

**Fast Facts:**

Mediation is a cost-effective alternative to litigation for local governmental units.

Mediation can lead to the establishment of new and sound public policies for the benefit of the public.

Mediation can be used to resolve disputes between a governmental unit and a third party, between two or more governmental agencies, or within a governmental agency itself.

## Why Local Government Needs to Mediate

By Richard J. Figura

> **W**ith tax revenues depressed due to plant and business closings, homes in foreclosure, revenue-sharing cuts, and Headlee millage reductions, local governmental units must find ways to cut costs. While many of the expenses facing local government cannot be controlled, there is a way to save on legal fees and litigation costs. While a governmental body cannot always predict when it will be faced with a lawsuit, it can help reduce the costs of those lawsuits—and even prevent some from occurring—by turning to alternative dispute resolution (ADR) techniques such as arbitration and mediation.

Arbitration and mediation have proven to be effective tools for the expedient and cost-effective resolution of disputes of all kinds. All too often, however, lawyers do not consider these potential alternatives. With respect to disputes with, between, and within governmental units, lawyers need to advise their public clients of these alternatives and urge their use. The dollars saved by avoiding litigation can help buy that new fire truck, pave over a lot of potholes, and keep police service levels intact. Although both arbitration and mediation are effective alternatives that governmental bodies can no longer afford to overlook, the focus of this article will be on the benefits of mediation.

Mediation brings disputing parties together in a confidential setting where they candidly discuss their differences and explore a resolution with the assistance of a mediator who facilitates their discussion so they can come to an agreement on their own terms. Mediation of this sort has been a part of the Michigan Court Rules since 2000,<sup>1</sup> successfully settling cases and saving substantial litigation costs while conserving valuable judicial time and resources.

### Benefits of Mediation to Government

Mediation can benefit the governmental unit in many ways:

- **Avoiding the expense of litigation**—Litigation can cost thousands of dollars that could be better spent delivering required services. Further, mediation can help resolve disputes for which, because of cost or other factors, litigation may not be an option.
- **Avoiding the time spent in litigating**—Litigation takes public officials and employees away from their job duties to give depositions, meet with legal counsel, help legal counsel prepare for trial, and appear in court to give testimony or to otherwise assist legal counsel. It is a far better use of tax dollars to keep public officials doing their jobs.

- **Mediation is private and confidential**—While the final settlement of a dispute will be a matter of public record and debate, the discussions and negotiations necessary to reach that settlement are confidential, thereby enabling the parties to freely discuss issues that may have adverse political or liability consequences.
- **Chance to establish sound public policy and good will**—The mediation process allows the parties to quietly consider remedies that are not limited to simple dollar demands. The parties are free to explore other options and can use a mediated settlement agreement to establish new and sound public policies, engendering the good will of the public served by the governmental unit.

## Where Mediation Can Work

The situations in which mediation can be used to benefit the governmental body are nearly without limit. The following are only some of the situations where mediation can be used. Because mediations are confidential, the examples are disclosed only in general terms to ensure that confidentiality is observed.

### Disputes Between the Governmental Unit and a Third Party

Everyone is familiar with the use of mediation in cases in which the governmental body is being sued for damages by a third party. This article will focus instead on situations in which mediation may not be the lawyer's first thought when considering available alternatives for resolving a dispute between a municipality and a third party. Such situations can include the following:

- **Zoning and land-use disputes:** These disputes are ideal for mediation because they are about more than money and present a playing field rife with opportunities. As an example, a recent case involved a church that wanted to construct a building, half of which would be devoted to church use with the other half being leased to a school. The governmental unit, after hearing from angry neighbors who complained about the increased traffic and the loss of the township's rural character, denied the church's request. The

church filed suit. The parties dug in their heels, preparing for trial six months to a year down a road paved with interrogatories, depositions, affidavits, counter-affidavits, motions, briefs, and reply briefs. They each faced the specter of thousands of dollars in litigation costs.

The parties participated in a mediation lasting two and a half days. More than 15 persons participated in the mediation, including the church's pastor, members of its board of elders, elected and appointed officials of the governmental unit, the parties' engineers, architects, planners, and, of course, legal counsel. The parties reached an agreement that allowed the church to construct the mixed-use building but with a laundry list of conditions designed to protect the surrounding community and the general public. The agreement was formally approved by the unit's legislative body following a public hearing that was attended by more than 100 people.

A consent judgment was filed nine weeks after mediation was ordered by the court and three weeks after mediation began, saving the municipality thousands of dollars and hours of time.

- **Ordinance enforcement:** A contentious citizen who refuses to comply with building code, zoning laws, or other local ordinances can have an adverse impact on a municipal budget. Consequently, because it can take months of attorney and court time to get even minimum compliance on the part of the citizen, such cases aren't always prosecuted vigorously. A particularly perplexing situation is a dispute between neighbors in which each is trying to get the municipality to stop the other's conduct—a no-win situation for the municipality.

Mediation provides a cost-effective and expedient method to obtain compliance with the law while recognizing the particular needs of each citizen. It is especially useful in getting feuding neighbors to reach an accommodation of their differences and getting the municipality out of the feud.

Consider the case in which A and B are neighbors, each of whom constantly complains to city officials about the other's transgressions. The city is besieged with complaints about barking dogs, loud music, junk, etc.

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In the usual scenario, tickets are issued to the offenders and both parties are brought into court. The court conducts a pretrial conference and schedules the cases for trial. The cases drag on for weeks until a trial is held or until a plea bargain is reached so that trial can be avoided. Each citizen is still upset with the other for having caused him or her to go through this lengthy and expensive court proceeding. They continue to fight and continue to file complaints with the city.

Seeking to alter the usual scenario, the city attorney informed both sides in one case that if they would participate in a mediation, the city would hold its prosecution in abeyance and if an agreement was reached, all the charges would be dropped.

The neighbors reluctantly agreed and the matter was referred to the local community dispute resolution center established under 1988 PA 260.<sup>2</sup> The city even agreed to pay the center's nominal fee. By the end of the second mediation session, the two neighbors agreed that bickering was against their best interests and entered into a written agreement that resolved their disputes. The matter was resolved in less than 60 days. The cost to the city was less than \$500. So far, neither A nor B has made further complaints to the city.

### Disputes Between Governmental Agencies

The taxpaying public abhors costly disputes between governmental units. The public wants governmental agencies to cooperate and jointly work toward the common good. Mediation can accomplish this at minimal cost. Situations in which mediation is a preferred remedy can include the following:

- **Jurisdictional disputes:** We have all seen cases in which different governmental units have overlapping jurisdiction. In those situations it is necessary that the different units come to terms with how jurisdiction will be shared. Having two governmental units argue over which of them is to provide a designated service to a group or to an area is a

waste of scarce tax dollars. Ugly disputes in full view of the taxpaying public can be resolved or avoided entirely by resorting to mediation.

- **Grant-funding disputes:** Funding disputes frequently develop between two governmental units where one is to perform certain duties with funds loaned or granted by another. One recent example involves a dispute between a municipality and a state department over the department's demand that the municipality repay a \$40,000 grant for failure to perform. Rather than pursue an administrative appeal process and subsequent litigation, the parties met with the assistance of a mediator and resolved their issues.
- **Cooperative agreement disputes:** Often, the parties to a joint agreement, such as a fire authority agreement, have a dispute. How the joint agreement will continue to be funded is a common source of disagreements. As in any dispute, the parties, having staked out their positions, are unable to find a mutually agreeable solution.
  - **Case No. 1:** City A is located in and surrounded by Township B. Each unit provides fire services to its citizens through its own fire department. The cost for each unit is approximately \$500,000 per year. If the two fire departments merged, they could jointly serve both communities at a total cost of \$700,000 (\$350,000 each), saving each \$150,000.

The departments' appointed representatives meet to negotiate an agreement, but they are reluctant to give up the control they each currently enjoy over their own department. Additionally, the city believes that the township should pay more than 50 percent of the cost because the township covers a larger service area, resulting in higher costs. The township, on the other hand, believes that the city should pay more because the frequency of fire calls is higher in the city.

Old political rivalries between the two units are kindled. The renewed animosities make it impossible to reach agreement. Each unit loses the opportunity to save \$150,000.

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– **Case No. 2:** In a nearby community, a city and township face the same facts as the units in Case No. 1. In this instance, however, attorneys for the two units of government suggest that their clients would be well-served to retain and share equally in the cost of a mediator, who can facilitate their meetings and help them resolve any disputed issues. They do so, and after four meetings agree to create a joint fire authority in which each have a role in appointing members to the authority board. The authority is charged with day-to-day control over the fire services, moving operation of the fire department one step away from the sometimes hostile political arena. The authority is a success, and each governmental body recognizes savings of more than \$100,000 a year. Reaching agreement took only 60 days and the total cost for legal and mediation fees was less than \$10,000.

- **Facilitating negotiations to reach cooperative agreements:** As seen in Case No. 2, the assistance of a mediator can result in two or more municipalities entering into a cooperative agreement; it was difficult to do so without such assistance. Some examples of cooperative agreements in which use of a mediator can facilitate reaching a meeting of the minds include agreements under the Urban Cooperation Act,<sup>3</sup> Act 425 land transfer agreements,<sup>4</sup> joint police service agreements, joint fire agreements, and many others.

### Disputes within Governmental Agencies

Like a private employer, public employers must also deal with officers and employees who can't always get along. Employees who don't talk to each other, who deride one another, or who try to blame others for problems create distractions in the workplace and impede productivity. The employer can require these employees to participate in mediation to resolve these disputes. Experience shows that mediation is successful in nearly all such cases. The public employer and the public in general are beneficiaries.

The problem of co-workers not getting along is exacerbated when the co-workers are elected officials rather than employees. Management can order employees to participate in mediation,

but elected officials are answerable only to the voters and generally cannot be forced to participate in mediation.

In one such incident two years ago, an elected township clerk and the elected treasurer were political rivals with personalities that mixed like oil and water. They argued over their duties, each claiming that the other was infringing on his "turf." Township board meetings became prime-time entertainment; citizens would watch the two verbally abuse one another. This caused substantial distraction and disruption to the operation of the government. Finally, the two officials were pressured into participating in a mediation at the local conflict dispute resolution center. The result was an agreement that allowed them to at least work on a cooperative basis with one another, even if it didn't result in their becoming close personal friends.

### Mediation Need Not Be Costly

There are obviously very few disputes in which mediation cannot be an expedient and cost-effective remedy. In fact, in many cases involving disputes without a lot of dollars at stake, mediation can be accomplished economically through the use of a local community dispute resolution center (CDRC), at least in those areas of the state where such a center exists.

CDRCs are established pursuant to 1988 PA 260.<sup>5</sup> These centers offer the services of trained mediators who come from a variety of backgrounds and bring a variety of experiences to the table. Mediation is confidential so that neither party needs to be concerned that its dirty linen will be aired publicly. Most significantly, such mediations are inexpensive, as most centers simply charge a nominal fee to cover their costs in conducting the mediation while the mediator services are provided voluntarily. Most CDRC mediations last two or three hours, and the success rate can in many cases be as high as 80 or 90 percent. The resulting benefits to the governmental unit, however, are many.

A list of current state CDRCs can be found online at the Michigan Courts Office of Dispute Resolution website.<sup>6</sup> ■



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### FOOTNOTES

1. MCR 2.410, 2.411, and 3.216.

2. MCL 691.1551 *et seq.*

3. MCL 124.501 *et seq.*

4. MCL 124.21 *et seq.*

5. MCL 691.1551 *et seq.*

6. Michigan Courts Office of Dispute Resolution, *List of Mediation Centers* <<http://courts.michigan.gov/scao/dispute/odr.htm>> (accessed May 10, 2010).

