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Keynote Address: Consensus Building, Public Dispute Resolution, and Social Justice

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KEYNOTE ADDRESS: CONSENSUS BUILDING, PUBLIC DISPUTE RESOLUTION, AND SOCIAL JUSTICE

*Lawrence E. Susskind**

KEYNOTE ADDRESS

It's a great pleasure to be invited. I want to talk about democracy. I also want to talk about public dispute resolution, social justice, and how these three topics fit together.

Imagine the following scenario: a small city, wherever you like; a proposed industrial development project of whatever kind is proposed. The city council and a number of other boards and permitting agencies in the city must say yes if this is to go forward. It involves something bigger than what the general regulatory system is set up to handle. Thus, it will require a special permit. Indeed, a number of different boards and departments will have to give approvals.

There is no question that this project is desirable from the standpoint of producing jobs and sorely needed tax revenue. It's pretty clear that the environmental and public-health risks associated with this project are substantial enough to cause concern, especially if impacts are not appropriately mitigated and design options that would reduce those impacts are not pursued. So how will the decision about whether and in what form to permit this project get made? What is the normal democratic decision-making process in such situations in the U.S.?

The city council, which has to give at least a primary permit, taps one or more agencies to undertake studies of what is being proposed. The city council might hold hearings, supplementing those required under the zoning law with additional public meetings. There would probably be a lot of lobbying behind the scenes by people for and against the project, speaking through and to mem-

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bers of the city council as well as various agencies. There would undoubtedly be a lot of letters written to the newspapers protesting and supporting the project. There would probably be a lot of direct public appeals—in other words, the proponents would take ads in the paper, contribute op-eds, contribute editorials on the local TV channel, while the groups opposed would mobilize, in whatever ways they can, to sway public opinion against the project because of their worries about the environmental risks as well as their concern that the gains will all go to a small number of out-of-city gainers, and not to local people who ought to be benefiting from the project.

At some point, the city council will vote. The majority will rule. Then there's likely to be litigation. It is highly unlikely that the vote in favor, granting the permits, will be definitive. Rather, we would expect somebody to say, "I want another bite at the apple. I don't like that decision." It doesn't matter which side; it could even be both sides. So they will litigate, because the primary venue for democratic decision-making in these kinds of cases is the court. Other opportunities are insufficient to convince those adversely affected that their interests have been adequately addressed. Then, whether the litigation succeeds or not, we'll look to the next election to change the membership of the council so that those who were unhappy can try again to make sure the outcome is different the next time a project like this is proposed.

I call this the *conventional procedure* for making decisions of these kinds in our democratic society. It offers a measure of accountability through the electoral process. It incorporates technical and expert input via the staff of public agencies. It builds on freedom of speech, so people can have a say. How and whether that say gets taken into account by our elected and appointed officials, however, is not clear. Nor is it clear what democracy requires in that regard.

Now consider this alternative. A project is proposed, conceptually, at a very early stage, to the council. The council says to the proponents, "Terrific. We want to set in motion a process to see if consensus can be reached on whether a project like that in the place you have in mind ought to go forward. If so, what stream of benefits and costs—gains and losses—are likely to be associated with it in the minds of those who see themselves as stakeholders? And, what can be done to adjust the benefits and costs flowing from the project to ensure that everyone is treated fairly and there is sufficient attention to sustainability?"

So the council, at that moment, hires a mediator (i.e., a professional neutral) and says, “We need to determine who should be at the table to participate in a collaborative design process, to ensure that we come as close as possible to an informed consensus on whether, and if so, how, this project should go forward.” The neutral undertakes something we call a conflict assessment. “Conflict assessment” is both a noun and a verb. As a verb, the conflict assessor, the neutral, interviews, privately and confidentially, three circles of potential stakeholders.

The first is an obvious set of people who have already made their views known. It’s clear that certain groups will want to be involved—abutters to the proposed site, various city departments and agencies, maybe regional agencies, maybe state or federal departments and agencies. The assessor meets with them and says, “Listen, confidentially and off the record, what are your concerns about this project? What issues do you think ought to be addressed in a collaborative process to see whether, and if so, how, this project should proceed? I’m not going to quote you, but I need some sense of what you think the conversation should cover and who should be at the table. I can’t do that without hearing from you. I need to map the potential conflict.” Within that round of interviews with the obvious first circle of potential stakeholders, one of the questions the neutral asks is, “Who else do you think needs to be at the table? Who else do you think I ought to be talking to?”

That first set of conversations leads to a much larger second circle of conversations. These are conducted in the same way: “Confidentially, off the record, I want to talk to you. I have been hired by the Council to explore the question of whether there ought to be a collaborative process, and if so, who should be at the table and how the conversation should be structured.” The Council announces publicly that this consultative process is under way and says, “Anybody who thinks they should be involved, contact the neutral.” The neutral’s name, email address, phone number, and local drop-in spot are described in a newspaper story about the process. This identifies the third circle of stakeholders. The first circle of people interviewed are the obvious players identified by those in authority; the second circle is suggested by the first circle; those in the third circle nominate themselves when they hear that there is a process of conversation underway.

That’s a lot of interviews. We do such interviews and prepare a one-page matrix, a map of the conflict, with categories of groups

down the side and issues across the top. In each cell, we indicate what that category of stakeholders thinks about that issue. How important is it to them? What do they most want to have happen and least want to have happen? What else do they think they need to know? We fill in the matrix. Nobody's name needs to be mentioned.

Then, the neutral takes the matrix and sends it to everybody who was interviewed, in draft, and says, "Do you see what you told me in here? If not, help me fix the matrix." Nobody is named directly, but if I talked to you, you ought to find what you said in my summary. The neutral gets that feedback, finalizes the matrix, and then writes, in a ten-to-twelve-page document, suggestions for how and whether to proceed with a collaborative design process. The neutral also offers another dozen pages that say, "These are the stakeholder categories that need to be represented if you really want to address this issue successfully. Here are the kinds of players in each category who need to be brought together, to caucus, to choose a representative to represent them. Here's what the agenda should include. It's these issues across the top. Here is the work plan."

To take up this set of issues and address the concerns of these groups, the neutral offers a work plan, a budget, and a timetable. The neutral can also say something about the kind of mediation team needed to assist, if the process goes forward. That document should be sent to everyone interviewed with a note that says: "If this is the game, would you play? Would you at least come to the first meeting? If you have a problem with what I am suggesting, please tell me. I won't quote you. I just want to hear whether my proposal makes sense to you."

The neutral gets the feedback, adjusts the document, and then gives it to the convening body that hired him in the first place. The first paragraph has to say, yes or no, do you think a consensus-oriented process can bring the right parties to the table and produce an agreement on whether, and if so, how, the project should go forward? The document also lists in the back all the groups that need to caucus in different kinds of ways to allow self-selection of representative spokespeople for each category of stakeholders.

The neutral sends that document to everyone interviewed and asks, "This is what I am proposing to the convening body. Do you have a problem with that? Tell me." The final version of this document goes to the elected body. It indicates either yes or no—should the city proceed with a collaborative design process. If no

the city will proceed with its traditional process. If yes, the parties have jointly designed the procedure for going forward.

If you say, “We’ll do whatever you guys say,” then someone is going to complain, “What did we elect you for? Who is going to guarantee that the public interest is served? Just because some people happened to have been talked to and you produced a document, that doesn’t mean you can abdicate your responsibility to exercise judgment on behalf of the public-at-large.” So there has to be a mission statement that explains that, if the process goes forward, what the status will be of the prescription that comes out at the end of that process, vis-à-vis decision-making by the authority. You can’t delegate away, if you are that body, your responsibility for making final decisions. You have to say something about what your predisposition is towards agreement, especially if it’s reached by consensus.

Once the assessment is done, the stakeholder representatives must be selected. Assume the officials involved appoint a forty-plus member collaborative group. The process should be facilitated by a team of neutrals. It may take eight-to-twelve months. The result is likely to be a different plan from what would have emerged if the developer—the proponent of the project—had produced his own plan. The collaborative plan should include deals between all kinds of dyads and triads about how some of the value that will be created will or won’t, on contingent terms, be given for this, given for that, given to this one, or exchanged in this way.

In that deal, for the lawyers in the room, all kinds of commitments are likely to be made that go beyond what the city government has the authority to require. Such agreements are voluntary. That is, they are negotiated. The parties can’t be asked to do something beyond what is statutorily required, but they can volunteer to do so. If they volunteer, all kinds of modifications can be added as orders of condition to any permit, even if what is included transcends the statutory authority of the regulatory body. If that isn’t good enough (from an implementation standpoint), a private contract can be fashioned among the different sets of parties. From all of this, a near-consensual deal can emerge, along with a schedule of commitments.

Ultimately, the draft agreement comes as a proposal to the council. The council still needs to hold a hearing on it. If all goes well, nobody should show up at these hearing. In fact, the only people who usually come are those who participated in the collaborative process, to say what a wonderful process it was. The participants

will look to see if anybody who refused to participate initially has the gall to stand up and say that something is wrong with what the group produced. The city council has to hear what everyone has to say, regardless of the success of the collaborative process. Maybe somebody will show up and say, "I never heard about this. I didn't know anything was being discussed. This deal just tramples on my rights," in which case the council may have to give the negotiating group a mandate to go back and make adjustments in its proposal. Finally, the council must vote.

Behind the scenes, some of the well-heeled participants may be looking for "a second bite at the apple," so to speak. They may take some members of the council out for dinner and suggest that their next political campaign might go a lot more smoothly if they make additional demands on some of the people involved in the collaborative process. In all likelihood, the council isn't going to do that. If they do, they are probably not going to get elected again. Certainly, it will be terribly difficult to get residents to participate in similar collaborative processes in the future.

There are all kinds of questions about what the court's reaction ought to be to people who were invited to participate, maybe even did participate and signed a consensus agreement, but want more. Should the court grant them standing to raise anything other than a constitutional question, as opposed to an interest-based or procedural question, that asks the court to reconsider the substance of the agreement? Some of you know a lot more about such legal matters than I do. All I can tell you is that I have facilitated many such processes. We have generated a lot of agreements, and, mostly, they have not been litigated.

So, I've described two scenarios: one, the traditional model; and, the second, a consensus-oriented model.

My question to you—and it's not an easy question—is which is more democratic? Which is more consistent with the ideals of democracy, as we mean to guarantee them in the United States, pursuant to our Constitution and our traditions? The first one values representative democracy. It says that a general-purpose elected official should make public policy decisions; that we need free and fair elections, accountability through transparency, and the right of individuals to petition the government and to speak freely. What is it, then, about the first scenario, that is not completely consistent with our democratic ideals? I would argue, nothing. It's completely consistent with our prevailing notions of democracy. How democratic is the second? It has everything the first one has, and

more. Does that make it more democratic? It depends on what you think democracy is supposed to achieve.

I am going to talk about three problems with the first model that lead me to advocate the second. What I am really doing is telling you about three problems I see inherent in our current approach to doing democracy. We are not forbidden, please note, from enhancing or deepening our commitment to democracy and our democratic ideals. Thus, I am going to suggest that a commitment to consensus building in public decision-making, embodied by the second model, would in fact, deepen our embrace of democratic principles.

The first problem is the majority-rule problem. The second problem, in my view, is the representation problem. The third problem is what I call the adversarial-format problem. These are, in my mind, three big weaknesses of traditional democratic decision-making. My argument is that all three can be remedied by a resort to the second model, by a commitment to supplement representative democracy with more ad hoc approaches to consensus building. I am going to take each of these three problems in turn and suggest why and how I think we can move, as a society, to the second model—not just at the city scale, but at the county, regional, state, and national scales as well. (I even think we can apply consensus building models at the international scale, but that's for another day.)

THE MAJORITY-RULE PROBLEM

The majority-rule problem inherent in the first model was presented in my first scenario: We only seek 51% support for decisions, as if somehow that's good enough. The other 49% are supposed to happily lump it. That's what a commitment to majority rule implies. We operate on a majority rule basis in almost every administrative and legislative context in America. Presumably, we have decided that a bare majority is the best we can do. I don't get that. Shouldn't we at least try to achieve near-unanimity before assuming that the best we can achieve is 51% agreement?

My primary point is that we are not going to do "better" than 51% unless we try. It rarely happens by accident in a controversial decision-making situation that more than a bare majority gets its way. Unless you organize a decision process to achieve near-unanimity—that is, structure the ground rules and the management of the conversation properly—it won't happen.

I imagine that what is going through your minds is that consensus building takes too long, costs too much, and won't be definitive. We have to make decisions. We have to make so many decisions in a democratic society that seeking anything more than 51%, especially seeking near-unanimity on a great many public policy decision—will take forever. Secondly, if it takes longer, it will cost more. Thirdly, if it takes longer and costs more, while that might be worth it, there is no guarantee that we will reach a final decision in time if we commit to near-unanimity as our decision rule. With a 51% decision rule, once you have it, you are done.

How many examples would I have to give you of large, complex, multi-stakeholder dialogues, organized in the way that I have described in my second scenario, that produced near-unanimity, forestalled litigation, produced higher levels of satisfaction with the outcome in the hearts and minds of the participants and those affected by the decisions who weren't participants, before you would say that maybe it is possible to shoot for something more than 51%? 100? 1000? 10,000?

I have spent my professional life working in these kinds of situations and training people to manage consensus building efforts. We now have more than enough examples of successful consensus building efforts in highly controversial situations—plenty of people in this room do this work and can attest to what I am saying—to be able to conclude that it doesn't take forever; doesn't cost too much; and can be definitive within a pre-set timeframe.

If you tell me we have nine months to get agreement and either we succeed in building consensus or we go back to the traditional model, then that's what we have to do. The participants either agree to produce a consensus in that time frame, and work to get a better result than what the traditional model will get them, or they don't proceed. We know we can get near-unanimity if the process is managed with that as the goal. We know we can get parties to come to the table when what we are offering them is an opportunity to get something better than what the traditional process is likely to produce. The only trick is that the participants have to believe that the elected body is going to accept the proposal generated by the group, as long as it meets certain tests of transparency, accountability, and fairness.

It works with a system of ad hoc representation, because all categories of stakeholders are explicitly represented by ad hoc spokespeople they have chosen for the specific discussion. It works because the process of conversation is not about arguing, it is about

problem-solving. It's not about discrediting the other side; it's about combining everybody's brain power, effort, and energy to come up with something better for everyone than what the traditional method is likely to yield.

THE REPRESENTATION PROBLEM

We should try to supplement representative democracy with “ad-hocracy.” The product of “ad-hocracy” will still have to be judged and evaluated by the representative democratic system. In the second model, representatives are chosen by each stakeholder group specifically for a particular policy discussion—that's why I say ad hoc. These are not general-purpose, longstanding elected representatives. They are not expected to represent a large, diverse constituency. Rather, they are chosen to represent a group that knows its interests and shares a point of view on a particular question.

We tend to think, in our democratic system, that general-purpose elected representatives are good enough for everything. We like having elections. We think that free and fair elections will somehow solve the problem of having a representative who has the support of 51% of the people in a district while 49% of the people in that same district voted against them. How (and why) are they supposed to serve the people that voted against them?

Why don't we have a system of representation that ensures that the people representing folks really are accountable to that constituency? If you didn't vote for me, why should I do anything for you? How are you going to hold me accountable if I don't do what you want? You were in the 49% that voted against me—too bad for you. Why not have representation that reflects the intensity of concerns of each constituency vis-à-vis a specific issue? The only way to do this is with ad hoc (i.e. temporary) representatives rather than general purpose elected officials.

Each person has many identities. If you ask me how I think about myself, I may choose to describe my interests in terms of a political party, as a resident of a geographic area, as an environmentalist, along the lines of my religious convictions, or some other way. But if you ask me to describe my views on a specific project in my neighborhood, suddenly I think of myself as an abutter or a landowner, in addition to all my other identities. How do I want to be represented with regard to a particular decision? Give me a choice. Talk to me and find out how I want to identify my stakeholder interests for the purposes of a specific decision and then

allow me to participate in the process of choosing an ad hoc representative for that purpose.

If you have hard-to-represent constituencies, you can use proxies to represent them. Think in terms of a guardian ad litem chosen by the court to represent the interests of a child. Or, think about how we choose the member(s) of a class to represent everyone with a stake in a class-action law suit. Once we have a sense of the categories of stakeholders, we can figure out a way to represent hard-to-represent or diffuse interests. We can even represent generations as yet unborn. We can select people who are willing to take on such roles for the purpose of a public policy discussion.

THE ADVERSARIAL FORMAT PROBLEM

Linked to these first two problems is what I call the adversarial format problem. I am not just talking about litigation. Go to a public hearing. What is your job as a spokesperson? Your job is to advance the interests of your group. How do you do that? If I assume that the only way my interests can be advanced is if somebody else's are compromised, then I will act accordingly. I will try to discredit the claims of others. I will trash whatever evidence or arguments they put forward. That's what I have to do if I assume that the only way my interests can be advanced is if other people's interests are short-changed. So, if you assume that you are in a win/lose contest, you will act accordingly to advance your own interests.

But what if we said, for the occasion of a particular public decision-making situation, that we want to seek an outcome that gets everybody more than what they can otherwise count on if there were no agreement through a collaborative process. (Everyone would have to do a hardheaded analysis of what their most realistic option would be if there was no consensus agreement. In negotiation language, we call that estimating your "BATNA," your best alternative to the negotiated agreement.)¹

I am not arguing that collaborative processes or consensus building efforts get everybody everything they want. I'm not talking about win/win. It is not possible for everyone to get everything they want. The question to ask is whether a consensus outcome offers everybody something better than what they have a right to expect from the traditional process of decision-making, the first

1. See generally ROGER FISHER AND WILLIAM URY, *GETTING TO YES* (Penguin 1981).

model? Usually, you can't know your BATNA, but you can estimate it. You just have to know how to multiply the probability of getting what you want times the value of what you want. That's called your "expected value."

Assume there's a 50% chance under the traditional model of getting two-thirds of what you want. Point five (.5) times two-thirds yields your expected value. This is what you do in a litigation context when you try to estimate the likely value of going to court. You need something to compare possible settlement agreements against. Is a proposed settlement any good? Well, as compared to what? As compared to what you want? No. As compared to what you are likely to get if the court case proceeds.

The same thing is true in the public arena. "If you work in this way, together with these other people, there's a chance you'll get a better outcome than what you'll probably get if you go the traditional route." In a collaborative process we ask the parties to commit to finding ways of creating value so that everybody can get more than they would from a traditional process. That requires exploiting the cooperative interests that the parties have, not just allowing their competitive interests to swamp the dialogue.

In negotiation theory, we talk about mixed motives. Everybody entering a negotiation has both a cooperative interest in creating as much value as possible—because that might yield a bigger share for them—as well as a competitive desire to get the biggest share for themselves that they can.

How can I cooperate with someone I know I'm competing with? It's hard, especially when you have to create enough trust for the cooperative part of your mixed motive interaction to work. That's often why the parties need a professional neutral to manage the dialogue, someone who is not partisan. It is too easy to sink into purely competitive behavior. Especially when there are many parties negotiating many issues it often takes some guidance to create value through what we call integrative bargaining—a process of listening, understanding, exploring possible trades, expanding the agenda, redefining terms, and considering options that would otherwise not be possible.

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I am arguing that the majority-rule problem, the representation problem, and the adversarial-format problem cause us, in a public disputes context, to produce, while still democratic, outcomes that are less just in the eyes of the parties than they need to be. I am

arguing that a switch to a consensus-oriented approach will be as, if not more, democratic. It will be as efficient—if you look at the entire time it takes to get something implemented—because participants in collaborative processes are more likely to do what they promise.

For people who have somehow gotten in their mind the idea that consensus building is bad for the least powerful, let me try to convince you otherwise. One assumption is that the least powerful parties won't know how to represent their interests or their interests will be ignored by the more powerful or articulate groups at the table. But, it is the role of the neutral to ensure a fair, efficient, and wise process. We talk about the responsibilities and professional obligations of a neutral (mediator) in the public arena. The neutral has an ethical obligation to ensure a process that is fair, efficient, stable, and wise, as well as an outcome that is fair, efficient, stable, and wise in the eyes of the parties. In my view, unless we require public policymakers, as a rule, to embrace consensus building, we will always get less just outcomes.

That's not how dispute resolution has been sold. Dispute resolution to date has been sold on efficiency grounds—save time, save money; choose ADR. But I am arguing, in the public arena, that a commitment to consensus building can produce fairer, wiser, more efficient, and more stable results.

Minimum procedural rights still have to be guaranteed. That's why consensus building is a supplement to and not a replacement for traditional decision-making. We cannot ask elected and appointed officials to delegate away their statutorily defined responsibility to ad hoc assemblies of various kinds. But that is why I advocate the elaborate conflict assessment procedures I described earlier. It is also why elected and appointed officials must convene collaborative processes to ensure their legitimacy. In addition, the convenors must provide a clear mission statement for the participants before they begin. Usually, it says something like: "If this process can be shown to produce an informed, nearly unanimous outcome, we are inclined to support what you come up with."

It doesn't forestall litigation. If somebody challenges what comes out, for whatever reason, (especially if they think that someone's fundamental rights have been abridged), then a consensus outcome can and should be challenged.

So, consensus building is not an alternative to representative democracy. It is a supplement to it when it is done in the way I have described. Unfortunately, too many people have said, "You can

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either choose the traditional approach or you can choose consensus building.” That is a gross error, and it has hurt the ADR movement. It is especially difficult for those of us who try to advocate the second approach, when we have to talk to elected and appointed officials who say:

“Oh, you want to put me out of business.”

“I don’t want to put you out of business,” we reply.

“You want to abridge my authority. I stood for election. What gives you the right to stand in my way?”

“I’m trying to give you a chance to find out what action you can take that will cause everybody to stand up and cheer and make them all want to vote for you. Don’t you want to know what that would be? Because, that is the product of consensus building. The product is the thing you could do that everyone would applaud and say, ‘My goodness, you’re a smart elected official. My goodness, you have taken my interests to heart.’”

That is not taking anyone’s authority away. But, unfortunately, too many people, in their enthusiasm to support the concept of public dispute resolution, have sold it or tried to sell it as an alternative to traditional decision-making.

For consensus building in the public arena to work, we probably need to institutionalize a set of ground rules—that is, to say what the qualities are of good processes—to make sure there is a supply of capable, qualified, professional neutrals, who subscribe to a clear code with regard to their unique responsibilities working in the public policy realm.

Why wouldn’t public officials prefer to know a way to proceed that would be viewed as meeting everybody’s interests? If we can show that an informed consensus can be produced in a reasonable amount of time, at a reasonable cost, in a way that doesn’t leave anybody out, in a way that deals with inequalities across groups, in a way that ensures that hard-to-represent interests are presented, why wouldn’t that be preferable?

I will stop at this point. We have a little time for questions.

Thanks very much.

QUESTION AND ANSWER SESSION

QUESTIONER: I have a technical question. I used to work for the Port Authority of New York and New Jersey. I was in charge of the Hoboken waterfront development for twenty-five years, so I have a degree of background in dealing with the processes you talk

about. But I don't think we did it as well as we could have if I had been here first.

At any rate, the technical question is on the confidentiality issue. When you go back and forth, I assume you are only asking that one group whether you are reflecting correctly what they want. You are not sending the whole matrix out to everybody.

PROF. SUSSKIND: I am. I am sending the whole matrix to everyone. Nobody's name is mentioned in it. I say, "Do you see what you told me adequately represented in here?"

QUESTIONER: But everyone knows who the representatives of the groups are.

PROF. SUSSKIND: How? I interviewed hundreds of people.

QUESTIONER: But you have it—explain it to me.

PROF. SUSSKIND: I indicate categories of stakeholders down the side, no names of people. It could be abutters. It could be agencies with waterfront responsibility. They don't know who I talked to. I am not citing anybody by name.

QUESTIONER: So the confidentiality is to a particular person.

PROF. SUSSKIND: Correct.

QUESTIONER: But it is important to have an understanding of what the group is likely to want or not want.

PROF. SUSSKIND: Correct.

QUESTIONER: Okay. I was interested in the issue of city council decision-making. One of the issues we always confronted was that the city council would often say, "I can't predict what I'm going to agree to." How do you deal with that?

PROF. SUSSKIND: I say, "Could you tell me ahead of time the qualities of an agreement that you are inclined to support?"

"If it is more nearly unanimous, would that make a difference to you?"

"If it reflects the full, direct involvement of all the parties, as opposed to some being left out, wouldn't you prefer that?"

"If it's done within an agreed-upon timeframe, wouldn't that be better?"

"If it's done in a way that is transparent so that during the process, summaries of what is going on are on a Web page that anybody can look at, wouldn't you prefer that?"

"What if the meetings are broadcast on an access channel, of the group actually having all of its conversations, so anybody can watch?"

"Wouldn't you prefer an agreement produced by a process like this? Wouldn't you prefer an agreement that has these attributes?"

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I am talking about the qualities of an agreement. Then, when I come to the end of my list, I say, "This is an agreement that met all the qualities of process design, process management, and outcome that you articulated in terms of what would make you predisposed to support it. If you don't support it now, you are going to need to explain to all these people why. It's still your choice."

QUESTIONER: Okay. We found that one of the problems was that the length of time to get decisions extended beyond terms of office, extended beyond the leadership role of the various stakeholder groups, particularly on a large-scale project. How do you overcome that?

PROF. SUSSKIND: There are two parts to that problem. First, a lot of processes take longer because they don't have a timeframe that people have committed to in the beginning. The presumption was, "Who knows how long it's going to take to get agreement? I have argued that the joint design of the collaborative process through a conflict assessment procedure needs to produce a timetable. The deadlines are binding unless the whole group unanimously agrees to extend the deadlines for an explicit period of time.

If I say to people, "We have six months. We are going to either have a process that gets consensus in six months or we're not. Do you want to participate?" They can usually answer yes or no.

I would argue that most things called "collaborative processes," most things called "consensus building" sponsored by public agencies today do not meet the tests I have described. They do not have ad hoc representation that is the product of a conflict assessment. They are not managed by independent professional neutrals that the group has chosen. They do not have explicit ground rules, a timetable, a budget, and a work plan that the group itself was part of producing. That's why they take so long and often fail to generate agreement.

Second, we do invite every organization or collective of organizations in a stakeholder category to not only have one representative, but also to have an alternate. If there is a change in the membership of a group or somebody's situation changes, the group has continuity in its representation. We often have one representative at the table and one sitting right behind them. We have, in a sense, multiple representatives of categories of stakeholders.

I don't want to pick on any particular federal agency, but I am working with the Interior Department which claims that it subscribes to consensus building and is committed to a whole lot of

Cs—“continuous,” “comprehensive,” “consultative,” C, C, C, C processes.

I asked, “Do the parties choose their own representatives?”

“Oh, my God, no. The crazies would be at the table then.”

“Do the parties help define what they are going to work on?”

“My God, no. They’re not expert enough to know what the agenda should be.”

“Is the process facilitated by a neutral that the parties selected?”

“No, no, no. We have people on staff who run the meetings.”

“Do they have a budget that they can use for joint fact finding?”

“No. Any facts they need, we have already done the work for them.”

“Have they produced a written agreement that the parties went back to their constituencies to get support for before they signed?”

“No. We don’t want to be bound by a written agreement.”

“But, boy, are we committed to collaborative consensus building.”

That’s my experience across the country.

QUESTIONER: I think the problem is that leaders and decision makers think that it will be quicker and easier not to have to deal with all of the, quote, crazies.

PROF. SUSSKIND: They think that, but look how long it takes them, when you count from the time they start to the time they tentatively finish, to the time the litigation takes, to the time that the next administration comes in and takes over and redefines the problem.

QUESTIONER: I’m sure this comes up whenever you give this presentation. How do you deal with a stakeholder who believes that the whole proposal is an unmitigated disaster? Why would they want to participate at all?

It makes me think of why people, as a group, decide to boycott elections. Sometimes it is in their interest to do that.

PROF. SUSSKIND: My experience has been that most of the ways in which people are consulted through the traditional mechanisms of public engagement only frame the public policy question in one way. They ask, “Should we build this facility, defined this way, in this place, with the presumed distribution of benefits and costs that go along with it?” A group in opposition is thinking, “Over my dead body,” literally. “I’m willing to fight to the death to stop this thing.”

You say to that group, “So there is no version of this facility anywhere that you would be interested in?”

They answer, "That's not the question I was asked."

"And there is no version of this facility-plus that would be of any interest to you?"

"What do you mean by plus?"

"Some way of taking some of the gains from the proposed facility and committing them, in a linked way, to a set of things you have been trying to get done that you have not had the resources or support to do. Let's talk about a package that includes the facility, changed, managed in a way you prefer, perhaps in a different location, plus the use of some of the benefits to accomplish a series of linked objectives in the community."

They usually say, "Nobody ever asked me that question before."

The only way you can have integrative bargaining around an issue is to fractionate it, enrich the agenda, alter the frame of the conversation, and put on the table different kinds of benefits and their distribution.

Typically, a public agency will tell me, "We don't have the authority to talk about those other benefits or linked changes. That's some other agency's responsibility."

We say, "You don't need additional authority. You won't be making a decision until there is a voluntarily agreed upon proposal. So, let's pursue this in the way the conflict assessment suggested that groups would like the agenda formulated. Then, it will be 'rich' enough to make it worth their while to come to the table."

Once they are at the table, whatever they come out with, if it's voluntary and all the relevant agencies and groups have been involved, then you won't have to impose something you have no authority to impose.

So, this is the way you can offer a set of benefits and reduce costs to groups who otherwise would say, "No way. I'm not even coming to the table. I don't want to encourage anyone to even think about this project." You have to reframe what is being talked about.

QUESTIONER: I think that presents a problem with the role of the neutral, which you referred to before. The role of the neutral isn't really neutral. The role of the neutral is, "I want a process that is going to make things go forward," when the stakeholders' interest might be, "Our interest is, kill it, period. Every single thing you do that moves the process forward is a disaster for us."

PROF. SUSSKIND: No. That's their position. Their position is, "Kill it." Their interests, however, are the reasons why they want to kill it.

If you say to me, “I want to kill it because I do not want that added risk or danger in my community,” I say, “What if, as part of building this project, I can help you reduce other risks you have that are even greater than the risk you are worried about?” That could be part of the package. If you are worried about risk, I am going to make you better off by having this facility.

QUESTIONER: The example I think of is when they proposed to build an eight-lane highway from the Battery to 34th Street, which involved destroying every neighborhood in between. If you said, “What if it’s two lanes and we give you some schools,” it’s still a disaster. No matter what you do, it’s always a disaster. So the only way for a person like Jane Jacobs to address it was, “We’re not negotiating anything. We are simply killing it.”

PROF. SUSSKIND: Trying to kill it.

QUESTIONER: The collaborative process seems to be, “Hey, let’s work a deal.”

PROF. SUSSKIND: The group that says no is hoping to kill it, to achieve or maintain certain values or interests that it has. If I ask that group, “What are the odds of your succeeding,” they’ll say “Well, it’s an uphill battle. Perhaps there’s a 20% chance of our succeeding.”

I say, “What if I could increase the odds of your accomplishing what you care about? What if you could get more of what you want (with certainty) by arguing for the project than by arguing against it?”

If the answer to that is, “No, you can’t offer me enough.” Then, you may not get a certain group to come to the table. The others may still decide it’s still worth going forward without that group. That is why I talk about near-unanimity.

I never define consensus as unanimity. That is an invitation to blackmail. The next-to-the-last group can put anything in the world it wants on the agenda. To some extent, that’s the United Nations’ problem. In my view, no one should adopt unanimity as their decision rule. It invites non-productive strategic behavior. If I seek unanimity, but I’m prepared to settle for overwhelming agreement, I eliminate the blackmail problem.

If I have a group that thinks there is no version of a proposal they can live with—“You want to put this bio-lab here next to me in the city? I don’t care how much protection you add. I don’t care whether you put it underground. I don’t care what security you wrap around it. It doesn’t belong in the city. Don’t build bio-labs near people.”

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You say, “I hear you. But there is no restriction against bio-labs in the city. If the majority of members of the regulatory board feel that safety has been adequately addressed, it can go ahead. So, would you like to talk, on a contingent basis, about what version of the bio-lab, if it goes forward, you would want, and what guarantees of mitigation and compensation should be part of a package, or do you want to take a chance that the proponents’ version of the project (without any input from you) will be permitted? You can still campaign to keep it out of the city. But, if it does go ahead, at least you will have participated in shaping the best possible version of the project from your standpoint.

QUESTIONER: Have you found that one of the problems with convincing people to use the second approach is that it makes the actual behind-the-scene powers who control things in danger, in terms of the transparency and the sunshine aspect? How do you deal with that?

PROF. SUSSKIND: I would argue that the second process is more transparent. What people worry most about is some sort of behind-closed-doors deal making by some ad hoc group that can’t be held accountable because they are not elected, because they are not general-purpose officials. That is why, by the way, that public dispute mediators advocate that almost all meetings be open.

QUESTIONER: I’m not sure I was clear. In other words, the first model, our regular model, perhaps allows a certain obfuscation of people who are actually engaged in controlling that. The second model –

PROF. SUSSKIND: Takes that away.

QUESTIONER: Yes.

PROF. SUSSKIND: That’s what I was going to argue. What I say to elected and appointed officials is, “Support this process, and the product will be one you can count on everybody liking. If the group fails to reach consensus, you can go back and play all the old games.”

