



# BREAKING GROUND

by Karen Gorden



Photography by Bronson Tate

*NCRC's Land Use & Environmental Mediation Group, With A Combined 150+ Years Of Expertise, Is California's First Mediation Group Dedicated To Resolving Environmental, Land Use, Energy And Public Policy Issues.*

Land use and environmental disputes can be complex and contentious. They pit preservation of the natural environment against new housing for a growing population. Or sacred Native American sites against new energy facilities. Or historical resources against new infrastructure. Such stand-offs almost always result in years of drawn out, emotional litigation, with both sides frequently unhappy with the outcome, particularly in California.

According to Cary Lowe, one of the founders of the National Conflict Resolution Center's new Land Use & Environmental Mediation Group, "In other parts of the country, mediation can be mandated in land use disputes. In California, however, the laws do no more than encourage its use." For Lowe, a land use lawyer and certified urban planner with 35 years of experience representing public agencies, developers, Indian tribes and non-profit organizations, there had to be a better way to solve these contentious disputes. "I got to the point where I was very frustrated with how intense land use conflicts had become." His initial forays into mediation convinced him that this was a better option, and he decided to become trained and certified.

## Building the Framework

Michael Jenkins happened to be one of Lowe's instructors. Jenkins' 20 years of mediating expertise, including teaching mediation at law schools and for the National Conflict Resolution Center, coupled with 25 years working with public agencies, had brought him to a similar view on land use disputes. According to Jenkins, "Mediation is a proven method for resolving a wide variety of business, financial and personal conflicts, with a success rate of over 80%, so why not apply it to land use issues?" Their mutual interest in bringing mediation to land use and environmental disputes began to take shape.

Soon after, Lowe was introduced to John Reaves, an attorney for more than 25 years of experience specializing in environmental and business disputes and litigation, with special expertise involving hazardous materials. His interest was piqued immediately by the ideas Lowe and Jenkins were formulating. The three of them decided to form the new group, and Reaves quickly earned his mediation credential as well.

At the same time, Jenkins' colleague Barbara Filner, the founding director of the National Conflict Resolutions Center's Training Institute, had just retired from NCRC after

25 years. Her expertise included designing and conducting workshops around the United States and Europe on mediation, facilitation, and conflict resolution. She had published numerous articles and co-authored three books on culture and conflict resolution, and taught negotiation at USD School of Law. Like Jenkins, she had personally mediated over 500 cases. Most importantly, she had expertise in facilitating resolution of conflicts with large numbers of disputants, as often occurs in land use and environmental conflicts.

Lastly, Reaves approached Richard Caputo, an engineer and mediator who had spent much of his career with the NASA Jet Propulsion Laboratory and had decades of expertise in energy issues. He had been recognized as a Mediator of the Year in Los Angeles County and, like Filner, had experience in facilitating dispute resolution involving large groups. Caputo had recently retired to Julian. Frustrated over unresolved conflicts affecting the region's energy future, Caputo eagerly joined forces with the others.

Together, the five founders of the newly formed Land Use & Environmental Mediation group have more than 150 years of practical experience relating to the resolution of environmental, land use, energy, and public policy issues.

### Why Mediation?

As Filner explains, "In mediation, unlike in court or in regulatory proceedings, the mediator does not rule in favor of one side or the other. The mediator's job, instead, is to facilitate a negotiation among the parties and assist them in reaching a mutually acceptable agreement. Sometimes, the settlement is based on simple compromise, but just as often, it involves finding creative solutions."

Mediation allows exploration of settlement terms that cannot easily be considered in litigation. For example, Jenkins mediated a California Environmental Quality Act lawsuit over a city road project that threatened to impact a local business. The owner sued, claiming that the environmental review was inadequate. However the lawsuit came out, the project ultimately would have gone forward, but only after great delay and with increased cost. Instead, through mediation, the parties identified a cost-saving change that minimized project impact to the business, and the lawsuit was dismissed. A similar situation involved a suit by an environmental group over the impacts of a large residential development. After years of litigation, Lowe mediated a settlement which satisfied the environmentalists, improved aspects of the project at an affordable cost to the developer, and eliminated a political headache for the city.

Mediation has also proven to be valuable in minimizing strains between the disputing parties. Through mediation, Lowe helped an organization of neighborhood residents and a local bar resolve a long-running, acrimonious conflict over noise and other disturbances from the bar and its patrons. Similarly, Caputo facilitated a lengthy process among scientific

teams involving dozens of projects, resulting in resolution of a host of working disputes.

### Defining Areas of Service

The group is seeking to educate developers, environmental organizations, businesses and public agencies, as well as their attorneys and consultants, about the benefits and opportunities of using mediation in solving land use and environmental disputes. They hope to apply mediation and public facilitation to conflicts over: new development; environmental regulatory issues, including CEQA, air quality, water quality, and endangered species protection; permits and permit conditions; water supply and water rights; siting of energy and other facilities; natural resource development and restoration projects; soil and ground water contamination; toxic torts; climate change impacts and adaptation, including compliance issues under the California Global Warming Solutions Act; "green" advertising or product claims; environmental insurance claims; neighborhood and homeowners association disputes; nuisances and other community conditions; and public policy development, including public and private stakeholder meetings.

### Ribbon Cutting Ceremony:

In late 2011, as a metaphorical ribbon cutting, the Land Use & Environmental Mediation Group decided to go big, and pro bono, by offering its services to resolve the high-profile dispute over reconstruction of the Plaza de Panama in Balboa Park. With the agreement of the parties, Lowe began serving as their mediator. Although the issue is still unresolved, the fact that both parties in dispute agreed to take the issue to mediation before litigation is a marked success for not only the Land Use & Environmental Mediation Group, but for the future of mediation in this field as a whole.

As far as the future of the not yet one-year-old group goes, Reaves says "Environmental conflicts are increasing in frequency. Most of them continue to be fought out through regulatory proceedings and litigation. Neither of those processes is very effective at resolving the issues and concerns which underlie these disputes. We are demonstrating that such disputes can be resolved more quickly, more creatively and at less cost than through the traditional, conflict-based methods." ■

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