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LEGISLATIVE ANALYST REPORT

TO: HONORABLE MEMBERS OF THE BOARD OF SUPERVISORS
FROM: Carol Roos, Sr. Legislative Analyst
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REQUESTED BY: Supervisor Tom Ammiano
HEARING DATE: Not Assigned
COMMITTEE: Not Assigned
SUBJECT: **CONSENSUS BUILDING/MEDIATION OF LAND USE PLANNING ISSUES IN SAN FRANCISCO**

SUMMARY

SUMMARY OF REQUESTED ACTION

The Office of the Legislative Analyst (OLA) was requested to identify potential non-profits that specialize in community-based planning, academics with expertise in City planning and/or private architects with urban planning backgrounds to serve as a neutral mediation team to begin resolving citywide conflicts about planning, including but not limited to Propositions L and K (on the November 2000 ballot). Subsequently, the request was revised to focus on the consensus building process itself, and types of consensus building tools, and that became the focus of this report. If a consensus building process goes forward, potential non-profits, academics architects and other team members would need to be identified.

EXECUTIVE SUMMARY

There is a perception in the City, as well as nationwide and internationally, that traditional planning methods with formal public participation points, described as a "top down" planning, fail those they are supposed to serve. A number of new planning models are developing and older alternatives are being refined. Among alternative planning processes, consensus planning is receiving positive attention. Consensus planning is an evolution and reinvention of traditional planning, particularly specific area plan development. Consensus planning includes extensive outreach. It is inclusive, bringing in all stakeholders, including neighborhood residents, regularly participating groups, advocates, planners and businesses, at the beginning of the process rather than having them respond to a finished plan. The process takes advantage of the contributions of experts such as city planners, as well as interested stakeholders with various expertise, including technical experts and neighborhood residents. For specific land use disputes, in particular, various forms of consensus planning are increasingly being used, including various forms of "assisted negotiation", involving neutral mediators and/or facilitators.

Land use planning can both cause and help resolve land use disputes. While land use planning in the United States originally focused on the most technically efficient method of segregating land uses, its emphasis has shifted toward a concern for fairness in the allocation of public resources. This shift has led to an increased demand for stakeholder participation in land use decision making, thereby stimulating some conflict while, at the same time, offering a basis for dispute resolution. According to its proponents, consensus building as a method of resolving land use disputes offers a strategy for balancing technical considerations, broader political concerns about fairness, and conflicting stakeholder interests.¹

Opponents feel that while negotiated settlements may be desirable, sometimes they are not possible without "selling out" some interests and principles that are in the community's best interest.² Some advocates of consensus planning address this issue by advising, "never trade interests for relationships", maintaining that no one in a consensus building process should be pressed to give up the pursuit of his/her/their best interests in response to the "feelings" or the "best interests" of the group. Thus, no one or stakeholder group should be asked to give up their own interests to ensure harmony or the success of the process.³

BACKGROUND

A VIEW FROM THE PLANNING ACADEMY

Based on research by planning academics, San Francisco is not alone in experiencing strains on the planning process. The following paragraphs are from a pointed critique, part of a report entitled, *Public Participation in Planning: New Strategies for the 21st Century*, prepared for the state Department of Transportation (CALTRANS) by a member of the University of California, Berkeley City and Regional Planning faculty:⁴

The traditional methods of public participation in government decision making simply do not work. They do not achieve genuine participation in planning or decisions; they do not provide significant information to public officials that makes a difference to their actions; they do not satisfy members of the public that they are being heard; they do not improve decisions that agencies and public officials make and they do not represent a broad spectrum of the public. Worse yet, they often antagonize the members of the public who do try to work through these methods. Moreover, they pit members of the public against each other as they each feel compelled to speak of the issues in polarizing terms to get their points across -- making it even more difficult for decision makers to sort through what they hear, much less to make a choice. Most often, these methods discourage busy and thoughtful individuals from wasting their time in going through what appear to be nothing more than rituals designed to satisfy legal requirements. Public hearings at the local level in the US typically are attended only by avid proponents and opponents of a measure affecting them personally, an occasional organized interest group and a handful of diehard city council or commission watchers. Formal processes of review and

¹ Lawrence Susskind (Ford Professor of Urban and Environmental Planning, Massachusetts Institute of Technology and President of the Consensus Building Institute [CBI]), Mieke van der Wansem (Vice President, CBI), and Armand Ciccarelli (Associate, CBI). *Mediating Land Use Disputes, Pros and Cons*; Lincoln Institute of Land Policy, Cambridge, MA; March 2000, p.1

² Norman Krumholz, Professor, Cleveland State University, College of Urban Affairs. Planning Director, Pittsburgh, PA., 1969-1979. Telephone communication; August 2, 2001.

³ Susskind, Consensus Building Institute, *A Short Guide to Consensus Building: An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad hoc Assemblies That Want to Operate by Consensus*; 1999.

⁴ Judith Innes, Department of City and Regional Planning, University of California, Berkeley and David Booher, Policy Consultant, Sacramento, CA and Visiting Scholar, Institute of Urban and Regional Development, University of California, Berkeley; *Public Participation in Planning: New Strategies for the 21st Century*; Paper prepared for the California Department of Transportation; Institute of Urban and Regional Development: Working Paper 2000-07; August 2000.

comment in the US, like environmental impact review or, in Europe, the public posting of planning proposals, end up with comments coming from all directions, that the agency may or may not respond to in any substantive way. Later the agency does what it chooses and the commentators are mostly unaware of whether their opinions have even been considered, much less used. Open meeting laws, designed to assure that the public knows how and why decisions are being made by requiring noticing and early agendas and preventing elected officials from communicating informally among themselves on public matters have largely had the opposite of their intended effect. They drive some decision making further behind the scenes, prevent elected officials from having the time and opportunity to become informed about complex issues that cannot be covered in formal meetings and discourage the speculative discussion needed to develop creative solutions. Elite citizen committees of local leadership are, by definition, unrepresentative of the range and diversity of citizens. Even the most traditional of methods of public participation -- voting for the people who will make the decisions -- in the United States is now at an all time low. . . . Such experiences lead to alienation from the political and planning system and contribute to the long-term trend, at least in the United States, of the public disengaging from civic activities. . . . They lead to lawsuits, to wars at the ballot box, and to an increased fragmentation of an already highly divided government and society.

San Francisco has a participatory and transparent decision-making process with a higher degree of citizen participation than many other places. Nevertheless, parts of the above passage may strike a chord with San Franciscans. Increasingly, San Franciscans are frustrated with the current planning and related decision making process in the City. This situation has led to fragmentation, controversy, litigation, and two opposing ballot measures regulating growth, both of which failed.

SAN FRANCISCO

Historically, San Francisco has a tradition of planning outreach to the community. In the 1970's, the Planning Department included a neighborhood planning group, funded by Community Development Block Grant (CDBG) money, and administered by the Mayor's Office of Community Development (MOCD). The group was dissolved in the early 1980's. During the 1980's, specific plans were developed including the Downtown Plan, South of Market (SOMA), Chinatown, and Van Ness plans. At that time the citywide Neighborhood Commercial Plan and zoning, and Tenderloin rezoning were also implemented. These planning efforts sought to address and contain an office development boom within the downtown core and protect affected neighborhoods. The associated planning process included extensive outreach to stakeholders throughout the process, including for example, bilingual meetings and materials for the Chinatown area plan. The planning process for the specific plans also typically included environmental review and plan development with specific, formal public participation points such as initial public notice of a proposal, hearings and receipt of public comments, publication of draft plans for public review and an approval hearing(s).

Currently, while most people contacted for this research who are familiar with San Francisco concurred about the contentious climate regarding planning issues in the City and the lack of trust in the process, at the same time, the Better Neighborhood 2002 program of the Planning Department is receiving wide support. Better Neighborhoods 2002 (BN2002) is a community based planning program, known to most stakeholders concerned about land use planning in the City. It is generally considered successful, as evidenced by the fact that neighborhoods are queuing up to enter the program, now limited to three neighborhoods: Balboa Park, the Central Waterfront, and Upper Market/Octavia Boulevard.

Community based planning is a form of consensus planning. The Better Neighborhoods 2002 process includes ongoing discussion with the residents in each of the neighborhoods through a series of public workshops, walking tours of the neighborhood, bus tours of other neighborhoods, focused meetings and discussion groups held throughout the neighborhoods, and other public activities and events. The success of the community based planning approach, used in BN2002, is attributed in part to its inclusiveness. Everyone may participate. It remains to be seen whether the resulting neighborhood plans will be accepted by "everyone".

On the whole, however, City planning/land use decision making in the City, a center of controversy over the years, has become increasingly acrimonious and divisive on the issues, and concern now also focuses on the process itself. The contest between the land use Propositions K and L on the November 2000 ballot, is an example of deep division in the City over land use and growth. Both propositions attempted to address growth, specifically the explosion of office/information technology (particularly dot.com office) development and resulting office and residential development pressure, particularly on the SOMA, Potrero Hill, and Mission neighborhoods. Both measures failed, leaving in place an office development cap that supporters of both measures agreed should be raised. As a result of the conflict over the regulation of growth in the City, and the ensuing election battle, the planning process has become more fragmented and stakeholders more alienated.

While widespread collapse of the internet business boom reduced immediate pressure on other land uses and users/renters/residents, questions such as how to direct growth in affected areas, and in the City generally, are still at issue. In order to break the stalemate, the Board of Supervisors, organizations, groups, and individuals are seeking ways to bring opposing parties together. Consensus planning, including assisted negotiation, with the use of neutral mediators and/or facilitators, is currently receiving attention, nationwide and internationally. Used for the past 20 years, mostly at the federal and state levels, local jurisdictions are increasingly making use of this tool in land use planning, particularly as a method of conflict resolution for controversial planning issues, or projects where the parties are at impasse.

DEVELOPMENT OF CONSENSUS PLANNING AND ASSISTED NEGOTIATION

As noted, consensus building techniques such as mediation and assisted negotiation have been used for almost two decades to resolve land use disputes in the US.⁵ According to proponents, these techniques can produce outcomes that are more satisfying to the parties and leave them in a better position to deal with their differences in the future.

Problems with traditional Comprehensive Planning were noted as early as the 1960's. Criticism included assertions that meaningful public debate on comprehensive planning is virtually impossible because of its scope and generality, and because the role, power and knowledge of planners is too limited for them to prepare a comprehensive plan.⁶

In the 1990's, a shift in viewpoint occurred, with the idea that the growing practice of consensus building as a method of deliberation provides the opportunity to reformulate the idea of comprehensive planning, built on different conceptions of knowledge, authority, analysis and public participation than traditional comprehensive planning. Consensus building is a specific type of group process involving extensive discussion among a wide

⁵ Susskind, *Mediating Land Use Disputes*; p. 1.

⁶ *Planning Through Consensus Building: a New View of the Comprehensive Planning Ideal*, Judith E. Innes, Professor, Department of City and Regional Planning, University of California at Berkeley; *Journal of the American Planning Association*, Vol, 62 No.4; 1996, pp. 460-472.

range of stakeholders: individuals, or their representatives, with interests in the outcome. It proceeds, instead of through formalities -- which may emphasize differences -- rather through structured discussion which seeks common ground. As a group, participants can learn about one another's interests/concerns, challenge assumptions, reframe issues and jointly develop strategies. Ground rules are set by each group and may require unanimity among participants, willingness by all members not to oppose a proposal, or in some cases, support of at least 80 or 90 percent of the group. Consensus planning is increasingly seen as an alternative to continuous conflict over issues, and formal processes. It is seen as replacing one-way communication at formal hearings -- whether citizen to agency, department or board or *vice versa* -- with two-way dialogue. As noted, community based planning is a type of consensus planning.

In consensus planning, facilitators try to assure that all are heard, that all concerns are taken seriously, and that participants are equally well informed. Consensus building and assisted negotiation have most often been found in the US at the state and regional or federal levels, where key agencies or private interests have initiated them as an alternative to continuous conflict over management of large-scale complex systems such as estuaries, wildlife habitat, transportation or, more generally, growth. At the local level, consensus building has most often been used to resolve conflicts over specific development projects. While there is nothing to prevent consensus building for local comprehensive planning (see discussion of Better Neighborhoods 2002, above), decades of relying on formal planning commission meetings and public hearing seems, in California at least, to have preempted such alternative methods of participation.⁷

In the consensus planning view, it is argued that well constructed deliberation among those with interests, expertise and experience can lead to knowledge that allows innovation and action that is better linked to practical reality than can more formal analytic techniques and procedures alone.

CURRENT LAW AND PRACTICE

San Francisco Charter Sections 4.102 (Boards and Commissions -- Powers and Duties) and 4.105 (Planning Commission) contain requirements regarding the Director, Zoning Administrator, and requirements regarding process. Section 4.105 requires the Planning Commission periodically to recommend to the Board of Supervisors proposed amendments to the General Plan for approval or rejection. This section requires the Planning Department, in consultation with other departments and the City Administrator, to periodically prepare special area, neighborhood and other plans designed to carry out the General Plan, and periodically prepare implementation programs and schedules which link the General Plan to the allocation of local, state and federal resources. The section directs that the Planning Department may make such other reports and recommendations to the Mayor, Board of Supervisors and other offices and governmental units as it may deem necessary, to secure understanding and a systematic effectuation of the General Plan. Section 4.105 states that, "the planning Department shall administer and enforce the City Planning Code."

In summary, the Planning Department, under the City Charter, is the implementing apparatus regarding zoning and land use. Planning Department representation on a consensus planning and/or assisted negotiation team would, therefore, be advisable. In consensus planning, while the planners help with data, ideas and strategies and may even write the final synthesis, the plan grows out of the group discussion.

RECENT CONSENSUS BUILDING EFFORTS IN SAN FRANCISCO

⁷ Ibid.

In addition to San Francisco's community planning precedents and current community based planning such as Better Neighborhoods 2002, the City has been trying out various methods in other forums, to address land use and related issues. The following examples include use of consensus planning methods and tools.

Municipal Transportation Agency Ballot Measures

In 1999, there was general agreement that the Municipal Railway (Muni) needed to be fixed, but there was not agreement as to a solution. Four competing ballot measures were prepared for the November 1999 ballot, three by individual Supervisors, and one as a petition effort for a ballot initiative, by the Rescue Muni group. Through assisted negotiation with key stakeholders (sponsoring Supervisors, Rescue Muni, business, labor, Muni), and with the Mayor's office, consensus was reached such that the four competing solutions were consolidated into one ballot measure. The resulting Proposition E, was passed by the voters in November 1999.

Housing Action Coalition (HAC)

A number of key stakeholders including housing advocates, transportation planners, environmentalists, developers, business and neighborhood groups together created the Housing Action Coalition (HAC), a working group focused on affordable housing which has met together for more than a year. Working with Supervisor Mark Leno, this working group reached general consensus in developing inclusionary housing legislation, introduced June 2000, and reintroduced with changes in June 2001.

Live/Work Task Force

In March 2001, Supervisor Ammiano, by Board of Supervisors resolution, established a Live/Work Task Force to develop recommendations for consideration by the Board of Supervisors as to City policy on live/work development and related issues. In July 2001, its June 31st sunset date was extended to the latter part of July 2001. Live/work, long a controversial subject in the City, polarized supporters and opponents. The group worked toward consensus and at the beginning of August 2001, the task force issued a comprehensive set of recommendations, including a call for a community based planning process to implement them.

The examples above each achieved a measure of success through consensus building. These efforts did not, however, include use of a neutral facilitator and/or mediator.

ISSUES/ANALYSIS

TYPES OF CONSENSUS BUILDING

In response to concerns and conflicts on issues like those described above, planners and public officials have found ways to test public opinion other than traditional hearings or review and comment processes. They may increasingly rely on social science research methods such as public opinion polls, focus groups and surveys. While these may give public officials a more accurate understanding of what the public wants than traditional procedures, they are not actual participation. They are detached and scientific.

Several techniques for participation are widely used in the US; most are required steps in the public decision-making process. They may include public hearings, written public comment on proposed projects and use of a citizen-based commission with quasi-judicial or quasi-legislative power. Communication is primarily one-way

and formalized. Changes in a proposal are most typically made where a large, vocal contingent packs a hearing or an interest group finds a major flaw. The events may alienate participants and may be seen as a waste of time, or nuisance, by professionals and officials. But such hearings are valued as expressions of the public will, and are not optional.

At the same time, new cooperative methods of public involvement are being invented or evolving. Most important, in the view of the academics consulted, are interactive collaborative methods of discourse allowing multi-party communication around tasks and issues, involving the public directly with planners and decision makers, that allow learning and change to take place on all sides.⁸ What these varied efforts have in common with each other and in contrast to traditional participation methods is that they engage the participants directly in conversation with one another and with decision makers. Such public participation contributes to the legitimacy of public decisions.

In research for this report, historic alternate methods of decision making were reviewed. They are described below. This report focuses on the development of the consensus building planning process which its adherents believe to offer the most chance of successful issue resolution. The different methods below may be used separately, or in combination.

Citizen commission.

A citizen commission, involves participation, but may not represent all interested parties. The commission can make decisions that can be overridden by the elected body. Examples of citizen commissions in San Francisco are the Planning and Recreation and Parks Commissions.

Agency outreach and presentation of ongoing projects is also useful, although it, again, is primarily one-way communication about a project and its progress. In the view from the academic community, such traditional methods have not been satisfactory to many. They have led to protests, citizen-initiated ballot measures, and in some cases social movements formed to challenge the powers that be. These end up affecting the agency, or officials involved, and while they may produce results, these may be felt to have been achieved at considerable cost.

The Charette

One model, largely developed by architects, is the design or planning charrette. The principle is that new ideas come out of intensive and often collaborative focus around a design problem. In this model, professionals will assemble a wide array of interested parties to look at a place, or site, imagine various futures for it, and develop strategies to achieve those futures.

Search Conference

⁸ Judith Innes, Department of City and Regional Planning, University of California, Berkeley and David Booher, Policy Consultant, Sacramento, CA and Visiting Scholar, Institute of Urban and Regional Development, University of California, Berkeley; *Public Participation in Planning: New Strategies for the 21st Century*; Paper prepared for the California Department of Transportation; Institute of Urban and Regional Development: Working Paper 2000-07; August 2000, pp.3-4.

A more recent model that has been used particularly at the local level, for the development of broad community objectives is the search conference. An invitation may be issued to all citizens of a community. A facilitator will manage a conference of a day or more, including small group discussions and plenary discussions, designed to allow different viewpoints to be expressed in a context which allows all to be heard and hostility minimized. The goal is to find common areas of community objectives and agreements and to build community in the process. The results can then be used as input to the policies of the agency or jurisdiction.

Collaboration or Consensus Building

At the same time as the ritualized and sometimes polarizing methods of participation continue, more collaborative and experimental types of public participation are taking place, often under the auspices of the agencies that are going through traditional formalities, and also in *ad hoc* and informal ways outside the formal decision making process. Some of these have been done in various forms for many years, evolving and gaining in popularity, and are being refined. Such short-term *ad hoc* task forces representing the major interests may be established to make recommendations on controversial issues. If a group like this can reach agreement the city governing body can avoid otherwise paralyzing controversy and have some hope of getting support for a policy.⁹

For supporters of the collaborative approach, it represents the only method of planning and public involvement that is flexible, responsive and adaptive enough to be effective in the uncertain and rapidly changing environment of the 21st century. The consensus building approach may include components such as those described directly above.

Mediation

According to proponents, consensus building techniques such as mediation and assisted negotiation have been used for almost two decades to resolve land use disputes in the US. Research has shown that these techniques can produce outcomes that are more satisfying to the parties and leave them in a better position to deal with their differences in the future. In this view, experience in America indicates that consensual approaches to handling resource allocation conflicts often yield outcomes that are fairer and more stable than traditional (particularly adjudicatory [litigation] methods).¹⁰

The Mediation Model

The purpose of the mediation model in land use planning is to ensure that the allocation of land uses takes place in a way that is viewed as fair by all stakeholders and that all possible joint gains are incorporated into a technically feasible agreement that can be implemented easily. Using this model, planners seek to integrate competing interests (ranging from efficiency concerns of government agencies and developers to equity concerns of special interest groups) with concerns about process and transparency. The mediation is a structured problem-solving process in which all stakeholders learn about each other's interests, challenge accepted assumptions, and develop strategies to maximize mutual gains. Planners using the model serve a

⁹ Ibid. p.8.

¹⁰ Lawrence Susskind (Ford Professor of Urban and Environmental Planning, Massachusetts Institute of Technology and President of the Consensus Building Institute [CBI]), Mieke van der Wansem (Vice President, CBI), and Armand Ciccarelli (Associate, CBI); *Mediating Land Use Disputes, Pros and Cons*; Lincoln Institute of Land Policy, Cambridge, MA; March 2000; p.1.

variety of functions. They seek to insure that all parties are well-informed, have equal opportunity to participate, and are part of an effort to produce a technically formed set of decisions that are better for all stakeholders than what they are likely to obtain if there is no agreement. Planners facilitate communication, identify potential zones of agreement, urge participants to carefully assess what no agreement is likely to mean for them, aide in codification of agreement on technical points, and suggest packages that allow parties to trade across issues they value differently. By filling this role, planners can help to ensure the credibility of public decision making and shift stakeholder relationships from adversarial to collaborative.¹¹ Ideally, instead of fighting to get the biggest piece of the pie for their constituency, stakeholders collaborate to create a bigger pie, with more for all stakeholders.

In consensus building it is considered important for participants to focus on interests rather than positions, in order to avoid inflated demands and the kind of escalation that often accompanies positional debates. By focusing on interests, participants are likely to be less locked into a position. (For example, an interest might be desire for a quiet neighborhood, while a position might be, "I don't want this bus on my street.") Looking at the interests that have created the position allows more negotiating room and greater ability to address the underlying issues. Brainstorming during the process can expand the range of proposals for each agenda item and generate packages that incorporate tradeoffs among items. "The goal should be to create as much value as possible and then ensure that whatever value is created is shared in ways that encourage effective relationships and successful implementation."¹²

Following identification of options, participants can begin crafting a final agreement. A list of objective criteria or indicators by which the acceptability of an agreement must be gauged gives participants a tool to assess various packages that all parties can accept. Most consensus building groups seek unanimity within the time frame established at the outset of the process. If unanimity is not possible, groups often settle for an overwhelming level of support as long as every effort has been made to meet the most important concerns of every key group. If more than 20 percent of the group is not in accord, consensus would generally not be considered achieved.

As noted, mediation is a highly structured process. The Consensus Building Institute describes the process, in detail.¹³

Mediators and Facilitators

Assisted negotiation and consensus building processes do not require use of professional mediators, but their participation is often necessary, according to CBI.¹⁴ In one form of assisted negotiation, the planner or an appointed facilitator fills the role of a process manager, taking necessary procedural steps to keep the discussion on course and to foster an environment conducive to joint problem solving. To accomplish this, facilitators monitor the quality of the dialogue and intervene with questions designed to increase understanding. Facilitators may act as moderators, usually when there are many parties involved, to ensure positive and

¹¹ Lawrence Susskind (Ford Professor of Urban and Environmental Planning, Massachusetts Institute of Technology and President of the Consensus Building Institute [CBI]), Mieke van der Wansem (Vice President, CBI), and Armand Ciccarelli (Associate, CBI); *Mediating Land Use Disputes, Pros and Cons*; Lincoln Institute of Land Policy, Cambridge, MA; March 2000; pp.6-7.

¹² *Ibid.* p.9

¹³ See Lawrence Susskind, *A Short Guide to Consensus Building: An Alternative to Robert's Rules of Order For Groups, Organizations, and Ad hoc Assemblies That Want to Operate By Consensus*; Consensus Building Institute, Cambridge, MA and Sage Publications, Inc. 1999. And, Lawrence Susskind and the Consensus Building Institute, *Using Assisted Negotiation to Settle Land use Disputes: A Guidebook for Public Officials*; Lincoln Institute of Land Policy; Cambridge, MA; 1999.

¹⁴ Susskind, *Mediating Land Use Disputes*, p.7.

productive discussion. They also work with participants to develop the topics for discussion and tasks for the group.

Mediators are more substantively involved (without taking control of the outcome), in addition to the process responsibilities of facilitation. In general, mediators help the parties move from a zero-sum mind set to integrative bargaining. Despite taking a large measure of responsibility for the quality of the agreement that emerges, or does not emerge, the mediator must remain absolutely neutral.

In the planning context in San Francisco, as in most cases, selection of the appropriate facilitator and/or mediator would be critical.

WHEN TO USE CONSENSUS BUILDING MEDIATION

The Consensus Building Institute (CBI) suggests that assisted mediation should be considered if the answer to six of the following eight questions is "yes":

1. Are the issues in your land use dispute clearly defined?
2. Are the key parties willing to talk about a possible settlement?
3. Is the outcome of the dispute uncertain if no agreement is reached?
4. Are the stakes high?
5. Are the issues of significant public concern?
6. Is the public frustrated with how the dispute has been handled thus far?
7. Is the government agency involved losing public trust?
8. Are some of the parties involved likely to have long-term relationships?¹⁵

Results of the CBI study of assisted mediation cases, discussed below, indicated that not all disputes are appropriate for mediation. When asked under what circumstances mediation should not be utilized, respondents answered:

1. When setting a [legal] precedent is important;
2. When participants do not recognize each other's rights;
3. When a complete stalemate has been reached;
4. When payment for the process is coming from only one side; or
5. When the process is being utilized only to delay any action or to create the illusion that something is being done.¹⁶

The Consensus Building Institute, in a study of 100 assisted mediation processes nationwide, reported that, overall, most study participants (86%) had a positive view of assisted negotiation. They thought the negotiated results were better than what they imagined the outcome would have been if they had pursued "normal" channels instead of consensus building. Even when cases were not settled, significant progress was often made. Moreover, neutrals were generally viewed by stakeholders as having made "important," if not "crucial," contributions to either the resolution of the dispute or the improvement of the conditions that surrounded it. Finally, mediation appeared to cost less money and take less time. In situations where the parties were not satisfied with the outcome, they felt that the process did not justify the time and effort involved, or that it was a burdensome step in the regulatory process that increased costs. Specifically, disputes involving development

¹⁵ Susskind, *Using Assisted Negotiation to Settle Land Use Disputes*, p.2.

¹⁶ Susskind. *Mediating Land Use Disputes*, p.19.

and growth issues generated slightly less positive reactions than did other types of land use disputes (about 80 % very favorable or favorable and slightly more than 20 % unfavorable and very unfavorable).¹⁷

Another study indicates types of outcomes that can result from a well managed consensus building process.¹⁸ The study identified categories of valuable outcomes and documented them in three major cases of water policy- making in California, including the San Francisco Estuary Project, the Sacramento Water Forum, and CALFED (Bay-Delta program). Outcomes include: *Social and political capital*: relationships that developed between adversaries enabled them to work better together, and translated to political capital in implementing the results once consensus was reached. *Agreed-on information and shared understandings*: discussions, along with detailed examinations of the analyses, prediction and models used, helped create trust in a shared set of data, deeper understanding of technical issues among stakeholders, and resulted in improved information. *End to stalemate*: stalemates dating back years, or decades, were ended and progress was made on issues before formal agreements were reached. Sometimes stakeholders drew back from lawsuits and legislative advocacy and began to talk instead. *High quality agreements*: agreements were reached that, in the authors' view, would not have been possible without the collaborative dialogue. *Cost effective decision making*: cost estimates and comparisons were not made, and the processes were expensive by some standards. The authors assert that the cost, however, must be compared to what the costs would have been without the processes, and that many of the outcomes would not have occurred using traditional governance institutions. *Learning and change beyond the original group*; *Innovation*: according to the authors, innovations adopted typically involved policies and practices that were more adaptive and context-dependent than existing practices and regulations, as well as faster and more responsive to unforeseen conditions, *And, changes in attitudes, behaviors and actions; and institutions and practices that involve flexibility and networks.*¹⁹

SUNSHINE LAWS

Depending on the structure, composition, and originator of the group; the appointment process; whether a public or private entity convenes the group; and other factors, the City's Sunshine Ordinance and or the state Brown Act may come into play. The City Attorney would need to be consulted regarding such matters.

CONCLUSION

Consensus planning, including community based planning, expands earlier planning processes and emphasizes bringing all stakeholders together at the beginning, in a generally informal, non hierarchical context to develop a plan collaboratively.

The inclusion of a full range of stakeholders and technical experts can assure that important factors are considered and that the geographic area is covered.²⁰ One paper on a set of case studies involving consensus building reported that in the consensus building cases the public interest was both discovered and willed. The stakeholders at first came to the table to represent their group's interest. As they went through a process of defining and learning about the technical or political aspects of a problem, they typically discovered their

¹⁷ Susskind, *Using Assisted Negotiation to Settle Land Use Disputes*, pp.20-21.

¹⁸ *Outcomes of Collaborative Water Policy making: Applying Complexity Thinking to Evaluation*, Sarah Connick and Judith Innes, Working Paper 2001- 08, Institute of Urban and Regional Development, University of California, Berkeley; June 2001.

¹⁹ *Ibid.*

²⁰ *Planning Through Consensus Building: a New View of the Comprehensive Planning Ideal*, Judith E. Innes, Professor, Department of City and Regional Planning, University of California at Berkeley; *Journal of the American Planning Association*, Vol, 62 No.4; 1996, pp. 460-472.

interests were bound together because they all depended on a common system. When they agreed on actions to improve this system, they also developed the political will to implement these actions. One case study concerned the Growth Management Consensus Project, and its subgroup, the Economic and Environmental Recovery Coalition, a 10-month-long program bringing together a range of stakeholders in development and growth in the state to design principles for legislation establishing statewide growth management. The Coalition produced detailed legislation resolving a substantial portion of the issues dividing the major interests. In this case, developers and environmentalists agreed that participants would only support growth management legislation that included all collectively worked-out components. They would not support piecemeal adoption of parts of the program. According to the author who documented the case, they understood that the parts of the program each had a function in making the whole system work and that each other's support was essential.²¹

Most of the consensus building processes made substantial use of experts of many kinds, either as participants in technical or issue-based committees, as expert staff borrowed from public agencies, or as consultants hired to do special studies. The stakeholders played a key part in defining needed information from these experts or in discussing the design of indicators that would reflect their concerns²². They confronted the technicians face to face, challenging the data, learning about its limitations, and deciding on its implications for themselves. Sometimes stakeholders brought in their own experts. The process of discussing the technical information meant that participants integrated it into their own understanding. Participants in the groups thus did a good deal of the necessary synthesis of information themselves. In consensus building experts are not the only knowledge providers. Some participants have ample first-hand experience, for example, as developers, attorneys, or other. Some are paid staff of organizations with a responsibility to go back regularly to their management to test their reactions to proposals. This checking process often meant that the group agreed on the necessity to change their emerging proposals, so they would be more likely to get support and also to work in practice.

Consensus building as a way of planning achieved coordination, in other ways than through top down exercise of power. Consensus building was instituted in situations where no players had the power to accomplish their objectives by themselves. Cases involved shared power across agencies, levels of government, and between interests and the public sector. Stakeholders tended to want products to maintain some generality. That is, they wanted the group to point the direction of action, but to keep the options open as they came to learn more and as conditions evolved. In most cases, groups agreed to continue some type of consensus building into the implementation phase. In several cases, unanticipated, innovative proposals emerged with near unanimous support. They emerged because the group's inquiry led it to conclude that conventional solutions would not work and that something new would have to be created. Innovativeness can be a feature of intensive collaborative group processes.²³

The practice of land use planning has changed in the United States over time. Decades of experience and experimentation with public participation have resulted in the perception that simply eliciting the concerns of diverse groups is not enough. Consensus based planning has come to represent an important way to synthesize diverse views, starting at the beginning of a process, and achieve a balance between technical considerations (such as environmental or health impacts) and political considerations (in order to have sustainable decisions). While there are many variations in consensus planning, it includes as basic elements:

²¹ *Ibid.* p.7 and p.9.

²² Susskind 1987, Cruickshank and Ozawa, cited in Innes, *Planning Through Consensus Building*, p.11.

²³ *Planning Through Consensus Building: a New View of the Comprehensive Planning Ideal*, Judith E. Innes, Professor, Department of City and Regional Planning, University of California at Berkeley; *Journal of the American Planning Association*, Vol, 62 No.4; 1996, pp. 460-472.

representatives of all stakeholder groups (chosen by those groups); agreed upon ground rules developed with the group; an informal, problem-solving dialogue that seeks to incorporate the best available technical information; and the assistance of a process manager (whether an outside professional mediator or agency staff member with facilitation skills).

The emergence of consensus building as a method for plan making is an indication of a sea change in the practices of analysis, deliberation, and choice, that cuts across many fields besides planning including business, law, and public administration.²⁴ The trend is a reflection of public frustration with cumbersome decision systems that cannot produce outcomes that work, and with seemingly unresponsive government. Planners in academia have documented the change in planning to a new paradigm which involves more interactive, discursive, and collaborative methods. The change solves some problems of prior comprehensive planning as practiced, and raises other questions such as who should be the stakeholders, and what relationship the choices of such stakeholder groups should have to the more traditional institutions of government such as elected officials or formal bureaucracy.

²⁴ Ibid. p. 14.