Land Use & Environmental Mediation Group
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MEDIATING LAND USE & ENVIRONMENTAL CONFLICTS

Abstract: Disputes over land use and environmental issues have become a common feature of the process of obtaining approvals for development projects of many kinds. These disputes frequently result in lengthy and costly litigation, lengthy delays in project development and long-term conflicts between project developers and opponents. Mediation is an effective means of resolving many of these disputes quickly and efficiently, with outcomes that are acceptable to all parties. Mediation involves using a neutral third party, specially trained to act in this capacity, to facilitate discussions among the parties and help them arrive at a solution that typically is not available through litigation or contested regulatory proceedings.

Opportunities Provided by Mediation

Development projects of many kinds, whether private real estate developments or public works, commonly become the subject of disputes over their land use issues and environmental impacts. Such disputes may involve aspects of the projects themselves, their effects on the surrounding area or other environmental issues. Traffic, noise and biological impacts are among the most common issues, but disputes can arise over a host of other concerns, as well.

Land use and environmental disputes typically involve a variety of parties, including developers, regulatory agencies, environmental organizations, community groups and affected individuals. Typically, these controversies play out first in regulatory proceedings and then, depending on where and what is approved, may move on to litigation. These dynamics are costly in time and money. They may result in substantially delaying or even terminating projects. They also tend to result in poor relations between project developers and those in opposition.

To avoid or minimize such unsatisfactory outcomes in land use and environmental disputes, strong consideration should be given to using mediation as the first option for resolving the conflicts that can arise in connection with planning, permitting, regulating or rule-making regarding development projects or plans. This paper explains the mediation process as it can be applied to any land use or environmental dispute, and identifies factors to consider in determining whether mediation is appropriate in a particular situation.

The Mediation Process

While best known for its use in international and labor disputes, mediation has become a prominent part of the legal landscape in helping parties reach settlement in a wide range of

legal conflicts. There is a less well known history of using it successfully in land use and environmental disputes.

There commonly is confusion among the public, among attorneys, and even among persons who hold themselves out as mediators, about what constitutes mediation. For the purpose of this paper, mediation is defined as a conflict resolution process in which a neutral third party facilitates communication among disputing parties to assist them in reaching a mutually acceptable resolution of the matter in dispute. There are some important points to make about this definition.

First and foremost, the mediation process emphatically is not like a court, an arbitration, a hearing officer proceeding, a public agency hearing, or other decision process, where a judge or some other form of authority considers evidence/information, applies particular rules, and then issues a decision. Rather, the decision authority in a mediation rests solely with the parties. A mediator does not have decision-making power to resolve the dispute.

The mediator does, however, control the mediation process. The mediator manages how the parties communicate with each other, the order in which topics are considered, and how information and settlement offers are exchanged. A mediator does not accept evidence for the purpose of applying the rules to that evidence, but rather reviews the evidence for the purpose of understanding the issues to better shape the dialogue between the parties. More importantly, a mediator encourages parties to exchange their evidence with each other and to share as much other information as is relevant, for the purpose of helping them understand each other's positions and thereby reach a mutually acceptable settlement. A mediator does not try to force a party to reach agreement. However, a mediator may ask a party uncomfortable questions or play devil's advocate to ensure that the party fully understands what might result from a particular decision or from rejecting a settlement offer.

In the context of a permit application or a planning, regulatory, or rule-making process, the final decision authority is vested with a public agency, so the goal of mediation is to present the agency with a settlement to which previously-contesting parties have agreed. Virtually all regulatory agencies will approve such a settlement, so long as it is consistent with the agency's responsibility and jurisdiction.

Mediation is a voluntary process. Each party can decide whether or not to participate, and a party can withdraw from the mediation at any time. In terms of settlement frequency, mediation is a very successful process, with resolution achieved in roughly three quarters of all cases. Settlement becomes more difficult to achieve in a case as the number of issues or the number of parties increases, and thus large or highly controversial development projects or programs tend to pose greater challenges for settlement. On the other hand, once parties sit down together and start discussing the details of the conflict, they typically begin to see the advantages of reaching a resolution, and often also begin to understand and respect the views of their opponents.

For instance, the siting of a renewable energy project may meet different kinds or levels of resistance from people who live in or visit the area, Native Americans who wish to preserve

sacred and cultural sites, environmentalists concerned about impact on habitat of protected species, and many other interests. Whether consideration of these various concerns will help reshape the project so as to assuage the concerns to an acceptable degree is uncertain, but it provides the proponent with an insight into differing perspectives, particularly the nature of opposition, and an opportunity to do make changes that may improve both the project and its chances of success. While the mediation process may add some time and expense up front, it is likely to be a more efficient and less costly process overall than encountering major resistance and facing litigation after agency approvals are granted.

Mediation is often thought of as confidential discussions carried out in a closed room. Indeed, mediations conducted to resolve lawsuits are confidential under most court rules, to encourage parties to speak openly, share evidence, and reach settlement. Mediations conducted to resolve team sports disputes, labor strikes and international conflicts are also usually confidential processes, with carefully controlled and scripted public statements, both during negotiations and after settlement. But mediations can be conducted in numerous environments, including public forums that are subject to open meetings laws. And mediation can be part of a decision process that extends over the course of several months. Indeed, renewable land use and environmental conflicts tend to differ from the usual closed-door mediation, in that there almost always are many parties involved, and the issues may be widely publicized. A mediation process can be designed to address the complications arising from the number and prominence of parties. (Note: A non-confidential mediation process is sometimes called a "public facilitation," but, for the purposes of this paper, the term "mediation" will include both traditional confidential meetings and public facilitations.)

Many people regard mediation as a last ditch opportunity to reach a settlement before going to trial. For that reason, it is sometimes seen as a sign of weakness for an attorney to recommend mediation. These views are unfortunate because mediation is best pursued at the earliest possible moment, as soon as it appears that there are strong opposing views and preliminary efforts at settlement have not been successful. As parties inch toward litigation, they tend to become more entrenched in their positions and have more time, emotion, and attorneys' fees invested in "winning." The prospects of settlement are greatest when parties engage in reaching settlement before hard lines are drawn. Another advantage of early mediation is that the costs of preparing for litigation are minimized. Even if a comprehensive settlement involving all parties is not reached, mediation can often result in settlement among some or many of the parties, and in a narrowing of the issues among the remaining parties, thus also reducing litigation costs.

For instance, in cases involving contaminated properties, there often are many parties involved, raising numerous issues. Parties with divergent interests over allocation of liability may find commonality in keeping investigation and remediation costs low by working together. Battles between insureds and their insurers who are paying the litigation defense costs and may contribute to the settlement can find commonality in trying to resolve the underlying conflict at the least cost. As information about the scope of contamination and remediation costs become available, parties will find opportunities to shrink or resolve disputes without engaging in an adversarial manner or spending as much as they would by litigating the matter. A skilled mediator can help the parties work through the issues,

facilitating choices on sharing consultant costs and finding reasonable bases for allocation, over a course that may take years. In the appropriate case, the parties can also ask the mediator to take on an evaluative role, in which the mediator offers qualitative opinions about the respective positions of the parties and the terms or methods to resolve the disputes. There are many other complex situations that would benefit from a coordinated sharing of information and costs, pacing the decision-making process, and pinpointing discovery needs, until sufficient information becomes available to resolve part or all of the dispute.

Advantages of Mediation

There are several significant advantages of a mediated settlement over a court or agency ruling. Most importantly, mediation allows exploration of settlement terms that cannot be considered in litigation or rule-making processes. For example, a mediator with the Land Use and Environmental Mediation Group mediated a California Environmental Quality Act (CEQA) lawsuit between a municipality and a business. The city was expanding a road, and the project threatened the business adversely, so the business sued the city, claiming that the environmental review was inadequate. If the CEQA lawsuit had proceeded, there would have been only one of two results possible. Either the court would have upheld the environmental review and the project would have proceeded; or the court would have found the environmental review to be deficient, the review would have been repeated, and the project then would have gone forward; in either case there would have been increased costs and delays because of the litigation. By contrast, in mediation, the parties were able to identify a small change to the project that minimized the impact to the business. The municipality agreed to that change, and the business dismissed its lawsuit, which also benefitted the agency by reducing costs. If the parties had not mediated, the CEQA lawsuit process they were pursuing would have precluded effective problem-solving communication, and would have resulted both in damage to the business and in higher costs to taxpayers.

Similarly, in another CEQA case mediated by a member of the Land Use and Environmental Mediation Group, an environmental organization and a community group sued to block a residential development due to various impacts on the surrounding area. The litigation had been underway for over five years when the parties agreed to seek a facilitated resolution. Through mediation, in a matter of weeks, the parties identified modifications to the project which substantially eliminated the impacts of concern and which were acceptable to the developer. The approving jurisdiction, while not a party to the mediation, was delighted to have the dispute resolved, and provided an inducement by way of a development agreement securing the project approvals. None of those outcomes would have been available had the parties simply continued to litigate.

Another significant advantage of mediation is that a mediated settlement can often salvage a relationship that may be damaged by the conflict. The value of mediation is obvious in divorces involving child custody, in probate cases where family members are in disagreement, or in disputes involving neighbors. But relationships are also present in conflicts involving planning, permitting and rule-making processes. The relationships may be among property owners, residents, businesses, environmental organizations, government officials and numerous others who will be obliged to work and interact with each other to

implement whatever decision is made. And the permitting or rule-making agencies are far more comfortable making a decision when contesting parties come to them with a consensus approach to resolving the issues.

Yet another advantage of mediation is that, other than the relatively modest cost for the mediator, there is nothing to lose in trying it, and a great deal to gain. The best outcome is a comprehensive settlement that resolves all issues among all parties. In that case, a few hours, or even a few dozen hours, of mediator time, plus the time and costs of the parties' attendance at those meetings, is modest in comparison to the hundreds of hours of attorneys' fees, possibly years of delay, and the risk of an unanticipated result from a court or a rule-making agency. In many cases, a less-than-complete settlement may be a success. As an example, one of the Group's members mediated a dispute between a developer and several dozen residents regarding a proposed institutional development in the heart of the neighborhood. The project required a community plan amendment, and when the opponents showed up *en masse* at the city's Planning Commission hearing, the parties were told to mediate. After two sessions involving all the parties together and numerous sessions involving individuals or small groups, the mediator was able to craft settlements between the developer and most of the individual residents regarding their specific concerns, along with a broad agreement regarding traffic issues that was agreeable to most residents. However, a few residents refused to sign on to any agreements and continued to oppose the project. When the matter returned to the Planning Commission, the commissioners compared the small number of opponents with the large number of residents who now supported the project, and were comfortable voting to approve the plan amendment. When the opponents appealed, the City Council rejected the appeal.

Costs of Mediation

Most mediators charge by the hour, and their fees to a large degree mirror the fees charged locally by attorneys, since many mediators come out of the legal profession. When large numbers of people are attending numerous meetings, scheduling and logistics become important process considerations, and so administrative costs also must be considered. Thus, mediation costs can add up, but the costs still are a small fraction of the cost of adjudicating the same dispute.

A mediator, by definition, must be neutral. Mediators are guided by ethical standards and, while those standards are not by and large adopted into law, mediators can be – and have been – found liable for ethical breaches. Sometimes the question of who pays for the mediator becomes an issue that must be considered. In most court cases, mediation fees are shared by the parties. In some situations, such as personal injury cases where one side has insurance coverage, the insurance company may cover mediation costs. This also may occur when a citizen group with limited resources agrees to mediate a dispute over a proposed project, but the costs are to be borne by the project applicant. When that happens, the mediator must be careful to disclose the payment arrangement to the parties, make clear that the arrangement does not compromise the mediator's duty to be neutral, and allow the selection of another mediator if that arrangement is not satisfactory.

It may be logistically impossible to ask both sides to share the costs equally when one side consists of dozens or even hundreds of persons who may not be connected in any way except for their opposition to a particular project. In other cases, neighborhood groups or environmental organizations may simply not have the funds to pay for mediation, even though they may be able to pursue litigation through a statute that authorizes payment of their attorneys' fees. In mediations about planning, permitting, regulating, or rule-making processes, ideally the public agency would pay for the costs of mediation, which has the additional benefit of putting the agency's imprimatur on the mediation. However, in an era of tight public funding, most public agencies simply do not have a budget for conflict resolution processes. Thus, by default in many cases, the cost of mediation is borne by the person or business having an application before the public agency.

In the case described above involving the developer seeking a community plan amendment, the developer agreed to pay for the costs of mediation. This created a problem for the mediator in two respects. First, the residents initially did not believe that the mediator was neutral. By frequently referring to his duty to remain neutral and following through consistently on settlement negotiations, the mediator's role eventually was accepted by most, if not all, residents. Second, the developer initially treated the mediator as if he were working as the developer's public relations consultant. The mediator repeatedly had to clarify his role as a professional neutral and refuse to take certain actions that the developer requested. It should be noted here that there is often a valuable role for public relations professionals to play in these kinds of disputes, and sometimes effective public relations may resolve conflicts. However, in most cases, there simply is no substitute for a professional neutral.

Land Use and Environmental Mediators

The Land Use and Environmental Mediation Group is affiliated with the National Conflict Resolution Center (NCRC). This is a non-profit corporation, which reinforces the perceived neutrality of its mediators. Ultimately, however, the parties themselves have sole settlement decision authority, so if, at the end of the process, they are not satisfied that the mediator has been neutral, they can decide not to sign a settlement agreement. Consequently, mediators particularly need to address directly the issue of their neutrality in cases where the mediation fees are not being shared equally by the parties.

Disputes involving land use and environmental issues are not qualitatively different from other kinds of disputes. They may, however, require a particular knowledge base to understand technical issues, along with an understanding of how to manage large group decision processes. For that reason, the Land Use and Environmental Mediation Group members, and other mediation groups that specialize in policy issues, have a broad range of backgrounds and skill sets, and work as a team to devise processes that are specific to each dispute. But the considerations involved in using mediation apply to land use and environmental disputes just as much as to other types of disputes. The most important consideration is to initiate mediation at the earliest possible time, when the greatest benefit can be achieved with the least time and expense.

We are available to discuss with interested parties the potential value of mediation in any situation.

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