

LOS ANGELES DAILY JOURNAL

December 9, 2011

Mediating Conflicts Over the Environment

by Cary Lowe

California is both praised and reviled for its array of environmental regulations, aimed at protecting such resources as the coastline, endangered animal and plant species, water supplies and air quality. The centerpiece of this regulatory system is the California Environmental Quality Act, or CEQA (Public Resources Code Section 211000 *et seq.*), which requires environmental review of most development projects.

Landowners, developers and businesses have long criticized CEQA for setting standards that often are unattainable and for exposing projects too easily to legal challenges. But modifying CEQA is a sensitive matter, as an army of environmentalists and much of the general public look upon any such moves with grave suspicion.

That dynamic recently has changed, mainly in response to several efforts in the state Legislature to provide special regulatory relief to a few high-profile projects, notably football stadiums. Two years ago, the Legislature exempted a stadium proposal for the city of Industry from any CEQA review (AB 81). This year, the Legislature mandated highly expedited review of any legal challenges under CEQA for a competing stadium proposed for downtown Los Angeles (SB 292, Public Resources Code Section 21168.6.5) and similar benefits for certain other large projects (AB 900, Public Resources Code Section 21178 *et seq.*).

CEQA always has included exemptions for certain classes of activity and projects, but those generally have been projects with little or no potential environment impact. This new trend has alarmed environmentalists and is forcing them to dig in for a long, hard fight to protect the core principles of CEQA. Developers, on the other hand, are seeing recent events as a sign that

exemption from CEQA may be their best bet, especially for large projects, if they can muster enough political strength to get special treatment.

There is a better alternative available. Since most projects are reviewed and approved without controversy, the focus should be on how to more effectively handle the disputes over the small number of controversial or high-profile projects that generate nearly all the excitement. That requires providing developers with an incentive to work within the system, rather than muscling their way to special treatment in Sacramento, while ensuring environmentalists that their values will not be sacrificed in the process. The key is mandating that environmental disputes be mediated before they have a chance to become litigation battles.

Mediation uses the services of a trained professional to assist parties to a dispute in reaching a settlement that they have been unable to reach on their own. While litigation over an environmental review is limited to addressing the technical adequacy of the analysis, mediation is much more open, providing a forum in which any issues relating to the project or its environmental impacts can be discussed and resolved. For instance, while a lawsuit may question the conclusions of a traffic study used in preparing an environmental impact report, mediation can produce an agreement to redesign the project itself so as to reduce the amount of traffic generated by the project in the first place.

Mediation is widely used in other kinds of legal proceedings, including personal injury cases, divorces, employment issues and general business disputes. Yet, it is rarely used in resolving environmental issues. State law merely encourages, but does not mandate, the parties to such disputes to consider mediation (Government Code Section 66030 *et seq.*), and the courts have been slow in promoting this alternative in environmental cases. A recent change in the law (Public Resources Code Section 21167.10) allows a project challenger to request mediation before filing a lawsuit, but does not compel the project applicant to participate. Too often, one or more parties fear that opponents will see proposing mediation as a sign of weakness.

In other words, there is nothing that actually promotes mediation of environmental disputes. Instead, these cases consume large blocks of valuable court resources, and yield a puzzling mix of frequently inconsistent judicial decisions, because of the complexities of the law and the factual situations. Yet, in the occasional environmental case where mediation is used, results can be achieved in days rather than months or years, at a far lower cost than through litigation. Moreover, because CEQA litigation has a well-deserved reputation of being a crapshoot for all involved, with great uncertainty in predicting how a trial court will view a situation, there are great risks. Since the parties to mediation effectively formulate their own outcome, as opposed to having it imposed by a court, they tend to emerge from the process with a much higher level of satisfaction and a much better working relationship, as well.

CEQA does require the parties to a lawsuit to meet and attempt to negotiate a settlement (Public Resources Code Section 21167.8), but this rarely has any effect. The law should require them to engage in mediation, both before litigation starts and, if it fails the first time, again after a lawsuit is filed. Based on experience in other areas, the vast majority of cases should be settled this way, quickly and cheaply, and without the rancor that accompanies litigation.

CEQA needs to be preserved, but so does public confidence that it can be implemented fairly and efficiently. Mediating CEQA disputes would go a long way toward achieving both those goals.

Cary Lowe is a lawyer and mediator associated with the Land Use and Environmental Mediation Group of the National Conflict Resolution Center.