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# ADR in local government - using dispute resolution to resolve planning disputes

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## Local government and ADR

# ADR in local government — using dispute resolution to resolve planning disputes

*Ebohr Munoz*

“There is also an increasing pressure on councils in NSW from the State Government to adopt a changed approach in the handling of disputes over planning and building matters”

Disputes are an inevitable part of the building and development assessment process. It could even be said that planning legislation is drafted in a manner that promotes conflict because it is based upon communication through ‘objections’. The focus on objections can create an environment that generates conflict between neighbours.

There are many strategies available for managing conflict, such as negotiation, mediation and facilitation. Many councils have expressed an interest in exploring how other councils are managing and resolving disputes with a view to benefiting from their experiences. There is also an increasing pressure on councils in NSW from the State Government to adopt a changed approach in the handling of disputes over planning and building matters. The pressure arises from a criticism of the excessive cost of litigation<sup>1</sup> and a desire to achieve greater efficiencies in the handling of disputes.<sup>2</sup>

In response to the interest in facilitative dispute techniques the Australian Commercial Dispute Centre held a workshop (the Workshop) in late 1997 for 18 councils which are using mediation on either an occasional basis or in a more systematic manner. This article provides an overview of the issues that were raised in the Workshop, presenting a range of challenges to the adoption of ADR within Local Government.

## What is influencing the use of ADR?

Within the planning context alternative dispute resolution techniques are being applied to areas which include:

- building and development applications;
- policy proposals, such as traffic management plans;
- preparation of local planning controls;
- plans of management.

The reasons that are motivating councils to explore the use of ADR include:

- *Avoid litigation* — save legal and administrative costs associated with Land and Environment Court appeals.
- *Community involvement* — allow everyone concerned with the application to have their say.
- *Save time* — in the assessment of matters involving objections by reducing the number of applications that need to be referred to full council or committees for consideration.
- *Change in attitude to conflict* — is promoted within the general community and council encouraging improved communication and problem solving.
- *Seek solutions* — allow parties to resolve issues of disputes themselves without having to involve professional staff or elected members of council.
- *Narrow down objections* — identify the key objections so that improved decisions can be made.

## What mechanisms are being used for managing and resolving disputes?

Councils use a variety of techniques to deal with objections that are made to building and development applications. Although the approaches are different, the term ‘mediation’ is often used to describe them. The techniques being used by councils have different objectives which include:

- improving communication between ➤



- the applicant and objector;
- clarifying and summarising objections;
- allowing objectors to 'have their say';
- debating the merits of the proposal;
- encouraging the parties to develop compromise solutions.

The techniques being used include:

- *Informal negotiation* — use of negotiation skills by staff to discuss issues raised by objectors directly with the applicant and objectors.
- *Informal meetings* — convened by council with the applicant and/or the objectors to discuss and negotiate possible changes to the application to address concerns that have been raised.
- *External panel of mediators* — matters that are selected for mediation are referred to an external mediator from a panel maintained by council. A council may also have a mediation co-ordinator or administrative assistant to case manage the mediations. An external panel may be comprised of professional mediators or community representatives trained in mediation.
- *Mediation by council staff* — a council employee from another division or team within council acts as mediator.

Example: One council has employed a full time in-house mediator for two years. She is not associated with any other section of council. The mediator has sought to ensure that her role is clearly defined in order to separate her from council's decision making process and promote her impartiality. In addition to mediating matters, she has arranged courses and seminars for the community on conflict resolution, communication skills and creative thinking.

- *Internal/external mediation panels* — Councils may use a combination of internal and external mediators.

Example: One council has a policy of referring any application which receives objections to either an internal dispute resolution process (described as a 'facilitation') or to an external mediator (described as a 'mediation').

'Facilitators' are drawn from a different team to the one which is responsible for assessing the application. The facilitator's role is to help the parties reach an agreement. Facilitations are normally held within the council administration building, in private and on a confidential basis.

If a facilitation settles all issues that have been raised, it is possible that the application may be approved under delegated authority. This is confirmed by checking with all attendees and any other objectors. The facilitator provides the participants with a written record of the meeting and offers their handwritten notes for review. If all of the issues are not settled, the application is referred back to council with a report on the facilitation.

Council will use an external mediator if council is a party (for example as the applicant), if the application has already gone to a council meeting (because council is now 'too close to the process') or in other cases where the circumstances require an external mediator (for example high media profile).

- *Planning conferences/assessment panels* — A council may have an assessment panel comprised of independent members. The assessment panel is used for matters that are not likely to succeed in mediation. The panel hears objections and makes recommendations to council after considering the objections.

An outline of the approaches used to handle objections demonstrates considerable modification of the traditional mediation model. In the ➤



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➤ case of mediation, the goal is to assist the parties to reach agreement on a confidential and without prejudice basis, while in other processes the goal may be to narrow down or clearly define the issues in dispute.

Importantly, if mediation approaches are to become more widespread within Local Government and the general community, it is important that mediation be distinguished from other approaches.

**Benefits of early intervention**

Early mediation can prevent parties from becoming locked into positions which become increasingly entrenched as time passes. It may also reduce the number of objections through a better understanding of the issues by all parties. There is strong acknowledgment among councils of the value of early mediation; however, the question raised is how to initiate mediation or facilitation at an earlier stage in a development proposal, particularly before an application has been submitted to council. Experience suggests that the larger development companies already do incorporate pre-application negotiation with residents as part of their development process.

In order to improve the chance of a positive outcome for pre-application consultation, it is important that formal processes be adopted — councils should not just 'hold a meeting'. Outcomes from consultation processes should be recorded and there may be provisions for the developer to confirm revised or draft plans with residents.

The experience with pre-application mediation is quite limited and highlights the need for ongoing awareness raising and education in the business and general community about mediation. As mediation becomes more widely understood there is an increased likelihood that it will be utilised more often before an application is made to council

**Preparing matters for mediation**

The chances of a successful mediation increase the more time that is spent

preparing the parties since they are more likely to arrive at the mediation ready to negotiate confidently. After all:

- How can you expect the community to understand the mediation process when the average person has no exposure to mediation?
- The community does not usually take an interest in understanding the development assessment process until a matter affects them directly.
- If people don't understand the mediation process or the proposed development they are likely to object in order to preserve their rights 'just in case'.

People should be invited to participate in either a facilitation or a mediation in such a way as to:

- ensure their commitment to the process;
- ensure they come prepared;
- ensure they have the authority to negotiate; and
- ensure they understand the process.

*Example:* One council holds a preliminary meeting to explain the mediation and development assessment process to the parties. The council officer processing the application also attends to ensure an understanding of the plans by the parties. Close to half of all matters do not proceed to mediation after a preliminary meeting, either because objections were withdrawn or the matter could not be mediated. Of the matters going to mediation, about 80 per cent settle.

**Selecting matters for mediation**

The benefit of preliminary meetings and provision of information to parties is that it not only serves to educate the parties but also can 'filter' out cases that can be handled less formally than mediation or may not be suitable for mediation. It is useful to identify matters which:

- are based on misinformation or poor communication that can be addressed through improved communication without the need for formal mediation; ➤



- • involve parties who will not compromise their position at all or who may have other agendas;
- do have a prospect for settlement of some or all of the issues because of a willingness of the parties to participate.

In making the assessment of whether a matter is suitable for mediation it can be helpful to consider a range of questions:

#### *The nature of the objections*

- Is clarification required because so many issues are raised?
- Are there factual issues that need investigation before mediation?
- Are some objections based on a misunderstanding of the development which can be dealt with by communicating the proposal more clearly?
- Are there differences of opinion on what would be a 'suitable development'?
- Do one or more of the parties have an entrenched position that is not likely to change?
- What is the applicant's attitude to the objections?

#### *Assessment of the application by council*

- Do the main issues concern the application of council policy?
- Will council need to set a precedent?
- Is the proposal likely to be refused on planning grounds?
- Is the proposal likely to be approved in spite of objections raised?

#### *Legal issues*

- What is the likelihood of an appeal by the applicant or objector (in the case of a designated development)? What are the likely costs of an appeal?
- Will a legal precedent be set?

#### *Other issues*

- Does the matter threaten to become political?
- Is there a good relationship between the applicant and objector(s)?

### **Timeframe for running mediations**

The efficiency of running a mediation is important. The applicant in particular will have a strong desire for a mediation to proceed as quickly as possible since delays may be costly. The length of the process is also a factor for council staff whose work

performance may be linked to the length of time taken to process applications.

The running of a mediation will usually add another two to three weeks to the assessment process to allow for notification of and preparation for the mediation. However the prospect of settling the objections in a reasonable time may still be quite attractive to the applicant.

The experience of one council is to allow about two weeks to arrange a facilitation. It has not experienced resistance to this delay from applicants. The council has a policy of giving delegated authority to approve mediation settlements where all objections are settled; the additional time involved in setting up the mediation is therefore matched by a saving in time by not having to make the application to council for decision.

### **What is the council's role in mediation?**

Although the mediator does not provide advice or make a decision, councils find it is helpful for the mediator be familiar with the development assessment process so that they can effectively 'reality test' any solution agreed to between the parties.

The role of council staff in mediations can involve:

- informing and educating parties;
- case management;
- acting as mediator;
- acting as observer.

It is often useful for an assessment officer to be present for any preliminary meetings or to be available during a mediation in order to answer technical questions or provide advice about the assessment procedures relating to any amendments to the proposal.

Where a council officer is available for technical advice, this role needs to be clearly defined and managed by the mediator so that the council assessment officer does not become involved in providing viewpoints or commentary on other issues.

In the case of development assessment mediations, the dispute is often between the applicant and objector(s). The council is not a party to the dispute and it is ➤



"The group must be self-directed and self-determining. However, a skilled facilitator is critical to keep the group committed to the task and distraction-free."

➤ preferable that council refrain from involvement which may prejudice its future decision-making role. The difficulty with council staff mediating is that:

- If an agreement is not reached the council's decision-making role may be seen to be prejudiced because of information received in a mediation.
- The parties may see it as a forum for advocating their positions before a representative of the decision-maker rather than an assisted negotiation between the applicant and objector(s).

If council staff are to be used it is important that dispute resolution training is provided with access to further training to cover staff turnover. Independent experienced mediators could also be used as co-mediators so that skills are improved. *Another option may be for neighbouring councils to use trained staff to act as mediators in each other's mediations.*

### What happens when the parties settle?

The parties usually enter into a written and signed agreement setting out the terms of their agreement. The council needs to be informed by the parties if there are any changes to the application or if the objections are withdrawn or changed as a result of a settlement.

In some circumstances, the applicant may need to prepare new drawings. If the application is significantly changed, there may need to be a second notification. Approval of any amended proposal will, of course, need to proceed through the council's assessment procedure.

The mediation process is confidential and only the parts of the settlement that the council needs to know (for example which relate to conditions of approval, or changes to their application) should be revealed. For example, settlements which are not of concern to the council might include:

- agreements to help a neighbour plant trees to block his view of a building extension;
- agreements to share the cost of fencing or to share costs of using better materials.

If the parties are able to resolve satisfactorily the matters between themselves there is arguably little reason for council to interfere with an agreement, unless other planning considerations are relevant. One council's early experience with mediation often involved the council routinely overturning mediated agreements and thereby undermining community confidence in mediation. More recently the councillors have expressed a dissatisfaction with the adversarial approach which has resulted in so many applications having to be assessed at the council meeting. Council now prefers that the parties negotiate compromise solutions themselves.

### Conclusion

More needs to be done to help councils move into conflict avoidance rather than conflict management. This involves a cultural change within and outside of councils. Mediation and facilitation techniques provide a vehicle for enabling this change to take place. The increasing interest in ADR is to be encouraged as it enables councils to serve their community more effectively through improved communication, even where differences of opinion cannot be reconciled. ●

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*ACDC has a strong commitment to assisting local government to effectively incorporate ADR techniques into their dispute management. ACDC's experience in this field includes mediation and conflict management training, management of mediations and facilitations and dispute systems design.*

### Endnotes

1. *Legal Services to Local Government: Minimising Costs Through Alternative Dispute Resolution*, Parliament of NSW Public Accounts Committee Discussion Paper, November 1997.

2. *Resolving Development Disputes Without Litigation*, NSW Department of Urban Affairs and Planning, Circular No A12, 15 December 1997.