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Honor Earth Day by resolving land use and environmental disputes with mediation

By Gideon Kracov and Malissa Hathaway McKeith

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On this Earth Day, many Californians are concerned about delays to housing development caused by zoning lawsuits and advocate for the need to streamline the construction of clean energy and water infrastructure projects. One solution that has been overlooked is the use of methods other than litigation, referred to as alternative dispute resolution (ADR), to speed resolution of California's environmental, land use, and related public policy disputes.

California is regularly criticized for its inability to address a housing crisis that requires an estimated 150,000 new units each year and to deliver the critical infrastructure (public transit, renewable energy, grid upgrades, electric vehicle charging, water delivery, wildfire and flood resilience, etc.) to meet our ambitious climate goals. As one example, a recent Daily Journal headline reports that *"To Save San Francisco, a Democrat Wants to Scrap Environmental Reviews."* Though the land use and environmental bar settle many cases on their own – often before there is a lawsuit– on this Earth Day California can build its sustainable future more expeditiously and with less conflict if litigants and government agencies adopt facilitated ADR.

The value of ADR, including mediation, is well-established. Mediation is a non-binding, confidential process that expedites resolution with the help of a qualified neutral – usually a lawyer or former judge with subject matter knowledge – who helps parties to better understand their options and craft voluntary agreements. The California Judicial Council's analysis of mediation programs concludes that they bring "substantial benefits to both litigants and the courts. These benefits included reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs." The federal courts in California require the parties in nearly *all civil cases* to attend an ADR session before trial. In the Los Angeles Superior Court, the parties in *every* personal injury and employment case must attend a Mandatory Settlement Conference, and judicial officers often urge the parties to reach a deal.

Thirty years ago, California lawmakers recognized that ADR, and specifically mediation, would aid in resolving land use, environmental, and related public policy litigation – but this option is rarely used. The Planning and Zoning Law in Government Code section 66030 *et seq.* provides "lawsuits can delay development, add uncertainty and cost to the development process, make housing more expensive, and damage California's competitiveness. This litigation begins in the superior court, and often progresses on appeal to the Court of Appeal and the Supreme Court, adding to the workload of the state's already overburdened judicial system . . . it is, therefore, the intent of the Legislature to help litigants resolve their differences by establishing formal mediation processes for land use disputes." The law authorizes permissive mediation in ten specified types of litigation matters including the California Environmental Quality Act (CEQA – the state law that requires analysis and mitigation of a project's environmental impacts and creates a private right of enforcement), general plan decisions, land annexation, public utility actions, mitigation fees, zoning matters, and an expansive catch-all

(with emphasis added) for *"the approval or denial by a public agency of any development project."*

Yet today, these decades-old Government Code mediation provisions of the Planning and Zoning Law are rarely invoked, largely because the provisions are permissive. Many attorneys and government agencies are unaware of this option even though land use, environmental, and related public policy cases are particularly suited to incorporate the culture of ADR and mediation. Mandatory mediation, on the other hand, is now commonplace in construction and real estate contract disputes and saves parties millions in litigation fees and costs. Requiring a neutral third party to facilitate resolution is a core reason why those disputes often resolve early, and the Legislature should amend section 66030 *et seq.* to make mediation mandatory in land use disputes to help get them settled.

CEQA's early settlement meeting process in Public Resources Code section 21167.8 also could achieve faster resolution with the use of mediation. It requires that the parties meet and attempt to settle the litigation within 45 days of service of the CEQA petition. However, this mandatory early settlement meeting is often *pro forma*, abbreviated, and does not meaningfully assist in resolving the dispute. The early meeting usually is over the phone, the litigants do not attend, no neutral mediator participates, and it finishes in less than half an hour. To make matters worse, once finished, the parties in CEQA cases cite the early settlement meeting to exempt themselves from any further ADR or mediation requirement. And while it is true that Public Resources Code section 21167.8 states that "if the litigation is not settled [at the early meeting], the court, in its discretion, may, or at the request of any party, shall, schedule a further settlement conference before a judge of the superior court," this rarely occurs.

Land use, environmental and related public policy disputes can be complicated and often fraught with emotion. It is precisely for these reasons that facilitated mediation can help build understanding and trust among the parties. On this Earth Day as California builds for its future needs and protects the planet, ADR and mediation provide the following benefits:

Participation. ADR and mediation bring the litigants with authority to settle to the table – no small feat. Depending on the case, this can include plaintiffs/petitioners (individuals, non-profits, community associations, etc.) and respondents/real parties (often city attorneys and representatives from public agencies or a private project proponent). By having the clients personally attend the ADR or mediation session, they learn about the litigation process, focus on key settlement issues and engage in efforts to reach resolution. While zoom and remote meetings are becoming the norm for reasons of convenience, there are advantages to convening in-person in a welcoming space. Time, travel and personal presence make for a more meaningful investment in reaching a deal. If emotions are high and repairing the parties' relationship will help settle the dispute (for example if the litigants are neighbors), joint sessions can be considered with a mediator trained in facilitation. Counsel can also set the timing of the ADR session, to ensure it occurs at the right stage of the case (pre-litigation, before or after administrative record preparation, trial briefing, etc.). Indigent or non-profit parties can select free, court affiliated ADR providers, mediators who offer reduced cost services, or newer mediators willing to work *pro bono* to gain valuable experience.

Facilitation. A skilled mediator will maximize the chance to settle by utilizing skills that promote better understanding and trust. Unlike the busy superior court judge with a docket of hundreds of cases, the mediator will have time to separately call or zoom counsel beforehand to distill the key issues. Not only is *ex parte* contact allowed during mediation, it is a best practice to understand the litigants' interests and settlement positions. The mediator performs "shuttle diplomacy" between the parties – the value of this practice is beyond question after decades of demonstrated success in all types of civil matters. Moreover, the expansive mediation confidentiality rules of California Evidence Code section 1115 *et seq.* enable parties to speak candidly to the mediator and protect all communications from disclosure. This is more absolute confidentiality than is provided by the familiar Evidence Code section 1152 rule for offers to compromise. Confidentiality creates an environment of trust within each mediation room that enables counsel and the parties to tell the mediator things they would never tell each other. The skilled mediator then strategizes with the lawyer and client about what to communicate to the other side.

Innovation. ADR and mediation are particularly valuable in land use, environmental, and related public policy disputes that have lasting implications beyond just distributive bargaining over money. These cases may involve mitigation conditions important to petitioners including construction design features, air and water quality, traffic impacts, community benefits, or conservation matters such as tree and open space protection. Mediation allows for creative brainstorming of the non-monetary terms. Selecting a mediator with a background in these types of cases is important. She will spend time with the parties to float ideas, alternatives, and proposals, and then sort feasible choices. Mediators are not judges, juries or arbitrators – and not all cases will settle. However, a trusted mediator motivates parties to reveal their core interests and demands – among even the most reluctant participants.

Evaluation. An unbiased third-party mediator can evaluate the disputed issues, litigation costs and remedies. She will explore personal connections in common with counsel and litigants to build rapport. She can employ techniques such as use of clarifying questions so that the parties will be more open to listening and receiving feedback. Any insurance and indemnity issues can be assessed. She can communicate frankly to the parties and counsel about their arguments and assumptions, especially as new information is disclosed. The mediator can work with counsel to set expectations, assess the merits, and guide the parties to abandon arbitrary litigation aims or settlement terms. For example, if a party in a CEQA case insists on complete victory or a drawn-out trial, a mediator with subject-matter expertise can discuss the complex and increasingly contested remedy provisions of Public Resources Code section 21168.9 and identify a range of logical outcomes.

Resolution. The US Environmental Protection Agency's environmental collaboration and conflict resolution (ECCR) data shows mediated cases are resolved in one-third less time than litigated cases and require 79% fewer staff hours than litigation. Best practices include preparing a draft term sheet before the mediation begins so that litigants identify the key components of a settlement. A good mediator will ensure client representatives have authority to settle. Where the case does not settle, or certain terms remain unresolved, the mediator can ensure the parties agree to next steps with a timeline. The goal of mediation is to resolve disputes sooner and never to encourage delay unless the parties jointly agree to stay or toll the action to save costs. The tenacious, flexible mediator does not give up, and will extend her "shuttle diplomacy" for days or weeks after the mediation session as the parties finalize a deal.

Conclusion. Land use, environmental and related public policy lawsuits, like all other civil cases in California, will benefit from an enhanced culture of ADR and mediation. Litigants, judicial officers, public agencies and the Legislature should revisit the too-often forgotten Government Code section 66030 *et seq.* mediation provisions of the Planning and Zoning Law. ADR tenets such as use of a neutral mediator should be incorporated into the CEQA early settlement meeting pursuant to Public Resources Code section 21167.8. Where cases do not resolve at the CEQA early settlement meeting, courts should consider ordering a further settlement conference with a mediator. The extra effort is worth it. By fostering a culture of ADR and mediation, we can streamline resolution of these disputes for the benefit of the parties, their lawyers and all Californians on Earth Day.

By Gideon Kracov *is an environmental, land use and real estate mediator with ADR Services, Inc., and* **Malissa Hathaway McKeith** *holds an LLM in Dispute Resolution from Pepperdine Strauss Institute for Dispute Resolution and is a seasoned land use, water and environmental lawyer.*