



LAND IN
CONFLICT

Managing and Resolving Land Use Disputes


SEAN NOLON, ONA FERGUSON, AND PAT FIELD

With a foreword by Bruce Babbitt

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■ FOREWORD

In 1993, when I arrived in Washington as secretary of the interior, a small gray songbird called the California gnatcatcher also arrived to become my instructor in land use planning. It came about when I placed the bird on the Endangered Species List.

That listing had far-reaching consequences. It became a federal crime to disturb or destroy even an acre of the remaining habitat utilized by the birds. What I had not fully comprehended was that the remaining populations of these endangered birds needed a lot of space in which to nest and forage, including several hundred thousand acres of prime development land stretching from Los Angeles south to the Mexican border.

All that land was now off-limits to development. As subdivision and highway construction came to a halt, developers headed to the Congress, demanding repeal of the act. My colleagues at the White House, pressing me for a solution, were quick to remind me that the president would undoubtedly be running for re-election and would need California's 54 electoral votes.

After assessing our options, it appeared the only way to lift the development moratorium would be by working out a region-wide land use plan that would allow development to proceed—provided we could guarantee permanent protection for enough of the remaining habitat to ensure the survival of the gnatcatcher populations. Developers would have to concede a lot of land to the bird in exchange for the green light to move forward with their subdivisions and roads.

Out came the maps, and they did not offer much encouragement. The coastal habitat of the bird was fragmented into thousands of irregular parcels scattered across three counties. To design and establish connected preserves responsive not to survey lines but to ecological needs of the bird seemed an insurmountable task.

A federally led negotiation affecting thousands of landowners, hundreds of subdividers, and dozens of environmental groups in three counties was out of the question. Land use decisions must be grounded at the local level, with state and federal actors playing a complementary role in shaping decisions. We would therefore have to reach out, delegating

authority and responsibility to state government, which could in turn delegate down to county and municipal governments that could deal with landowners in the familiar context of local planning and zoning regulations.

The first task was to structure a negotiation process to draw in representatives at all levels of government, developers, environmentalists, and civic leaders. Fortunately, we encountered a progressive state government ready to engage in the process, led by Doug Wheeler, the resources secretary. On the ground level, San Diego County became the test case with strong leadership provided by the mayor of San Diego, Susan Golding, and her staff. From there on we would, by trial and error, learn many of the lessons so insightfully discussed in this book.

Next we had to identify other stakeholders and encourage their strongest leaders to join in. On one end of the spectrum were environmental advocates arguing that releasing any land for development would further diminish the chance for survival of the bird population. At the other end, developers and landowners saw a huge infringement on their legally protected property rights.

The next challenge was to broaden the discussion beyond zero-sum confines and to introduce new and often unconventional ideas that were ongoing in multiple forums. A major hurdle would be economic: ensuring that landowners would receive fair value for any land necessary to fill out the preserves. But how could we compensate owners of ecologically essential landholdings while exacting some contribution from other landowners outside the planned preserves?

Transferable development rights and the use of conservation easements could assist large landowners. In other cases, particularly with smaller landowners, outright purchase would be the better alternative. A few enterprising groups initiated mitigation banking, purchasing critical habitat land, and recouping the investment by selling mitigation credits to developers. The San Diego Zoo, with a wide base of support in the community, proved an especially important advocate for the program.

In an undertaking of this size, federal, state, and local appropriations were essential to complete the open space preserves. To secure public funds meant building political support, which in turn required an expansive communications plan explaining the process and stressing the mutual benefits accruing to the entire community in the form of open space,

wildlife enhancement, and watershed protection, thereby increasing property values and making San Diego City and County a more attractive place in which to live and work.

After several years of negotiation and compromise, the plan went into effect; the details can still be visited on the websites of the City and County of San Diego. A land use undertaking of this scope and complexity could hardly have been imagined, much less achieved, through traditional adversarial procedures driven by the prospects of litigation and judicial intervention. Land use issues, large and small alike, almost always have implications for the broader community, which should lead to more frequent use of the techniques that are the subject of this book.

—Bruce Babbitt
Fellow, Blue Moon Fund
Board Member, Lincoln Institute of Land Policy

■ PREFACE

Why do some decisions about land use go smoothly while others generate multiple lawsuits, ruin relationships, and waste community resources? This book focuses on those land use disputes that take so much of our time and usually produce unsatisfying results. The disputes we explore involve zoning, planning, and development decisions that arise at the local level, but often have implications at the state and national levels. While the principal decision makers are local governments, state and federal agencies are frequently involved in these decisions.

Depending on the state, “local” may refer to the town, township, village, or county level of government. Local disputes are generally site-specific and influence residential, commercial, and industrial neighbors. Though land use decisions often include environmental issues (such as wetlands, water quality, storm water, and flooding), our focus is not primarily on environmental cases.

Through our years of experience and drawing from conflict theory in other fields, we have developed an approach to minimize the destructive nature of many significant local land use conflicts. This approach encourages parties to focus on mutual interests and strive to achieve mutual gains.

Throughout the book, we use stories to illustrate our approach. Many of these cases are real, in addition to one hypothetical case (the Discordia Mall). The cases illustrate how mutual gains approaches can be utilized and give insight into how these approaches might play out on the ground. Many of the techniques highlighted in these cases originate from the collaborative practices used by mediators. Accordingly, mediation theory and practice serve as ongoing concepts in our approach.

At the core of this approach is the reality that communities have many choices about how to handle controversial land use decisions. However, many leaders believe they have no choice or voice in land use decisions, since decisions about regulating the use of land must follow specific procedures codified in state and local laws. Yet these legal requirements serve only as procedural minimums and do not preclude the addition of more collaborative forms of decision making. A community may elect to use the required, minimal procedure or it can elect to implement a

supplemental process that enhances the interaction between the stakeholders involved. Some communities even choose to incorporate the collaborative processes of the mutual gains approach into their bylaws and ordinances.

The approach in this book is built on sound practices at the core of planning theory. The website of the American Planning Association (APA) lists the “ability to function as a mediator or facilitator when community interests conflict” as one of the skills of successful planners. In addition, the APA’s guidebook on planning for smart growth, *Growing Smart*, notes the importance of collaborative decision making in the context of planning and development approvals. Chapter 7 on local planning bemoans the fact that most state planning statutes do little to promote dialogue and to advocate for citizen involvement in comprehensive planning (Meck 2002). Only a few states—Florida, Maine, Washington, Oregon, and the District of Columbia—have adopted statutes that encourage more dialogue and collaboration in planning decisions. Chapter 10 provides a model ordinance provision to allow aggrieved parties to mediate instead of filing a legal appeal. Chapter 8 on effective development provides guidance for nonjudicial mediation and for the review of decisions. The Urban Land Institute’s book entitled *Breaking the Development Logjam: New Strategies for Building Community Support* (Porter 2006) explains how to enhance citizen participation and collaborative decision making. Our book builds on those suggestions by describing a comprehensive approach to managing and resolving controversial local land use disputes.

Why would a community choose to supplement or improve its minimal, land use decision-making process? How would adding more steps solve difficult problems? Would this create more work, take more time, and cause more delays?

Consider how the required process recently worked in controversial land use decisions in your community. Was the result satisfying to a range of stakeholders? Was the process rewarding? Were relationships improved? Did participants share valuable information about the community? Did the process contribute to the growth of the community? Chances are that few people were happy with the results, the process was long and expensive, long-standing relationships were stressed, the information shared was incomplete, and the sense of community was compromised.

If citizens and government acknowledge that the existing process can be adversarial and stifle creativity, they are more likely to seek out and participate in more constructive approaches. State and county governments can help local governments transition to a new approach by providing training and education for local boards. Some regional planning commissions, bar associations, state and federal agencies, and civic groups already provide this kind of training for local leaders. The Land Use Leadership Alliance in the Hudson River Valley and the Alberta Municipal Assistance Program in Canada are examples of regionally funded land use dispute resolution and education programs. In addition, groups like the American Planning Association, the Urban Land Institute, and the Lincoln Institute of Land Policy have programs and materials to help raise awareness among local officials.

The approach laid out in this book will help local planners, lawyers, developers, residents, and students devise strategies to address high-conflict in complex land use cases. The types of disputes appropriate for the mutual gains approach have the following characteristics.

- There will be long-term, far-reaching impacts on the community or landscape.
- The board has some discretion in decision making.
- Numerous stakeholders are affected or have expressed an interest in the project.
- There will likely be a challenge to an outcome if it is not developed collaboratively.

This book is written as a primer for those involved in controversial land use decisions. Local planners can obtain advice and ideas to address the problems they face. Proponents of projects, both developers and their financiers, may consider how to incorporate these approaches into their projects and plans. This book can also inform the public and give them the insights to request that local decision makers and project proponents utilize these principles, steps, and processes to improve the public's access to and involvement in land use decisions. Finally, this book can serve as a reference guide and an introduction to students interested in land use, including the next generation of attorneys, planners, and site engineers.

CHAPTER 1



The Mutual Gains Approach to Resolving Land Use Disputes

In the United States, over 25,000 local and regional governments play a role in making land use decisions. Every day, local officials must make challenging decisions involving land that impact open space, economic development, transportation, and countless other issues. These decisions affect the built environment, the landscape, and the economy for decades or even centuries. How officials make these decisions influences the way community members interact with one another and whether they work as a cohesive or a divided group.

To help understand how a land use decision process can affect an outcome, we have created the fictional town of Discordia, where a dilapidated 1960s strip mall sits on a three-acre parcel of land. As shown in figure 1.1, the parcel with the vacant Discordia Mall fronts on a busy four-lane road, is across the street from a gas station and a supermarket, is flanked by a bank and a small office building, is close to a newly restored creek on one side, and in the back corner adjoins a school in a residential neighborhood. The owners of the mall have proposed demolishing the existing one-story building to erect two new, three-story buildings with commercial space on the ground floor and two floors of offices above.

This may seem like a major improvement for the town, but that is not the initial reaction of the public. Parents of children at the adjacent Quimby Elementary School have expressed the most heated concern, raising questions and anxieties about increased traffic, danger from delivery trucks, and the general safety of children in the neighborhood. Residents of the neighboring apartment complex are worried about traffic, odors from garbage, lighting on the buildings and parking lot, hours of operation, and noise. A local environmental group trying to restore adjacent Discordia Creek has expressed outrage that the new development

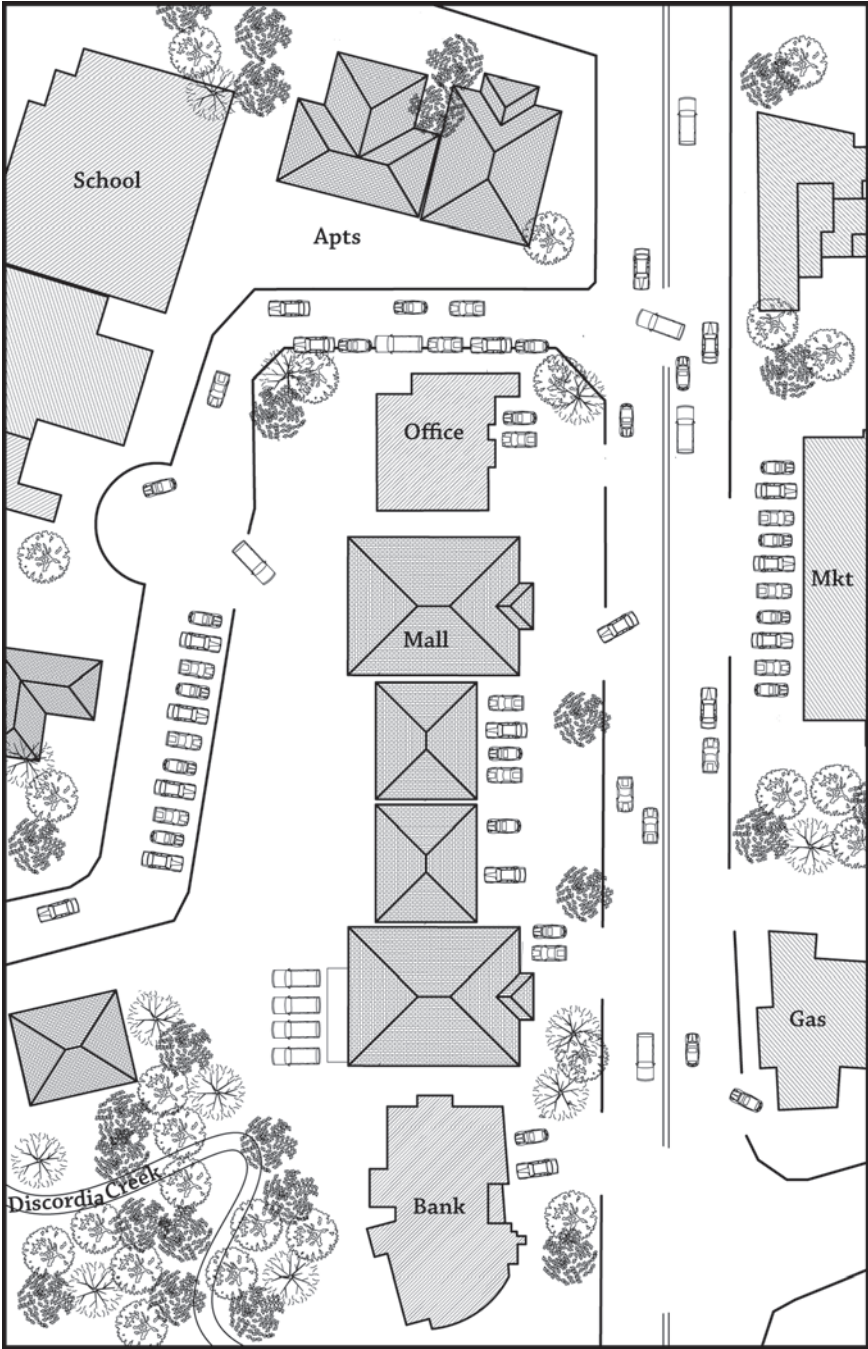


FIGURE 1.1 Map of Proposed Discordia Mall
Drawn by Martha Paynter.

would add impervious surfaces on the bank of the recently restored stream habitat. A group of parents has written an editorial stating that the project is out of scale and would threaten their children's health, asking the planning board not to approve the project. Another article voices concern about the competition this new complex would present to nearby businesses. Several rumors have begun to circulate about the poor reputation of the developer and the possible corruption of municipal officials.

The developer is concerned about losing money if the proposal for a conditional use permit (a zoning mechanism that identifies certain uses that are appropriate under the right conditions) is delayed by community opposition. The municipality is troubled by the vocal outcry from local residents. Hearings are postponed so the town may collect further information. Citizens feel that their questions are not being answered or their concerns addressed. Local board members, all volunteers, are disheartened that this is becoming such a difficult, time-consuming, and contentious job. Formerly friendly neighbors glare at each other at their kids' soccer games. The decision is at a standstill and everyone is unhappy.

Unfortunately, this example is common across the United States in small towns and large cities alike. Take just a few examples of headlines collected from across the country:

- "Mormon Church's Plans for Land Upset Harlem." *New York Times*, 9 January 2012.
- "Two Groups Opposing Walmart Neighborhood Market Zoning Case in Fort Worth." *Fort Worth Star-Telegram*, 9 January 2012.
- "City Must Honor Its Zoning Rules: A Dispute over Proposed Construction Raises the Specter of Changing Zoning Rules Based on Whims." *Denver Post*, 9 February 2012.
- "Neighbors Oppose Testo's Zone Change." *Connecticut Post*, 25 February 2012.
- "Some Neighbors Oppose 'Field of Dreams' Plan." *WCF Courier* (Iowa), 21 February 2012.
- "Neighbors Oppose Feedlot Expansion." *Norfolk Daily News*, 17 February 2012.





View of the Public Garden and Boston Common (1829).

Source: Boston Public Library.

Since colonial times, we have managed land use. The Puritans set aside the Boston Common as a shared space to graze livestock. The descendants of the Pilgrims protected the Province Lands on Cape Cod to ensure common access to hunting and fishing. Many years later, the first, large skyscrapers were built, and city dwellers confronted the new challenges of street congestion, loss of light and air, overcrowding of land, and the need for public transportation. In the early 1900s, as America transitioned rapidly from a rural to an urban society, city governments passed laws to gain greater control over land development. In 1916, New York City was the first municipality in the United States to address these challenges with a comprehensive approach to controlling development. Based on a model from Germany, the city council adopted an ordinance that created zones designating appropriate uses. In 1926, the U.S. Department of Commerce followed suit, developing a model “Standard Zoning Enabling Act” based on New York City’s ordinance. That same year, in a case called *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the U.S. Supreme Court determined that restricting the use of land through zoning was permissible and did not violate the U.S. Constitution. All state legisla-

tures have since adopted similar models, creating a largely consistent, broad structure of land use control in this country (McQuillin 2011).

THE INADEQUACY OF EXISTING PROCEDURES

Over the last one hundred years of land use management by local governments, a common approval process for decision making has developed. As shown in figure 1.2, there are essentially four stages. Applicants are required to file proposals with a local board or department. These plans are reviewed and sometimes modified and they often come before a planning board or zoning board of appeals. The applicant gives a presentation; the board asks questions, may request modifications, and hears public comment. The public body either makes a decision or forwards a recommendation to a final decision-making body such as a town or city council.

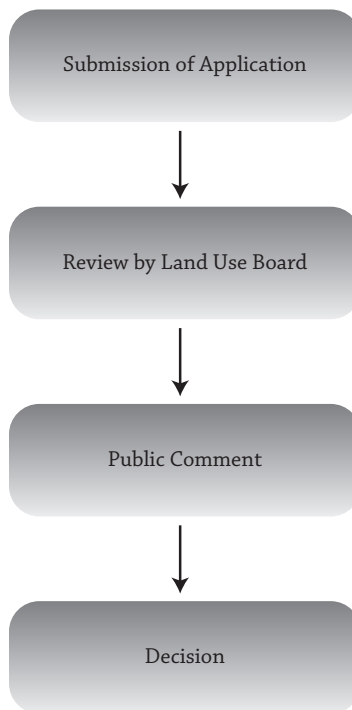


FIGURE 1.2 Land Use Approval: The Required Decision-Making Process

For controversial decisions, such as the *Discordia* example, the required process does not provide adequate opportunities for various groups with vested interests in the outcome to be heard or for the decision-making process to meet their needs. Neighbors testify in public comment periods, but are not given the opportunity to engage in a constructive dialogue. Developers have little incentive or ability to change proposals because the submission process requires expensive and elaborate plans from the start. Everyone withholds key information for fear the other side will somehow take advantage of them. Therefore, the public forum of the required process limits the opportunity for actual dialogue; instead it sets the stage for opposing claims, political positioning, and controversy.

Often people in conflict move to solve problems in court without actively exploring negotiation first. A study of mediation by the Vermont Environmental Court, which hears all land use appeals in that state, found that in roughly half of the cases studied the parties had never engaged in settlement negotiations before coming to court (Field, Strassberg, and Harvey 2009). This failure to talk has significant consequences. A study of intermunicipal mediation in Alberta, Canada, found that over three-quarters of the time and expense of a land use appeal is attributed to the final hearing and any appeals that challenge the decision (Alberta Municipal Affairs 2005). As the Alberta and Vermont reports show, the required process can result in a tremendous amount of wasted time and money when applied to controversial land use decisions.

This standard, required process works well for the majority of land use decisions. Most decisions made by land use boards using this process are made rather quickly and without much controversy. By a rough measure, a majority of a board's decisions are not controversial and only take up a small amount of its time. On the other hand, a minority of the decisions are controversial and can end up taking the majority of the board's time. When faced with controversial and complex decisions, communities often become embroiled in battles that tear at the civic fabric, pit neighbor against neighbor, demonize the applicant, and wear down local officials. Volunteer board members, neighbors, and applicants are often disheartened by what seems to be an insufficient process for solving these difficult, time consuming, heated land use disputes. The mutual gains approach presented in this book is appropriate for these controversial decisions.

POWER AND RIGHTS CANNOT RESOLVE COMPLEX DISPUTES

When a community is faced with disputes on land use, the interactions between stakeholders provide valuable lessons to help us understand how disputes are managed. A decision-making system is “a coordinated set of processes or mechanisms that interact with each other to prevent, manage, and/or resolve disputes” (Bordone 2008, 2). The processes of land use decision-making systems can vary in efficiency, effectiveness, and satisfaction. According to the field of dispute system design, there are three principal approaches to resolving disputes (Ury, Brett, and Goldberg 1988; Costantino and Sickles Merchant 1996).

- ***Rely on power.*** Use one’s leverage to force or coerce someone to act.
- ***Adjudicate rights.*** Rely on an arbiter to decide who is right. Set up adjudicatory processes to determine who has legally enforceable rights and who does not.
- ***Reconcile interests.*** Try to satisfy needs, concerns, and fears of everyone involved.

These approaches help us analyze the limitations of the systems used to resolve land use disputes. Most land use systems are designed to adjudicate rights, not reconcile interests. Power- and rights-based systems are less likely to produce durable outcomes because results can be overturned when the power balance changes. In local communities, the power balance is always shifting with new elections and court challenges. While power and rights approaches may allow for quick decisions, the results of those decisions are not likely to last or satisfy many of the people involved, and they might be challenged through administrative and judicial appeals. These approaches often destroy relationships among the involved parties by creating winners and losers and by fostering mistrust and hostility. Projects and decisions that require long-term implementation depend on the support of a wide range of stakeholders beyond the current elected officials to ensure their sustainability over time. These are the decisions that are appropriate for processes that reconcile interests.

The vast majority of land use decisions are easy to make. Does a landowner's request to build an addition fit within the zoning ordinance? Does the request for an area variance meet the requirements of the statute? Is the lighting proper? Is there enough off-street parking? From a systems perspective, most decisions are appropriately and efficiently handled by adjudicating rights. The standard, required process is a rights-based, adjudicatory process.

However, with some significant and complex decisions, parties have many interests that are not likely to be addressed in a rights-based approach. In addition, the questions raised in complicated decisions present many interconnected issues. These "polycentric" disputes make it difficult, if not impossible, for a board or a judge to find common ground. For example, can public access to a waterfront be enhanced while ensuring a successful, private development? Can new uses support or enhance adjacent, current land uses? Can new development contribute to the tax base for an entire community? These are questions that are better answered by the most-affected stakeholders through interest-based processes. If the board assumes the rights-based process is appropriate in more complex decisions, it will likely miss an opportunity to reconcile numerous, important community interests.

Communities have a choice when it comes to process: they can continue using the rights-based, required process for all types of decisions, which may deter people from participating, create deep divides among segments of the community, and overlook opportunities for creative problem solving; or they can use a different process appropriate for the nature of the decision being made.

Many communities decide to supplement regular processes with the mutual gains approach. These communities have learned that people may shift perspectives when allowed to learn jointly and explore interests, generate options from those interests, and build trust in the process and in each other. Some communities have enacted provisions that require preapplication meetings between the developer and potentially affected citizens (Gardiner 2008). Some developers have convened ad hoc advisory committees to help craft appropriate plans for the community prior to submitting an application (Nolon 2009). Some local officials have encouraged disputants to put the decision-making process on hold while they enlist the help of a mediator to see if agreement can be reached in a

different forum (*Merson v. McNally*, 90 N.Y.2d 742 [1997]). Many courts across the country have instituted mediation programs to encourage and support parties in reaching agreement prior to court in an effort to prevent costly, lengthy, and unpredictable court proceedings. This book examines the common features of these processes and provides a framework to apply them in your community.

A PREFERRED WAY TO MANAGE CONTENTIOUS SITUATIONS

In over a decade of research sponsored by the Lincoln Institute of Land Policy and with years of professional experience, we have found there is a better way to manage the most challenging situations. The mutual gains approach is not a single process or technique. It draws from the fields of negotiation, consensus building, collaborative problem solving, alternative dispute resolution, public participation, public administration, and deliberative democracy. The mutual gains approach is different from the required land use processes in its goals, intended audience, structure, methods, and decision making.

Mutual Gains Approach Versus the Required Process

The mutual gains approach is guided by core principles, follows a set of clear action steps, and is useful at various stages of land use decision making. It is different from, though not incompatible with, the required land use procedures. Appropriate in those cases where an impasse has arisen or is likely to arise, the mutual gains approach

- is based on all stakeholder interests as well as the necessary technical information;
- involves stakeholders along with appointed and elected decision makers;
- generates information relevant and salient to stakeholders, including abutters, community leaders, and others;
- requires strong community and public engagement skills along with strong, technical planning skills; and
- engages the public above and beyond sharing information and views.

The mutual gains approach is not limited to any one phase of the land use decision-making process. It may be used early on to help prepare a municipality-wide, comprehensive or master plan prior to an application being filed, prior to or during the public hearing process, or even after a decision has been made.

In planning efforts, communities can use charrettes (a kind of public design studio), public workshops, stakeholder committees, and other tools to build greater understanding and consensus around neighborhood or community-wide plans. Even before an application is filed for a particular project, a proponent can meet with potentially affected stakeholders to share ideas and learn about people’s concerns and issues in order to build a better plan going forward. Once an application or proposed plan is submitted, municipal officials, citizens, and project proponents have at their disposal a range of process options.

The mutual gains approach, as compared to the required procedures, is summarized in table 1.1.

The mutual gains approach incorporates two key dimensions: (1) the *principles* that inform the approach; and (2) the *steps* of this approach. While the stories in this book are often complex, involving long disputes

TABLE 1.1
The Required Versus the Mutual Gains Approach

	<i>Required</i>	<i>Mutual Gains</i>
Goal	A technically viable plan that conforms to all laws, rules, and regulations	A technically viable plan that integrates stakeholder interests
Primary Audience for Plan or Project	Decision makers	Decision makers and stakeholders
Purpose of Data and Information	To ensure the plan conforms to professional practice and passes technical review	To ensure the plan is feasible and addresses stakeholders’ issues and concerns
Skills	Technical (engineering, design, and fiscal) and legal	Technical, legal, and community engagement (dialogue and deliberation)
Role of Public	Provide input and advice	Engage in discussion, joint problem solving, and consensus building

and stakeholder engagement processes, the principles and steps described may be used in situations as simple as a single meeting. This approach, tailored to fit, can work on multiple scales.

Principles of the Mutual Gains Approach to Managing Politics and Process

A review of hundreds of cases makes clear that the most successful mutual gains processes incorporate the same key principles. While every situation and context require flexibility, the most effective processes incorporate the following:

- Engage early.
- Listen and learn first.
- Build on interests, not positions.
- Design and build an effective process.
- Involve many, not just a few.
- Learn jointly.
- Use a skilled facilitator.
- Build relationships for the long term.

Throughout this book, these principles are used in both real and hypothetical cases. When these principles are followed, they can result in productive engagement rather than adversarial forms of interaction with the public. The principles should be woven through each of the four steps of the collaborative mutual gains process: assessment, design, deliberation, and implementation.

- **Engage Early.** Leaders, decision makers, and key parties should begin collaborating with stakeholders as early as possible in the development process. Early on, people are less likely to be committed to a particular vision or outcome, and design and engineering work are still preliminary. In the early stages there is more opportunity to change the proposal and to respond to feedback and ideas from key groups. Engaging early provides those involved the luxury of time to work through differences and increase trust and transparency. This will also allow the parties to identify the full range of concerns early on and to address those interests in the proposal. This is in stark contrast to

what typically happens when stakeholder interests are discovered later, when it is less practical to alter a proposal due to time and budgetary constraints.

- **Listen and Learn First.** The best tools for reaching a workable solution to a complicated situation are listening and understanding. Thus, we recommend an assessment process (formal or informal, small or large) to identify key stakeholders, learn about their interests and concerns, and hear how they want to be involved. It is impossible to effectively address concerns about a proposed development without understanding the hopes and fears behind those concerns.
- **Build on Interests, Not Positions.** Through over 40 years of research on negotiation, we know that parties have the best chance of success if they understand from the start what their counterparts care about and why. Rather than simply stating their positions, which are often in opposition to one another, parties should focus on their interests. Positions are the outcomes people believe will satisfy their underlying interests. Interests explain why people care about an issue, what motivates them, and what they deem important. This distinction may be characterized in this way:

POSITION: What I want or demand. For example, I do not want more than 50 parking spaces in the lot near my home.

INTEREST: Why I want what I want, or the underlying reasons for my stated position. For example, I am very concerned about traffic congestion and not being able to get through the intersection quickly on my way home.

Processes that help parties tease out interests, invent options based on those interests, and find ways to select options that meet the shared interests are most likely to result in stable, wise, and fair outcomes. If well identified, interests can serve as the building blocks for options and approaches to satisfy the parties. For example, one may respond to the above position by asking, “If you are worried about heavy traffic, can we explore ways to ensure that traffic will be controlled in the new development?” Too often, the conventional, “offer and counteroffer” dynamic does not create innovative options that address multiple interests.

- ***Design and Build an Effective Process.*** Each community and conflict has a unique context and set of dynamics. It is important to design a process tailored to the specific situation, structured around the interests and concerns of the stakeholders. The design must be coordinated with the formal, decision-making authority and existing administrative procedures (as required for any project to be legitimate and legally defensible).
- ***Involve Many, Not Just a Few.*** Engage those with a broad range of perspectives who may be affected (both positively and negatively), rather than merely working with the customary community leaders, planners, elected officials, power brokers, and those few who have legal standing in the final appeal. You are more likely to reduce opposition and make new allies if you engage more than the few people in positions of power.
- ***Learn Jointly.*** Land use planning and development is a complex process with multiple economic, environmental, and social impacts. Because the development community is sometimes seen as suspect in the eyes of the public, it is important to present technical information that is accurate, factual, and trusted. Likewise, neighborhood or environmental groups may be mistrusted as they enter into a conflict. These community groups deserve the opportunity to share their local knowledge and to be included in the discussion. For example, reviewing traffic studies that are completed by a jointly selected consultant, sharing the data, bringing in experts on design and development, and planning activities together will increase the level of trust in the information available and, ultimately, in the process itself.
- ***Use a Skilled Facilitator.*** Given the number of stakeholders and the complexity of issues and influencing factors, it is difficult to successfully manage deliberation and joint problem solving. Position taking, adverse reactions, disagreement, and misinformation may result. Thus, actively facilitating and coordinating the process will improve outcomes of multistakeholder processes. This may be accomplished through technical tools, independent facilitators, or skilled internal staff.
- ***Build Relationships for the Long Term.*** The very nature of land use decisions involves the construction or alteration of physical space. The people and organizations involved will live with these decisions for years. Given the long-term nature of development, it is essential that

parties work to build and maintain good relationships. One way to do this is to make decisions transparent and consistent. Effective processes seek to inform and include stakeholders early and often, share information to the greatest extent possible, provide parties advance notice of proposals, changes, and information, and ensure that the process is clear and open. Reducing the element of surprise can build the community's trust that citizens will be informed and that they will have a chance to weigh in meaningfully.

Steps to Implement a Mutual Gains Approach

In addition to the underlying principles, there are four general steps in implementing a mutual gains process. These four activities are discussed in more detail in chapters 4–7.

- ***Assess and Understand Stakeholders, Issues, and Interests.*** In order to bring people together, a small group needs to determine who should be involved, what topics should be addressed, and how the process should be structured. This is called an *assessment*. Assessment is the broad task of gathering information about stakeholders and their perspectives, which is a key step in understanding the situation thoroughly enough to make well-informed decisions about how to proceed. This evaluation is a series of confidential interviews with key stakeholders, often carried out by an impartial professional (such as a mediator or facilitator), that results in summary findings and recommendations. Assessment results identify critical issues, help determine who needs to be involved in the process, and aid in developing a plan of action.

Assessments can be as simple as talking to 10 people from a variety of stakeholder groups and giving an oral presentation at a public meeting of what was learned, or as complex as interviewing 100 people over many months and preparing a lengthy report detailing a complex history and opportunities for moving forward. The type of assessment used depends on the nature of the conflict and available resources. (See chapter 4.)

- ***Design a Process for Collaboration.*** Process design is the deliberate effort to identify the key elements and conditions that must be put in

place to enable people to work together well. Good process design serves the community just as good infrastructure does. You cannot build a thriving city without the necessary infrastructure (water, streets, sewer, and open space) and you are not likely to create durable, widely supported decisions without sufficient process structure. Good process design can channel conflict productively, ensure meaningful stakeholder engagement, define both problems and solutions, identify what people care about most, generate creative and nuanced options, and increase the likelihood of broad agreement among stakeholders. (See chapter 5 for examples and characteristics of good process design.)

- **Facilitate Deliberation.** A mutual gains approach always involves some form of deliberation in which people work together. This may take the form of face-to-face meetings or may deploy any number of technological solutions from keypad polling to online visioning tools. There are three broad phases of deliberation: *the beginning*, when groups form and establish some kind of norms, scope, and focus; *the middle*, when groups identify their interests, gather technical information, manage their relationships with one another, and generate options to create added value; and *the end*, when groups narrow choices, package components of a solution, and strive to reach agreement (see figure 1.3).

Processes that address a limited number of issues may tackle all three phases in one or two meetings, as often occurs in the mediation of simpler cases. Other processes may take one or more years and multiple phases. Though these phases of deliberation may seem linear and simple, this three-phase framework provides a useful structure to prepare for the challenges that may arise during deliberation. (See chapter 6 for more on deliberation.)

- **Implement Agreements.** In the same way that assessment and process design are often ignored or rushed, the implementation of outcomes is often given inadequate attention. After working hard to reach an agreement, stakeholders (most of whom are volunteers) are eager to return to their lives. They feel that their job was to reach an agreement and, once that is accomplished, their work is done. Reaching agreement, however, is not necessarily the end of a collaborative process.

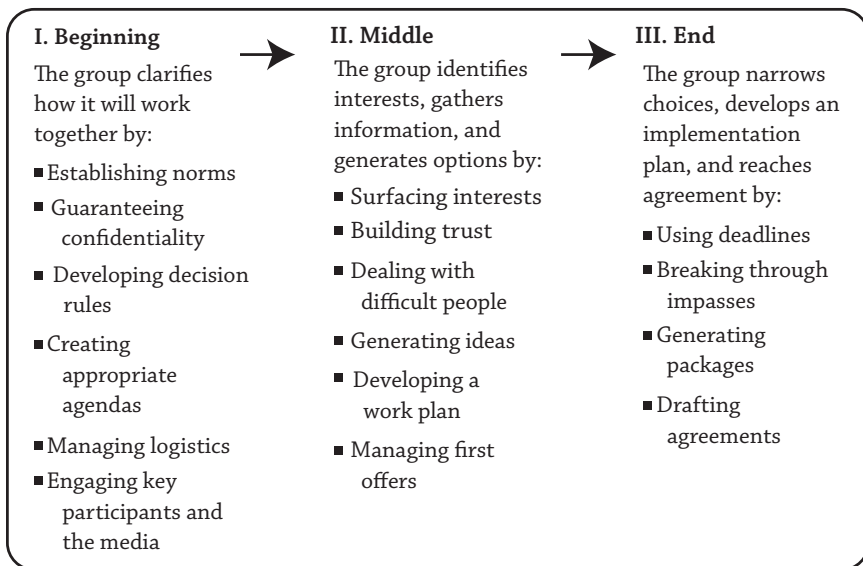


FIGURE 1.3 Three Phases of Deliberation

During deliberation, the parties will have identified a solution that satisfies as many needs and interests as possible. Once that agreement is reached, the outcomes must become legally enforceable or required in ordinances or other formal agreements; stakeholders must stay involved to ensure that their hard work is realized. Constantly changing conditions at the local level necessitate planning for implementation. Staff turnover, changing political players, and unstable market conditions should be anticipated in most land use decisions. Conveners and stakeholders must plan for such surprises.

In the implementation stage, three tasks must be completed. First, the recommendations are incorporated into a proposal for a plan, an ordinance, or a development. This proposal must meet the requirements of the decision-making board while incorporating the recommendations from the agreement. Second, the application is reviewed by the decision-making board and is subject to the standard decision-making process. Parties to the agreement must advise the board of their work and recommendations during the review process. Third, if approved, the plan must be implemented, the ordinance administered, or the development built. (See chapter 7 for more on implementation.)

Key Negotiation Concepts

While this book does not focus on negotiation theory, several negotiation concepts are essential in the mutual gains approach and warrant review. (See Fisher, Ury, and Patton 1991, for more explanation.)

- **Explore Interests, Not Merely Positions.** As previously discussed, positions are assertions about what someone wants or demands: “I want no changes to the local strip mall next to me.” Interests refer to the “why” of someone’s position, one’s underlying needs, desires, and concerns: “I want no changes because I shop at the local grocery store in the mall every day, am afraid of construction disruption to my neighborhood, and feel new development will be too big and bring too much traffic.” It is important to explore underlying interests early because (1) there may be multiple ways to satisfy interests beyond the stated position; (2) early statements of position tend to increase oppositional behavior; and (3) different approaches may be precluded because the position has already been stated, making it difficult to back down.
- **Determine Best Alternatives to a Negotiated Agreement (BATNAs).** Negotiation theory and practice have shown that the areas of possible agreement or the bargaining range for a negotiation are powerfully shaped by what the parties believe they could do on their own if there were no negotiation. If they do not talk through the issue together, what other actions might they take (political, legal, personal, or financial)? If there is no discussion or negotiation, citizens may instead write letters to the editor or make bumper stickers to express their views; environmental groups might organize a campaign or litigate; or a developer might seek to prevail in court. BATNAs shape the scope and possibility at the bargaining table. If one party believes they can get a vote passed at city council, for instance, it may be less willing to make compromises with neighbors or other stakeholders. On the other hand, if citizens determine that they have a weak best alternative, they may decide to increase their power by building alliances, reaching out to the press, or other means. All stakeholders have alternatives to negotiating.
- **Create Value.** It is frequently assumed that negotiation only involves allocating pieces of a fixed pie among stakeholders. Negotiation is thought to merely determine who gets what: Who are the winners and

losers? But effective negotiations expand the pie for all parties. Participants can expand the pie by coming up with new solutions together that meet their multiple interests through processes such as brainstorming. When participants propose solutions that meet many interests, they are effectively enlarging the pie. Time and time again, we have seen people work together in a structured process and create ideas that are better than any previously discussed and that everyone can support. This is one of the benefits of the supplemental mutual gains approach that is often missing from the conventional, required decision-making process.

- **Base Decisions on Joint Criteria.** The required processes of land use decision making rely on criteria or rules established through state laws, local ordinances, and other regulations and policies. But often these criteria are not sufficient to address most or all of the underlying interests of the multiple parties. A setback, for instance, might be 100 feet from a wetland. But a developer may make the case to the town and environmental advocates that spending more money on additional, natural, storm water management (swales and variable vegetated buffers around the development) can produce a better environmental outcome than merely adhering to a specific setback.

The criteria of cost, appearance, and preservation of open space might be used to select among several designs the architect has developed. Open space organizations may care most about the environment while neighbors might be more interested in the style of the design. Furthermore, in the required process that involves only a few public officials and developers, other stakeholders may have the sense that backroom deals are being made if they do not know the criteria used in arriving at a final decision. A more public, collaborative process can tease out the range of interests and criteria, compare various alternatives, and determine which alternatives satisfy the most interests.

Case Studies

This book features case studies from across the United States and Canada, summarized in table 1.2, to illustrate the principles and steps in the mutual gains process.

TABLE 1.2
Cases: Various Outcomes of the Mutual Gains Approach

<i>Case Name/Location</i>	<i>Year</i>	<i>Description</i>	<i>Outcome</i>
Assembly Square/ Somerville, Massachusetts	1998–2007, and ongoing	For nearly a decade, disagreements impeded creation of redevelopment plans for Assembly Square, a former economic and manufacturing hub declared a blighted district by the City of Somerville.	Disputing parties negotiated an agreement in 2006 that addressed the short- and long-term land plans. Litigation was dropped and agreements were reached to continue to fund public transportation, study health effects, create green space, and establish an employment-training program. Development began in 2012.
Borderland Village Innovation Pilot/ Killingly, Connecticut	2008–2010	Guided by technical experts, residents participated in planning exercises to preserve a critical habitat and the rural character of the community by integrating new development into town centers and clustering development to preserve one of the last wildlife corridors on the East Coast.	The collaborative processes resulted in final reports that provided recommendations for inclusive research and implementation processes for future planning efforts.
Chelsea Salt Dock/ Chelsea, Massachusetts	2002–2003	Long-term conflicts among municipal, residential, and industrial users led to a mediation to discuss mitigation and resiting of the salt dock.	The mediation did not result in a final settlement, but it led to restoration of relationships among the parties and additional mitigation measures.
Downtown Planning Process/Meriden, Connecticut	2004–2005	The City Center Advisory Group, which represented 20 stakeholder groups, was formed to address issues associated with the City of Meriden's downtown redevelopment plans.	The process produced a report detailing the four main obstacles to redevelopment and how to overcome them.
Hercules, California	2000	Historically, development in Hercules was poorly planned. To remedy this, the Hercules Planning Commission used a 10-day charrette to gather citizen input and plan the development of a town center <i>before</i> developer proposals were accepted.	The charrette enabled community members and elected officials to avoid conflict and collaboratively plan a walkable, mixed-use neighborhood with the first form-based code in California.

TABLE 1.2 (continued)

<i>Case Name/Location</i>	<i>Year</i>	<i>Description</i>	<i>Outcome</i>
Homeless Shelter/ West Chester, Pennsylvania	1994–1995	Growing signs of socioeconomic stress in the city of West Chester led local charitable foundations to form a nonprofit shelter, Safe Harbor of Greater West Chester. The shelter was to provide meals and counseling for the homeless. However, the proposed location for the shelter, near the city's downtown business district, raised concern and ire from nearby businesses and neighbors.	The shelter was eventually approved after the applicant made assurances that addressed concerns of neighbors.
J. P. Carrara Mine/ East Middlebury, Vermont	2007–2009	The J. P. Carrara gravel company applied for a permit to expand a mine onto adjacent land. Community members, upset with the expansion, formed a group to discuss the issues. Eventually the developer joined the group.	The collaborative process produced an amended permit application that included mitigation measures proposed by the parties.
Leonard P. Zakim Bunker Hill Memorial Bridge/Boston, Massachusetts	1990–1992	Disagreements over the design of the Charles River Crossing brought lawsuits that threatened progress on the Central Artery/Tunnel project.	A committee of 42 members drafted a bridge design proposal that the State of Massachusetts eventually adopted.
MaxPak/Somerville, Massachusetts	2004–2005	Residents raised concerns about excessive noise, air pollution, traffic congestion, and soil contamination in a city plan to densely redevelop a former industrial brownfield site. The city required the developer to solicit community input through an engagement process, which the city ultimately facilitated.	The community planning process resulted in a concerns-and-recommendations report that offered guidelines for site development. After a yearlong planning effort, a preliminary master plan for a 199-unit, residential development surrounded by green space was approved in 2008.

Mill Plaza/Durham, New Hampshire	2006–2008	The Mill Plaza Study Committee, formed as part of a private developer’s community engagement plan, created a conceptual design for a central, downtown property that the public would support and the city would permit.	The committee produced seven recommendations to create a pedestrian-friendly downtown that incorporated green building standards and carbon-neutral principles that conserved an important waterway.
North 4th Street Corridor/Albuquerque, New Mexico	2007–2008	Residents and merchants disagreed with the City of Albuquerque’s draft redevelopment plan and the process used to create it. Representatives of the stakeholders used overlay zoning plans, satellite imagery, and interest-based discussions to create a set of development recommendations.	The representative stakeholder group drafted its recommendations and presented them to the Environmental Planning Commission (EPC). The City of Albuquerque redrafted the plan and gained the support of residents and merchants. The EPC approved the plan in 2009.
Streamlining Community Planning/Falmouth, Maine	2007	The Town of Falmouth sought to engage the community in a facilitated dialogue to reach a shared vision and plan for improving the effectiveness and efficiency of its complex community development and planning system.	With the help of mediators, town decision makers reached a shared vision and a realistic plan for revising and implementing short- and long-term improvements to the town’s land use and community development systems.
Threshold Process/ San Mateo County, California	2008	An affordable housing shortage in San Mateo compelled Threshold 2008 to engage community members in discussion about housing issues and options to ensure an improved, long-term quality of life for those affected by housing choices.	The process helped housing advocates, policy makers, and other participants of Threshold 2008 understand the issues more clearly. The project continued as Threshold 2009 to increase civic engagement in government practice.
Wind Turbine Farm/ Manchester, Vermont	2005–2006	The Orton Family Foundation began a community engagement process to clarify citizens’ interests and concerns about a proposed, five-turbine wind farm.	In a town board meeting following these discussions, the community narrowly voted to allocate funds to oppose the project.