the Big House.

The maintenance, arrangements for shared use and costs of ownership increasingly become sources of friction between the siblings. Conflict over the Big House becomes the norm. Child Three refuses to talk to Child One. Child Three asks to be bought out but the other Children cannot afford to do so. Child Three files an action for partition of the Big House property.

Litigation Outcome – Because it is in an R40 district, the Big House property cannot be subdivided into three parcels. The court must therefore order sale. Child One insists that they use his favorite local broker, that they market the Big House for at least a year prior to accepting an offer and that the offer must be at least three times the town’s assessed value. Child Three wants to make costly cosmetic improvements prior to sale but also wants the Big House sold within three months while the market remains favorable. Motion practice ensues and eventually, after a year, the Big House is put on the market under the direction of a court-appointed Special Master and, several months later, it is sold. The Children now communicate only through attorneys.

Mediation Outcome – After two days of meeting together and separately with the mediator, the terms of a negotiated settlement are agreed upon. A small mortgage will be taken out on the property and one new lot created by subdivision. The new lot will be encumbered with several easements benefiting the Big House property. The money generated from the mortgage and sale of the new lot allows Child Three to be bought out at 1/3 of the appraised value with enough money left over to cover delayed maintenance. A property manager is hired and the Big

RICHARD S. HUMPHREY LAW OFFICES

Richard S. Humphrey
Christina Dzierzek

DUI / Refusal	Admiralty
DUI / Serious Bodily Injury	Personal Injury
DUI / Death Resulting	Construction
Social Host Liability	Municipal

401-624-6152 (OFFICE) 401-641-9187 (CELL)
richardhumphreylaw.com
3852 Main Road, Tiverton, RI 02878



*A local connection for your
Florida Real Estate needs*

Attorney Owned and Operated Since 2004



Anthony M. Gallone, Jr., Esq.



Timothy H. Olenn, Esq.

Ph: 561-912-0922

olenn@AlliantFL.com

1 Lincoln Place, 1900 Glades Rd, Suite #245 Boca Raton, FL 33431

House is rented out frequently enough to cover the management fee and real estate taxes. The remaining time is split between Child One and Child Two. Child One is also allowed to live in the Big House during the winter months in return for paying for utilities. The terms are reduced to writing before the parties leave the mediator's office. By agreement of the parties, the mediator facilitates hiring an appraiser, an engineer, a title attorney and a property manager to implement the settlement.

III. Land Use Dispute

Development Corp. plans a mixed-use development on a 30-acre parcel for which it will need approval for a Major Subdivision from the municipality's Planning Board and several variances from the Zoning Board. The development is consistent with the town's comprehensive plan.

The property has ample frontage and borders a residential neighborhood on two-sides and a commercial area on one. The neighborhood kids have played on the property for years and their parents have enjoyed the natural buffer the property provides between their homes and the commercial zone. When the neighbors receive notice of an upcoming Planning Board meeting regarding the Major Subdivision, they are up in arms. Why haven't they heard about this before? How long has the town known about this?

A group of angry neighbors appears at the first Planning Board meeting. Many of them express concerns about flooding and dangerous traffic and increased noise. They testify that the property is often wet and, in their opinion, is almost certainly a wetland. They cannot understand why, despite their large numbers and impassioned pleas, the Planning Board seems to be moving ahead. Rumors spread. Development Corp. must be hiding information from them. Their anger increases, driving a number of conspiracy theories. Development Corp., with its experts and engineers, has the upper hand. In the end, the neighbors decide to pool their resources and hire a lawyer.

Litigation Outcome—The proposed development is held up for more than two years with appeals at every stage of permitting. In the end, after several visits to superior court and a petition for certiorari to the Supreme Court, the development is approved. With potential profits depleted by litigation costs, Development Corp. eliminates many of the plantings and other “beautification” aspects of the original plan. The neighbors input is ignored.

Mediation Outcome—At the first Planning Board meeting, the neighbors and the developer are asked to meet with a mediator. The mediator helps the representative from Development Corp. explain the details of development to the neighbors, the extensive engineering that has been completed and answer all questions. In private sessions, the mediator explains to the neighbors that the 30-acre property could be developed in a number of ways as a matter of right without permitting and, more importantly, without their input. Some of these would be far worse than the proposed development from the neighbors' perspective. The mediator explores Development Corp.'s BATWA with its representative, which is similar to the costly litigation result above.

In the end, the developer agrees to a 100' vegetated undeveloped buffer strip bordering the residential zone, to limit the number of units and to certain other restrictions on the property benefiting the neighborhood. The developer and the neighbors

meet again with the Planning Board to describe their agreement. Permitting proceeds expeditiously.

Conclusion

Of course, hypotheticals are not real life and all mediations are not as wildly successful as the ones described above. Hopefully, these narratives demonstrate, however, that for attorneys whose clients have found themselves enmeshed in a judicial equivalent of a protracted ground war, mediation offers the significant chance to efficiently and cheaply obtain favorable outcomes.

ENDNOTES

¹ *With apologies to Leo Tolstoy*, ANNA KARININA.

² See e.g., *George Howe Colt*, THE BIG HOUSE: A CENTURY IN THE LIFE OF AN AMERICAN SUMMER HOME, (Simon and Shuster 2003). ◇

Bar Association Mentor Programs

Our Bar Association is proud to offer mentorship opportunities to our members, promoting professional development and collegiality, and assistance and guidance in the practice of law. Experienced practitioners can share their wealth of knowledge and experience with mentees, and mentees receive a helping hand as they begin, or revitalize, their legal careers. Over the years, the Bar Association has matched numerous new members with seasoned attorneys, and we would like to refresh our directory.

For traditional mentoring, our program matches new lawyers, one-on-one with experienced mentors, in order to assist with law practice management, effective client representation, and career development. If you would like to volunteer and serve as a mentor, please visit ribar.com, select the **MEMBERS ONLY** area, and complete the **Mentor Application** form and return it to the listed contact.

As an alternative, the Bar Association also offers the Online Attorney Information Resource Center (OAR), available to Bar members through the **MEMBERS ONLY** section of the Bar's website, to help members receive timely and direct volunteer assistance with practice-related questions.

If you have any questions about either form of mentoring, or if you would like to be paired with a mentor through our traditional program, please contact Communications Director Erin Cute by email: ecute@ribar.com, or telephone: 401-421-5740.