City of Austin

SPECIAL REQUEST REPORT

A Report to the Austin City Council

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Special Request Report on Mediation in Peer Cities

February 2015

Office of the City Auditor

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REPORT SUMMARY

Professional literature suggests that mediation is used in a variety of ways in municipalities to effectively resolve disputes in a less costly manner and can help build trust between disputing parties and add value when parties are willing to compromise and engage early in the process. Currently, City of Austin practices related to mediation are utilized in a variety of ways, both formal and informal, and use City staff and independent staff to facilitate mediations. Related to land use, we identified three cities that have a recognized mediation program, Bellevue, Washington; Berkeley, California; and Albuquerque, New Mexico.

REPORT NUMBER: AS15102

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PROJECT TYPE

This project was conducted as a non-audit project.

TEAM

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Special Request Report on Mediation in Peer Cities

Report Highlights

Why We Did This Project

This memo responds to a request from Council Member Kitchen regarding mediation practices in peer cities.

What We Did

To complete this special request, we:

- researched and summarized professional literature and practices related to municipal use of mediation;
- interviewed key staff and researched Austin's current and historic practices regarding mediation; and
- contacted staff in identified cities to determine how they utilize mediation in their land use process.

For more information on this or any of our reports, email oca_auditor@austintexas.gov

Mayor and Council,

I am pleased to present this report on the use of mediation in peer cities.

BACKGROUND

Mediation is a method of dispute resolution involving a neutral third-party who tries to help the disputing parties reach a mutually agreeable solution. Historically, the City of Austin had a formal mediation program that focused on collaborative dispute resolution mostly for land use conflicts. While the City does not currently have a formal program, mediation and facilitation services are provided through the Communications and Public Information Office. The Office of the Police Monitor also provides mediation related to citizen-police disputes.

OBJECTIVE AND SCOPE

Our objective was to summarize peer city practices related to the use of a mediation function for addressing municipal disputes including land use.

WHAT WE FOUND

- Professional literature suggests that mediation:
  - is used in a variety of ways in municipalities to effectively resolve disputes in a less costly manner;
  - can help build trust between or among disputing parties; and
  - can add value when parties are willing to compromise and engage early in the process.
- Currently, City of Austin practices related to mediation:
  - are utilized in a variety of ways, both formal and informal, and
  - use City staff and independent staff to facilitate mediations.
- Related to land use, we identified three cities that have a recognized mediation program, Bellevue, Washington; Berkeley, California; and Albuquerque, New Mexico.

We appreciate the cooperation and assistance we received from the Planning and Development Review Department, Communications and Public Information Office, and peer city staff during this project.

Corrie E. Stokes, Acting City Auditor

RESULTS

Mediation: Definition and Characteristics

Mediation is a method of dispute resolution involving a neutral third-party who tries to help the disputing parties reach a mutually agreeable solution.

Professional literature[1] suggests that mediation is being employed in a variety of ways in municipalities and can be an effective way to resolve disputes in a less costly manner for all parties. Mediation can benefit parties that need to preserve an ongoing relationship and can provide creative and long-lasting solutions with more buy-in from the parties due to the collaborative nature of the resolution. Mediation has been noted as especially effective in the municipal context when conflicts arise in the context of:

- other governmental bodies;
- public officers;
- land use disputes;
- purchasing contracts; and
- local code enforcement.

The literature also noted that mediation is not appropriate in all circumstances, including where the issues in dispute cannot be clearly defined, the primary parties are difficult to identify, or when deadlines for completing the process are not realistic. Generally, disputed issues are screened before mediation begins and success is not limited to full agreement of all parties. Depending on the specific circumstances in which mediation is utilized, mediations can be conducted ad hoc or as formal processes and mediators can be a third-party facilitator or a member of the organization. Mediators generally have specific training and can be certified, but certifications vary by state. We noted that Texas law requirements for a court-appointed impartial third party includes completing a minimum of 40 classroom hours of training in dispute resolution techniques.

Mediation in the City of Austin

Currently, the City of Austin uses collaborative processes and alternative dispute resolution in a variety of ways, both formal and informal. For example, the Office of the Police Monitor offers a mediation process to address issues between members of the community and members of the Austin Police Department. In addition, there is a mediation clause in the general conditions section of the City's construction and professional services contracts.

Also, the Community Engagement division within the Communications and Public Information Office provides mediation and facilitation services. Community Engagement also provides dispute resolution services through an agreement with the Dispute Resolution Center, an independent, non-profit organization in Austin. The Dispute Resolution Center also cites a 40-hour training process. The City's mediation services are available to any City department upon request on an ad hoc basis.

Additionally, while not a formal mediation program, Planning and Development Review Department staff indicated that land use issues are addressed by case managers early in the process and managers sometimes facilitate disputes later in the process. Also within the Planning and

[1] See Appendix A for a listing of the professional literature reviewed.

Development Review Department, the Neighborhood Assistance Center works to provide Austin neighborhood groups with better access to the City's resources and processes. Neighborhood Assistance Center staff provides public information and makes engagement efforts early in the development process, but is typically not involved with dispute resolutions that arise during the review process.

Historically, Austin had a land use mediation program that began as a pilot program in 1999. In 2002, the program's "pilot" status was removed and it operated out of the City Manager's Office. The program's services were free to applicants and remained confidential. In 2003, the program's manager retired and the program was eliminated during the subsequent budget cycle. The program was cited as resolving two-thirds of the 36 mediations it conducted. Former program staff indicated that the program benefited, in part, from specializing in land use cases, having the necessary technical expertise, and screening cases to determine which disputes were best suited for facilitated dispute resolution.

Mediation in Other Cities

We found that other cities utilize mediation in a variety of ways that reflect their unique issues. For example, in Philadelphia, Pennsylvania, mediation is used in municipal decisions that result in intergroup conflict and tension with neighborhoods, specifically focusing on racial and ethnic tensions through its Community Relations Division. In Miami, Florida, mediation is used to deal with intergovernmental conflicts that arise among the city, county, and South Florida Regional Planning Council. The conflicts arise due to sensitive environmental issues and overlapping jurisdictions related to land use decisions. In Charlotte, North Carolina, the combined city-county government makes mediation services available for landlord-tenant disputes and other minor legal disputes.

Also, 14 of the 23 largest cities in the United States, including Austin, utilize some form of mediation between citizens and police. The City of Austin's program is typical in that it is run outside of the police department by a neutral party. Across the cities, these mediation programs range from informal to highly structured.

Land Use Mediation in Other Cities

Professional Literature and Practices

Regarding land use mediation, we reviewed the professional literature and found that a few cities have mediation programs specific to land use issues. The professional literature suggests that benefits to employing early public engagement and mediation in contentious zoning disputes include building trust between the parties, reducing litigation, empowering traditionally disadvantaged groups, and reaching better development outcomes. Further, these mediation outcomes do not create a binding precedent, which allows flexibility and creativity in the final agreement. However, the literature also noted a challenge is that some parties have little incentive to enter mediation, especially early in the process.

The literature suggests that a good land use mediation program should offer multiple opportunities in the land use review process for mediation. Again, while incentives to enter into mediation are low at the beginning of the process, collaborative dispute resolution is noted to be most successful where it engages the parties early in the dispute – before large outlays of resources are committed by the applicant. It was also noted that a mediation program must remain voluntary.

The literature also suggested that, in some instances, neutral third parties make the best mediators, with planning staff involved to provide technical assistance. However, it was also noted that trained planning staff can act as mediators and, in fact, may be effective mediators where the issues in dispute are subject to obscure local zoning regulations.

Another practice stressed by the professional literature is having a suitable screening process. In some instances, disputes are not going to be improved by collaborative dispute resolution methods. The literature suggests that it is best to mediate cases only where mediation can add value – when all parties are willing to compromise and the dispute has multiple issues to resolve. Also, it was noted as especially important to use mediation in situations where the parties will have to maintain an ongoing relationship because it can save a single dispute from creating a profoundly contentious relationship.

Cities with Formal Land Use Mediation Programs

Based on the professional literature, we identified three cities that have formal programs for land use mediation. Each city approaches the issues related to land use mediation differently and state laws on mediation and the requirement for open meetings vary. All three cities make mediation services available at no cost to the disputing parties.

In addition to cities with formal programs, we looked at Texas peer cities and found some evidence of ad hoc mediation being used in land use disputes in Dallas, Fort Worth, and San Antonio. However, we were unable to identify a documented, formal land use mediation program in any of those cities.

Bellevue, Washington: Bellevue has a mediation department that coordinates mediation using trained volunteers in all city departments. Staff stressed that when they conduct a mediation for the permitting department, the mediation is not a discrete event. Rather, it is a relationship that the mediator builds with the parties. Bellevue begins mediation as early as possible in the zoning process – before plans are filed – and returns to mediation if the possibility of collaboration exists. Disputes that are not a good fit for mediation are screened out by mediation department staff. The mediation department also trains city employees on mediation techniques to encourage more collaborative dispute resolution in all departments. Mediations in Bellevue are binding and confidential per Washington state law. Staff reported that a successful mediation results in a binding agreement. However, the mediator reports on the outcome of all mediations, whether successful or not.

Berkeley, California: Berkeley has an agreement with a third-party, non-profit organization to conduct mediations. As in Bellevue, the Berkeley mediation program involves a variety of municipal disputes. Mediators are trained in the city's zoning process in order to hold informal mediations. Land use disputes are referred to the program by city departments and mediation is highly encouraged in the land use code. The program does not screen candidates for mediation. Staff reported that even where they do not reach an agreement, the mediation serves to bring the parties closer to a compromise. A mediation results in a written report to the zoning board related to the changes agreed to in the zoning change application. However, it is the duty of the applicant to make the compromised changes in the application.

Albuquerque, New Mexico: Albuquerque has a mediation unit within its law department. The law department works closely with the planning department to divert contentious issues to mediation

during the proposal stage of the planning process. While the mediation unit screens cases, the mediation is actually provided by neutral third-party professional facilitators. The facilitator generates a report that is distributed to the planning division and the office of neighborhood communication. That document is instructive to decision-makers on the version of the plan reached through collaborative efforts. The mediations are public and posted under New Mexico's sunshine laws. Staff indicated that even where mediations fail to reach an agreement, they often serve to educate the parties in a manner that makes the conflict more productive as it moves through the zoning process. Also, when creating a collaborative dispute resolution process for any type of dispute, but especially for land use issues, it is important to have buy-in from the stakeholders. The users of the program are the best architects of the program.

APPENDIX A

PROFESSIONAL LITERATURE REVIEWED:

Abrams, Joshua 2011. “The Zoning Dispute Whisperer.” (Planning).

Esterman, Pamela, Michael Keanneally, Jr., and Howard Protter 2011. “The Benefits of Alternative Dispute Resolution for Resolving Municipal Disputes.” (New York State Bar Association).

Forester, J. Richard 1999. “Mediating Land Use Cases.” (Mediate.com).

McKinney, Matthew, Sarah Bates Ven de Wetering, and Patrick Field 2007. “Responding to Streams of Land Use Disputes.” Policy Report #5 (Public Policy Research Institute. The University of Montana).

Nirken, Howard, and Tracy Watson 2000. “New Model for Land-Use Dispute Resolution.” (State Bar of Texas Environmental Law Journal. Vol. 30).

Susskind, Lawrence, Mieke van der Wansem, and Armand Ciccarelli 2000. “Mediating Land Use Disputes. Pros and Cons.” (Lincoln Institute of Land Use Policy).