

By Stanley Leasure and Ray Gosack

EMINENTLY SENSIBLE

WHY MEDIATION WORKS IN EMINENT DOMAIN CASES

TAKEAWAYS

- › Mediation is a low-cost and expedient alternative to litigation.
- › Mediation requires cooperation and agreement by all parties.
- › Mediation is more likely than litigation to achieve a win-win outcome.

Eminent domain mediation is a process through which a neutral mediator assists a condemning authority—for example, a local government—and a landowner to reach a settlement agreement that each finds acceptable. Our experience with mediation as local government representatives tasked with acquiring land for a large water supply, lake-expansion project has led us to three conclusions:

1. Mediation can be effectively employed to help resolve difficult eminent domain disputes.
2. Mediation in eminent domain cases is universally available by agreement of the parties. Some jurisdictions—by statute or court rule—require mediation prior to scheduling eminent domain cases for trial, even in the absence of agreement of the parties. In jurisdictions in which mediation is not required, it is underused.
3. As a result, the local government and the landowner forfeit the significant benefits of this alternative.



Mediation Basics

For local government managers who haven't been part of the mediation process, the mediator's primary task is to facilitate communication between the parties, identify their respective interests, and, hopefully, help them resolve the issues on terms with which both can live. The prospect of settlement is quite high.

Reports of settlement rates in mediations generally are impressive—as high as 80 percent—and are comparable to the limited settlement rate data in eminent domain mediations.¹

The reasons are self-evident: The parties come together with a skilled mediator—often with eminent domain expertise—for the express purpose of trying to settle the case. Mediation can occur whenever the parties agree, but it is important that the parties have exchanged

In the group session, counsel for the parties make a statement about the case and outline what they consider to be the important factors in evaluating the case. In the next phase, representatives of each side are separated into private caucus rooms to meet confidentially with the mediator.

There the parties, with the assistance of the mediator, consider the strengths and weaknesses of their position, identify essential interests, and develop settlement proposals. The mediator engages in a form of shuttle diplomacy, relaying offers and counter offers between the parties and continuing to assist the parties and their representatives to analyze the important elements of the case.

Several caucuses with each party are usually necessary. If an agreement is reached, a settlement agreement is

confidentiality provisions—pertinent in the event the case is not settled—typically include: inadmissibility at trial of statements made during mediation; protection of the privileged character of information disclosed to the mediator; protection of the mediator from compelled disclosure in judicial proceedings; and introduction of evidence related to the mediation. These protections help parties speak freely during mediation.

Parties can exercise significant control over the resolution process itself. Rather than being required to adhere to court-mandated procedures, they can focus on the merits of the case and their own interests. The emphasis shifts from compliance with court mandates designed to accommodate a wide variety of civil disputes, to the particular requirements of the condemnation case at hand.

This control can extend to every facet of the dispute, including discovery, timing, and the nature of the dispute-resolution process itself. Mediation almost always yields quicker resolution. The parties to the eminent domain case also have control over the selection of the mediator. Most consider it helpful to employ a mediator with condemnation expertise.

Importantly, parties have complete control over the outcome since they decide their own fate, which can include creative solutions specifically tailored to the special needs of the parties.

Condemnation litigation is costly in terms of lawyers, expert witnesses, lost productivity of staff, negative public perception, and other intangibles. Mediation typically results in lower cost in all these areas owing primarily to the expedience with which the case can be resolved.

Fort Smith's Success

The city of Fort Smith, Arkansas, used mediation extensively to acquire properties in a neighboring county for expansion of a regional water-supply lake. The properties were acquired to meet regulatory requirements and to

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the information necessary to effectively evaluate the critical issues in the case.

Those in attendance will include the mediator, counsel for both sides, one or more representatives of the condemning authority, and the landowners. The format can be as varied as the wishes of the parties and the style of the mediator, but most eminent domain mediations consist of a group session; a series of private meetings, also known as caucuses, between the mediator and the parties; and, hopefully, drafting and execution of a settlement agreement.

drafted for execution prior to conclusion of the mediation.

Mediation Advantages

Mediation in eminent domain cases has three primary advantages: confidentiality, control, and cost.² In jurisdictions in which it is available, mediation confers the critical advantage of confidentiality. Litigation, conversely, is an extremely public process. This factor, in and of itself, may hamper efforts at settlement of eminent domain cases.

Statutory and contractual confi-

Litigation vs. Mediation

Here is a comparison of key features of the two processes:

KEY FEATURES	LITIGATION	MEDIATION
Cost	More Costly	Far Less Costly
Determination of Outcome	By Third Party (judge or jury)	Self-Determined by Parties
Amount of Time	Lengthy	Quick
Focus	Legal Positions	Issues Important to Parties
Problem-Solving Approach	Adversarial	Collaborative

provide long-term protection of the watershed. In every instance where mediation was employed, a settlement was reached.

Some property owners were skeptical to try mediation. To get them more comfortable with the idea, the city made sure the property owners understood there was no risk to them for trying it. The city paid the entire cost of the mediator's services to encourage participation. This small accommodation paid large dividends.

In the opening group session, it was important for Fort Smith's lead representative to:

- Make a statement that the city is committed to be fair and reasonable with the property owner, but it must also be fair with the taxpayers whose funds will pay for the property.
- Explain the purpose for the acquisition and the benefits the project will provide for the entire region.
- Acknowledge the impact the property acquisition was having on the owner. In some cases, the acquired property had been owned by the family for several generations. It was important to recognize the emotional connections many landowners had to their properties.

These opening points demonstrated to the property owner that the city was sensitive and empathetic to the property owner's interests. Mediation isn't a complex process, it can be tailored to

meet the particulars of the issue at hand, it requires only a moderate amount of preparation, and it usually doesn't compromise the party's interests if the case does proceed to trial.

A practical benefit of mediation compared to litigation is that mediation allows the parties to discuss the issues important to each party. Litigation, on the other hand, is focused on advancing and protecting legal positions. This difference allowed the parties to arrive at mutually agreeable outcomes at far less legal cost and time than allowing a jury to decide the compensation.

Unlike jury trials, the parties were always satisfied with the final outcome. There were cases where the mediator discovered that property owners wanted minor nonfinancial considerations that were easily accommodated.

Good mediators will push the envelope to encourage the parties to arrive at a settlement. At times, this can make the parties uncomfortable. It's important, however, to remember that the mediator brings objectivity to the process and provides a reality check on the strengths and weaknesses of each party's desires. The participants have to keep focused on the goal of arriving at a settlement that's fair and reasonable for the property owner and for the taxpayers.

No two mediation cases proceed identically. The process and outcome of each mediation case couldn't have been scripted in advance. Those who don't have a stomach for spontaneity shouldn't be at the mediation table.

Flexibility, without compromising core principles of fairness, is imperative for a successful outcome.

Mediation is a low-risk, low-cost alternative for resolving many types of legal cases, including property acquisitions by eminent domain. A mediator can facilitate, but not force, an agreement.

Mediation allows more resources to be focused on project planning, development, and execution rather than energy-draining legal battles. And, it helps to preserve vital relationships necessary for crucial public projects to succeed. **PM**

ENDNOTES

1 See, Report of the Tennessee Advisory Commission on Intergovernmental Relations (February 2013). Eminent Domain in Tennessee, p.8. Retrieved March 14, 2014, from http://www.tn.gov/tacir/PDF_FILES/Growth_Policy/EminentDomain.pdf and American Bar Association Division for Public Education (n.d.) How Courts Work-Mediation. Retrieved March 14, 2014, from http://americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html.

2 Variation in local law is beyond the scope of this article. It is important to note that local law must be considered in assessing the advantages available through the use of eminent domain mediation. This is particularly true with respect to confidentiality



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