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Consensus-Building Mediation

Resolving Environmental And Public Policy Disputes

By Diane R. Smith

FOR MOST public policy and environmental disputes, attempting resolution through consensus-building mediation is the only reasonable approach. Mediation is facilitated negotiation, and it has become the first choice of business and government for difficult, highly charged and often complicated disputes. It is highly effective (85 percent success rate), confidential and cost-effective, and by far the most prudent course of action where serious public issues are concerned. And if it is unsuccessful, all other options for dispute resolution still remain.

Advantages of Mediation

Mediation allows parties to take numerous different or opposing points of a complicated network of interests into account, and allows government to deal with a wide range of interests and great diversity of constituents. It

also allows parties to deal collectively with the pervasive involvement of one or more layers of government as a party and/or a decision maker, and adjust collectively to changes if new parties emerge as the process of dis-

pute resolution continues. Mediation prevents or resolves expensive disputes and lawsuits, minimizes transaction costs and, because it relies on consensus building, allows parties to forge solutions they can live with and that will endure, despite widespread public implications and highly charged, controversial issues. Perhaps most importantly, it maximizes options for joint use and funding of mutually acceptable expert and dispute resolution resources, which promote confidence

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Post-Kyoto Program Changing U.S. Business

EPA ADMINISTRATOR Carol Browner and Energy Secretary Federico Peña have announced that three of the world's greatest landmark buildings, New York's World Trade Center and the Empire State Building and Chicago's Sears Tower, will be taking action under a new Clinton administration program to reduce energy consumption and cut the pollution that contributes to global warming. The initiative, called the Energy Star Buildings Program, creates voluntary partnerships with owners of commercial buildings nationwide to achieve energy savings. EPA, in an April 20 press release, reported that U.S. commercial buildings account for 19 percent of greenhouse gases through their use of energy, and, if all U.S. office buildings were to participate in the new program, energy consumption could be cut 30 percent, saving \$25 billion per year. Under the new program, being developed and managed jointly by EPA and DOE, commercial building owners and managers are volunteering to reduce wasted energy consumption through the use of more efficient products, which range from new lighting to improved heating and cooling systems. The EPA press release reports that the Kyoto conference, and unusual weather patterns caused by El Niño, have focused attention on the problem of climate change and underscored the consensus among scientists that the gradual heating of the earth from pollution can lead to increased infectious disease, decreased crop production, rising sea level and more severe incidents of storms and droughts. The Energy Star Buildings Program will combine efforts to address climate change while promoting economic growth and competitiveness, achieved through a \$6.3 billion package of tax cuts and R&D investments to spur clean energy technology and partnerships with industry and encourage cost-effective emissions reduction. Building owners who want to achieve Energy Star Building status will need to demonstrate energy excellence, typically in the upper 25 percent of energy efficiency. Once the designation of Energy Star Building is earned, the building owner can use it in self-promotion, increasing leasing and sale value. ■

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and cooperation.

Of all forms of dispute resolution, mediation has the least harmful effect on the parties' future relationships with each other and the highest likelihood of a lasting resolution because it is a consensus-building process.

Effective mediation of environmental and public policy disputes requires consensus building according to certain principles:

- The process must be voluntary, or the parties must at least have an unconditional right to withdraw at any time. A voluntary process creates incentives to cooperate and be reasonable. The ability of any party to withdraw is an incentive to inclusion of all interests and dedication of all parties' best efforts.

- The process of reaching a consensus must be inclusive, not exclusive. All parties with a significant interest should be involved, including those affected by the process or outcome or necessary to achieve a resolution and those who could undermine or sabotage the process.

- Recognize that there is no single answer, and that solutions must be designed to meet specific circum-

stances and needs.

- Flexibility must be a fundamental principle. It is not possible to anticipate everything, and the process of reaching a resolution must remain open, fair and equitable. "Equal opportunity" must be assured. All parties must have access to necessary information, and diverse values and interests must be accepted.

- The parties and the mediator must focus on fostering trust and openness to move participants beyond bargaining over positions to exploring underlying interests, needs, and, eventually, options. Trust depends on confidence in the convener's integrity and competence, willingness to share information, ability to deal with setbacks, careful analysis, protection of important interests, clear and accurate statements, affirmation of success, control of rhetoric, and dedication of sufficient time for the process to work.

- Accountability must be built into any solution. Accountability builds understanding and commitment, minimizes surprises and fosters trust. Representatives of groups must account not only to their constituents, but also to the process. Representatives must also provide timely feedback and reporting. The parties and mediator must set and observe time limits. Clear and realistic deadlines marshal resources, focus efforts and mark progress.

- Implementation, support and follow-up must be built in.

Implementation of solutions to environmental and public policy disputes usually requires government buy-in and a way to deal with post-agreement problems. Implementation requires identification of who is responsible for what and when, a realistic timetable and funding for agreements reached and development of procedures for review, revision and renegotiation.

Making Consensus Building Work

The principles set out above are fundamental guideposts to be used and referred to frequently by the parties and the mediator, but making consensus building work also requires the following:

- **Motivation.** Since motivation arises most frequently as a result of a crisis, the high cost of the problem in terms of time and money, the potential unsatisfactory outcomes and the availability of options must be demonstrated and emphasized throughout the process.

- **'Giving good meeting.'** A mediator must have a clear mandate from the group, plan meetings thoroughly and establish a problem-solving setting. Participants must work to keep meetings on track.

- **The ability to identify issues.** A clear, visible agenda must be assembled before meetings, and checked out in advance with key participants. Are the items appropriate? Has enough

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time been allocated for each? Have any issues been forgotten? Are they in the right sequence? The agenda should be reviewed at the conclusion of the meeting, listing items added and items to be revisited.

- **Maintaining focus.** Keeping discussions focused, relevant, appropriately sequenced, and tactfully squelching digression into injustice and war stories.

Thinking About Mediation?

WHEN CONSIDERING starting or participating in a consensus-building mediation, parties should ask themselves:

- Is there a reason to participate?
- What are the likely consequences of failing to reach a resolution voluntarily?
- Can the subject of the dispute be addressed now?
- Can progress be made?
- Can major interests be identified?
- Are there representatives who can speak for such interests?
- Are there special incentives for reaching agreements?
- Can meaningful deadlines be established?
- Are decision makers willing to be involved?
- Can a viable process for reaching consensus be structured?
- Are there preliminary matters that need to be dealt with first?
- Are there parallel activities that must be considered?
- Is another decision making process feasible, or more applicable or desirable?

— Diane R. Smith

- **Communication.** Effective use of communication techniques, such as effective listening, reflecting, summarization and encouragement of participation, and maintenance of a positive tone.

- **Good record-keeping.** Recording major ideas and viewpoints, creating a group memory for guidance, refreshing recollections, and testing agreements are essential.

- **Managing activities between meetings.** This includes correcting misperceptions, communicating new information, testing new ideas, arranging for technical assistance and planning the next meeting.

- **Involving constituents' representatives.** Representatives must keep

constituents informed, and persons representing groups must be asked, "Will your group support that position?"

- **Handling intense emotions in public.** This requires contacting parties beforehand and telling them what to expect; listening to what they have to say in advance of the meeting; setting boundaries with agendas; emphasizing that the meeting's success is dependent on the parties' conduct; acknowledging feelings; avoiding sen-

sitive words; being willing to terminate the meeting if necessary; and interrupting personal attacks.

- **Overcoming resistance to negotiations.**

Resistance often stems from fear of exhibiting weakness; distrust so severe that good-faith agreements seem impossible; an attitude that a

party can win without negotiating; unfamiliarity with, and the perceived risk of, the process; availability of other options; and fear of increasing the visibility of the dispute. Resistance can be overcome by the strength of public opinion within and outside the group; explaining the advantages of negotiation; making the inevitable costs of other courses of action obvious; stressing the unpredictability of adversarial processes; and insisting on trying one more meeting.

- **Keeping people at the table.** Parties must be prepared to expect some degree of frustration. Gains must be made explicit; the group must be used for support and to keep negotiations alive; parties must become

aware of hidden obstacles, enforce ground rules, let troublesome people go and ask for replacements when necessary; and insist on trying one more meeting.

- **Breaking deadlocks.** This can be accomplished through bringing in outside experts; treating obstacles as routine problems; showing that "there is a new ball game"; reviewing past procedures and getting out of old roles and habits; getting the right people to come to the table; breaking the problem into smaller pieces; brainstorming new options; requesting alternative proposals; recording disagreements; asking parties to be more specific; and insisting on attempting one more meeting.

There are a number of tools to get parties into mediation, and, subsequently, to help reach lasting resolutions, aid implementation and follow-up and provide documentation of agreements. These tools include: cooperation and/or cost sharing agreements; agreements regarding confidentiality and future requirements; tolling agreements to get disputes out of the courts and preserve rights; non-interference agreements; "horse trading" among parties; combining resources and sharing experts and costs; use of land use restrictions or covenants; assuring evaluation of all potential options; various types of assurances, indemnities and releases; and enlisting the aid of regulatory or other governmental agencies and knowledgeable people. ■

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