

ALTERNATIVE DISPUTE RESOLUTION: AN ALTERNATIVE TO AN OMB HEARING?

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DEVELOPERS AND BUILDERS

IN THE GTA know that getting projects approved has become more complex, expensive, lengthy and uncertain. Anything that eases these stresses is a relief.

The provincial government amended the *Planning Act* on December 3, 2015 allowing the option of Alternative Dispute Resolution (ADR) escalation to an expensive OMB hearing, which should ease some stress. Simply, ADR is assisted negotiation. In the case of the changes to the *Planning Act*, it is an opportunity to resolve matters earlier and, assuming you work with a professional skilled at dispute resolution, in an amicable fashion while minimizing uncertainty and delay.

Why is this a good change? The OMB has a successful track record of using mediation to resolve appeals once case files are open and parties have expressed their positions. The changes to the *Planning Act* now make this model available to parties outside of the OMB framework after an appeal is filed but *before* the file is transmitted to the OMB. The choice of ADR technique is not prescribed in the legislation, so you may use a mutually acceptable third party and create a process to suit your needs.

Will the changes work? Everything new needs testing and success stories will assist others in trusting the mechanism of early ADR. We can all think of successful negotiations that we have participated in and the thrust of these changes is no different. Here are some key considerations for assessing whether ADR may be successful:

- The first ingredient is willing parties. If a party doesn't want to compromise or is

interested in keeping its case as "close to the vest" as it can, ADR is not appropriate.

- Selecting a third party who is skilled in dispute resolution and has subject matter expertise can lead to time well spent resolving all or part of the issues and will lead to additional clarity regarding any remaining issues.
- When all parties agree to a predictable process, the outcomes can be more sustainable. The parties need to have authority to commit to settlements. Leaving outcomes to be finalized later often leads to less success.

What should you expect if you opt for ADR? The process looks something like this:

- The mediator will be selected by the parties together and an agreement can be entered into setting out the process and the costs.
- The mediator will preside over the opening of the session by "setting the table." This means the roles and responsibilities of the parties are explained and the confidential and without prejudice nature of the discussions is confirmed. The approach to meeting as a group or in break-out sessions ("caucuses") will be discussed and ground rules will be set for conduct.
- The parties are given the floor to tell their stories.
- The parties assess whether they have any common interests and what they hope will come from the process.
- The parties identify the issues that need to be resolved.
- Brainstorming occurs – nothing is irrelevant. All possible solutions are encouraged.
- Sustainable options are then selected from the brainstorming session. At this time, the

parties individually must assess their best case if they don't arrive at a mediated solution, and this will set the goal posts for what they are prepared to negotiate in order to feel they have achieved an acceptable option.

- Closure. As noted above, any successful outcome must be recorded in a manner acceptable to the parties so that agreements cannot be resiled.

Mediator/facilitator services range from actively and fully assisting with developing solutions to simply ensuring that the discussion is confined to the parties and that the dialogue follows a productive path. The selection of the type of mediator will depend on the needs of the parties and the nature of the issues.

The province is planning to review the OMB in the near future. If ADR prior to a matter being referred to the OMB is successful, it could achieve what some of the public have been seeking – a process that is less confrontational and that delivers solutions that are more cost-effective, more collaborative and lead to better ongoing relationships. Maybe we don't need to reform the OMB but simply reform the way we think about addressing issues and take advantage of this dispute-resolution opportunity provided by the province. **TB**

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