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Planning — November 2011

The Zoning Dispute Whisperer

Adding mediation to the planner's toolkit.

By *Joshua Abrams, AICP*

Every day in meeting rooms across the country some variation of this scenario plays out: A property or business owner wants to make a change that requires a hearing. Neighbors are opposed. Both sides marshal their forces and appear before the zoning board. Each speaker engages in a few minutes of impassioned huffing and then the board must make a decision. It has limited freedom and limited time; the board members must work with the facts in front of them and make a decision within the context of the zoning rules.

No matter what the board decides, some people will leave disappointed. Often this process aggravates rather than heals relationships; it is rarely satisfying even for the winner. And it doesn't always end there. The party that did not get its way might appeal or file a lawsuit, both of which take up valuable staff time and city money. This, more or less, has been the standard zoning process since the 1920s.

But now some cities are getting good results with a much different approach: mediation.

Recently, a church located in a residential neighborhood came before the Zoning Adjustments Board in Berkeley, California, seeking a permit to add a small second building to its lot for its day care center. (Some details have been changed for confidentiality.) After hearing the case, the zoning board realized that the parties already had a strained relationship that could make the hearing process ugly. The board suggested that they try mediation and both sides agreed. (Usually, cases are referred to mediation by city staff before an initial hearing is held.)

During the mediations — there were several, each lasting two to three hours — it became clear that the real issues went back many years and were as varied as a loud, slamming gate and children picking flowers from someone's yard. During one interesting exchange, a neighbor said, "Members of the church don't even say hello to us as they walk by. I feel like a 'townie' being ignored by people who go to the university."

A member of the church responded, "Really? You want everyone to say hello? I was trying to respect your privacy. But I am happy to say hello. Hello."

In the end, the church agreed to make a number of changes in both its permit proposal and its day-to-day practices. Some were as simple as giving the neighbors advance notice of planned events, something that would never have been discussed at the zoning board hearing.

When the church reappeared before the zoning board it presented a revised request — and no one from the neighborhood was opposed to it. The board granted the permit. The mediation process reduced the staff's workload and eliminated the danger of the decision being appealed to the city council or a court.



Mediation in practice

Planners are familiar with a range of public engagement methods, such as community meetings and design charrettes. Mediation can complement these processes. By involving an impartial person, often called a neutral, it helps disputants reach a solution that everyone can live with.

It is a structured, facilitated process usually conducted by a trained volunteer or professional with a special set of skills. Mediators have to know how to manage emotions, make sure people feel heard,

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Mediation begins with everyone agreeing to a clear set of ground rules and the mediator guiding the conversation. The parties (generally not their lawyers or hired experts) present their views, and when appropriate, the mediator encourages the participants to try to find ways of meeting everyone's needs.

Simple mediations usually last two to four hours, while more complicated issues can require multiple sessions. The tool is most appropriate when maintaining ongoing relationships is important; emotions are running high; issues are complex, interrelated, and often not stated explicitly; and novel solutions (as permitted by zoning law) are useful.

In a planning context, mediation is a way of generating improved, less contentious proposals for planning or zoning boards to consider. Applications are subject to the same standards and procedures as other proposals. It is a pre-step, usually optional, before projects have their hearings.

Incorporating mediation into planning activities offers a number of benefits, including saving time and money. Between 50 and 80 percent of land-use cases brought to mediation reach a formal agreement, according to 2007 report published by the University of Montana that studied 27 programs across the country. Because participants are more likely to have a resolution that they are satisfied with, the number of appeals and lawsuits is minimized. At the very least, mediation reduces the contentiousness of the dialogue, even if no agreement is reached.

"In my opinion, decisions made by appointed or elected officials are almost invariably less optimal than those that could be agreed to by those directly involved," says Daniel Sider, AICP, assistant to the zoning administrator in San Francisco. The city partners with a local nonprofit dispute resolution center called Community Boards.

Where it's worked

Since the inception of the Berkeley mediation program in 1988, SEEDS Community Resolution Center, a local nonprofit group, has mediated hundreds of disputes referred by the city, with a success rate of about 50 percent. In the Berkeley program, there is no formal written agreement or report; success is clear by the lack of opposition at zoning board meetings and the improvement in communication.

Nathan Dahl, who has worked in Berkeley's planning and code enforcement divisions for six years, is a vocal proponent of the city's mediation program. "Mediation frees up staff time. It allows us to give more thorough evaluation to the projects themselves," he says. "It's better for the parties as well. They have a forum to describe their objectives or express their concerns. Otherwise, it's a lot of back and forth through letters or e-mails. Without that personal engagement, things can be misinterpreted."

"The zoning board loves us," adds Victor Herbert, the volunteer who designed the program and continues to run it. "We save hours of their time and they can go home early."

Albuquerque's Planning Department also has a well-developed alternative dispute resolution (ADR) program that handles about 100 land-use cases a year, focusing on infill development, business permits (liquor licenses, stores requiring a hearing), and infrastructure changes. The department uses independent, paid consultants, and over 60 percent of the issues raised are resolved prior to the application being heard by the Hearing Board, according to Shannon Beaucaire, the ADR coordinator for the city. The typical cost is between \$170 and \$400, paid for by a \$10 to \$50 surcharge on development applications.

Unlike Berkeley's program, in Albuquerque the meetings between the applicant and the affected parties are public, and afterwards the consultant produces a formal report detailing areas of agreement and disagreement. Beaucaire cites several advantages: "It saves a lot of time. Planning board meetings used to last until two or three in the morning. Now, comments are more focused because there are fewer misunderstandings. Also, if the applicant and the people most affected reach an agreement on a point, as long as it is not contrary to policy, the planning board can incorporate appropriate language into its findings."

Programs can be run on the state level as well. The Massachusetts Office of Dispute Resolution (MODR, now called the Office of Public Collaboration) ran a program for the Department of Environmental Protection (MassDEP) to reduce lawsuits involving developments that impacted wetlands (the program was moved in-house by MassDEP in 2003). In Massachusetts, local conservation commissions conduct wetland reviews as part of the development process, but appeals go through a special state administrative hearing process. While cases were waiting to be heard by the judge, staff members from MODR offered disputants a chance to mediate.

Harry Manasewich, former program manager and now senior mediator at Human Factor Dispute Resolutions, an Arlington, Massachusetts-based consulting firm, notes that the system was quite successful in resolving lawsuits. "We were often able to come to an agreement, because frequently the dispute was less about the stated, appealable issues, and more about other issues. Because it was mediation, they were able to discuss everything."

Using mediation

Planners are using mediation in a number of ways.

Zoning/conditional use disputes. Mediation offers a complement to the traditional zoning process. When done right, the zoning or planning board maintains full control of the process, but receives fewer contentious proposals. It works well in cases involving nonconforming additions, small infill development, new business applications that require a conditional use permit, and businesses seeking liquor licenses. It's less appropriate for cases where the zoning or planning board has little discretion or where the opposition is rooted more in ideology or politics and less based on direct impacts. Because of this, NIMBY cases can be some of the best to mediate.

Ideally, projects will get referred to mediation before they go to the zoning or planning board, although some programs prefer to concentrate on projects that are being appealed. While zoning boards are fairly limited in the formal scope of their review, mediation, because it is informal and not legally binding, provides more freedom. In mediation, participants can brainstorm unconventional solutions and engage in more in-depth discussion.

If a builder proposes something, neighbors can discuss how they think it will affect them. If neighbors suggest ideas, the builder can consider the feasibility. Ideally the participants will reach an agreement, and a modified proposal will move forward without opposition. If not, in a successful mediation, the subsequent hearings at least will be more civil.

While this is going on, the clock on the permit process usually continues to tick, which is important to the applicant. In the end, the planning or zoning board maintains full decision-making authority

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Code enforcement. With good reason, cities focus on major problems that threaten health and safety. Code enforcement seldom has the resources to address other minor issues that affect residents' quality of life — like a theater that occasionally operates outside its normal hours or a restaurant that gets deliveries earlier in the morning than allowed.

While these infractions are rarely acted upon, neighbors aren't likely to forget them and they may come out in force the next time one of these operations needs a new permit.

These kinds of cases are ripe for mediation. Often the disputants are not flagrant rule breakers and therefore a gentle nudge encourages them to become compliant with the zoning rules. Dispute resolution nonprofits handle these situations all the time with great success, and residents are generally open to mediation in these cases — if they know it's available.

Day-to-day interactions with an angry public. City planners manage urban conflict. They are constantly interacting with an angry public. The problem often starts at the zoning and planning counter when someone arrives expecting to be able to do something and is told he or she cannot. Emotions also run high at public meetings. And with good reason: People's livelihoods, homes, and dreams are being threatened — or at least are perceived as threatened.

The challenge is that most planners receive little or no training in conflict resolution. The rational model for city planning looks straightforward on a flowchart. You begin, collect data, define the problem, formulate goals, and so on — and that is what city planners are trained to do. There is nothing in this model about how to calm an infuriated, beet-faced member of the public.

Dispute resolution training can teach planners how to help someone calm down, show someone he's been heard and understood, and channel the conversation in a more useful direction. Some planning schools offer mediation training, and their students are often very positive about the experience.

James Kostaras, AICP, senior research associate at the Institute for International Urban Development, taught such a class at Harvard. "To this day, I have students who took the class 10 or 12 years ago tell me they use the skills they learned every day," he says.

Sider, the San Francisco planner, agrees: "The mediation-dispute resolution class was incredibly useful and was certainly one of the most important I took during graduate school."

Consensus-based policy making. Conflict resolution skills can be used to deal with bigger disputes as well. This typically involves a process called Consensus-Based Policy Making. This approach, worked out over the last 20 years, helps bring people from various stakeholder groups together to engage in creative problem solving. The objective is to pool what everyone knows, and with the help of a mediator, to try to formulate policy proposals that satisfy all the interests involved.

The Consensus Building Institute, based in Cambridge, Massachusetts, has done considerable work on using consensus-based policy making for land-use changes and other planning topics. "One of the great advantages of consensus building is that it actually provides a forum, without in any way taking away decision-making authority from those boards or elected officials, to bring in new parties and new voices," says CBI's managing director, Patrick Field. "And through innovative, dynamic, vibrant processes, a whole bunch of energy and new ideas can be brought to the table."

Moving forward

For cities interested in incorporating mediation and dispute resolution there are several next steps.

Staff training. Most dispute resolution centers offer training. Some cities, like Berkeley, ask trainers to tailor programs for their staff. Somerville, Massachusetts, hired professional dispute resolution experts to observe public meetings and then work with staff on ways to handle the types of conflict that they saw. An ideal training program will use role-play simulations tailored to situations that planners face.

Starting a program. Because it does not change the legal process for permits, a mediation step can be added informally if cities want to test out the process.

It is easier to create an ad hoc procedure to refer cases to mediation if there is a local or regional mediation organization that wants to help. The nonprofit group will already have a knowledgeable volunteer base or staff professionals, but it is important to make sure that the group understands the priorities and concerns of the planning department.

If a city wants to more actively embrace mediation and make it an integral part of the system, it should seek the support of elected and appointed officials and figure out how the process would work best locally. Important structural questions include: Is there a potential nonprofit partner? What will be the costs and who will pay them? Are mediations covered by open meeting laws? What are the staff or volunteer training needs? Important strategic planning questions include: Will the program use volunteers, paid consultants, or a mix? Which development proposals have the highest priority? How can the process be publicized? How will success be measured?

Zoning and other planning disputes have been resolved through an adversarial process for so long that it is hard for many city planners to imagine another way. But Berkeley, Albuquerque, and many other cities have turned to mediation, and it has helped to resolve disputes, limit lawsuits, reduce staff time spent handling such situations, and save money. It can mesh nicely with existing planning processes and in many cases there is nothing to lose by trying it. As it turns out, sometimes with the proper process, we all really can get along.

Joshua Abrams is a mediator and city planner. He is the founder of the Community Planning Collaborative and a principal at Baird + Driskell Community Planning. Contact him at abrams@bdplanning.com.

Resources

Images: The former Walter Baker chocolate factory on the Lower Nesponset in Massachusetts. Photo Massachusetts Division of Ecological Restoration.

Organization: The National Association for Community Mediation lists 400 local dispute resolution centers across the country: www.nafcm.org.

Training: The Consensus Building Institute has training and other material about consensus-based policy making: <http://cbbuilding.org>.

Reading: "Responding to Streams of Land Use Disputes: A Systems Approach," produced in 2007 by the Public Policy Research Institute of the University of Montana in partnership with CBI, summarizes successful programs, best practices, and relevant state laws.



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