

# Mediation

## *for Land Use Decision-Making*

by Philip Dack, MCIP

*EVERY DAY, COUNTLESS PLANNING DECISIONS are made throughout the world, decisions that create the communities where we will be living far into the future. How well-considered and wise are many of these decisions?*

With the public demanding an ever larger role in planning decisions, finding ways to direct public input into more constructive channels is becoming ever more vital. The City of Calgary's Planning Mediation Program (PMP) provides a significant test of new ways of resolving difficult planning problems.

Calgary's planning approval system uses a development control model that allows substantial discretion to planners in granting approvals, which can result in substantial negotiation on applications.

Calgary City Council established the PMP in 1998 as a pilot program testing the use of mediation in planning disputes. The Land Use Planning Division has contracted three professional mediators to provide their services when requested. Since the launch of the program, the mediators have handled disputes involving rezoning, development permit approvals, enforcement and policy matters.

The mediator operates between an applicant and opposing parties, not between the planning authority and applicants. Generally, mediation occurs only before the planning authority makes its decision on the matter.

The PMP operates on the assumption that face-to-face, facilitated negotiation is a more effective way to resolve some disputes than is the exercise of legislated power. Decisions made within the established approval process, including those by appeal tribunals and the courts, all have their place. The Calgary Planning and Building Department handles more than 8,000 planning applications a year; formal mediation is only appropriate and cost-effective for a very small number of the most controversial and time-consuming applications.

### How the program works

> A dispute which has been brewing "out there" for some time reaches a level of intensity where City staff or councillors decide that the normal public-input process is not working. The dispute is referred to the PMP, where it is decided:

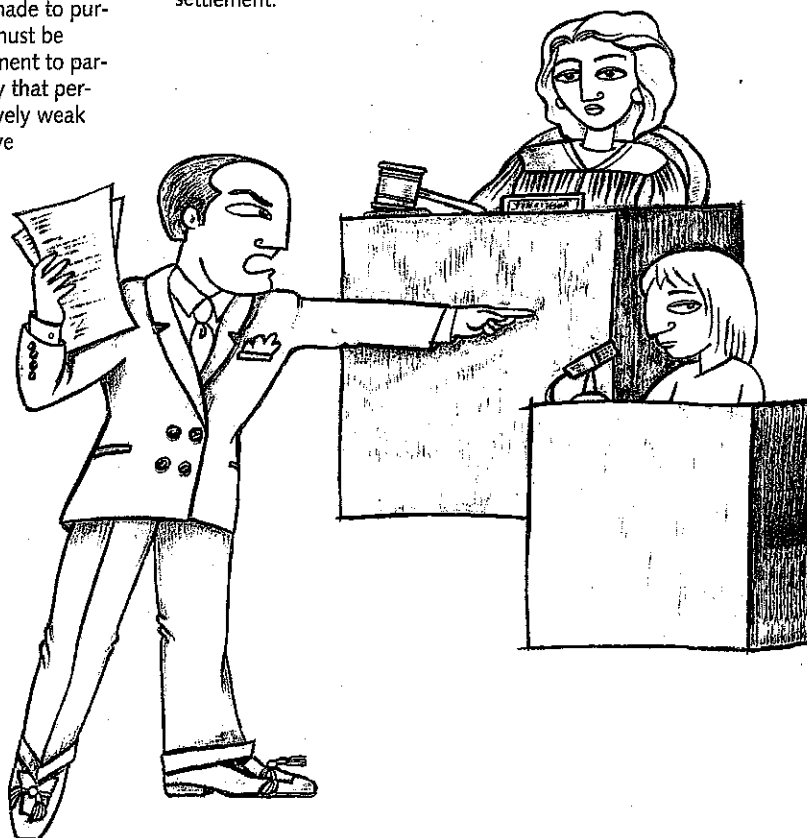
- whether the conflict is likely to benefit from mediation;
- which mediator to use;
- who should make the first contacts to arrange the mediation; and
- how much time and money will likely be required by the mediation.

> Once a decision has been made to pursue mediation, the parties must be approached for their agreement to participate. Generally, the party that perceives itself to be in a relatively weak position will be more positive towards the use of mediation, while the other(s) may need stronger persuasion. The persuasion may be accomplished by a planner or politician who explains the possible outcomes to all the parties, i.e. what could be lost by a negative decision.

> Once it is agreed that mediation will be attempted, the mediator contacts the parties, gives a detailed outline of the mediation process, and sets up the meeting time and location. The mediation meeting(s) are held, and a Mediator's Report is prepared, signed by all parties and submitted to the approving authority.

> In many cases, the technical input of a planning staff person is required at a mediation meeting. As the mediators gain experience in planning matters, they are more able to handle matters without the assistance of planning staff. One important objective of the PMP is to reduce staff costs. Thus, training the mediators in rudimentary planning content/process matters is important.

> If a solution agreeable to all parties is reached, it must still be agreed to by the appropriate planning authority. Normally, the approval bodies appreciate the efforts of the parties involved in the mediation and support the mediated settlement.



### Types of PMP mediations undertaken

The PMP has conducted mediations covering a number of issues including:

- > Design issues between communities/applicants
- > Enforcement issues
- > Noise from bars and outdoor restaurants
- > Land use policies covering multi-block areas
- > Group home locations
- > Signage
- > Industrial-residential land use conflicts

The PMP does not handle neighbour-neighbour disputes unless there is clear City involvement, e.g. pending application or enforcement action.

### Timing of mediation

There are two points at which mediation can be incorporated into the decision process. Either before a decision is made on the application (the Calgary practice) or after the decision has been made and an appeal lodged. These two approaches give rise to very different dynamics, issues and outcomes, most of which are beyond the scope of this paper.

### The more complex, the better

Of one thing there is no doubt: interest-based mediation is a very effective decision-making tool, one which, luckily for planners, works particularly well in complex disputes. This is because mediation works not by resolving the dispute on the basis of who is "right" and who is "wrong" but on the basis of "whether it is possible to find a way that each of you can get what you want out of this decision." Needless to say, this is often impossible, and all rhetoric about "win-win" aside, much time is spent trying to find acceptable compromises.

### Lessons learned

The actual procedures used in Calgary are still evolving, and there are several broader initiatives being explored as the program deals with the surprisingly wide range of disputes that development in a large city can engender. Thus far, twenty disputes have been handled by the program. Several more were considered for mediation, but once the parties had been contacted and made aware that mediation was being considered, they were able to reach a resolution.

The use of mediation in the planning context presents certain challenges to those with training in mediation:

- > Parties, issues and interests may be unclear, and substantial preliminary work may be necessary to clarify the dispute.
- > Planning legislation is limited regarding which matters are legitimate grounds for planning approval. For example, when one community wanted the developer to provide baseball uniforms for the local team, the planning department had to make it clear that the two parties could negotiate such matters between themselves, but that the City would not be involved in requiring or enforcing that specific condition.

> Often a mediated agreement can be appealed by a party trying to improve its position.

> Injecting a mediation process into the normal community-neighbour-developer dynamic can have a substantial impact on traditional power relationships. It can create insecurity among some parties who are used to wielding political influence or strong emotional arguments in their attempts to gain approval.

### Role of the politician

Land use decisions are deeply political. Introducing a new element like mediation into the decision process can occur only with the active support of politicians. Luckily, politicians are often a major beneficiary of mediation, because it attacks the type of complex problem that takes up so much of their time.

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### Evaluation

It is difficult to evaluate the effectiveness of softer planning initiatives in the area of approval processes and conflict resolution. Mediation has been extremely successful in some cases, moderately successful in others, and of absolutely no help in at least two of the twenty cases.

Preliminary observations suggest that:

- > Mediation can be a very effective way of reaching planning decisions.
- > There are no quick ways to create consensus. It takes time and skill. If, as in the Calgary situation, public funds are being used to cover mediator costs (even as an alternative to planner costs), there should be some public-interest rationale as to when mediation is funded.
- > A formal mediation approach such as the interest-based Harvard mediation model cannot be applied in a rigid way to planning disputes.
- > Is mediation cost effective? Certainly not in all cases. The great majority of planning decisions should be made through the existing structures, which are highly effective at rendering decisions on planning matters in which the facts and regulations are clear.

Although mediation is now being used for conflict resolution in almost all areas of society, its emergence in land use planning is very recent. The Calgary Planning Mediation Program was in part inspired by Randy Diehl's initiative in the Kamloops Planning Department, as reported in Plan Canada.

## An example

In response to a noise complaint, investigators discovered that a fairly sophisticated sandblasting operation that had been operating for thirty years did not have the proper permits. The owner applied for approval, which the neighbouring residents strongly opposed. The planning department felt that, since there had only been one complaint in many years, and since the owner stood to lose the more than \$1 million he had invested in the site, an attempt at mediation would be worthwhile. Through the mediation process the applicant and the residents established a complaint committee and worked out a solution that limited both the hours of operation and the number of outside sandblasting units that could be used at particular times. The City approved the arrangement as a temporary permit and, when no problems occurred, made it permanent a year later.

## Message for planning managers

The interest-based mediation/negotiation model described above teaches problem-solving skills which can be applied to most planning disputes, even those which don't require formal mediation. It focuses on the motivations and interests behind the positions, cutting quickly through posturing and politics. Planning departments can benefit greatly from this approach, and should encourage mediation training for staff.

There is a pressing need in planning departments for people who can facilitate the change process with the public. Most planners have excellent skills in problem analysis, evaluation, and communication. That is what most planners do for a living. But it is not enough: planners today need to be experts in presentation, group facilitation, dispute resolution, and public process design. The interest-based mediation/negotiation model is the best place to start developing these skills.

## Other initiatives

Calgary also operates an extensive Planning Education Program that offers workshops, publications, and videos to train developers and the public in the approval and strategic planning processes.

The Alberta Government's Municipal Affairs Department has also initiated a mediation program, the Inter-Municipal Dispute Resolution Initiative. The coordinator of the initiative, Bill Diepeveen, says that it was developed to encourage municipalities to work together to resolve disputes in a manner that meets the interests of all involved. Alberta Municipal Affairs encourages mediation, provides municipalities with financial support to cover mediator costs, and maintains a roster of experienced mediators.

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## Summary

The City of Calgary has developed a Planning Mediation Program (PMP) to help resolve difficult land-use and enforcement issues. The PMP uses private-sector mediators who are contracted to work with disputants such as community associations, developers, and special-interest groups. They use an interest-based mediation model which involves:

- > a professional mediator using a semi-formal conflict resolution approach;
- > agreement among all parties on the outcome;
- > negotiation among the principles, not their agents;
- > focus on interests (why do you want...?) rather than on positions (what do you want?).

The PMP has operated successfully for over two years, resolving conflicts over enforcement, design issues, conflicting land uses, restaurant noise, group homes, and policy matters.

## Sommaire

La ville de Calgary a mis sur pied un programme de médiation de l'aménagement (PMA) pour mieux gérer les problèmes d'utilisation des sols. Le PMA retient les services de médiateurs du secteur privé pour travailler avec les parties à un conflit, qu'il s'agisse d'associations communautaires, de promoteurs ou de groupes à intérêt commun. Le modèle de médiation, fondé sur la négociation raisonnée, nécessite les éléments suivants :

- > un médiateur professionnel favorisant une méthode semi-formelle de résolution de conflits;
- > l'engagement de toutes les parties concernées à accepter la décision;
- > des négociations entre les principales parties en cause, sans intermédiaires;
- > un modèle de négociation qui privilégie l'intérêt (pourquoi désirez-vous...?) plutôt que la position (que désirez-vous...?).

Depuis deux ans le PMA a permis d'identifier des solutions plutôt que d'imposer une réglementation. Il a aidé à clarifier diverses questions de principe, et à résoudre des conflits reliés à l'utilisation des sols, à des problèmes de bruit et à l'établissement de foyers collectifs.

