

4840

2009-2010 Regular Sessions

I N S E N A T E

April 27, 2009

Introduced by Sen. AUBERTINE -- read twice and ordered printed, and when printed to be committed to the Committee on Commerce, Economic Development and Small Business

AN ACT to amend the state administrative procedure act, in relation to fostering the use of alternative dispute resolution techniques in resolving public disputes and to establish a state committee on public dispute resolution relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. The state administrative procedure act is amended by adding
2 a new article 6 to read as follows:

3 ARTICLE 6

4 ALTERNATIVE DISPUTE RESOLUTION

5 SECTION 601. DEFINITIONS.

6 602. AUTHORIZATION.

7 603. LIMITATION ON AGREEMENTS.

8 604. NEUTRALS.

9 605. LIABILITY.

10 606. CONFIDENTIALITY.

11 S 601. DEFINITIONS. 1. "AGENCY" SHALL HAVE THE SAME MEANING AS IN
12 SUBDIVISION ONE OF SECTION ONE HUNDRED TWO OF THIS CHAPTER.

13 2. "PUBLIC DISPUTE" MEANS A DISPUTE WHICH INVOLVES THE PUBLIC INTEREST
14 AND THE DETERMINATION OF RIGHTS, OBLIGATIONS AND PRIVILEGES OF PERSONS,
15 AGENCIES, UNITS OF LOCAL GOVERNMENT, OR OTHER ENTITIES.

16 3. "ALTERNATIVE DISPUTE RESOLUTION" OR "ADR" SHALL MEAN ANY PROCESS
17 OTHER THAN LITIGATION USED TO RESOLVE DISPUTES, INCLUDING BUT NOT LIMIT-
18 ED TO MEDIATION, FACILITATION, REGULATORY NEGOTIATION, FACT-FINDING,
19 CONCILIATION, MINI-TRIALS, EARLY NEUTRAL EVALUATION AND PARTICIPATION IN
20 POLICY DIALOGUES.

21 4. "CONVENOR" SHALL MEAN ANY PERSON, AGENCY OR OTHER ENTITY, INCLUDING
22 THE COMMITTEE ON PUBLIC DISPUTE RESOLUTION, WHO HELPS PARTIES TO A

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 PARTICULAR PUBLIC DISPUTE DETERMINE WHETHER AN ADR TECHNIQUE IS FEASIBLE
2 AND APPROPRIATE OR WHO ATTEMPTS TO PERSUADE PARTIES TO UTILIZE ADR IN
3 SUCH DISPUTE.

4 5. "NEUTRAL" MEANS AN INDIVIDUAL WHO PROVIDES SERVICES AS A MEDIATOR,
5 FACILITATOR, FACT-FINDER, OR CONCILIATOR, OR OTHERWISE ACTS TO AID
6 PARTIES IN RESOLVING DISPUTES. A NEUTRAL SHALL HAVE NO OFFICIAL, FINAN-
7 CIAL OR PERSONAL CONFLICT OF INTEREST WITH RESPECT TO AN ISSUE IN
8 CONTROVERSY UNLESS SUCH INTEREST IS FULLY DISCLOSED IN WRITING TO ALL
9 PARTIES AND ALL PARTIES AGREE THAT THE NEUTRAL MAY SERVE.

10 S 602. AUTHORIZATION. 1. GENERAL AUTHORITY. EXCEPT WHERE PROHIBITED BY
11 LAW, AN AGENCY MAY USE ADR TO RESOLVE ANY DISPUTE, ISSUE OR CONTROVERSY
12 IN WHICH THE AGENCY IS INVOLVED. THE TECHNIQUES TO BE EMPLOYED SHALL BE
13 VOLUNTARY PROCEDURES TO BE USED AT AN AGENCY'S DISCRETION EITHER UPON
14 ITS OWN INITIATIVE OR AT THE REQUEST OF ANY PERSON. NOTHING CONTAINED IN
15 THIS ARTICLE SHALL BE CONSTRUED TO REQUIRE AN AGENCY TO EMPLOY ANY SUCH
16 TECHNIQUE IN ANY PARTICULAR MATTER, AND A DECISION BY AN AGENCY TO
17 EMPLOY OR NOT TO EMPLOY AN ADR TECHNIQUE SHALL NOT BE SUBJECT TO JUDI-
18 CIAL REVIEW.

19 2. SUITABILITY OF ADR. AN AGENCY SHALL CONSIDER USING ADR WHERE THE
20 NATURE OF THE CONTROVERSY IS SUCH THAT IT APPEARS TO BE SUITED TO RESOL-
21 UTION THROUGH CONSENSUS BUILDING AND WHERE THE PARTIES WITH A SUBSTAN-
22 TIAL INTEREST IN THE CONTROVERSY HAVE BEEN OR CAN BE IDENTIFIED AND
23 APPEAR TO BE WILLING TO UTILIZE AN ADR PROCESS EITHER BY DIRECT PARTIC-
24 IPATION OR THROUGH A REPRESENTATIVE. AN AGENCY SHALL CONSIDER NOT USING
25 ADR IF A DEFINITIVE OR AUTHORITATIVE RESOLUTION OF THE MATTER IS
26 REQUIRED FOR PRECEDENTIAL VALUE AND AN ADR PROCEDURE IS NOT LIKELY TO BE
27 ACCEPTED AS SUCH A PRECEDENT, OR IF A FULL PUBLIC RECORD OF THE PROCE-
28 DURE IS REQUIRED AND AN ADR PROCEDURE CANNOT PROVIDE SUCH A RECORD.

29 3. CONTENTS OF AGREEMENTS. AGENCIES MAY ENTER INTO AGREEMENTS TO
30 UTILIZE ADR WHICH MAY, AMONG OTHER THINGS: PROVIDE FOR THE APPOINTMENT
31 OF NEUTRALS, CONSULTANTS, OR EXPERTS; PROVIDE FOR THE PAYMENT OF FEES
32 AND EXPENSES; EXTEND ANY LIMITATION PERIODS APPLICABLE TO THE COMMENCE-
33 MENT OR CONCLUSION OF FORMAL ADMINISTRATIVE OR JUDICIAL PROCEEDINGS; AND
34 ESTABLISH GROUND RULES FOR THE PROCEEDINGS. SUCH AN AGREEMENT MAY ALSO
35 BE INCLUDED IN AN ENFORCEMENT ORDER, STIPULATION, CONTRACT, PERMIT OR
36 OTHER DOCUMENT ENTERED INTO OR ISSUED BY AN AGENCY TO ASSIST IN THE
37 RESOLUTION OF FUTURE DISPUTES.

38 4. COSTS. AN AGENCY MAY PAY THE COSTS NECESSARY TO ACHIEVE THE OBJEC-
39 TIVES OF THIS ARTICLE, INCLUDING REASONABLE FEES FOR TRAINING, POLICY
40 REVIEW, SYSTEM DESIGN, EVALUATION, TECHNICAL AND EXPERT ASSISTANCE AND
41 THE USE OF NEUTRALS, FROM ANY APPROPRIATE AREA OF ITS BUDGET INCLUDING
42 LEGAL SERVICES AND ADMINISTRATION.

43 5. ADR COORDINATORS. EACH AGENCY SHALL APPOINT AN ADR COORDINATOR WHO
44 SHALL PROMOTE THE USE OF ADR WITHIN THE AGENCY. THE COORDINATOR SHALL
45 MAKE RECOMMENDATIONS TO THE AGENCY'S EXECUTIVE STAFF ON ISSUES AND
46 DISPUTES THAT ARE SUITABLE FOR ADR, ANALYZE THE AGENCY'S ENABLING STAT-
47 UTES AND REGULATIONS TO DETERMINE WHETHER THEY CONTAIN IMPEDIMENTS TO
48 THE USE OF ADR, AND SUGGEST WHATEVER MODIFICATIONS MAY BE NECESSARY;
49 MONITOR THE AGENCY'S USE OF ADR; ARRANGE FOR SUCH TRAINING OF AGENCY
50 STAFF IN ADR PRACTICES AS MAY BE DESIRABLE; AND PROVIDE INFORMATION
51 ABOUT THE AGENCY'S ADR PRACTICES TO STAFF, THE REGULATED COMMUNITY, AND
52 THE PUBLIC. THE NEW YORK STATE COMMITTEE ON PUBLIC DISPUTE RESOLUTION
53 WILL PROVIDE GUIDANCE AND ASSISTANCE TO AGENCY COORDINATORS.

54 S 603. LIMITATION ON AGREEMENTS. NO AGREEMENT, STIPULATION OR UNDER-
55 STANDING ARRIVED AT THROUGH THE USE OF AN ADR PROCESS AUTHORIZED HERE-
56 UNDER SHALL REQUIRE AN AGENCY TO TAKE ANY ACTION INCONSISTENT WITH ANY

1 STATUTE, RULE, OR REGULATION, OR TO REFRAIN FROM TAKING ANY ACTION
2 REQUIRED BY ANY SUCH STATUTE, RULE OR REGULATION.

3 S 604. NEUTRALS. A NEUTRAL IN AN ADR PROCEEDING CONVENED UNDER THIS
4 TITLE SHALL BE SELECTED BY AND SHALL SERVE AT THE WILL OF THE PARTIES TO
5 AN ADR PROCEEDING. SUCH NEUTRAL MAY BE AN EMPLOYEE OF AN AGENCY INVOLVED
6 IN THE DISPUTE, AN EMPLOYEE OF ANOTHER FEDERAL, STATE OR LOCAL AGENCY,
7 AN INDIVIDUAL WITH EXPERTISE IN ADR PROCESSES OR THE SUBSTANTIVE AREAS
8 IN DISPUTE, OR ANY OTHER PERSON ACCEPTABLE TO THE PARTIES. IN CHOOSING A
9 NEUTRAL, COMPETITIVE BIDDING SHALL NOT BE REQUIRED. COMPENSATION FOR
10 SUCH NEUTRAL AND THE PARTIES' RESPECTIVE RESPONSIBILITIES FOR CONTRIBUT-
11 ING TO SUCH COMPENSATION SHALL BE BY AGREEMENT OF THE PARTIES. WHERE A
12 NEUTRAL IS PROVIDED BY A NON-PARTY AGENCY, THE PARTIES MAY AGREE TO
13 REIMBURSE THAT AGENCY FOR THE FULL OR PARTIAL COST OF ITS EMPLOYEE'S
14 SERVICES.

15 S 605. LIABILITY. NO NEUTRAL OR CONVENOR SHALL BE HELD LIABLE IN
16 NEGLIGENCE FOR ANY ACTS OR OMISSIONS RELATED TO HIS OR HER PARTICIPATION
17 IN AN ADR PROCEEDING.

18 S 606. CONFIDENTIALITY. 1. CONFIDENTIAL MATERIAL. NOTWITHSTANDING ANY
19 OTHER PROVISION OF LAW OR REGULATION, DOCUMENTS PREPARED SPECIFICALLY
20 FOR USE OR PRESENTATION AT AN ADR PROCEEDING SHALL BE CONFIDENTIAL. IN
21 ADDITION, THE PARTICIPANTS IN AN ADR PROCEEDING, INCLUDING ANY NEUTRALS
22 OR CONVENORS, MAY AGREE TO KEEP THEIR ORAL COMMUNICATIONS CONFIDENTIAL.
23 EXCEPT AS PROVIDED IN SUBDIVISION TWO OF THIS SECTION, PARTICIPANTS MAY
24 NEITHER DISCLOSE NOR BE COMPELLED TO DISCLOSE CONFIDENTIAL INFORMATION
25 IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING, NOR SHALL CONFIDENTIAL
26 INFORMATION BE SUBJECT TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION
27 LAW PURSUANT TO ARTICLE SIX OF THE PUBLIC OFFICERS LAW. THIS SECTION
28 SHOULD NOT BE CONSTRUED, HOWEVER, TO PREVENT THE RELEASE, DISCOVERY OR
29 DISCLOSURE OF OTHER DOCUMENTS OR EVIDENCE MERELY BECAUSE THEY ARE
30 PRESENTED IN THE COURSE OF AN ADR PROCEEDING.

31 2. EXCEPTION. A COURT HAVING JURISDICTION OF AN ACTION RELATED TO THE
32 SUBJECT MATTER OF AN ADR PROCEEDING MAY ORDER DISCLOSURE OF A COMMUNI-
33 CATION OTHERWISE CONFIDENTIAL UNDER SUBDIVISION ONE OF THIS SECTION IF
34 THE COURT DETERMINES THAT SUCH DISCLOSURE IS NECESSARY TO PREVENT HARM
35 TO THE HEALTH OR SAFETY OF AN INDIVIDUAL OR THE PUBLIC AND THAT SUCH
36 HARM OUTWEIGHS THE DAMAGE TO DISPUTE RESOLUTION PROCEEDINGS IN GENERAL
37 BY REDUCING THE CONFIDENCE OF PARTIES IN FUTURE CASES THAT THEIR COMMU-
38 NICATIONS WILL REMAIN CONFIDENTIAL.

39 3. CLOSED SESSIONS. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE
40 PARTIES TO AN ADR PROCEEDING MAY AGREE TO MEET IN CLOSED SESSION TO
41 DISCUSS THE ISSUES IN CONTROVERSY.

42 S 2. A New York state committee on public dispute resolution is hereby
43 created. 1. Purpose. The purpose of the committee shall be to assist
44 the executive, legislative and judicial branches of state and local
45 government in resolving public disputes. It shall accomplish this
46 purpose by disseminating information regarding the resolution of public
47 disputes through an alternative dispute resolution by publications,
48 workshops, seminars, and other means; by providing training in alterna-
49 tive dispute resolution; by establishing and maintaining a roster of
50 neutrals with expertise in alternative dispute resolution processes and
51 in substantive areas in which public disputes can be expected to arise;
52 by encouraging and monitoring the use of alternative dispute resolution;
53 by providing guidance and assistance to state agency alternative dispute
54 resolution coordinators; by providing technical support; by helping
55 state and local officials establish pilot and permanent programs to
56 resolve individual public disputes and categories of such disputes; by

1 conducting assessments of public disputes to determine whether alterna-
2 tive dispute resolution is likely to succeed in resolving them; and by
3 acting as convenor by bringing together parties to public disputes
4 deemed likely to be successfully addressed by alternative dispute resolu-
5 tion processes. Where disputes are already in litigation, the commit-
6 tee shall work with the unified court system to identify cases which may
7 be good candidates for alternative dispute resolution.

8 2. Membership and compensation. The committee shall be comprised of
9 thirteen members. Four, including the chair, shall be appointed by the
10 governor, of whom one shall have substantial experience in local govern-
11 ment, one shall have substantial experience in the private sector, and
12 one shall have substantial experience in the not-for-profit sector. The
13 additional members shall be appointed as follows: two by the chief judge
14 of the court of appeals, two by the attorney general, two by the tempo-
15 rary president of the senate, two by the speaker of the assembly, and
16 one by the state comptroller. Members of the committee shall serve with-
17 out compensation but shall be reimbursed for actual and necessary
18 expenses incurred in the performance of their duties.

19 3. Budget, facilities, and staff. The committee shall have such budg-
20 et, facilities and employees as are necessary to carry out its purposes.
21 It shall appoint a staff director who shall hire such additional staff
22 as may be necessary.

23 4. Fees, other income, and contracting authority. The committee may
24 establish, collect and retain reasonable fees for the provision of its
25 services, including services rendered to agencies and units of local
26 government. The committee may also apply for and accept grants,
27 bequests, gifts and contributions to aid in the financing of its activ-
28 ities. The committee may also enter into contracts and agreements with
29 government and private entities, including contracts and agreements
30 providing for inter-agency transfers of funds, to assist in effectuating
31 the purposes of this act.

32 5. Reports. Within two years of the effective date of this act, and
33 every two years thereafter, the committee shall issue a public report on
34 its progress in achieving its objectives and shall recommend any legis-
35 lative or other measures deemed necessary to effectuate the purposes of
36 this act.

37 S 3. This act shall take effect on the one hundred twentieth day after
38 it shall have become a law.