Conflict Overview

The Department of Community Affairs reviews approximately six hundred amendment packages from local governments annually. The amendments are initially sent to the Department and the reviewing agencies as proposed amendments. The Department, in coordination with other state, regional, and federal agencies, review the amendments and determine whether they meet the statutory requirements. If they meet the requirements the Department responds with a letter to that effect. If the amendment does not meet the statutory requirements the Department notifies the local government and includes an Objections, Recommendations and Comments Report. By its very nature and title the response can generate conflict. The reasons for this conflict can include a lack of data analysis, a difference of interpretation of data and analysis, a misunderstanding of the purpose of the amendment or the objection, a difference of interpretation of statutory requirements, a need to achieve the result of the amendment but a lack of knowledge of how to achieve it within the boundaries of the statutory requirements, or in some extreme cases a wanton disregard for the statutory requirements.

Some of these issues can be resolved through staff communication during the review of the amendment. However, there are sometimes circumstances within which there is not enough time or resources within the review timeframe to address the objection.

After the Department has issued its report the local government has 60 days to adopt the comprehensive plan amendment. Within the 60 days the Department, depending on the individual local government or the reviewing team’s initiative discuss the report with the local government. This is the normal occurrence though there is no formal requirement or procedure for this to occur at this point in the review process. If the Department management determines that there is an extraordinary issue either based on the size or character of the amendment or the character of the objection then direction may be given to staff to initiate a discussion of the amendment and the report. These discussions may occur by telephone, or through a meeting depending on schedules and financial resources as well as the character of the amendment and the objection. In most cases this practice is successful inasmuch as the Department does not ultimately find a great number of amendments out of compliance with the statutory requirements once they are adopted. However, sometimes the issues are not necessarily resolved to the satisfaction of all the parties resulting in animosity which can later appear in changes to the statute that relieve the Department of authority in certain areas of implementing growth management or a perception of incompetence or mistrust that sometimes accompanies animosity.
Once the amendment is adopted is sent to the Department and reviewing agencies. The Department has 45 days to determine, based on the earlier objections, whether the amendment is in compliance with the requirements of Chapter 163, F.S. and Rule 9J-5, F.A.C. If the Department determines that the amendment is out of compliance or the Department’s finding is challenged by an affected party, the case is referred to the Department of Administrative Hearing. After a hearing the hearing officer will issue a recommended order. Either the Department or the Administration Commission will then issue a Final Order.

Statutory Requirements for Mediation

Section 163.3184(10)(c), Florida Statutes, states, in part, that if the Department finds an amendment not in compliance, as described above, prior to an administrative hearing the state land planning agency shall afford an opportunity to mediate or otherwise resolve the dispute. If a party to the proceeding requests mediation or other alternative dispute resolution, the hearing may not be held until the state land planning agency advises the administrative law judge in writing of the results of the mediation or other alternative dispute resolution. The costs of the mediation or other alternative dispute resolution shall be borne equally by all of the parties to the proceedings.

Section 163.3189(3)(a), Florida Statutes, also allows for mediation if the Department finds an amendment in compliance and the determination is challenged by an affected party. Section 163.3189(3)(a), Florida Statutes, states, in part, that after the Department has issued its notice of intent and the matter has been forwarded to the Division of Administrative Hearings, the local government proposing the amendment may demand formal mediations or the local government proposing the amendment may demand formal mediation or the local government proposing the amendment or an affected person who is a party to the proceeding may demand informal mediation or expeditious resolution of the amendment proceedings. However, this process would not result in a delay of the administrative hearing process without mutual agreement by all parties.

Dispute Resolution Process

The above statute does not elaborate on the guidelines or process for the mediation. The following dispute resolution procedure is for this particular situation when mediation is specifically required if requested. The process is divided into four parts: 1) pre-mediation preparation; mediation coordination; the agreement; and implementation of the agreement. The timeframes expressed in this process may need to be adjusted based on the time allowed under each of the above statutory scenarios.

Pre-mediation

The mediation may be initiated by the following parties:
   1) The approving local government
   2) The challenging party
   3) Any formal intervenors
The statute does not specifically state that the Department can request and compel the other parties to take part in mediation. However, the Department can request mediation but the mediation can only go forward if the other parties are in agreement on the process. It should also be noted that mediation can only be successful if all parties are seeking agreement. Therefore, even though the Department may in some cases be compelled to undertake mediation it must be understood that the mediation has to be approached with the frame of mind that the Department wants to reach agreement (which is usually the case). In most cases the mediation will be requested within a week or two of the action that initiates the case (finding of not in compliance or challenge by affected party being filed). However, the mediation may be requested up to the time of the hearing or any time after. The degree that the Department is legally compelled to participate in the mediation changes though after the hearing has begun and it is no longer compelled to participate in the mediation although in most cases it is unlikely the Department would turn down a request for mediation at any point in the litigation process.

After the mediation process is agreed upon as an acceptable way to attempt to resolve the conflict the next step will be to choose a contact/spokesperson for the Department that would act as the representative for the Department in the mediation and would be the liason between the Department and the other party’s representative and the mediator as well as the Department media contact (as coordinated with the public affairs office). Given the legal nature of these proceedings in most cases this would be one of the attorneys from the General Counsel’s office. Depending on the implications of the case upper management may want to directly participate. This decision would be made at the Division Director level or higher if necessary.

The parties will need to agree upon a mediator. This should occur quickly, within approximately a week from the process being agreed to. Resources for mediators can include:

- Local governments (free)
- Department of Community Affairs staff not involved in the review of the amendment (free)
- Other state agencies (free)
- Volunteer (free)
- Conflict Resolution Consortium (paid)
- Professional facilitator (paid)
- Regional Planning Councils (paid/free depending on the situation and time commitment)

The criteria for considering a mediator should be someone who is:
- neutral
- knowledgable of conflict resolution methods
- able to commit for entire mediation process
- affordable to all parties
- competent/ethical
The Department, at a minimum, should expect the facilitator to be responsible for:

- Arranging an agreed upon adequate meeting site (should be held within the local government jurisdiction to allow for public observation)
- Scheduling a mutually agreed upon time for the meeting
- Preparing a resolution process plan agreed upon by all of the parties
- Preparing an agenda (mutually agreed upon by the parties in concept ahead of time)
- Coordinating the distribution of materials before the meeting including
  - Data
  - Rules (as mutually agreed upon ahead of time if possible)
- Conducting the meeting
- Coordinating any follow through from the meeting

The Department should suggest that the party initiating the mediation provide five names for mediators. If the other parties cannot agree on an individual from that list then they may counter offer with five names. If the initiating party does not agree to any of those individuals they may select another person and that will be the mediator as long as it is not one of the individuals originally proposed and dismissed by the other parties. The period to propose or accept should not take more than 24 hours. The Department’s representative will have the authority to propose or accept names for the Department and may seek the input Department personnel. This entire process should not take more than two to three working days.

Once a mediator is selected it will be their responsibility to develop and propose a resolution process plan, develop and propose rules for the process and coordinate a mutually acceptable place and time for the mediation to occur. This should take no more than a week after an agreement is entered into with the mediator. If the complexity of the situation or availability of resources for interviews or data requires additional time the mediator may request the time from all parties. The Department’s representative will coordinate scheduling any interviews with Department personnel and will be responsible for determining acceptance of the resolution process plan. The scheduling of the mediation meeting should occur within a week to two weeks of agreement on a resolution process plan. It should also be expected that there will be a need for more than one meeting with all of the parties involved depending on the complexity of the issue and the divergence of interests.

Once a resolution plan has been agreed upon, the Department representative should meet within a three days with appropriate personnel from the Department including:

- The reviewing planner
- The reviewing Regional Planning Administrator
- The Bureau Chief
- The Division Director (if available)
- The Department’s attorney
It will be the responsibility of the representative for the Department to conduct the meeting. Topics and outcomes for the meeting should be identified in an agenda and should include at a minimum:

- Agreement on the interests and needs that have to be addressed in the mediation
- Agreement on data resources and on any experts needed for the mediation
- Agreement on some alternative solutions to address the interests and needs
- Agreement on the decision maker and whether they will attend the mediation or be available within one working day after sessions to make the necessary decisions
- Agreement on what is the best alternative to a negotiated agreement
- Agreement on a trip wire (if the mediation is heading toward a certain solution the representative will meet with the above staff to determine whether to continue the mediation process)

Mediation

During the mediation process the Department representative will participate. The reviewing planner and any other experts identified in the earlier internal meeting will provide technical assistance at the mediation.

After a mediation session there may be a need to collect additional data, develop alternative solutions or agree upon a proposed resolution. It is the responsibility of the Department’s representative to coordinate the necessary internal meetings to complete the necessary task(s). The representative should either through internal e-mail or meeting provide an update on the occurrences at the mediations. The briefing may include insights on the other parties and the perceived direction they are taking, or points of the conflict that the parties have agreed upon and are awaiting the decision makers to approve. The reviewing planner and the other identified experts may be designated with data collection and development of alternative solutions. It will be the responsibility of the representative to present any proposed resolutions and any summaries of the events at the mediation to Department staff at internal meetings. The timeframes for when these tasks have to be completed would be agreed upon at the mediation. The representative would schedule the internal meeting to discuss the above outcomes as soon as possible. A second meeting may be necessary to coordinate the data or the alternative solutions. This process will be repeated as necessary between each mediation meeting with the other parties.

The representative may also want to meet internally because the direction of the mediation is getting close to the above described trip wire or if they feel that the mediation process is not working and changes are needed or the process needs to be abandoned and litigation needs to proceed. This will involve another look at the Department’s BATNA to determine whether abandoning mediation is the best direction to take the conflict.
Agreement

If the parties are in agreement with a solution then a formal agreement would be entered into. The mediator will not likely be needed for the drafting of the agreement or may not be needed after an initial draft agreement and details are being worked out between the parties. The agreement should address:

- Implementation
  - Who will be responsible for monitoring the compliance of the agreement
  - The precise steps each party is required to take to implement the agreement
  - The precise responsibilities (which party is responsible for which action)
  - The precise timeframes in which the actions will be carried out
- A renegotiation clause in case one of the parties is unable to implement part of the agreed upon solution
- A violations resolution procedure

It will be the responsibility of the representative to coordinate the Department’s actions to implement the agreement.

Alternative opportunities for mediation within the review process

There are other opportunities beyond the statutorily required ones discussed above where a structured conflict resolution process with a neutral party conducting the process would foster a better system for the review and determination of consistency. Mediators and facilitators may be selected from volunteer or paid resources depending on the finances of the parties involved (see above list)

Benefits of the conflict resolution process

The conflict resolution process can provide the following benefits at different stages of the comprehensive plan review process:

- assist in clarifying issues further for the concerned parties.
- foster mutual acceptance of resolutions avoiding some animosity.
- avoid costly litigation further in the process that impacts all of the parties involved
- develop a wider selection of solutions that may better serve a community by involving more “experts”
- avoid historical animosity between the involved parties
Requests for facilitation

- The local government proposing the amendment
- The applicant proposing the amendment
- Reviewing Agencies
- The Department of Community Affairs
- Affected parties (the public) who can identify possible impacts to state resources or facilities

Opportunities for Mediation

- Prior to the proposed amendment being sent to the Department and reviewing agencies for formal review
- After submittal of the proposed amendment but before the Department issues its objections, recommendations, and comments report
- After the Department has issued its objections, recommendations and comments report but before the local government adopts the proposed amendment
- After the local government adopts the amendment but before the Department makes its compliance determination

In most cases the local governments or the applicants would initiate the process since the Department is usually in a reactive posture to actions initiated by the local government. However, the further along in the process the amendment is the more opportunity for the Department to initiate the mediation.

Scenarios warranting early mediation

- Text amendments
- EAR based amendments
- Future Land Use Map amendments which
  o Involve large acreage that
    ▪ Substantially increases density or intensity
    ▪ The Character of the site includes state resources
      • Wetlands
      • Listed species
    ▪ Amendment will potentially increase traffic on a Florida Intrastate Highway System
    ▪ Is located within the 100-year floodplain or the coastal high hazard area
    ▪ Adjacent to state owned property set aside for environmental protection
    ▪ Expansion of urban service areas
    ▪ Urban level of development outside urban service areas
    ▪ Amendment is associated with a development of regional impact
Facilitation

Facilitation may also be another alternative for avoiding conflict. This would have to occur early in the process before the amendment is proposed. Since the Department would not be aware of the amendment until informed by the local government, the process would in most cases have to be initiated by the local government. The facilitation would provide the opportunity for the exchange of information and input early on and the identification of potential conflicts that may occur later in the process if not addressed as part of the initial submittal.

The Public’s Role/Opportunity

All of the above scenarios for mediation and facilitation are open to the public to observe under the public meeting laws in Florida. The earlier opportunities for facilitation and mediation would perhaps lend themselves to public input as a balanced part of the process. The public’s interest is best represented by a spokesperson when there is an opportunity for participation.

Once the parties have entered into mediation after litigation has been initiated public input should not be taken at the mediation meetings. If one of the individual parties wants to take public input between meetings or before the process begins and then present it as their idea that would be acceptable. The law does not require notice of mediation meetings nor does it prohibit observation of the meeting by the public. However, the mediator or one of the parties may request that the public not insert itself into “caucuses” the parties may have among themselves or with the mediator.

It is not unusual for the ultimate agreements to need some type of hearing by a local board to approve some action. While the agreement is generally signed and it is anticipated that the board will implement it, there is the opportunity also for public input at that public hearing.