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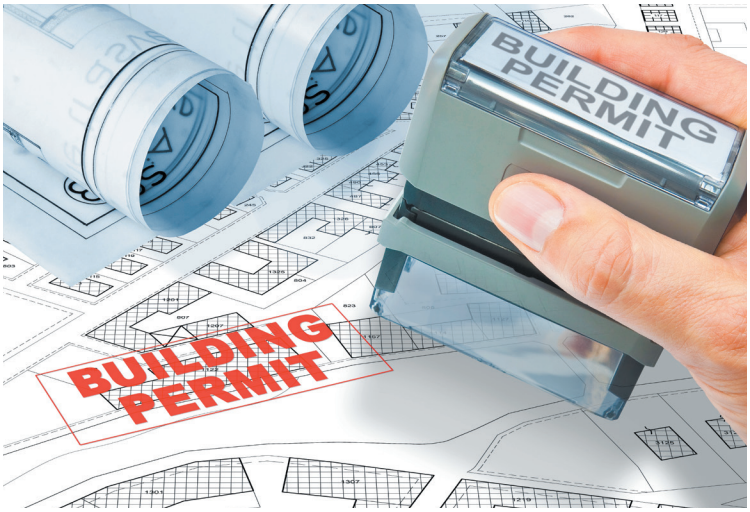

The 'abundance agenda' and alternative dispute resolution

By Gideon Kracov and Darrell Steinberg

Have you heard of the "abundance agenda" - that California must streamline housing and infrastructure permitting to build the affordable, green economy that we imagine? Our housing demands require an estimated 180,000 new units a year. To meet the state's decarbonization and public welfare goals, investments are needed in renewable energy, grid modernization, water infrastructure, health care, and transportation mobility. In 2028, as Southern California hosts the Olympics while recovering from the impacts of wildfires, these projects will be more critical than ever. The "abundance agenda" urges us to remove bottlenecks that limit building the things California needs.

As we focus on how to quickly resolve the state's environmental, land use and related permitting disputes, alternative dispute resolution (ADR) is an indispensable tool in the state's toolbox.

ADR, particularly mediation, is common in all types of real estate, government law and environmental cases. In construction defect, eminent domain, neighbor conflicts, tort claims, labor, property cleanup and water rights matters, ADR saves parties millions in litigation fees and costs. Expanding its use in land use and infrastructure permitting disputes can lead to significant benefits for parties, attorneys, and others.

The iceberg: Mediators look below the surface

Environmental and land use disputes are often about more than bargaining over money. These cases may involve mitigation conditions, including construction design, air and water quality, traffic, community benefits agreements, labor conditions or open space protection. However, many of the issues driving these cases lie beneath the surface and aren't readily apparent from the pleadings. Mediators often analogize litigated cases to an iceberg. We can all see the iceberg. It is the lawsuit and the parties' litigation positions or money demands. But what is beneath the surface, or "below the iceberg" - the parties' motivations and interests? Mediation allows for both exploration of these subsurface issues and creative brainstorming of the non-monetary terms.

In cases where mitigation measures or injunctive terms are at issue, the mediator should signal to the lawyers - expect open-ended, clarifying questions. Why? How? Can we? Why not? What if? This is how mediators identify and resolve what is "below the iceberg." The answers can help justify the parties' demands. An example is a recent mediation of a multi-party CEQA writ of mandamus lawsuit challenging land use approvals for a large warehouse development project. The path to settlement was not about the sufficiency of California Environmental Quality Act (CEQA) thresholds of significance or the rigor of the cumulative impacts analysis in the environmental impact report (EIR) - but instead, community benefits and design changes to lessen project impacts.

Mediators present a choice to the parties

The parties often enter into mediation focused on a single outcome. The goal of mediation should be to present the parties with perspective and a choice. The mediation session must not end before the mediator explains to the lawyers and clients what it will take to settle the case. What are the best terms, after hours or days of negotiating, that we can get from the other side? Then we can compare that with "BATNA," the best alternative to a negotiated agreement. We also discuss "WATNA," the worst alternative outcome (i.e., what the party will lose) if the case is not resolved. The parties then have the information to make an informed choice: Settlement or more litigation and trial.

Another example from a recent CEQA mediation is instructive. In that case, neighboring homeowners sued over approvals for a large senior living planned development. There was the "iceberg" - litigation positions on EIR recirculation and the content of the greenhouse gas and construction noise analysis.

In response, the mediator described to the petitioner neighbors recent caselaw on the

remedy provisions of CEQA and explained they may not be able to "kill" the project or undo land use approvals with broad support from the local elected officials. The mediator emphasized that there will inevitably be resolution and asked that the mediation session focus on mitigation measures that can best meet their interests.

Their perspective refocused; the neighbors expressed that they had issues with traffic and public safety, along with attorneys' fees. As it turned out, the developer real party in interest also cared about security and controlling property access. These issues became currency for the negotiation. In the end, the parties reached a creative settlement where the homeowners' association licensed unused land to the developer for a security kiosk at the property entrance. In return, the association received money for community benefits and legal fees, the benefits of extra neighborhood security and wayfinding signs for access. The developer received land for a security kiosk at the front gate that it wanted and it did not have to reopen its land use approvals. The respondent public agency successfully closed the matter and removed the case from its litigation docket. In the end, the parties chose settlement because the mediation uncovered and focused on common interests "below the iceberg." A residential housing project moved forward, community interests were protected and substantial time and litigation costs were saved.

Mediation mechanics

Environmental and land use cases also, thankfully, already have some built-in mediation mechanics that can help lead to resolution.

An existing but underutilized tool is the CEQA early settlement meeting, outlined in Public Resources Code section 21167.8, which requires the parties to meet and attempt to resolve the litigation within 45 days of the lawsuit being served. However, the early meeting is often pro forma, too informal, abbreviated, and does not meaningfully assist in resolving the dispute. Many practitioners agree that the early meeting can be taken more seriously. One path is to exchange terms sheets and conduct an in-person session including the litigants and a neutral mediator who "speaks CEQA."

CEQA's early settlement meeting is not the only specialized tool to get these cases resolved - the Planning and Zoning Law in Government Code section 66030 authorizes mediation in 10 specified land use matters including general plan decisions, zoning, and a catch-all for "the approval or denial by a public agency of any development project." Yet today, this decades-old Government Code mediation provision is rarely invoked, largely because it is permissive. Practitioners should dust it off in their pending cases.

As for the mediation process - and this is general advice for all litigated cases - the right mediator can make all the difference. Look for mediators who separately call or Zoom with counsel before the mediation to distill the issues. This adds value to the ensuing "shuttle diplomacy" between the parties, all protected by the expansive, mediation-specific confidentiality provisions of Evidence Code section 1115 et seq. When the mediator works as a team with lawyers and clients, up to and including on what to say to the other side and when to say it, all parties become invested in the settlement process.

Not every case is possible to settle during the mediation session. Sometimes parties are not yet ready to settle, or more information is required, especially if creative solutions emerge during the mediation session. In these situations, though, the mediator can still ensure that the parties agree to next steps with a timeline - extending "shuttle diplomacy" for days, weeks, or however long it takes by text, phone or Zoom to keep focus on the parties' interests and what is "below the iceberg."

Conclusion

ADR and mediation are important tools to resolve our state's thorny environmental and land use permitting disputes - and to advance an "abundance agenda" for a greener, more affordable California. The right mediator with the right strategies can help.

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