

COMPROMISE HAS LIMITS

Alternatives to formal dispute resolution techniques are needed. But can the environment be represented adequately in a method designed for resolving the private concerns of two parties?

It was with some interest that I read the September *Planning Quarterly* articles on mediation, as I was involved in the Bexley plan change as a negotiator, and the Taylor's Mistake plan change as a submittee. I also negotiate on behalf of community groups as a planning consultant.

While alternative dispute resolution (ADR) techniques are a stimulus for better public participation, and a useful component of the planning consultant's toolkit, I do not believe compromise is the essence of planning.

My background in conservation leads me to discuss options on the basis of values, effects, gains and losses. I use the ADR process to resolve issues rather than as a method of avoiding conflict.

My clients are often put under pressure to be "reasonable" and reach a compromise position. The pressure comes from those untrained in social science or resource-based disciplines, eg lawyers, accountants, politicians and planners. Planning frequently lacks a resource-based perspective, and participants tend to "talk past" one another.

Conservation groups are well aware of the flaws of formal legal processes. The groups generally have stricter financial constraints than public agencies and developers.

As an alternative, some groups have trained them-

selves in negotiation techniques and ADR.

Negotiating can be costly and time-consuming. It can be rendered ineffective by factors such as those described below.

In the Taylor's Mistake example (*PQ* Sept 93), the process was hindered by the fact that not all interested parties were informed of the mediation. The Taylor's Mistake Ratepayers' Association had withdrawn from the process, raising doubts about whether it was in fact mediation or merely a facilitated working party.

The previous appeal proceedings arising from Changes 31 and 32 were delayed several times because of the mediation. Some of the original submittees to Changes 31 and 32, including the North Canterbury branch of Forest & Bird, felt they had been disadvantaged by the process.

Ironically, the commissioner's recommendations on Plan Change 3 were similar to the recommendations of the previous commissioner to Changes

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31 and 32. There was thus a two-year delay, and expense to all parties, for little change.

One lesson from the exercise is the necessity for a clear enforceable methodology for identifying, notifying and indemnifying (by agreement) the participants in a mediation. Another is the insufficient guidance from the Planning Tribunal in complex multi-party discussions. Although the case was heard under the Town & Country Planning Act, the RMA has not provided additional guidance. Section 268 implies that an appointed mediator is an "agent" of the Tribunal. Rules and amendments to the RMA which clarify the position of the mediator will build up when ADR is used more frequently. For s268 to be an effective and just tool, firm parameters must be set.

The "public good" basis of the RMA is designed to empha-

Taylor's Mistake baches, the subject of a case study in an article on dispute resolution in PQ September 93.



SPEAKER'S CORNER

side public needs rather than the private needs enshrined in other legislation, such as family, matrimonial, small claims and employment law. This creates a fundamental tension between processes designed for private, closed disputes, and resource planning.

Mediation has the potential for abuse, by allowing the making of private deals. Discussion between a mediator and separate parties is privileged, and cross-examination is at a tribunal's or court's discretion under Section 35 of the Evidence Amendment Act. It is therefore difficult for other interests to obtain access to the reasons for decisions. The interests of the public can therefore be denied by the skilful use of a tool intended to produce openness. It becomes a "privatisation of process".

Human factors can impede agreement. Personal motivations and characteristics of the participants can include cultural preferences, insecurity, passive aggression (denial), personal dislikes, competitiveness (common in legal circles), or ignorance, aggression and pride masquerading as assertiveness.

These manifestations are not

the sole preserve of fanatical farmers or litigious lawyers. Mediators and psychologists themselves are among the most difficult groups to pin down in discussions of their own issues, so why should others be expected to be reasonable?

WISDOM OF SOLOMON

An all-or-nothing approach is sometimes a viable bargaining option. A habitat is sometimes as indivisible as the child in the dispute mediated by Solomon, because of its uniqueness or because it protects communities. Parties to mediation are often castigated for taking this stance.

In order to make decisions on environmental and social effects, we need better information. We require systematic evaluation of costs and benefits, and effective auditing procedures. In the past, the easy option of quick decisions has been favoured over those based on negotiation or investigation.

The Waitaki water rights negotiations (PQ Dec 91) and the Bexley Plan Change cited by

Ken Lawn (PQ Sept 93) were admirable examples of negotiations based on a good understanding of the needs of the river and wetland communities and those of the developers. Conservationists had free access to scientific information.

In the Taylor's Mistake process, a dearth of information on critical points of law, coastal hazards, heritage values and recreation potential, produced an inadequate basis for discussion or decision-making.

PRECEDENTS

Fiona Sands (PQ Sept 93) correctly stated that environmentalists (and conservationists) are, at times, interested in obtaining judgments in order to establish precedents. We do not take this route lightly, and in my experience it is used only where it is thought little will be gained through discussion.

Sometimes, obtaining a judgment can be the best option for all parties. The Christchurch City Council's seeking a declaration under s310 of the RMA

on the coastal zone boundaries across its rivers is an excellent example of a stakeholder moving to avoid unprofitable discussion. This particular decision was nationally important as it provided guidance on the interpretation of s310.

Two years after becoming law, the RMA is open to redefinition. We are still in a phase in which formal dispute resolution is as valuable for the environment as ADR. However this is likely to change as a more definite interpretation of the concept of sustainability emerges.

Planning will be a matter of steering a course between the imprecision and over-concern for the personal which hamper ADR in its present form, and the whirlpool of formal legalism. User-group complaints and successes will help by defining boundaries for ADR and its problematic offspring, mediation.

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The Waitaki River water rights case (PQ, Sept 1991) is an example of a negotiation based on adequate information.

