

# PUBLIC MANAGEMENT BULLETIN

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Margaret S. Carlson, Editor

## USING A MEDIATOR IN PUBLIC DISPUTES

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### I. Introduction

Mediators and facilitators are becoming a regular part of the landscape of state and local government in North Carolina. Examples include:

- when a group comprising state and local government officials, advocates of low-income people, and foundation and religious representatives sought a way to work together on welfare reform information, a facilitator guided their planning session;
- in Greensboro, a facilitator offered impartial guidance to developers, environmentalists and planning department staff in drafting revisions to a tree protection ordinance, passed by the city council this summer;
- in Craven County, amid controversies related to large hog operations, a group of nine local residents including environmental advocates, agricultural interests, health professionals, government officials, landowners, and concerned citizens reached agreement on regulatory standards (adopted by the Craven County Commission in May 1998) with the help of a facilitator from the N.C. Cooperative Extension Service;
- at the federal level, the U.S. Environmental Protection Agency has a multi-million dollar contract to use mediators on waste cleanup controversies and facilitators to guide representatives of public, private and environmental interests on developing new regulations.

Who are these “neutral third parties”? How do elected officials and top government managers know when to call on them? How can you find a mediator for a tough public issue? This article offers a brief answer to these three questions, and describes the Institute of Government resources in the area of public dispute resolution.

## II. Handling public disputes: combining mediation and facilitation

When an impartial third party begins to help government officials, businesses and citizens involved in a public dispute, techniques of both mediation and facilitation are typically used. A public dispute mediator's role is to help people in a conflict—the disputants—negotiate their differences and see if they can reach an agreement. Mediation can be considered “assisted negotiation” where the mediator does not have a stake in the outcome of the conflict. The mediator guides disputants in sharing their views, arguments and information about the problem and helps summarize their divergent stories into issues that need to be addressed. Sometimes a mediator will meet privately with each disputant—called caucusing—to give them the opportunity to consider options without having to “think out loud” in front of the full group. However, like most mediators, the public dispute mediator should refrain from making any substantive suggestions and not urge one party to agree with another. Like court-based and neighborhood mediation, a public dispute mediator helps disputants address their underlying interests, generate and explore new potential solutions, and assess the trade-offs between the different options.

However, unlike many kinds of mediation where most of the negotiation is done in private, in a public dispute there are usually many parties who must address their differences in public settings. Like a facilitator helping a work group within a business or non-profit organization, a public mediator assists all members of a group to communicate with their constituents and to jointly determine the purpose of their meetings. The mediator helps disputants create and uphold ground rules for how they address their differences. A public dispute mediator has expertise in working with diverse groups to share information, work through conflict, and reach consensual decisions. In most cases of public policy conflict the mediator has to be attuned to the political and legal dimensions affecting the particular dispute.

One central part of being a public dispute mediator is to be, and **to be seen** as, impartial. Often someone from outside government or from outside the community may be needed to create the fact and perception of impartiality. On the other hand, a person from the community skilled in working with groups and seen as fair and balanced by everyone involved in the dispute can be effective.

For simplicity, in this article I refer to *mediators* of public disputes, which encompasses work that leans more toward facilitation, as well as mediation.

## III. When to use a mediator on public issues

Why would elected officials and government managers call a mediator to help them handle a public conflict? Doesn't bringing in another person make things more complicated? Mediation is not a panacea for resolving public disputes, but it is one tool to consider.

The general conditions where a mediator is more likely to be helpful are when:

- a. **The disputants are interdependent.** Public disputes often involve services, regulations, or other actions that affect relationships between citizens, political activists, business owners, non-profit organizations and government officials. The different resources, information and behavior of one group or part of government depends on other parts or groups. Even if different people share the same goal, how they decide the best way to reach the goal makes them dependent upon one another. Also, even if one individual or group is more powerful than others, if there is a relative balance of power—at least to impede any one group from getting its way easily—then mediation can be helpful.
- b. **There is a history of opposition or animosity.** A mediator unconnected from previous clashes or policies can help create an atmosphere of trust.
- c. **Elected officials or agency administrators are perceived to be biased.** Most city and county managers and numerous elected officials see themselves as problem-solvers and are often adept at encouraging compromises among citizens, business interests and others. However, even if they are skilled, in some situations government officials may not be perceived as even-handed due to previous policy or administrative decisions, or interpersonal friction. Designing and managing a negotiation or public involvement process that is seen as fair by a range of stakeholders can be an important advantage held by a mediator.
- d. **The disputants have uncertain or unattractive alternatives to a negotiated solution.** There must be some set of incentives to bring and keep people at the negotiating table. A third party without a stake in the outcome of the conflict can

offer a positive alternative to filing a lawsuit, appealing to the media, organizing a petition, disrupting a public hearing, or wearing down an opponent.

When these conditions are not present, a mediator is less likely to be helpful. In addition, if a decision must be reached quickly, mediation is not advisable. In situations of an immediate deadline, an upcoming election, or a budget crisis, direct negotiation and compromise is appropriate. However, one must be careful if it seems **every** public issue demands a quick fix, rather than taking the time needed to reach a durable solution.

It may be extremely difficult for opposing parties to reach an agreement when the dispute is about moral values that cannot be compromised. For example, it is unlikely that mediation could help pro-life and pro-choice advocates reach an agreement on the core issues of abortion. However, even in this conflict, mediators have worked with some pro-life and pro-choice advocates to increase their mutual understanding. The adversaries have also cautiously worked together on making adoption easier as one strategy that satisfies some of the goals of both sides.

For many disputes coming before elected boards and government workers, rhetoric about individual rights, property ownership, principles of taxation and claims of equity and social justice are common. There are often important values expressed through government decisions. Nonetheless, in our pluralistic political system these general values can often be translated into interests where mediation is feasible most of the time.

#### IV. Qualifications of Public Mediators

If you think a mediator might be helpful, where do you find one? And how do you know if he or she is qualified to do the work? The good news—and bad news—is that there is a very free market for locating **public dispute** resolution professionals. Divorce mediators have clear national standards for education and training, and the N.C. Dispute Resolution Commission certifies mediators for cases referred by Superior Court judges. However, public dispute mediation covers a wide range of substantive knowledge and problem-solving skills that defies a single professional background. Public mediators come from many backgrounds and professions: private mediation experience (e.g., attorneys and counselors), civic and political action (neighborhood and issue

advocates), as well as government experience (planners and public administrators).

Several of the 27 local dispute settlement centers in the state have worked on public disputes such as siting of a group home for people with AIDS, multi-agency collaboration on Smart Start, a merger of city and county school systems, and a controversial “rails to trails” issue.

Institute of Government faculty have taught facilitation skills to about 90 N.C. government officials—trainers, personnel directors, department heads—for use within their jurisdictions and to occasionally help neighboring counties and cities. Some of them have applied their facilitation skills in more public settings—between departments, or convening churches, businesses, citizens and government officials on welfare reform issues—and the Institute can make referrals, as well as provide direct service.

While there is no certification for someone to facilitate a public meeting or mediate between neighbors, developers and a town council, the Society of Professionals in Dispute Resolution recommends eight knowledge areas for public dispute mediators.

#### Knowledge Areas Recommended for Mediators of Complex Environmental and Public Disputes

1. Knowledge of the particular dispute resolution process being used
2. Knowledge of the range of available dispute resolution processes, so that where appropriate, cases can be referred to a more suitable process
3. Knowledge of the institutional context in which the disputes arose and will be settled
4. Knowledge of the process that will be used to resolve the dispute if no agreement is reached, such as judicial or administrative adjudication or arbitration
5. Where parties’ legal rights and remedies are involved, awareness of the legal standards that would be applicable if the case were taken to a court or other legal forum
6. Familiarity with relevant government rules and procedures
7. Familiarity with the substance of the issues in conflict
8. Familiarity with group dynamics that will arise in structuring and managing a productive negotiation

Society of Professionals in Dispute Resolution. (1992). **Competencies for Mediators of Complex Public Disputes**, pp. 5-6.

## Public Management

The Institute of Government serves as a consultant, broker and limited direct provider of public mediation services for N.C. officials. The Institute works with the Mediation Network of North Carolina, the Natural Resources Leadership Institute at N.C. State University, the N.C. Bar Association's Dispute Resolution Section and others to respond to requests for mediation of public disputes.

### Public Dispute Resolution Assistance for North Carolina Government Officials

The Institute of Government, with the financial support of the Love Foundation, offers assistance to elected and appointed officials in resolving public disputes. The Institute's services include:

- **Consulting on public disputes.** The Institute can help evaluate different options for addressing a public issue, including task forces, public meetings, mediation, facilitation and other techniques to assist parties in productively resolving their disputes.
- **Teaching.** The Institute offers short courses on managing conflict collaboratively, group facilitation and facilitative leadership. We will work with N.C. government agencies to provide or broker training in negotiation, mediation and other consensus-building techniques focused on inter-governmental or community disputes.
- **Locating mediators and facilitators.** The Institute can provide mediation and facilitation of public disputes to a limited extent. We can help secure services from local mediation centers, councils of government and other impartial providers.
- **Providing a clearinghouse of information.** The Institute can help locate relevant case studies, guidelines and models for successful negotiation, mediation and collaboration. The Institute will publish case summaries, role plays, directories and guidebooks, and compile information from government officials nationwide to assist North Carolina officials. We will research and evaluate various public conflict management methods.

In brief, the critical qualifications for public mediators are experience in assisting diverse groups address complex tasks or solve problems, combined with knowledge and experience relevant to the governmental and legal setting in which the dispute arises. Another factor to probe is a mediator's personal or professional background that might compromise his ability to be seen as unbiased. For

example, a person trained as a planner may be viewed by a neighborhood association as leaning toward a developer's interests. However, if that planner has worked for private businesses, neighborhood groups and/or government clients, his balanced experience could create the perception of even-handedness.

To date, the Institute has offered only one training for public dispute mediators. In May 1997, 25 experienced mediators and facilitators attended a one-day workshop on mediation of budget disputes between county commissions and school boards. A 1997 revision to G.S. 115C-431 provides for mediators to work on these very important, contentious, matters. In five cases across 1997 and 1998, mediation helped the county commissions and school boards reach an agreement [See reference #2].

## V. Case Study

To give a better view of public dispute mediation, the following case summarizes work performed by the Institute of Government on a zoning and land use dispute.

In September 1993, the Orange County Commissioners rezoned land including a dairy farm owned by the Hogan family to allow for residential development. Later that year, developers Dale Redfoot and Brad Young submitted site plans to the Carrboro Planning Department staff and advisory boards on Transportation and Planning, because the farm was within Carrboro's extra-territorial jurisdiction.

At public hearings in March 1994, the two advisory boards and residents adjoining the farmland criticized the development plan. Concerns were raised about traffic, impact on schools, and flood plain and wildlife protection. The Carrboro Planning Board voted unanimously to deny issuing a conditional use permit. The following month, in a second public hearing, one of the two advisory boards recommended approval of the permit with some revisions. The Carrboro Board of Aldermen voted 4-3 to reject the conditional use permit. Later that month, the Hogan family and developers Redfoot and Young jointly filed suit in Superior Court to overturn the decision of the Board of Aldermen. Alderman Jay Bryan and Planning Director Roy Williford contacted Roger Schwarz of the Institute of Government for assistance.

### Third Party Involvement<sup>1</sup>

Schwarz met separately with the Board of Aldermen, the Hogan family and developers, and their attorneys to agree on a process separate from the legal proceedings to seek a settlement. The parties agreed that the participants in the mediated process would include four aldermen, two Hogan family members, the developers, and the architect/engineering firm. Schwarz met twice with the group for a total of five hours to agree on the process and to select another impartial party, William Stagg, to work with Schwarz as a planner/renderer.

The two-day mediation occurred June 20 and 21, 1994. The Carrboro town manager and planning director were present as resource people. Thirty distinct interests were identified and Schwarz and Stagg helped the group find ways to meet their interests by redesigning the site plan.

### Outcome

The mediation resulted in a tentative agreement on a revised site plan, which provided for more open, common space by increasing the number of townhouses and decreasing the number of large lots for single-family homes. Further negotiation sessions, without Schwarz, through July and August were tense, with continuing contention over a bike path along the creek's greenway and access to the lake by non-residents of the development. An agreement was submitted to the board with some controversy. In mid-August the Board of Aldermen approved the conditional use permit and submitted it to the Superior Court as part of the settlement agreement. Twelve days later, the board voted unanimously to approve the revised development plan with bike path corridor protection, public access to the lake, more distinct neighborhoods, and redesign of a large common area.

The developers judged that the revised site plan would yield less income compared to their original design. However, they estimated that pursuing the permit through the courts would last two years and

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1. Schwarz considers his work in this case as facilitation, rather than mediation, based on his model of working with a group as described in **The Skilled Facilitator: Practical Wisdom for Developing Effective Groups** (San Francisco: Jossey-Bass, 1994). The "mediation" term is used in this section as an umbrella term, as described earlier in the article.

cost \$150,000. The mediation services and related costs were less than \$30,000.

### Lessons

1. A mediator can be of assistance on land use disputes even after a lawsuit is filed. However, it may have been more productive to involve a mediator earlier in the process.
2. Bringing together people with divergent views—landowners, neighbors, government officials, developers—in land use disputes can be difficult. While attention to legal rights is important, ongoing relationships among neighbors, developers, and governing boards can be addressed comprehensively through identifying **all** ideas and interests to reach a mutually satisfactory agreement.

## VI. Conclusion

Mediation of public disputes can be a useful supplement, and enhancement, to public hearings, inter-jurisdiction negotiation or other policymaking techniques on public issues. Use of mediators is growing, and the Institute of Government has strengthened its resources to serve state and local government officials in North Carolina.

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1. Society of Professionals in Dispute Resolution (January 1992). **Competencies for Mediators of Complex Public Disputes**.
2. Stephens, John B. and Matthew J. Michel "School Funding Disputes: Mediate, Don't Litigate," **School Law Bulletin** 29 (2), Spring 1998 pp. 29-42

## Public Management

This new bulletin from the Institute of Government discusses subjects of interest to public managers and others concerned with management, leadership, and organizational effectiveness. Edited by Margaret S. Carlson, future issues of the bulletin will include contributions from the following Institute of Government faculty members:

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