Consensus Strategies For Policymaking
Consent Of The Governed

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New Jersey's agenda for the 1990s is clear. The state has urgent needs in the areas of housing, the environment, education, health care, crime and delinquency, social welfare, and transportation, and the ways to finance them. The order of these priorities has shifted over time but the needs have persisted and intensified. New approaches are long overdue.

In order to develop and implement policy to address these, needs, we must find common ground, especially if we anticipate meeting the challenges raised in the preceding articles in the "Issues for the Nineties" series (see **NJR**, Sept. '89 to March '90). Our techniques for developing policy affect the quality of that policy, and its effectiveness. What we accomplish in tax and school reform, in improving the quality of social services and health care, in transportation, and in environmental protection and enhancement are measures, in part, of how effective our decision-making and dispute-resolution processes are.

Recent developments, ranging from local to global, suggest that there are ways to make decisions and resolve differences with respect to them that are less confrontational and adversarial, and subsequently less protracted and costly, than those of more traditional vintage. They include facilitation, mediation, and other processes that attempt to develop solutions to problems based on common interests and needs.

In the public domain, particularly, new dispute-resolution techniques that signal this shift in approach have been introduced in the last 10 years. The results are evident in the judicial system, in the extraordinary growth of community-based dispute-resolution centers, in the development of legislation stipulating that mediation and/or arbitration be used for handling disputes which arise as a result of that legislation, and in the increased interest in negotiation theory and practical training in skills that empower participants, facilitate decision-making and lead to more productive resolutions of conflict. Some of the more interesting and compelling developments indecision making and dispute resolution may hold particular promise for New Jersey and suggest opportunities for the state's policymakers at the community, court, executive and legislative levels.

Community Action: A New Direction

The disarmingly simple acronyms, "lulu" and "nimby," have become common parlance in recent years. The "locally unwanted land uses" and "not in my brickyard" syndromes

refer, of course, to land uses or facilities which are generally conceded to be necessary, but which no one wants in his community.

These unwelcome developments range from group homes, halfway houses, low-income, high-density housing, and shelters for the homeless, to prisons and temporary and permanent storage and treatment sites for hazardous and solid waste and contaminated soil. But the kind of adverse public response "lulu" and "nimby" describe can also be provoked by efforts by colleges and elementary schools to close their doors, by hospitals to cease operation or to focus solely on specific areas of care, or by public agencies to reduce services or close facilities altogether.

Community resistance, typically accompanied by the seemingly inevitable lawsuit, produces a stalemate that neither exhortations by mayors or governors, promises by agency officials, nor calls from other quarters for political courage and reasonable balance, can overcome. The conflict remains, for all intents and purposes, unresolved. What is society to do? How do we reconcile the community's needs with its apparent refusal to meet them? Part of the solution, clearly, lies within the community itself. And, in our judgment, a potent force for constructive community action on siting decisions, paradoxically, may be well-established, activist, community organizations that have - and this is the *sine qua non* - the wherewithal, the capacity, and the context in which to engage in negotiations to advance the public good.

Community organizations have a long history in this country, but they proliferated in the 1960s. These organizations have helped to develop their communities on a score of fronts, and they could now be called upon to accept another mission: helping to deal with local conflict. Credible and highly visible, they may serve to avert conflict, or de-escalate it by moving community strategies, where appropriate, from confrontation to constructive negotiation.

Experience throughout the country demonstrates the potential of such negotiation: Across the nation, community organizations have helped to determine the density of public and private housing and the height of buildings; they have designated units for senior citizens and for families whose homes have been destroyed by fire (thus providing opportunities for many residents to remain in their communities); they have set the period of years a trash transfer station is allowed to function, as well as the hours of its daily operation, the routes its trucks can travel, and the use (for community purposes) of the fees its operation generates. Community organizations have also helped to determine the uses of school buildings scheduled to close, creative uses that in some instances mix public and private purposes. These decisions have been reached through negotiations involving public agencies, private developers, and community organizations.

In many communities in New Jersey, siting controversies have reached crisis proportions. Approaches must be found to help communities engage constructively to meet their needs, not only with desired land uses, but also with unwanted but necessary facilities.

Much of the negative community posture we see in "lulu" and "nimby" controversies grows from fear, outrage, and resistance to change. But it also reflects the absence of a means for the community to exercise power responsibly, creatively, or constructively.

With training in conflict-resolution skills and negotiation techniques and support, community organizations can fill that void. They can provide communities with a way to say something other thin simply "no." They can, in some instances, serve as mediators or facilitators, assisting the negotiation process.

For the most part, however, community advocacy organizations, prepared for constructive negotiations, can become more effective in representing community needs and interests. They can become part of a now civic infrastructure that provides for greater individual and group participation in arenas where critical public decisions must be made.

Now Jersey's government, and private interests, would do well to work with community foundations and community organizations toward that end. The Governor's planning and policy advisers could pioneer on this front, for example, jointly with the departments of Environmental Protection, Community Affairs, Human Services, and Health, to encourage the use of mediation-assisted negotiation in siting controversies and to prepare community organizations for a constructive role in those negotiations. Certainly, siting controversies cross departmental lines, and fresh approaches are long overdue.

The Courts and Dispute Resolution

When differences become disputes, and disputes become claims and counter-claims, a lawsuit is born. Adjudication need not be the end of it, however, for the courts can provide other options for resolving disputes as well.

Increasingly, courts across the nation, whether by legislative mandate or court rule, are providing litigants and their lawyers with a range of alternatives to trial, ranging from mediation of child-custody and visitation disputes between divorcing spouses, small claims, minor commercial, and neighborhood disputes, to arbitration of claims below a certain monetary level (from the low end - $15,000 - New Jersey, up to $150,000 in Hawaii). In some instances, a variety of hybrid processes are offered for civil cases, those involving public and private interests, such as abbreviated "trials," sophisticated third-party-assisted negotiations, and assessment of the "value" of a case or claim by disinterested third-party neutrals.

The leadership of a state's highest court is vital in launching a comprehensive dispute-resolution program. Here in New Jersey, the Supreme Court has encouraged, financed, and evaluated programs in a fashion that places the state in the national forefront of dispute resolution.

Following recommendations of a task force it appointed, the state Supreme Court encouraged and supported a variety of mediation, arbitration, and settlement

demonstration programs in several counties. Researchers then evaluated the programs, and, finally, a second task force reviewed the evaluation results and made recommendations to the court with respect to statewide initiatives.

These final recommendations, presently being considered by the court if adopted, would make dispute resolution an integral part of the state judicial system, taking New Jersey into the 1990s with a variety of options to offer disputants that would expand access to and enhance the quality of justice.

Complex Issues and Public Policy Mediation

Innovative dispute resolution is being used with increasing frequency to supplement traditional decision-making processes at all levels of local, state, and federal government, as well as to complement adjudication in courts. Former adversaries have thus been able to resolve difficult, seemingly intractable disputes.

Through mediation, complex environmental and intergovernmental disputes have been settled. Agreements have been reached on such problematic public- policy issues as highway location, port development urban-renewal plans, and the siting of a nuclear-power generating plant.

At the federal level, for example, agencies are increasingly relying upon dispute-resolution techniques. The Environmental Protection Agency is exploring strategies for encouraging negotiated settlement of toxic waste "Super Fund" cases; the Department of Energy has indicated a willingness to use mediation in siting the first high-level nuclear waste repository; and the Federal Trade Commission is studying dispute-resolution techniques which might be used to handle product liability issues.

The states are developing capacities in this regard as well. In 1975, New Jersey became the first state to have an agency - the Department of the Public Advocate - to advocate and litigate public-interest issues. Ten years later, in 1985, New Jersey became the first state to create agency within the Department of the Public Advocate - the Center for Public Dispute Resolution - to mediate disputes over those same issues.

As with such agencies in four other states, the New Jersey office offers mediated negotiation, fact-finding, and other dispute-resolution services to courts, municipalities, counties, and state agencies when the issues in contention involve the public interest. In New Jersey, however, this capacity is under-utilized.

Nevertheless, an example of its potential is illustrated in a recent case in which a landmark federal housing lawsuit, concerning demolition of housing in Newark, was resolved with the assistance of a mediator.

Involved in the dispute were the Newark Housing Authority, the U.S. Attorney's Office, the Federal Department of Housing and Urban Development (HUD), a construction

company, the NAACP Legal Defense and Education Fund, the Newark City Council, and various others organized into an ad-hoc housing coalition advocacy group. The coalition's goal was to stop the demolition of existing housing until replacement housing could be constructed.

Even if the lawsuit had been won, the sole achievement would have been ft maintenance of admittedly obsolete public housing. The agreement that resulted from mediation, however, provides for the demolition of existing substandard housing and the construction of new housing in phases to preserve the number of units presently available.

HUD agreed to give Newark high priority for construction of the replacement housing and money -$100,000,000, which, given time constraints, might well have been lost if the litigation had been pursued through trial and appeals courts. As part of the agreement, too, HUD agreed to provide the city with an additional $2.3 million to renovate other apartments elsewhere in the city, and to evaluate the city's long-term need to rehabilitate public housing not already scheduled for demolition.

The Newark agreement reached beyond adversarial positions to meet the interests of all without sacrificing the rights of any. Through the creative development of options, the agreement enhanced public-policy interests and needs by securing a far better housing deal for the city's residents than anyone had anticipated at the onset of litigation.

Another example, initiated in the Massachusetts courts, also demonstrates the value of mediation: Eight families whose homes had been built on top of a former public dump that was used for toxic waste disposal sued the gas company that was deemed responsible for the dumping. With the assistance of a mediator assigned by the court, a settlement was reached.

It took six months to reach an agreement. The willingness of all the parties involved - private company, state, and local residents - to participate in mediation saved a significant amount of money and time, the parties believe, over what would have been involved had the issue progressed through the courts.

The mediator in the case believes mediation worked because the involved parties shared the available information concerning the site investigation, the assessment of risk, and evaluations of the health of the families. This base allowed them the greatest possible opportunities for reaching a resolution of the issues.

Consensus Building

State support can create a climate for similar initiatives at the local level. Two examples from California illustrate the potential of mediation.

The City of Menlo Park established a task force to develop recommendations regarding restrictions on additions to older homes. In the Bay Area, the rising price of real estate led

many people to enlarge homes they already owned, rather than move to larger homes, resulting in some extremely large homes in neighborhoods previously characterized by smaller homes.

Numerous residents complained about this encroachment on the character of their neighborhoods to city management and planning officials. The task force, including representatives from all neighborhoods, developed consensus recommendations on restrictions such as daylight planes and floor area ratios. Following a series of public hearings on the recommendations, they have proceeded through the city planning commission and the city council, without objection.

The second example comes from Ventura, where a political controversy developed between the regional sanitation district and the county health department concerning jurisdiction over solid-waste planning. In a series of negotiating sessions, representatives of the two county agencies hammered out a recommendation to establish a commission, with both county and city representatives, that would advise the county on solid-waste planning. All staff participants in the negotiations backed the plan and are presently working to gain political acceptance for it from both county and city governments. Had New Jersey's Liberty State Park Commission chosen to go the route Ventura followed, it might have saved the legal expenses of fighting lawsuits pro- testing the park's development (see "Private Money, Public Space," **NJR**, November 1989). In non-adversarial forums, the interests of contesting groups might have been considered and, at least in some instances, satisfied.

For issues affecting the environment - for reconciling economic development needs with environmental protection goals, for improving the quality of life now and in the future, as well as cleaning up past environmental mistakes - initiatives born of consensus-building will be essential in the years ahead.

Such an approach for dealing with sensitive environmental matters was used successfully in the management of PCBs in the Hudson Raritan Estuary and the New York Bight System. The dispute involved differing assessments of scientific data, and there was a long history of antagonism among the parties. Mediators from the New York Academy of Sciences helped participants to design a process by which the parties could negotiate from a single text, rather than trying to amalgamate independently produced, competing versions.

As a result, representatives from a diverse group of users and managers of the Bight reviewed available information, along with scientists from the Academy of Sciences, in a joint fact-finding effort. A final report, produced after five drafts, has been endorsed by IS organizations, including federal and state environmental agencies, port interests, fishermen, environmental groups, and waste water utility managers.

The strategic value of facilitating dialogue between scientists, agency policymakers, and citizens in order to build trust and bring relevant information to bear in a timely fashion is clear. The single-text negotiation method may hold promise for other complex

environmental issues, because it enables competing interest groups to arrive at a common under- standing of the problems and to forge constructive recommendations.

Regulatory Negotiation

Not only can New Jersey benefit from the national experience in resolving site-specific disputes, but also from the notable success of consensus approaches in the promulgation of regulations at both federal and state agency levels. "Regulatory negotiation' (reg-neg) is a process in which those who are likely to be affected by - and thus likely to contest or support - proposed regulations meet to attempt to draft them by consensus, generally prior to an agency's formal involvement.

When the parties involved in regulatory negotiation succeed in resolving differences and produce recommended regulations, they submit these proposed regulations for review by the governing

agency. If approved - and more often than not they are, given the diverse and comprehensive make-up of the group which developed them - the regulations are posted for the legally required notice and comment period.

Regulatory negotiation is not a substitute for formal rule-making, but it pre- cedes it and can serve to effectively and expeditiously implement legislation. Regulations have been negotiated in this way by federal agencies having jurisdiction over the environment, transportation, aviation, communication, and labor. Considering the high rate of litigation over proposed regulations (EPA estimates 80 percent of its regulations are contested) and the consequent delay in implementing legislation (7 to 10 years on the average), attempts to reach early consensus among contending parties is becoming a mark of “good government."

A few states, such as Massachusetts, Colorado, and New Mexico have turned to regulatory negotiation during the last several years as well, negotiating regulations governing nursing homes, health care, transportation, and economic development prior to the formal notice and comment process. In most instances, these regulations were approved with only minor alterations. Furthermore, to our knowledge, none of the regulations promulgated in this manner have been challenged in court - either by those directly affected parties or by public-interest advocacy groups.

Given the track record for regulatory negotiation, New Jersey might consider a move in this direction as well. The perennially contentious regulatory areas of new housing construction and health are Rely candidates for this approach. Traditional approaches have produced bureaucratic nightmares-, regulations are complicated, confusing, and often overlapping, and they are costly to all concerned, including the public. The shortage of affordable housing units, as well as the chronic problems in the financing and delivery of health care, underscore the need for new regulatory methods.

Legislative Initiatives

While Americans' penchant for litigation continues to be strong, a countervailing trend toward the development of new dispute-resolution initiatives is evident nationwide. Legislatures have enacted close to 100 laws providing for "dispute resolution," all within the last half-decade or so. These dispute-resolution statutes provide for mediation in such areas as farmer and lender disputes over loan defaults; hazardous waste facilities siting; child-custody and visitation disputes; conflicts over resource allocation; and homeowner and building contractor disputes.

Beyond issue-specific legislation, there have been legislative efforts to place mediation in a broader context. Minnesota, for example, has integrated mediation into the administrative hearing process. Other states have established state- wide commissions for the comprehensive use of dispute resolution, most recently in Arizona, Ohio, Oregon, and New Hampshire.

New York State has enacted comprehensive legislation to foster community justice programs for dealing with disputes among neighbors and family members; landlords and tenants, cases in which small amounts of money are at issue; and those involving minor criminal matters such as vandalism. The state provides guidance and partial financial support to initiate and, in some instances, to sustain these programs. There are now community or neighborhood justice programs in 32 states, although few have the scope of New York's.

Legislative committees have proposed new approaches in labor relations as well. (For example, California would require its public employment relations board, by law, to research, promote, and provide training in innovative techniques of labor/management cooperation and dispute avoidance on a voluntary basis to interested parties in its jurisdiction.)

Legislative committees have also begun to incorporate requirements for resolving disputes into proposed legislation in order to manage disputes that may arise in implementing the legislation - a so-called "dispute resolution impact statement" which provides for the mediation and/or arbitration of those disputes.

At the federal level, in May 1989, Senator Charles E. Grassley (R-lowa), introduced S.971, the Administrative Dispute Resolution Act, to authorize and encourage federal agencies to use mediation, conciliation, arbitration, and other techniques to promptly and informally resolve disputes. It provides that each agency examine alternative procedures for every kind of dispute, including controversies arising from adjudication, rule- making, enforcement, issuing permits, settling disputes, and litigation. It also requires review of contracts, grants, and other assistance agreements to authorize and encourage use of dispute resolution at all stages where disputes may arise.

New Jersey, in at least one instance, has already taken the statutory route to dispute resolution. The Council on Affordable Housing (COAH), which was established by

statute in 1985, provides for the mediation of disputes that arise between developers and municipalities in regard to affordable housing over the number, location, and density of "fair share" units.

In some states, legislatures have been employing consensus-building approaches even earlier in the process - in the development of the legislation itself. Unlike the traditional legislative process, the consensus-building process relies upon joint problem-solving with affected groups.

In Wisconsin, for example, beginning in the mid-1980s, nine legislative committees, comprised of legislators from both sides of the aisle, representatives from industry, environmental groups, and from executive agencies, produced major state laws on such controversial environmental issues as metallic mining reclamation, a motor vehicle inspection program, regulating stationary sources of air pollution, solid and hazardous waste disposal siting, and groundwater management.

According to members of the Wisconsin committees, these comprehensive bills would not have developed out of the traditional private negotiation processes between legislators and economic and other interest groups. The public nature of the consensus-building legislative process contributes to a better product, and to its ultimate legislative acceptance, in part because environmental and citizen representatives are able to participate directly. (The rate of passage for bills developed by this process exceeds 70 percent, compared to the usual passage rate in Wisconsin of one bill in four).

A pioneer of the Wisconsin approach, former Assemblywoman May Lou Munts, offers this assessment: "Much of our thinking about legislative leadership is about how to get and keep power, not about how to share it … There is, however, a different kind of excitement and reward for legislators who are part of a group process in which the resulting product is one that nobody believed could be developed."

And Wisconsin is not a fluke. In Washington, major improvements in that state's Environmental Policy Act (SEPA) were developed by a remarkably wide range of special-interest groups working together to reform the law in the public interest. The basic forum for this achievement was a commission established by the Legislature to review and reform the SEPA Act, which basically required that environmental values must be considered in all public decisions.

Almost everyone agreed that there were serious problems with the law - environmental-impact statements as big as telephone books, and may result in burdensome paperwork, needless duplication, inordinate delays, complicated rules, and unnecessary litigation - but no one knew how to solve them.

After two years of difficult, painstaking effort by an unlikely - and initially reluctant - coalition of environmentalists, real-estate developers, timber-industry representatives, and state, county, and city officials, a bill was developed, by consensus, and that bill became law by a Senate vote of 42 to 6 and a house vote of 85 to 13.

Landmark legislation on water quality in the state of Idaho was developed through assisted negotiation, and was approved overwhelmingly by the Legislature, bringing to a close a festering, divisive, 10-year-old debate over the process by which water is protected from non- point source pollution. This debate had caused deep political rifts in the state, pitting industry against conservation interests, and had threatened to take the important business of protecting water quality away from the state, to be assumed by a federal judge or by the Environmental Protection Agency.

The agreement on the Idaho legislation was facilitated by executive leader- ship. Governor Cecil Andrus vetoed legislation that
was industry-endorsed. At the same time, he persuaded the conservationist community to agree to stay the lawsuit they had filed in exchange for one more round of negotiations.

Andrus told both sides that he would provide third-party assistance, and he brought in professional mediators to facilitate the talks. Working groups were set up, and dialogue among the parties, in small and large groups, continued over several months. After much work - and a few close calls when the process almost came unraveled - agreement was reached.

According to Andrus, the agreement "marks the dawn of a new era of resource management in Idaho. The process that led to the agreement shows us what is possible when people and groups with widely diverse views and agendas commit to seeking a balanced, reasonable solution."

These examples suggest an approach for New Jersey which is applicable to a variety of problematic policy arm in addition to environmental matters. To Massachusetts, for example, a consensus effort produced legislation affecting nursing homes - a subject of vital interest to that state's aging population and the industry that profits from its needs.

The problem in Massachusetts centered on efforts to get the state Legislature to approve a policy requiring nursing homes to maintain and follow a sequential list of applicants, regardless of who was paying the bill. Advocates for the elderly supported a bill that would regulate nursing home admittance procedures; the nursing home industry regarded it as an unwarranted intrusion.

The state's office for public dispute resolution facilitated a series of meetings between advocates, agency staff, and industry representatives. As a result, legislation was developed that proved far more acceptable than any previous proposal, and was supported by a consortium of advocates for the elderly, legislative staff, and non-profit nursing homes, Objections raised subsequently by the public health department, and the rate setting commission, have been met, and the nursing home access bill now being considered by the Massachusetts Legislature is mainly drawn from the agreement worked out during the mediation sessions.

Dispute resolution has much to offer a legislature, whether for site- or issue- specific legislation, for comprehensive approaches, or for incipient legislation. Legislative initiative can also influence how other institutions-schools, organizations, hospitals - handle disputes by creating a climate, or providing a framework, for the use of nonconfrontational approaches. (An analogy to the historic labor-relations legislation of the 1930s and 40s, which legitimized, and created a framework for, collective bargaining, comes immediately to mind.) Unquestionably, the New Jersey Legislature could add immeasurably to the quality of life in the state by placing dispute resolution squarely on its agenda.

What needs to happen if negotiation, mediation, and other consensus-based approaches are to be used to develop and implement law and policy in New Jersey? Simply stated, we need to create a receptive climate, one that is predicated upon - and generates - an informed, active, and participating citizenry.

We need to expose both the executive and legislative branches of government to the potential that these approaches can offer in addressing critical state issues, such as housing, health care, and education, We need to advance reform in the courts, to provide access to options other than traditional adjudication, for resolving disputes. And we need to create frame- works which encourage and support negotiation and mediation, so that public institutions and private ones, as well as community-based organizations, will have a capacity to resolve disputes in less confrontational ways.

Leadership from the state's highest elective office can advance this end significantly. All signals suggest that New Jersey's newest Governor may want to do just that.

Jim Florio has said that he wants "to set goals and try to get people together to achieve those goals," and that in getting government to work, he will "challenge traditional assumptions that have been the basis for setting policy for decades." His work is cut out for him to be sure. There is sufficient experience to suggest, however, that joint problem-solving approaches can work.

Democracy was once defined as a way to settle differences by argument instead of force. Perhaps now we need to amend that definition to include identifying and building on common needs and interests so that we can find solutions, not by winning or losing arguments, but by consensus. Doing so will build confidence in the political system by which we choose to govern ourselves, the system that, in the final analysis, we must rely on to chart the state's course in the 1990s and beyond.

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