

# **DISPUTE RESOLUTION SECTION**

January 2011

"Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise."

> Edna Sussman, Chair, NYSBA Dispute Resolution Section David Singer, Chair, White Paper Subcommittee

# THE BENEFITS OF ALTERNATVE DISPUTE RESOLUTION FOR RESOLVING MUNICIPAL DISPUTES

By Pamela Esterman, Michael Kenneally, Jr. and Howard Protter\*

"Traditional litigation is a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle... Our system is too costly, too painful, too destructive, too inefficient for really civilized people." Chief Justice Warren E. Burger of the U.S. Supreme Court

Any litigator will attest that litigation has become a lengthy and expensive proposition. It is a stressful process that destroys relationships. As some disputes will inevitably arise, lawyers seeking to best serve their clients must consider forms of alternative dispute resolution ("ADR" or "dispute resolution") which can avoid much of the delay, expense and disruption of traditional litigation. Mediation and arbitration, both of which are responsive to party needs in a way that is not possible in a court proceeding, are two of the most frequently utilized forms of dispute resolution.

When a dispute involves a municipality, the costs of resolving it will typically be borne by the taxpayers either directly through taxation, or indirectly through increased insurance premiums. No matter who ultimately prevails in the action, it is the taxpayer who pays. Arbitration and mediation can be used as an expeditious, more costeffective means to remedy these disputes. For public officials, these dispute resolution mechanisms have the added benefit of promoting effective communication with the public and making government more responsive to community concerns.

Mediation and arbitration are no longer *alternate* dispute resolution mechanisms but have become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation and arbitration are routinely incorporated into contracts as the method of choice for resolving disputes that may arise in the future. They are also routinely used after problems arise and the parties are seeking an appropriate means to resolve their disputes.

Nevertheless, in the context of non-employment related municipal disputes, there remains significant potential to expand these forms of ADR. This white paper reviews the benefits of mediation and arbitration generally and then provides several examples of the types of non-employment municipal disputes that can be resolved using these methods of dispute resolution.

## I. Mediation

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time." Abraham Lincoln

Mediation is the process in which parties engage a neutral third person to work with them to facilitate the resolution of a dispute. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose. While not every case can be settled, an effort to mediate is appropriate in virtually any subject matter and any area of the law. The advantages of mediation include the following:

1. *Mediation Works.* Statistics have shown that mediation is a highly effective mechanism for resolving disputes. The rate of success through mediation is very high. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90 percent of its cases settle in mediation. Most cases in mediation settle long before the traditional "courthouse steps" at a significant saving of cost and time for the parties.

2. *Control by the Parties.* Each dispute is unique, and the parties have the opportunity to design their own unique approach and structure for each mediation. They can select a mediator of their choice who has the experience and knowledge they require, and, with the help of the experienced mediator, plan how the mediation should proceed and decide what approaches make sense during the mediation itself.

3. **The Mediator plays a crucial role**. The mediator's goal is to help the parties settle their differences in a manner that meets their needs, and is preferable to the litigation alternative. An experienced mediator can serve as a sounding board, help identify and frame the relevant interests and issues of the parties, help the parties test their case and quantify the risk/reward of pursuing the matter, if asked provide a helpful and objective analysis of the merits to each of the parties, foster and even suggest creative solutions, and identify and assist in solving impediments to settlement. This is often accomplished by meeting with parties separately, as well as in a group, so that participants can speak with total candor during the mediation process. The mediator can also provide the persistence that is often necessary to help parties reach a resolution.

4. **Opportunity to Listen and be Heard.** Parties to a mediation have the opportunity to air their views and positions directly, in the presence of their adversaries. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral authority figure, the parties often feel that they have had "their day in court."

5. *Mediation Helps In Complicated Cases*. When the facts and/or legal issues are particularly complicated, it can be difficult to sort them out through direct negotiations, or during trial. In mediation, in contrast, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. The mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues.

6. *Mediation Can Save An Existing Relationship.* The litigation process can be very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. In contrast, in mediation disputes -- such as those between an employer and employee or partners in a business -- can be resolved in manner that saves a business or personal relationship that, ultimately, the parties would prefer to save.

7. *Expeditious Resolution.* The mediation can take place at any time. Since mediation can be conducted at the earliest stages of a dispute, the parties avoid the potentially enormous distraction from and disruption of one's business and the upset in one's personal life that commonly results from protracted litigation.

8. *Reduced Cost.* By resolving disputes earlier rather than later the parties can save tremendous sums in attorney's fees, court costs and related expenses.

9. *Lessens the Emotional Burden*. Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there typically is much less of an emotional burden on the individuals involved than proceeding in a burdensome and stressful trial. Furthermore, proceeding through trial may involve

publicly reliving a particularly unpleasant experience or exposing an unfavorable business action which gave rise to the dispute. This is avoided in mediation.

10. *Confidential Process and Result.* Mediation is conducted in private -- only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved.

11. Avoiding the Uncertainty of a Litigated Outcome. Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions as the predictive abilities of parties and their counsel are unclear at best. Attorney advocates may suffer from "advocacy bias" -- they come to believe in and overvalue the strength of their client's case.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of \$1.1 million -- when they did make the wrong decision.<sup>1</sup>

A mediator without any stake in the outcome or advocacy bias can be an effective "agent of reality" in helping the parties be realistic as to their likely litigation or arbitration alternative."

12. *There are no "winners" or "losers."* In mediation, the mediator has no authority to make or impose any determination on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties.

13. *Parties Retain Their Options*. Since resolution during mediation is completely voluntary, the option to proceed thereafter to trial or arbitration is not lost in the event the mediation is not successful in resolving all matters.

14. *The pro se litigant.* Mediation can be very helpful when a party does not have an attorney and is therefore representing him/herself *pro se*. Court litigation can be very difficult for the *pro se* litigant who is unable to navigate the complexities of the court process and trial. With the downturn in the economy, studies showed that fewer parties are represented by counsel and that lack of representation negatively impacted the *pro se* litigant's case.<sup>2</sup> Dealing with a *pro se* litigant in court can also create difficult challenges for the party that is represented by counsel. However, in mediation, the parties can more

<sup>&</sup>lt;sup>1</sup> Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients, (Springer Science + Business Media LLC New York publ.) (2010)

<sup>&</sup>lt;sup>2</sup> Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary), ABA Coalition for Justice, July 12, 2010, available at

http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf

easily participate in the process and benefit from the involvement of an experienced mediator.

15. *More creative and long-lasting solutions.* Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular interests rather than being limited by the remedies available in court or arbitration.<sup>3</sup> Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be satisfying, long-lasting ones, adhered to by the parties.

# II. <u>Arbitration</u>

"Choice- the opportunity to tailor procedures to business goals and priorities- is the fundamental advantage of arbitration over litigation."<sup>4</sup>

Arbitration is the process in which parties engage a neutral arbitrator or panel of three arbitrators to conduct an evidentiary hearing and render an award in connection with a dispute that has arisen between them. As arbitration is a matter of agreement between the parties, either pre-dispute in a contract as is generally the case, or postdispute when a difference arises, the process can be tailored to meet the needs of the parties. With the ability to design the process and the best practices that have developed, arbitration offers many advantages including the following:

1. **Speed and Efficiency**. Arbitration can be a far more expedited process than court litigation. Arbitrations can be commenced and concluded within months, and often in less than a year. Leading dispute resolution providers report that the median time from the filing of the demand to the award was 8 months in domestic cases and 12 month in international cases compared to a median length for civil jury trials in the U.S. District Court for the Southern District of New York of 28.4 months and through appeals in the Second Circuit many months longer.<sup>5</sup>

2. Less Expensive. The arbitration process can result in substantial savings of attorney's fees, court costs and related expenses because the arbitration process generally does not include time consuming and expensive discovery that is common in courts in the United States (such as taking multiple depositions and very extensive e-discovery). Time consuming and expensive motion practice is also much less common.

<sup>&</sup>lt;sup>3</sup> Irene C. Warshauer, *Creative Mediated Solutions*, 2 New York Dispute Resolution Lawyer n.2, p. 59-60 (Fall 2009).

<sup>&</sup>lt;sup>4</sup> Thomas J. Stipanowich, Arbitration and Choice: Taking Charge of the "New Litigation." 7 De Paul Bus. & Comm.

L.J. 3 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1372291

<sup>&</sup>lt;sup>2</sup> Judicial Business of the United States Courts 2009 Table C-5, available at

http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C05Mar09.pdf

3. *More Control and Flexibility.* In cases where arbitration is required by contract, the parties can prescribe various preferences to suit their needs, such as the number of arbitrators hearing the case, the location of the arbitration and scope of discovery. Once the arbitration is commenced, a party seeking a more streamlined and less expensive process will be better able to achieve that goal than in court where the applicable procedural and evidentiary rules govern. The parties will also have input in scheduling the hearing at a time that is convenient.

4. **Qualified Neutral Decision Makers.** The parties can select arbitrators with expertise and experience in the relevant subject matter or that meet other criteria that they desire. Arbitration avoids a trial where the subject matter may not be within the knowledge or experience of the judge or jury.

5. Arbitration is a Private Process. Arbitrations are conducted in private. Only the arbitrators, the parties, counsel and witnesses attend the arbitration. Confidentiality of the arbitration proceedings, including sensitive testimony and documents, can be agreed to by the parties. In contrast, court proceedings are generally open to the public. In the generally less adversarial context of a private arbitration, ongoing relationships suffer less damage.

6. *Arbitration provides Finality.* In court proceedings, parties have the right to appeal the decision of a judge or the verdict of a jury. In contrast, the grounds for court review of an arbitration award are very limited. The award of an arbitrator is final and binding on the parties.

7. Special considerations for international arbitrations. Party selection of arbitrators ensures that a neutral decision maker rather than the home court of one party decides the case, and allows the parties to select an arbitrator with cross cultural expertise and understanding of the different relevant legal traditions. Of crucial importance also is the enforceability of arbitration awards under the New York Convention, in contrast to the much more difficult enforcement of court judgments across borders.

### III. Application of Mediation and Arbitration to Municipal Disputes

The number of contexts in which mediation and arbitration may be utilized by municipalities is limited only by the context of the disputes they may be a party to. Below are a just a few examples of how arbitration and mediation can be incorporated into common municipal disputes.

### 1. Inter-Governmental Disputes

Mediation can be particularly helpful in resolving disputes between two or more local governments. As noted above, one important advantage of mediation is to preserve existing relationships. Due to their nature, local governments interact with one another on a continual basis. And despite recent efforts to reduce their number, chances are that these governments will continue to exist and work together in perpetuity.

Nevertheless, disputes between governmental entities occasionally arise. As individuals responsible for governance change frequently, clashes of personality, politics or otherwise may operate to deteriorate existing relationships. When such disputes arise, it is in the best interest of the public for local officials to resolve these disputes as amicably, cheaply and expeditiously as possible. Two common contexts where such disputes arise are inter-governmental planning and zoning and the consolidation / sharing of services.

## a. Inter-municipal Planning and Zoning disputes

One common context for these inter-municipal disputes is planning and zoning. When one government undertakes a project in another nearby community, or within a different level of government within its boundaries (i.e., a county undertaking a project in a town within its bounds), there are often questions about whether the host community's zoning and planning laws will apply to the project. To answer these questions, the host community must conduct a balancing test, taking into consideration a number of factors enumerated by the Court of Appeals in 1988 case <u>Matter of County of Monroe v. City of Rochester</u>.<sup>6</sup> Pursuant to <u>Monroe</u>, the host community must weigh the following nine factors:

- 1. The nature and scope of the instrumentality seeking immunity;
  - 2. The encroaching government's legislative grant of authority;
  - 3. The kind of function or land use involved;
  - 4. The effect local land use regulation would have upon the enterprise concerned;
  - 5. Alternative locations for the facility in less restrictive zoning areas;
  - 6. The impact upon legitimate local interests;
  - 7. Alternative methods of providing the proposed improvement;
  - 8. The extent of the public interest to be served by the improvements; and

9. Intergovernmental participation in the project development process and an opportunity to be heard.

A quick glance at these factors reveals that inter-municipal zoning disputes provide an excellent opportunity for resolution through mediation. Mediation can offer a forum for the evaluation of these factors in an expeditious and non-adversarial manner, and encourages the participation and cooperation of all parties involved. A cooperative approach to resolving these disputes is particularly important as it is likely that the municipal parties involved will have to work with one another not only on the subject project, but on other issues as well.

## b. Inter-municipal Cooperation and Consolidation

One area where there is likely to be an increase in inter-municipal disputes is shared services / inter-municipal cooperation. Although the concept of sharing services

<sup>&</sup>lt;sup>6</sup> Matter of County of Monroe v. City of Rochester, 72 N.Y.2d 338 (1988)

among and between local governments is not a new concept in New York State, such initiatives have received much more attention recently. A State grant program for shared services has been included in the state's budget each of the past five years, and recent legislative enactments have attempted to make it easier to offer cooperative services and consolidate local governments.

There are a number of issues associated with cooperative services and government consolidation that can be very complex and very difficult to resolve. When entering into a cooperative agreement for a particular service, issues such as liability of employees and the allocation of costs can give rise to disputes between the parties. If the disputes that arise during the course of an agreement are resolved through litigation, the efficiencies and cost-savings associated with the agreement can easily be lost. No matter how well intentioned they may be, governmental parties to cooperative agreements are well served by anticipating such disputes and agreeing to a means to resolve them without resorting to litigation. When agreed to and incorporated into the inter-municipal agreements, a dispute resolution clause will provide certainty to the parties as to how to proceed, and encourage them to work cooperatively to resolve the dispute.

A recent addition to the General Municipal Law is designed to facilitate the consolidation and dissolution of certain types of local governments.<sup>7</sup> The process can be initiated by either the governing bodies of the local governments involved, or by petition of the residents of such local governments. Either way, the consolidation or dissolution of local governments must be in accordance with a consolidation / dissolution plan. These plans, however, must be comprehensive and will often address issues that are controversial and require local officials to make decisions that may be politically unpopular. Mediating these issues in the course of developing a plan can save both time and money for the local government entities involved.

Regardless of the particular context, inter-municipal disputes often invoke strong emotional support or opposition from the local officials involved as well as the residents of the community. Resolving these disputes through mediation can provide an opportunity for all to be heard and ultimately lessen the emotional burden caused by the disputes.

## 2. Disputes Involving Public Officers

One of the more difficult positions a municipal attorney may find his or herself in is resolving a dispute between two elected officials or bodies. A chief executive may challenge the authority of a local legislative body, a local clerk may refuse to perform a non-discretionary act, or a legislative body may be attempting to discipline another elected official. Just recently, the Mayor of New York City pursued an action against the City Council all the way to the NYS Court of Appeals over their respective powers.<sup>8</sup>

<sup>&</sup>lt;sup>7</sup> General Municipal Law Art. 17-a, New York Government Reorganization and Citizen Empowerment Act.

<sup>&</sup>lt;sup>8</sup> Mayor of the City of New York v. Council of the City of New York, 9 N.Y.3d 23 (2007).

Although these disputes occur on a routine basis, they litigated only on occasion.

The lack of case law on many of these issues means that there is no clear precedent for many of these disputes, making resolution more difficult. What is more, these disputes often become political, leaving the parties involved, as well as the public, frustrated and cynical about government and public service. As these officials will likely have to continue working with one another, and with the public, for the duration of their terms of office, resolving these disputes through a non-adversarial mediation process will help preserve the working relationship needed between these officials.

Mediation has also proven to be a useful tool to resolve disputes between public officials and citizens within the community that may not otherwise be actionable in a court of law. For example, Civilian Police Review Boards (CPRBs) have been established in some communities to increase police accountability and improve the public's communication with the local police department. In some cases, rather than pursue a costly and time-consuming investigation of the citizen's complaint, the complainant and the police offer may agree to resolve the dispute through mediation. Resolving disputes of this nature through mediation not only provides an expeditious and cost efficient remedy, but helps maintain the public's confidence in its officials.

### 3. Municipal Purchase and Public Works Contracts (Non-employment)

Municipalities enter into contracts as a routine part of their day to day operations, whether it be a purchase contract for a quantity of road salt or a public work contract for an expansion of the town hall. Such contracts serve an important function in government operations. Despite the best intentions of the parties, disputes will occasionally arise under these contracts.

Municipalities are authorized to enter into arbitration and mediation agreements to resolve the disputes arising under such contracts.<sup>9</sup> This authority is derived from the principle that the "authority to contract implies the authority to assent to the settlement of disputes by a means of arbitration."<sup>10</sup> Although the authority to assent to arbitration may be implied from the authority to enter into contracts, the intent to arbitrate a dispute arising under a contract must be an "express, direct and unequivocal agreement in writing between the parties."<sup>11</sup>

A well written dispute resolution clause can be particularly beneficial for complex public works projects. For example, it can often be difficult for a public official to

<sup>&</sup>lt;sup>9</sup> Village of Brockport v. County of Monroe Pure Waters District, 75 A.D.2d 483 (1980).

<sup>&</sup>lt;sup>10</sup> Dormitory Authority of the State of New York v. Span Elec. Corp., 18 N.Y.2d 114 (1966), citing Campel v. City of New York, 244 N.Y. 317 (1927), "The expediency of such a settlement of differences is to be determined by the public officers to whom the regulation of the form of contracts is confided by the statute." <sup>11</sup> <u>Village of Brockport, *supra* note 3, at 488.</u>

determine whether a contractor has complied with the written specifications, or has otherwise satisfactorily performed their obligations under the contract. In such cases, independent engineering consultants may agree to be the arbiter of such factual issues arising under the contracts. Again, this will allow for a much more expeditious and cost effective manner of resolving complex factual issues than would otherwise be accomplish through litigation.

### 4. Land Use

Dispute resolution may be used in connection with local land use review processes to enable parties representing diverse interests to negotiate a consensus on some or all of the controversial aspects of a proposed application prior to the decision of a town board, planning board, architectural review board or zoning board of appeals. It may also be used to prevent or settle a lawsuit after a board's decision, or in connection with town planning initiatives.

The traditional land use review process focuses to a large extent on the public hearing, at which speakers state whether they are for or against the proposed application. The process, and especially the public hearing, is often emotionally charged and adversarial. The format of the hearing, which is based on a courtroom model, affords no opportunity for meaningful dialogue among the interested parties and therefore does not lend itself to collaborative problem solving. Often, a board must sift through reams of written comments and testimony, which may contain conflicting scientific and technical data.

After the hearing, the board must then decide whether to grant, deny or conditionally grant the application before it. It often does not have the latitude to devise creative solutions beyond the scope of the specific application upon which it is deliberating in order to respond to certain legitimate concerns that may be raised by the public. Dissatisfaction with the outcome of the process often results in the filing of lawsuits challenging the decision of the board.

Unlike the traditional process in which there are typically winners and losers, ADR can often achieve a "win-win" resolution for all of the interested parties. In the context of land-use decision making, mediation is the most commonly used form of ADR, although other forms of ADR, such as collaborative decision-making or consensus building, may also be utilized. In this process, a neutral facilitator assists parties to develop a collaborative framework for reaching consensus on a particular path or strategy, such as in connection with the development of a comprehensive plan or proposed regulation.

Mediation provides an atmosphere in which representatives of all interested parties, experts and planners can communicate more effectively and collaborate on issues of concern. A mediated process encourages brainstorming and the creation of solutions that can satisfy the interests of most, if not all, participants in the mediation. Because of the opportunity for improved communications, mediation often has the added benefit of streamlining the review process, especially where it its utilized at an early stage.

Most types of land use matters are appropriate for ADR. Examples include applications for site plan or subdivision approvals, special use/conditional permits, rezonings, subdivision plats, floating zones, and planned unit developments. It may also be used to facilitate the preparation or update of comprehensive plans or zoning ordinances. Some land use professionals have argued that ADR should not be used in connection with non-discretionary decisions, such as for use variances, which require application of specific legal criteria. It is uniformly agreed, however, that if a use variance is granted, ADR may be used to impose conditions on the variance, which are discretionary in nature.

The New York State Legislative Commission on Rural Resources previously published a model local law providing for the use of voluntary mediation in the prevention or resolution of municipal planning, zoning and land use disputes. The model contemplates the use of existing voluntary mediation programs, technical assistance and training as an optional means to enhance the quality of life for local citizens. It helps bring about cost-effective prevention or resolution of certain planning, zoning and land use disputes in the community.

The Rural Resources model provides that the commencement of any such mediation proceeding is at the discretion of the authorized municipal board or body having jurisdiction in the dispute or potential dispute, and that all costs associated with voluntary mediation should be allocated among the parties of interest as determined by mutual agreement of the parties. It further provides for a required notice to the parties in interest that: 1) the mediator has no duty to protect their interests, or provide them with information about their legal rights; 2) signing a mediated settlement agreement may adversely affect their legal rights; and 3) they should consult an attorney before signing a mediated settlement agreement, where they are uncertain of their rights.

The Rural Resources model also recognizes limitations upon government discretion, by providing that: 1) any mediation proceeding or outcome initiated shall complement, but not replace, otherwise applicable practices, procedures or enforcements, whether required by state law, local law, or ordinance; 2) the outcome of a mediation proceeding shall not be deemed to bind or otherwise limit the discretion of the authorized municipal board or body having jurisdiction in the matter being mediated; and 3) an agreement that requires additional action by the authorized municipal board or body shall not be deemed to be self-executing. If any such additional action by the authorized municipal board or body is required, the landowner or his or her agent shall be responsible for initiating a request for such action and supplying any information required by said municipal board or body to undertake the action. Further, provided that the action undertaken by such municipal board or body shall not be bound or limited by the mediation agreement.

### 5. Local Code Enforcement

Mediation of any dispute requires consent to a process separate and apart from the judicial system. While use of mediation in the code enforcement context can be a useful additional tool, establishing a preventive system which can eliminate or reduce the need for judicial enforcement seems to be very effective. Many communities in the US and in Western Europe, have established voluntary systems for community mediation of property maintenance and nuisance disputes which, when unresolved, otherwise consume municipal code enforcement resources – typically code enforcement, police or animal control.

The New York State Unified Court System currently partners with local nonprofit organizations, known as Community Dispute Resolution Centers (CDRCs), to provide mediation, arbitration and other dispute resolution options. The Court System also provides special mediation services to the agricultural community through the New York State Agricultural Mediation Program. According to the Unified Court System, in 75 percent of the cases that are mediated, parties reach a mutually acceptable agreement and a recent statewide survey indicated that 90 percent of people who mediated their case felt that mediation was a good way to address the dispute even when they did not reach agreement on all of the issues.

Typical issues resolved through a community mediation system include:

- Noise complaints
- Complaints about pets / barking dogs and leash violations
- Parking space problems
- Property maintenance/nuisance issues
- Safety and environmental concerns

While these issues often can be addressed by neighbors talking to each other, there are times when people simply can't work out their differences and they resort to the courts, or complain to the municipal code enforcement authorities for assistance. If there is an alternative system made available for dispute resolution which is low cost, fast, confidential, and, most importantly, effective, experience shows mediation can solve the dispute at less cost to all- including the local government.

When it comes to the enforcement of a municipality's local codes, the municipal interest is frequently served by obtaining compliance with the law- not in fines or penalties. In those circumstances, arriving at a compliance process and timetable through mediation can be a viable option. This "compliance first" policy can be served by incorporating a mediation process as an enforcement tool by local law.

There is no reason that the Rural Resources model law, discussed above, could not be applied in the context of the state's Property Maintenance Code (State Code). According to the code, violations of must be dealt with "in a manner appropriate to the applicable provisions of a city, town, village or county and shall be in accordance with the applicable provisions of local law."<sup>12</sup> Thus, the code anticipates enforcement mechanisms will be provided by local law.

The State Code provides in general, that property must be maintained "in a clean, safe, secure and sanitary condition ... so as not to cause a blighting problem or adversely affect the public health or safety." While local governments can't waive, modify or otherwise alter the State code, what constitutes a violation in any individual context can sometimes be the subject of discussion and hence mediation.<sup>13</sup>

Similarly, how a violation may be remedied is frequently capable of alternative solutions. The State Code explicitly recognizes this in §105.2 which provides for alternative materials and methods:

> The provisions of this code are not intended to prevent the installation of any design or material or to prohibit any method of construction not specifically prescribed by this code, provided that any such alternative has been approved. An alternative material, design or method of construction shall be approved where the State Fire Prevention and Building Code Council finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety.

For example, the State Code provides that "drainage of roofs and paved areas, yards and courts, and other open areas on the premises shall not be discharged in a manner that creates a public nuisance."<sup>14</sup> How that is accomplished can be an appropriate mediation topic.

#### 6. Environmental Cases

Dispute resolution is especially useful when a municipality faces potential liability for soil or groundwater contamination under such statutes as the Comprehensive Environmental Response, Compensation and Liability Act. A municipality's liability may arise from its ownership or operation of a municipal solid waste landfill, from the generation and disposal of municipal waste, or from spills of petroleum or chemical contaminants. These types of environmental disputes may involve many potentially responsible parties. ADR can facilitate agreement among the disputing parties

<sup>&</sup>lt;sup>12</sup> (§PM106.1) <sup>13</sup> (§PM111.1 ) <sup>14</sup> (§PM507.1)

concerning their liability in a manner that is less expensive and time consuming than litigation.

Mediation can also be used to settle oil and petroleum spill cases in which a town may be either the discharge or the injured party. Oil and petroleum spills can damage lakes, beaches, fish, drinking water and other natural resources, and result in significant property damage and clean up costs. For example, when an underwater pipeline ruptured affecting a body of water between New York and New Jersey, mediation rather than litigation was used to craft a settlement which would not have been likely in a court ordered decree.

ADR may also be used to assist a municipality with problems stemming from industrial operations such as odors, air emissions or noise issues. It may also be used to address issues related to climate change. Frequently, a municipality may be faced with the competing needs of protecting the quality of life for its citizens and preserving its relationship with the industry which provides needed jobs and tax revenues in the community. Paper mills, quarries, power plants pharmaceutical companies, incinerators and sewage treatment plants are just a few of the industries which might present such conflict within a community. Mediation or other forms of ADR have been used in such cases to allow all parties to the dispute to participate in a process to identify the source of the odor, noise or emission, gather needed information on technical solutions, develop a plan for reduction or elimination of the offending matter, and establish a timetable for accomplishing such tasks.

#### **Conclusion**

When it comes to disputes involving a municipality, there is often more at stake for municipal officials than dollars and cents. Establishing effective communication with the public, obtaining compliance with its local codes, maintaining the public's confidence in its public servants and working cooperatively at all levels in the best interest of the public are paramount considerations. The alternative dispute resolution measures discussed in this paper help local government officials maintain this perspective in the face of a dispute, and the effectiveness of these techniques will be limited only by the extent to which the municipality makes ADR processes available and accessible.

\*Pamela Esterman is a mediator and attorney with Sive Paget & Riesel, P.C. in New York City, specializing in environmental and land use matters.

Michael Kenneally, Jr. is Associate Counsel with the Association of Towns of the State of New York.

Howard Protter is the Managing Partner of Jacobowitz & Gubits, LLP in Walden, New York.