

PLANNERS AS MEDIATORS

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A researcher finds planners are not perceived as neutral parties with the appropriate skills to resolve environmental disputes.

During 1992-1993 I researched and wrote a Masters thesis entitled *Environmental Dispute Resolution (EDR) and the Resource Management Act (RMA) 1991: Should Planners be Mediators?* The aims of this research were to examine the implementation of EDR in RMA 1991, and to discover how these provisions are being interpreted by different groups of people. While planners were the main category interviewed I also interviewed representatives from Maori, environmentalists and developers.

ENVIRONMENTAL DISPUTE RESOLUTION

The method that is normally used to resolve environmental conflicts is the legal system. There are, however, a number of problems with this approach, such as the costs, delays, win-lose outcome, cultural and gender biases, and the fact that it does not resolve the basic issues in dispute (Amy, 1987; Amy, 1990; Bingham, 1986; Lovenheim, 1989; and Susskind and Weinstein 1980). Because of these criticisms there has been a search for alternative ways to resolve environmental conflicts.

EDR was first used in the US in the 1970s (Blackford, 1990 and Talbot, 1983). Within EDR there are a range of informal decision-making methods such as negotiation and mediation which produce win-win or "all gain" outcomes. In Figure 1 a continuum of conflict management and resolution approaches is given. The processes involved in EDR are shown on the left hand side of the typology.

RESOURCE MANAGEMENT ACT 1991

The RMA 1991 has significantly altered the framework within which planners work (Sands, 1993). The act presents a number of challenges to planners, one of which is the processes that planners use to resolve resource management conflicts (Penny and Penny, 1991).

In the consents process under the RMA 1991 there are a number of provisions which encourage the use of EDR. These provisions are: s99 *Pre-hearing Meetings*, s267 *Conferences*, and s268 *Additional Dispute Resolution*.

Pre-hearing meetings are designed to clarify, mediate or facilitate resource management disputes, and provide an opportunity for informal decision-making prior to administrative procedures. The pre-hearing provision allows for the consent authority (for example, members of the hearings committee) to be present. The outcome of any pre-hearing meeting becomes part of the information that a hearings committee has in order to make a decision on an application. If conflict is resolved under this form then under s100 a hearing need not be held.

The conference provision enables a planning judge to call a conference after any appeal has been lodged to the Planning Tribunal. Depending on the outcome of any conference, the issues to be tried may be defined, and the process to be used at the Tribunal hearing may be agreed upon by the parties involved.

The provision for additional dispute resolution enables EDR to be used either before or during the Planning Tribunal hearing. The planning judge or one of the parties may realise that the issues which are in dispute could be negotiated.

RESEARCH FINDINGS

The themes that emerged from the interviews with Maori, environmentalists and developers will be discussed. These ideas are by no means representative of the opinions of all people within these groups, but represent the opinions of those people interviewed for this research.

Several representatives from each group were interviewed. Each person was a recognised and influential representative and had been involved in a number of environmental conflicts where EDR had been used. In order to allow interviewees to express their opinions freely the chosen research method was in-depth semi-structured taped interviews. Each taped interview was transcribed and sent back to the interviewee for verification. The findings from the interviews will now be discussed.

CULTURAL PERSPECTIVE

Under the RMA 1991 councils have greater responsibility than past legislation to consult with tangata whenua. Under s93 1 (f), local authorities have to notify iwi authorities of developments that may affect them. Currently in many local authorities throughout New Zealand consultation pro-

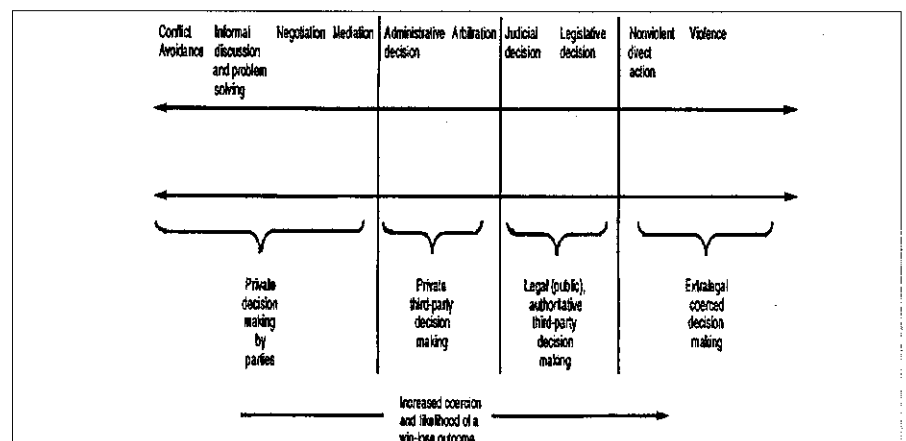


Figure 1: A continuum of conflict management and resolution approaches. (SOURCE: Moore, 1986, 5).

cedures with tangata whenua are being established. The issues that were raised in discussion with Maori may provide some insight into the direction that this consultation should take.

The legal system has been described as a culturally inappropriate forum for Maori (Blackford and Matunga, 1991). The New Zealand legal system is based on a British system of justice. It may then be argued that this system does not reflect the needs of other cultural groups within New Zealand.

Maori decision-making processes use procedures similar to mediation. The role of the chief or rangatira was described in the interviews as being similar to that of a mediator. EDR may then provide a more effective decision-making forum for Maori. It became obvious during the interviews that a number of concerns would have to be addressed before mediation was entered into by Maori.

Concern was expressed by interviewees that it is important for councils and staff to get the consultation process correct. In the past tangata whenua have often been incorrectly identified or not notified about a proposed development until the proposal is publicly notified. For tangata whenua this is too late in the planning process. Concern was also expressed by interviewees on the way they had previously been consulted.

It is important for Maori to be consulted either on site or on marae. For Maori this is necessary, because it enables Maori to maintain their mana while giving the opportunity to members of the marae to listen to the debate. When meetings occur on marae it is particularly important for the planners concerned to become familiar with the tikanga (cultural protocols) of the particular marae before the meeting occurs. This may involve setting up informal meetings with members of the local marae committee to find out appropriate cultural procedures. At this informal meeting stage it is also important that planners ask members of the marae committee and/or the trustees of the land who the appropriate person to talk to is, as this may vary depending on the issue that is to be discussed.

When consulting with Maori, planners have to be sensitive to the resource requirements of Maori. This may involve contacting members of the marae committee or trustees of the land about the appropriate koha (gift) to bring along to contribute to the collective resource pool.

If the groups involved in any environmental conflict agree that mediation is the appropriate dispute resolution process to use then for Maori there may be problems. For instance, it is normal in mediation for there to be one representative from each participating group. Problems may arise for Maori

who may consist of two to three iwi. Each iwi may have different opinions on the same issue (Blackford and Matunga, 1991).

Problems may arise from Maori representatives if they are required to keep information confidential. The rest of their iwi may then criticise their representative for not sharing information (Blackford and Matunga, 1991). Because of the factors mentioned above EDR may not be appropriate process for Maori to use in some circumstances.

While Maori interviewed for this research did identify a number of problems associated with their participation in EDR, some Maori were also optimistic about the future use of these processes. They felt in general that the cultural understanding of planners had increased immeasurably to what it was in the past. The increasing cultural awareness of some planners can only enhance the effectiveness of consultation for all parties concerned. One way that was mentioned by a number of Maori interviewed for this research for improving consultation procedures was the employment of Maori planners.

POWER ISSUES

Amy (1990) has identified six conditions that promote the use of EDR. One is that a balance of power exists among the disputants. In environmental conflicts power typically rests in the hands of the developer. Developers normally have more financial and technical resources at their disposal than community and neighbourhood groups.

It is recognised, however, that there are different forms of power such as the power that environmentalists engender through emotional appeals to the local community (Sands, 1993). The imbalances of power that often exist in environmental conflict were a major issue for the environmentalists who were interviewed in this research.

In the legal system they felt financially and technically powerless. It was mentioned previously that the legal system is a public forum, hence environmentalists can be boosted through emotional appeals to the community and media. In fact because of the win-lose nature of the legal system, environmentalists stand to benefit through the setting of legal precedent. Concern was expressed by environmentalists over the way EDR had been implemented under the RMA 1991.

Because of the way EDR has been implemented under the RMA 1991, it can be seen as an adjunct to the formal planning process. The EDR provisions s99, s267, and s268 are part of the formal statutory framework. Because of this, EDR was seen by some of the environmentalists interviewed for this research as an added burden. Most

environmentalists and ad-hoc community groups are not paid and have limited financial and technical resources. If these groups have to commit resources to pre-hearing meetings etc, the time and money available for the formal process may be compromised. This concern was also expressed in the interviews with Maori.

In the interviews I suggested that environmental legal aid may be a means for redressing power imbalances. Not surprisingly Maori and environmentalists were positive about this idea. However some people were cynical, because they felt that the idea had been put forward for some time, but nothing had developed from it.

Within the RMA 1991 provision is made for the granting of funds. Section 26 states that the Minister may make grants and loans available to achieve the purpose of the act. During the course of this research I became aware of at least one case where a community group had applied to the Ministry for the Environment under this section and had received some monies to participate in a negotiated forum.

TIME FRAMES

Both the environmentalists and the developers considered that the statutory time frames put in place by the RMA 1991 were too restrictive. For instance, there are only 25 working days between a pre-hearing meeting and a local authority hearing. Restrictive time frames may place undue pressure on people who are participating in a negotiation process.

The Resource Management Amendment Act 1993 addresses this problem for restricted coastal permits. In Section ► 22

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25 (5A) (b) (4) it states that a consent authority "may extend the period within which any person must do something in connection with the application for such a period as the authority thinks fit". The Amendment Act does not however extend this provision to other resource consents. For resource consents other than restricted coastal permits the provisions of s37 are still valid which state that the "extension of a time period shall not have the effect of more than doubling the maximum time period specified in the Act". EDR is therefore still perceived under the Amendment Act as an adjunct to the formal resource consent process, and will in the future still be restricted by statutory time frames.

FORMAL MEETINGS

Representatives of all three groups of people who were interviewed for this research mentioned that the pre-hearing meetings in which they had participated had been organised too formally. Interviewees described pre-hearing meetings which had used procedures and settings similar to hearings, with questions being directed through a chairperson, and with set times for speaking. The RMA 1991 clearly states in s.99 (1) that pre-hearing meetings are for the use of informal processes, such as "clarifying, mediating or facilitating resolution of environmental disputes". One of the reasons why formal procedures are being used to administer what is supposed to be an informal process is that planners are used to working within the formal system of hearings and appeals (Sands, 1993). This raises the question of whether planners should be mediators.

PLANNERS AS MEDIATORS?

Concern was expressed in the interviews over the role of the planner as the mediator. Interviewees felt that planners did not necessarily have the skills to be mediators or facilitators of pre-hearing meetings. They felt that planners required education or retraining to act effectively in this forum.

They also felt that traditional planning thinking which imposes scientific and engineering solutions onto human centred problems is not appropriate for mediation. This concern was also expressed by the developers. A more holistic approach to planning is required that is not restricted by boundaries either real or imagined.

A further concern that these groups had with accepting planners as mediators is that in some circumstances planners may not be perceived as being neutral. Essentially a mediator is an impartial outsider who aids the parties towards agreement (Raiffa, 1982). A planner employed by a local

authority may not be seen in this way, because they may be perceived to be representing their council's agenda. The planners who were interviewed for this research also expressed a similar concern.

Some of the developers and Maori who were interviewed expressed doubt about accepting a mediator, whether the person was a planner or not.

BETTER DECISIONS

Some interviewees were sceptical whether EDR would produce better decisions than the legal system. Environmentalists in particular were concerned that agreements might be reached using EDR procedures that may suit the parties involved, but could be negative for the environment and/or future generations.

Environmentalists and developers, however, were reasonably optimistic about the effect that EDR could have on small or minor disputes, for instance, disagreements between neighbours over the height of boundary fences on adjoining properties.

Environmentalists strongly expressed the opinion that they would not negotiate with multinationals, because there would not be a balance of power between the disputing parties and they would not want to be seen to be working with them. This opinion was also expressed by the developers, as they felt that some groups did not want to be seen as "giving in" to large corporations such as multinationals.

CONCLUSIONS

In this research it was found that Maori, environmentalists and developers were sceptical about EDR and the effects it might have on the planning process.

If some parties do not agree to participate, because for instance they feel financially and technically disadvantaged or lack commitment to the process, then the implementation of any negotiated agreement could be affected.

The RMA 1991 provides new opportunities for planners and other groups to be involved in alternative decision-making. EDR provides this opportunity. Whether or not planners and other participants in the planning process adopt this opportunity is another question. The future effectiveness of EDR will then be dependent on the training, education, experience and commitment of planners and other participants in the planning process to the use of this process in resolving environmental conflict.

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