

Effective management of real estate and land disputes through mediation

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SUMMARY

A stable and transparent real estate and land framework is affected by many factors. Inefficient policies to promote the development of land and property markers, uncertainty of real estate markets, financial crisis, inadequate of excessive regulation, inability to engage in effective and constructive dialogue, difficulties in engaging constructively with project stakeholders and so on. All the above could bring about challenges and concerns that eventually lead to disagreements and disputes. If parties choose the adversarial path of court proceedings it may mean dramatic increase in litigation, huge costs and enormous time delays. If on the other hand parties opt for an alternative way such as mediation, they have a great opportunity to engage constructively in the dispute resolution process and engineer agreements. Even when a dispute is not there yet, a concern or disagreement that isn't handled collaboratively can grow into a destructive energy for any project. The stages of the mediation process, the benefits of using mediation, the shift from positions to interests, issues of neutrality, trust, privacy and confidentiality, a list of the nature of cases suitable for mediation, the mediation environment inside and outside the mediation room will be outlined and real disputes that have been resolved through mediation will be cited.

Keywords: Dispute resolution, mediation, risk management, effective policies, constructive communication, real estate mediation, land disputes

A stable and transparent real estate and land framework can be affected by a number of factors that bring about challenges and concerns that will eventually lead to disagreements and disputes. These factors may include inefficient policies to promote the development of land and property markets, uncertainty of real estate markets, financial crisis affecting several countries, inadequate regulation of real estate and financial markets, inability to engage in effective and constructive dialogue and difficulties in engaging constructively with project stakeholders. The surveyors often find themselves in the middle of different parties like owners, developers, neighbors or contractors, facing disputes regarding building contracts, boundaries, access to property and other real estate or land disputes. In short, the surveyor is an expert that provides specialized services whose effective communication skills could be useful or even needed, although facilitating disputes is not in the main job description.

There is a great potential that these disputes will become court cases if parties will choose the adversarial path of court proceedings. Whenever facing disputes, our society has seen a dramatic increase in litigation. Turning to the courts of law to deal with it has become the norm these days. While different parties of real estate and land disputes could engage constructively in the dispute resolution process and engineer agreements, sadly those disputes often end up in the courts. Even when a dispute is not there yet, a concern or disagreement that isn't handled collaboratively can grow into a destructive energy for any project.

If, on the other hand, parties opt for an alternative way such as mediation, they have a great opportunity to engage constructively in the dispute resolution process and engineer agreements. This is because all parties aim to use the court to prove them right and the other one(s) wrong, while only one party will win and the other one(s) will lose the adversarial contest. Mediation is usually following a failed negotiation by using a professional mediator to facilitate a private and confidential communication process from a neutral and an impartial perspective.

When facing concerns, the parties can communicate directly or can choose to seek independent trusted parties, such as mediators that can prove to be instrumental in helping them to build conversations and processes, usually private and confidential, that would address concerns while considering common interests as common ground. Therefore, the mediation processes can be seen as negotiations facilitated by trusted neutrals without power to impose decisions. This way, the risks of having the court deciding for the other party would be successfully managed.

It is to be noted that, although it isn't required, a mediator can have substantive expertise or legal knowledge in the field of the case being mediated. That up to the parties' needs for the mediator's ability to influence the process and its outcome.

Mediation can be seen as another communication channel that brings about parties' possibilities to share concerns and interests for the purpose of building creative options that would address parties' interests and priorities. Therefore, mediation may be useful whenever parties need independent facilitation for dispute prevention or resolution purposes; fail to communicate effectively; need capacity to engage in constructive dialogue; would like to manage the risks associated with an adjudicative process; and other.

When it comes to the architecture of the mediation process, parties usually meet together or separately with the mediator and start by sharing their perspectives over the stories in the

past, explore the issues and their present priorities and interests in relation with the issues and continue with identifying the common interests as base for future plans that would resolve the issues in a way that considers their priorities. In short, a mediation process would look like a business meeting (or more) where parties, their advisors and mediators would work together as builders of settlements. Simply put, the mediator helps the parties to find common ground by harmonizing what stands behind their demands and positions.

The mediation process brings about solid benefits, as it can be seen as a risk management tool and the opportunity of making the time and money investment would be just another business decision. Therefore, the risks may include serious damage to the business relationship, enhanced costs related to the unresolved dispute, the risk of losing the court case, the risk of compromising the business or even the risk of affecting one's health.

The surveyor, from the position of a specialist that is indirectly providing mediation services, can shift to the position of a referral, recommending use of mediation considering its proven virtues or even to the position of an expert that provides input in the mediation room whenever parties may find this needed.

The fundamental question is, however, if such approach towards collaboration and consensus building can be found in the human nature, across cultures, in the conduct of people, businesses or governments or even if it can be harmonized in the legal framework as part of necessary reforms that will address challenges?

David Plant ones said that we have to start by defining the process as part of the problem¹. It is, therefore, up to us to make sure that the process will help towards the resolution of the problem.

It all goes back to a sustainable real-estate market policy framework that can be achieved by reforms that address present needs without compromising the possibility of future needs to be addressed. Mediation is a process that will not only look in the past and in the present, but also in the future, which makes it an approach towards dialogue, collaboration, constructive conflict resolution, and eventually, sustainable real-estate markets.

¹Jeremy Lack, "The Neurophysiology of ADR and Process Design: A New Approach to Conflict Prevention and Resolution."