THE RECORDER

ENVIRONMENTAL LAW

A case for early mediation

Coming to the table at the outset of the dispute often leaves parties with broader options for negotiations and mutually acceptable resolution.

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Environmental Law

For many years, the California Legislature has sent strong encouragement to opposing litigants in land use disputes to resolve their issues through mediation. It has been the declared intent of several statutory enactments that matters broadly labeled "environmental disputes," such as CEQA challenges, contested planning and zoning decisions, and disputed permit applications, could benefit from negotiations among the parties and resolution outside of the courtroom.

California Government Code §66030 *et seq*., set forth what the Legislature described as "formal mediation processes for land use disputes" brought in superior court, recognizing the delay, uncertainty and cost of such contentious litigation. The legislation does not mandate mediation, but allows the court to "invite the parties to consider" alternative dispute resolution, and addresses such potential issues as statutory time limits and "open meeting law" requirements that could arise during negotiations pursuant to the statute.

More recent enactments (California Public Resources Code §21167, *et seq*.) have been specifically directed to CEQA cases. Section 21167.8 mandates a "settlement meeting" in the nature of a "meet and confer" after service of a petition or complaint and within certain time limits. The latest enactment, §21167.10, effective July 1, 2011, provides a method for a prospective petitioner to make a prelitigation mediation request to the lead agency which the agency may accept and "proceed with mediation" or deny. Key provisions affecting mediation are set to expire on Jan. 1, 2016.

There is little evidence that these procedures are extensively used or widely successful. While many experienced land use attorneys achieve results outside the courtroom, it seems more a product of direct professional relationships developed over time, rather than the result of the codified procedures. Where such trust does not exist between disputants, there are unanswered questions about the newest statute with one side concerned about delay and frivolous claims, and the other uncertain about the tolling of limitation periods. In addition, there is shared concern over the short time for the lead agency to respond and the fact that the law is silent as to any role of the project proponent.

Perhaps these doubts could be overcome by such measures as (1) a request, not just a "demand"— for mediation that contains a suggested framework for negotiations — truly an "invitation" to mediate; (2) the lead agency's willingness to allow a response from the real party in interest; (3) the real party's participation; (4) a mediator's ability to work with the parties to establish a framework of issues, a time table for negotiations and resolution of any issues concerning statutory time limits.

A CASE FOR EARLY MEDIATION

In spite of well-intentioned statutes and the commendable efforts of many attorneys and parties who voluntarily and independently engage in alternative processes, there is a strong argument to be made for bringing stakeholders together much earlier than the courthouse steps. This model envisions a forum to be held at the earliest possible time — long before positions have hardened, emotions and tempers have flared, heavy financial commitments have been made, and before the involvement of a decision-making board or agency. Interested parties and potential adversaries would convene to listen and learn, exchange views, and most importantly, seek a path toward a mutually beneficial outcome through structured negotiations. Greater support needs to be given to such early-stage mediation — support from the Legislature as well as the legal profession, the government and the business and environmental/citizen advocacy community.

Early-stage mediation offers many advantages. There are, of course, the financial, emotional and control-over-outcome benefits inherent in all mediations, as well as the advantage of confidentiality. In environmental cases, there is a vital addition-

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al advantage to an early gathering: the ability to consider broad issues. One of the primary limitations with mediation during or on the eve of litigation is that the topics "on the table" tend to focus on specific issues as framed by the litigation — e.g., whether proper CEQA procedures were followed or whether the record sustains a finding of a project's conformity with an ordinance or a general plan. It is difficult — and often impossible — to move the parties beyond the narrow issues. Early-stage mediation offers the advantage of an open, more global framework for the exchange of positions, thus broadening the chances for a creative and mutually beneficial resolution.

Of course, it is overly idealistic to believe that by merely gathering, a settlement will be magically created. There are many factors at play that provide a foundation for successful negotiations in environmental cases, including the following:

1. A forum recognizing equality: The setting for early stage mediation must be one of mutual respect and equally-shared communication. All involved must have confidence in the process from the outset. Unfortunately, many attempts at early meetings involve only a developer's staged slideshow attempting to persuade an invited audience or an uninterrupted barrage of criticisms from citizen groups aimed at the project proponents. Compare such unproductive events to a facilitated roundtable discussion free of any power imbalance.

2. Motivated parties: Whether arising from developed trust, time pressure from external sources, including public agencies, or other factors, a gathering of strongly motivated parties gives impetus to results. It is a truism that participants who enter into mediation with a desire to resolve a dispute and who are open to a creative exchange of ideas have the most productive negotiations.

3. Involvement of key decision makers: The mediation needs to include the major players — people with the authority to speak and act on behalf of their constituents, or at least with a minimum of outside consultation and advice.

4. A carefully structured process: From the outset, a comprehensive framework for mediation should be established. Such a "memorandum of understanding" serves as a set of ground rules and can include provisions for such matters as the anticipated issues for discussion, time deadlines (with freedom to extend by agreement), the role of the mediator, the need and mechanism for gathering and exchanging critical information, including necessary scientific data or other expert-generated materials, confidentiality, anticipated implementation issues and allocation of mediation costs.

5. Confidentiality: Although the final product of most environmental settlements should best be open and subject to public scrutiny, absolute confidentiality should govern the process of mediation. Any question of keeping constituent groups informed should be resolved in the ground rules.

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6. Perseverance: The parties must be willing to commit the necessary time for negotiations, commensurate to the nature of the dispute, and to persevere. Experience shows that even if initial sessions do not achieve full resolution, participants who are open to the opportunity to engage in further mediation are able to break off, re-examine positions, and return to overcome what once seemed to have been an unbreakable impasse.

Across the nation and around the world, there are stunning examples of mediated environmental disputes, including some that seemed incapable of commencing, let alone resolving. From New York's Hudson River to Port Townsend, Wash., citizen groups, developers, utilities and public agencies have successfully resolved seemingly intractable differences through mediation.

Perhaps no better pre-litigation example exists than one closer to home, the Tejon Ranch Conservancy, described as the "Holy Grail of conservation in California" by Joel Reynolds of the Natural Resources Defense Council. This dispute arose out of the potential development of the largest privately owned property in the state, involving four ecosystems from the grasslands of the Mojave Desert to the coastal mountain ranges and areas critical to the California condor. Instead of a predicted 50 years of piecemeal proposals and litigation, the CEO and other executives from the developer Tejon Ranch Co. and senior staff members from a coalition of environmental groups, including NRDC, the Sierra Club, the Planning and Conservation League and Audubon California, worked across the table for two years to achieve a settlement. As a result, 90 percent of the property was conserved, public access was guaranteed, and the Tejon Ranch Conservancy was created to oversee and maintain the public lands. The company remains free to pursue delineated real estate and commercial development in other portions, subject to all applicable federal, state and local rules and processes. In return, the groups have agreed not to oppose these projects.

There are, of course, limitations and challenges to the mediation of environmental disputes. For example, notwithstanding an agreement among potential adversaries, a public agency remains free to exercise its discretion concerning a matter before it; groups or individuals can splinter off and leave the negotiations; key public officials and agencies may not be willing or able to participate (but it may be productive to keep them informed where possible and to look to them as a source of information); or the issues may involve unusually complex technical issues (perhaps calling for a neutral expert adviser for the mediator). However, none of these potential factors should preclude the attempt to meet and negotiate.

While the Legislature and the courts could do more to strengthen the role of mediation of environmental disputes, the opportunity for successful early resolution will always rest within the control of motivated and creative parties and their counsel, facilitated by experienced and engaged mediators.