Alternative Dispute Resolution:

Navigating Special Legal Issues in Public Agency Disputes

Institute for Local Government

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About the Intergovernmental Conflict Resolution Program

Thanks to generous funding from the JAMS Foundation, the Institute for Local Government will be able to offer local officials more resources about using alternative dispute resolution techniques for avoiding and resolving disputes between public agencies in the future.

As part of that effort, we are collecting case studies involving alternative dispute resolution from around the country. Please contact the Institute at conflictresolution@ca-ilg.org or 916.658.8208 with any information that will help us help local officials in this area.

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Overview

Alternative dispute resolution (ADR) is a term that refers to a range of processes that can be used to resolve a conflict, dispute, or claim. Conflict assessment, fact-finding, conciliation, and mediation each are tools that add an experienced and impartial individual to help to change the path of a developing disagreement or resolve an existing conflict.[1]

Advantages of ADR for Public Agencies

Resolving disputes between public agencies using one of these alternative dispute resolution techniques offers both unique opportunities and unique challenges. Using ADR can avoid placing a public agency in an adversarial position with members of the community or a fellow public agency and can save taxpayers the resources it typically takes to litigate disputes. ADR can provide public officials with a mechanism to create their own mutually acceptable solution to a dispute which bridges the gap between their public positions. It builds community that conflict may otherwise tear down. For these reasons, the use of ADR to resolve disputes between public agencies is growing.[2]

The Unique Aspects of Public Agency Decision-making

There are, however, some challenges associated with using alternative dispute resolution which are specific to public agency disputes. Public agency decision-making, unlike that of private disputants, is subject to a number of laws designed to impart transparency and fairness to local agency decision-making. A functioning representative democracy must allow the public to maximize their input into the decision-making process and to hold their representative government accountable.

About this Pamphlet

The existence of these laws does not mean that ADR cannot be successfully used with public agency disputes. They just mean that those involved need to take steps to make sure that the process respects the special requirements that ensure that the informal and formal dispute resolution processes occur within the framework of traditional legislative decision-making. ADR must be used as an adjunct, not a replacement for, traditional public decision-making process.

[1] For more information about these approaches to resolving inter-agency conflict, please see *A Local Official's Guide to Intergovernmental Conflict Resolution* (www.ca-ilg.org/intergovtconflictresolution).

[2] Robert Zeinemann, *The Characterization of Public Sector Mediation*, 24 Environs Envtl. L & Policy Journal 49 (2001).

Examples of such laws include laws relating to:

- Delegation of legislative authority;
- Open meetings;
- Public records disclosure; and
- Public hearings requirements.

This pamphlet will explore each area.

Have we overlooked a kind of law? Do the laws in your state result in a different analysis? Please share your experiences with the Institute for Local Government's Intergovernmental Conflict Resolution Program at conflictresolution@ca-ilg.org. For more information on intergovernmental conflict resolution, please visit www.ca-ilg.org/intergovtconflictresolution.

Furthering Education for Mediators

The Institute for Local Government is exploring offering an educational program to help mediators understand the variety of factors that makes resolving disputes among public agencies different from private disputes. For information on the Institute's progress in this regard, please visit www.ca-ilg.org/intergovtconflictresolution.

Special Issue #1:
Limits on What Authority Can Be Delegated

Frequently when an organization sends a representative into an ADR process, the representative has authority to commit the organization to the resolution of the dispute that results. This will not be the case in an ADR process involving public agencies.

Why? City councils and boards of supervisors typically exercise legislative authority when they make decisions. The power to make legislative decisions is in the nature of a public trust. Such power may not be exercised by others in the absence of express statutory authorization.

A legislative body may not delegate the power to establish the rule or standard itself.[3] Contrast this situation with one in which a local legislative body delegates the power to determine whether the facts of a particular case bring it within an established standard or rule.

[3] *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22 (1976); *Kugler v. Yocum*, 69 Cal. 2d 371 (1968).

Special Issue #2:
Balancing Confidentiality with Governmental Transparency Requirements

Most ADR processes occur in a context of confidentiality. Because of governmental transparency requirements, ADR processes involving public agencies will involve less than a quorum of decision-makers.

Nearly every state has open meeting laws.[4] These laws typically require that public agency decision-making occur in open and publicized meetings where the public can both observe and participate in the decision-making process by offering their input.[5] The theory underlying such laws is that the people have a right of access to information concerning the conduct of the people's business.[6]

The challenge is, of course, it's difficult to work out disagreements in public. The public setting neither encourages a frank discussion of the issues nor rewards innovative solutions. Public settings can create a platform for making ill-advised or inadvertent comments that can add fuel to disputes. Outside the public setting, public officials may have the opportunity to more easily identify their common interests and to talk with each other rather than at each other.

This is one of the reasons that confidentiality is an essential component of an effective mediation experience. The notion is that such confidentiality is essential to effective mediation because it promotes a candid and informal exchange regarding events in the past and the possibilities for the future.[7]

Transparency requirements mean that a governing body is not likely to be able to send a quorum of its members to participate in an ADR process. Typically, when a conversation occurs among a quorum of a decision-making body, those conversations need to occur in an open and publicized meeting.[8]

Another issue to be alert to is that individuals who will participate in the mediation process should not comprise a standing committee of the larger decision-making body. In some states, such committees are also subject to the open meeting requirements.[9]

> Note that the transparency laws may allow discussion of an agreement which settles the dispute in closed session under open meeting law exceptions relating to the resolution of litigation.[10]

[4] *See, for example,* Ann Taylor Schwing, *Open Meeting Laws 2d: The Complete Open Meeting Law Reference* (2006).
[5] *See, for example,* California Government Code § 54953(a) ("All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.").
[6] *See, for example,* California Constitution art. 1, § 3(b)(1) ("The people have a right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.").
[7] *Foxgate Homeowners Association, Inc. v. Bramalea Cal., Inc.,* 26 Cal. 4th 1, 14 (2001).
[8] California Government Code § 54952(b).
[9] Note, for example, that California Government Code Section 66032(b) provides that mediations involving less than a quorum of a legislative body conducted pursuant to the chapter providing for mediation of land use disputes are not considered meetings of a legislative body for purposes of the Brown Act.
[10] *See, for example,* California Government Code § 54956.9.

Practice Tip: Consider Adopting a Mediation Resolution

How can public agencies balance transparency and make effective use of ADR processes?

The first step is to be clear about the process that will be used to balance both the utility of frank discussion and the importance of decision-making transparency.

In some cases it might be helpful to adopt a resolution generally establishing the framework for the ADR process and demonstrating that decision-makers respect the public's right to be involved in the public's business.

In contrast to traditional decision-making, informal and formal dispute resolution processes are effective because they are voluntary, informal, and flexible. Therefore, a mediation resolution should not be overly prescriptive or procedurally burdensome. Flexibility in carrying out these processes is necessary for success. Designing the details process should be left to the participants and the conflict resolution professional.

The resolution can include the following information:

- The process for selecting a conflict resolution professional
- A brief description of the issue that will be the subject of the ADR
- The elected and appointed officials who will participate in the process[11]
- The timing of the ADR
- A requirement that the people participating in the process agree at the close of each session how to respond to inquiries from the media
- A statement that any agreement or understanding reached in ADR sessions is tentative and preliminary. No agreement or settlement will be reached without first receiving public input and full review by the legislative body.

In other cases, announcing the dispute and the plans to bring in a conflict resolution professional will hurt the efforts to resolve the dispute more than it will help. This is particularly true in the early stages of a dispute when an informal process is best suited for resolving the dispute.

A sample resolution is available on page10 and also at www.ca-ilg.org/mediationresolution.

[11] Less than a quorum of the legislative body should be appointed to participate in the process in order to allow the ADR process to be conducted confidentially.

Special Issue #3:
Public Records Disclosure Requirements

Public officials contemplating ADR may be concerned that records produced for those processes will be subject to disclosure and such disclosure could hurt the agency's position in litigation.

Many states also have "freedom of information" laws that require disclosure of public documents upon request. For example, California's Public Records Act provides that "public records" are open to inspection at all times during the office hours of the local agency and every person has a right to inspect any public record except as specifically provided by statute.[12]

It's important to keep in mind that typically records disclosure requirements have exceptions. Two exemptions to look for that are relevant to mediation in general and mediation among public agencies in particular are:

1. Evidence Code exemptions
2. Exemptions relating to disclosure to other agency officials.

These two exceptions can protect documents prepared for ADR processes from harming the public's interests by being subject to disclosure.

Evidence Code Exemptions

For example, California law says that no evidence of anything said for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery.[13] Disclosure of the evidence cannot be compelled in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding. The same protection applies for writings prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation.[14]

What does it mean for a writing to be prepared "for the purpose of" the mediation? One state appellate court case addressed this issue in the negative by noting that the privilege created for such documents does not extend to a writing that was used or introduced in a mediation but was not "prepared for the purpose of, in the course of, or pursuant to, a mediation."[15]

The court did not, however, address the important question of how to determine when materials are prepared for mediation. One commentator suggests that the privilege should apply to evidence and items that were prepared for use

[12] California Government Code § 6253.

[13] *See, for example*, California Evidence Code § 1119(a). A "mediation consultation" is a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining a mediator. California Evidence Code § 1115(c). *See also* California Government Code § 6254 ("Nothing in this chapter shall be construed to require disclosure of records that are...exempted or prohibited pursuant to...state law...."). *See also Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008) (upholding confidentiality of mediation communications and finding that mediation privilege may be waived only by express agreement under mediation confidentiality statutes).

[14] *See, for example*, California Evidence Code § 1119(b).

[15] *Rojas v. Superior Court*, 33 Cal. 4th 408 (2004).

Practice Tip: Preserving Confidentiality of Mediation Materials

During a mediation, it is advisable for the parties to identify those writings which are "prepared for" the mediation and, therefore, inadmissible in a subsequent court proceeding. This should greatly reduce the likelihood of a subsequent dispute over their admissibility.

solely at mediation and that the party seeking to have the mediation evidence excluded from trial should have the burden of proving that the evidence was prepared solely for mediation.[16]

Further, there should be a rebuttable presumption that the evidence was prepared not just for mediation but for possible use in litigation as well. A contract between the parties that describes which items were prepared for mediation could overcome this presumption.[17]

Disclosure to Agency Officials

Some public records disclosure laws have exceptions for documents disclosed to other public agencies. For example, California's open records law provides that a public agency may disclose a document that is not otherwise subject to disclosure to another public agency if the agency agrees to treat the document as confidential.[18] The section provides a means for public agencies to share privileged materials without waiving the privilege.[19]

This is important for mediation because it means documents that are not subject to disclosure do not lose their status through the process of mediating with other local officials.

[16] Laura Stoll, *"We Decline to Address" Resolving the Unanswered Questions Left By Rojas v. Superior Court to Encourage Mediation and Prevent the Improper Shielding of Evidence*, 53 UCLA L.Rev. 1549 (2006).
[17] *Id.*
[18] *See, for example*, California Government Code § 6254.5(e) ("...whenever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in section 6254....This section, however, shall not apply to disclosures...(c) within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes...(e) made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.").
[19] *County of Los Angeles v. Superior Court*, 130 Cal. App. 4th 1099 (2005).

Special Issue #4:

Public Hearing Requirements: Their Impact on What Can Be Agreed To

Depending on the nature of the dispute, a public agency may not be able to approve a matter without conducting a public hearing in which the public has a chance to weigh in on a particular decision. As with most public hearings, public officials are well-advised to keep an open mind until hearing all information presented at the hearing.

Land use issues can be the subject of a dispute between public agencies. Many land use actions – for example, general plan amendments, rezoning, subdivision maps– require a local agency to conduct a public hearing before making a final decision.

Even if public agencies can discuss resolution of disputes under litigation exceptions to open meeting laws,[20] at least one state appellate court has ruled this exemption does not empower a public agency to take actions that would otherwise require a public hearing. The case arose in the context of an agreement to rezone property as part of a non-publicly ratified settlement. The court concluded that such an action may not be taken without a public hearing and an opportunity for the public to be heard.[21]

The challenge then becomes how to have a truly fair public hearing. It's not okay to just go through the motions: a court has warned that the statements of individual officials or staff which make it appear a decision is a "done deal" won't pass muster.[22]

It's possible, therefore, that an agreement reached through an ADR process and approved by the legislative body will not settle all issues, since a decision on some issues might require a public hearing. Agreements can be made contingent on subsequent proceedings by the decision-making body.

The bottom line: be careful when crafting a mediation agreement or settlement to only agree to what a public agency can agree to without having a public hearing.

[20] *See, for example,* California Government Code § 54956.9.
[21] *Trancas Property Owners Association v. City of Malibu,* 138 Cal. App. 4th 172 (2006).
[22] *Save Tara v. City of West Hollywood,* 45 Cal. 4th 116 (2008).

Final Practice Tip: Choose a Conflict Resolution Professional Familiar with These Requirements

There are many different types of conflict resolution professionals with a variety of combinations of training and experience. In many states, mediators are not licensed nor are there any minimum standards that must be met to hold oneself out as a mediator.[23]

There are a number of factors to consider when choosing a conflict resolution professional. Some of the most significant include:

- Experience resolving disputes involving one or more public agencies
- Demonstrated understanding of the range of alternative dispute resolution processes
- Understanding of the political environment in which public officials operate
- Experience helping to assess alternatives, create options, and guide decision-making
- Demonstrated knowledge of governmental structures and processes
- Training and/or apprenticeship[24]

California's court rules[25] for court-ordered mediation may provide some helpful guidance even if they are not directly applicable to a voluntary mediation between two public agencies. For example, California's Rules of Court provide:

- A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination. This means that the parties must understand that the process requires a voluntary agreement of the parties and that any party may withdraw from the mediation at any time.
- A mediator must at all times comply with the law relating to confidentiality and must before the outset of the first mediation session provide the participants with a general explanation of the confidentiality of mediation proceedings.[26]
- A mediator must maintain impartiality toward all participants in the mediation process at all times. The mediator must withdraw if any party questions the mediator's ability to conduct the mediation impartially and is not satisfied with the mediator's response.

A mediator must conduct the mediation proceedings in a procedurally fair manner.

The Dispute Resolution Advisory Council in the Division of Consumer Services of the State of California Department of Consumer Affairs is a helpful source for mediator qualifications and guidelines.

[23] In the mid-1990's, legislation was introduced in the California Legislature that would have imposed licensing requirements. The legislation would have required a "certified mediator" to have had 25 hours of training, 33 hours of real practical experience and a personal assessment by a "mediator certifying organization." *See* SB 1428 (Russell) in 1996 and SB 873 (Russell) in 1995. This legislation did not pass.

[24] For additional information on selecting a mediator, please see the Institute for Local Government's *A Local Official's Guide to Intergovernmental Conflict Resolution* at www.ca-ilg.org/intergovtconflictresolution.

[25] California Rules of Court 3.853 through 3.857.

[26] California Evidence Code Section 1119(c) requires that all communications, negotiations, or settlement discussions in a mediation or mediation consultation remain confidential. Neither a mediator nor anyone else may submit to a court or other adjudicative body, any report, assessment, evaluation, recommendation, or finding of any kind concerning a mediation conducted by the mediator unless all parties expressly agree otherwise. California Evidence Code § 1121.

Appendix

Resolution No. ___
A Resolution of the County of Peace
Initiating an Alternative Dispute Resolution Process

Whereas, the City of Harmony has announced its intention to process an application for residential and commercial development project called the "21st Century Community" in close proximity to the unincorporated area of the County of Peace; and

Whereas, the County of Peace is concerned that the development project will generate traffic and other impacts that will adversely affect residents and businesses in the County of Peace; and

Whereas, it may not be economically feasible for the County of Peace to mitigate these impacts while maintaining the level of service currently provided to County residents and businesses; and

Whereas, the County Board of Supervisors wishes to initiate a process with the City of Harmony to attempt to resolve the differences between the County of Peace and the City of Harmony in a manner that benefits the residents and businesses in both the County and the City; and

NOW, THEREFORE, the Board of Supervisors of the County of Peace does hereby resolve as follows:

Section One. The purpose of this Resolution is to initiate an alternative dispute resolution process with the City of Harmony to attempt to resolve the differences between the County and City regarding the residential and commercial development in close proximity to the jurisdictional boundaries of the County of Peace ("The 21st Century Community").

Section Two. The process initiated by this resolution will include the selection of an ad hoc committee of [agency body] which committee shall consist of less than a quorum of the body and shall not have a fixed meeting schedule. This ad hoc committee shall then meet with whomever is designated as an ad hoc committee of [other agency body]. It is anticipated that the first step in the process will be the joint selection a qualified conflict resolution professional. Qualifications include experience in resolving disputes between local government agencies; an understanding of how local governments operate; and a working knowledge of the laws pertaining to the meetings of a local government legislative body; the environmental review process; and the land use approval process.

Section Three. The meetings between two members of the City Council and two members of the Board of Supervisors are not considered to be meetings of the legislative body under the state's open meeting laws and will not be open to the public. It is anticipated that appointment of an ad hoc committee will maximize candid conversation and the frank exchange of ideas. Agreements reached in these meetings shall not be binding upon the Board of Supervisors. Any such agreements shall be brought back to the Board of Supervisors in a public meeting to allow the two participating Supervisors to present the agreements to the Board of Supervisors and to the public for their comments.

Section Four. Supervisors _____ and _____ are appointed to participate in the process initiated by this resolution as an ad hoc committee of the Board. Any Supervisors appointed to this ad hoc committee are authorized to speak on behalf of the Board of Supervisors.

Section Five. At the first meeting of the Board in [a date two months following the adoption of the resolution] the adhoc committee shall provide the Board with a status update on who was selected as the conflict resolution professional and the status of the process and when the process might be concluded.

Section Six. The County Administrator is authorized to do all things necessary and proper to implement this resolution.

PASSED and ADOPTED this _____ day of _____ 2009 by the following roll call vote:

Chair of the Board

Supervisor #1

Supervisor #2

Supervisor #3

Supervisor #4

ATTEST: Clerk of the Board

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About the Institute for Local Government

The Institute for Local Government is the nonprofit research affiliate of the League of California Cities and the California State Association of Counties. Its mission is to promote well-informed, ethical, inclusive, effective and responsive local government in California through innovative (state of the art) resources, tools and programs.

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- Climate Change
- Collaborative Governance Initiative
- Communities for Healthy Kids
- Intergovernmental Conflict Resolution
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