Strategies for Successfully Resolving CEQA and Land Use Disputes

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California needs to build abundantly for its green economy and to achieve the sustainable, equitable future we all imagine. Our housing demands require an estimated 120,000 new units each year. An enormous quantity of public infrastructure projects are planned to meet the State's decarbonization goals – grid upgrades, battery and water storage, transportation mobility projects and electric vehicle charging. In 2028, the Olympics come to Southern California, which will still be recovering from wildfire impacts.

This paper suggests strategies to resolve the permitting and litigation disputes that agency clients confront in considering and approving these types of projects. This paper is divided into three sections. Section I provides guidance for agency decisionmaking in California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and land use matters, including shaping the project, working with counsel and experts, and preparing for public hearings. Section II identifies ten tips to follow to obtain successful outcomes in CEQA and land use litigation. Section III discusses settlement strategies and negotiation tips to resolve these disputes.

I. SHAPING THE PROJECT AND PREPARING FOR PUBLIC HEARINGS: EARLY ENGAGEMENT WITH LEGAL COUNSEL FACILITATES SUCCESSFUL CEQA REVIEW[1]

Helping public agency clients solve problems and facilitate reasonable outcomes are prime goals of most government lawyers. These goals can be easily frustrated when assisting a public agency with shepherding projects through the environmental review process required by CEQA.

Fortunately, CEQA's procedures, often derided as onerous, provide ample opportunities for public agencies and their counsel to collaborate proactively to shape public agency projects, create stakeholders to advocate for projects, and build administrative records that can withstand legal challenges to projects. This paper provides recommendations for early engagement between legal counsel and public agency clients that can help facilitate successful CEQA review and legal defense of CIP projects.

Don't Wait Until It's Too Late

CEQA contains multiple procedures and requirements that must be scrupulously followed to avoid challenges to, or even reversal of, CEQA decisions regarding CIPs. Legal counsel can assist staff with drafting checklists, reviewing draft documents, and planning timelines and deadlines that can make CEQA's procedures manageable and create an administrative record to buttress the project against legal challenges.

A common problem with many agencies is the failure to engage legal counsel early in the CEQA process. CEQA's requirements can be triggered by agencies taking actions or making decisions that definitively commit the agency to a project, but agencies may

[1] Authored by Johanna Canlas and Davin Widgerow, Burke, Williams & Sorensen, LLP.

violate CEQA by doing so without first performing environmental review of the project's potential environmental impacts. Legal counsel will have far fewer options available to defend the project from legal challenge if the agency has already committed resources, funding, and stakeholders to a project, but nevertheless failed to perform CEQA's required environmental review.

Counsel can avoid being consulted too late in the process by establishing regular meetings or lines of communication with agency staff. Staff often have preliminary ideas that can quickly develop into major projects without legal input. Good discussions for legal counsel to have with agency staff include assessing the likelihood of a proposal evolving into a project, the timeline for planning and implementing the project, and whether funding is available for contracts, consultants, potential legal challenges. More focused discussions should include whether a prior environmental analysis was performed that would encompass some or all of the project activities; whether or not the project is an emergency project that would qualify for expedited CEQA review; if the project is likely to impact sensitive natural resources or is located very close to residences, medical facilities, or schools; and if the project is likely to be controversial and engender significant public debate. Having these discussions *before* a project is already underway can help inform CEQA strategies, consideration of alternatives, preparation for public engagement, and building a good record for any decision to adopt the project.

Embrace Scrupulousness With The CEQA Document

Lawyers are trained to sit down for long periods of time, with long documents, and edit them, improve them, criticize them, and engage with them. CEQA documents and materials are no different. Effective agency counsel will be scrupulous in reviewing and editing CEQA documents to ensure that no questions are unanswered, no pitfalls exist, no regrettable statements are made, and all conclusions are justified with substantial evidence. Agency staff should embrace the same scrupulousness—an early and exhaustive review by a trusted advisor far outweighs a draining CEQA challenge after the project is adopted. If agency staff do not have annoying redlines from their legal counsel, they are not fully prepared—embrace scrupulousness!

Agency counsel should approach review of a CEQA document with the mindset of a potential challenger to the project: What are the weak points? Where is the conclusion on shaky grounds? Is there obvious information missing from the draft document that is critical to understanding the project? Is the evidence for a conclusion significant, or could the evidence be supplemented? This requires a very unforgiving analysis of the document by agency counsel, but the effort is more than worthwhile. The deference provided by courts to agency factual conclusions provides opportunities for meticulous counsel to help the agency build a defensible record before the CEQA documents are final—the more evidence and substantiation for the agency's conclusions, the fewer grounds any court will have to reverse those decisions. It is worth building that record from the very start of a project, so that the agency can feel confident it has thoroughly examined and documented the project, even if litigation is filed.

Encourage Consultant-Counsel Collaboration

Multiple firms provide consulting services specializing in both the procedural and substantive aspects of the CEQA environmental review process. For instance, consulting firms can help prepare checklists and background reports, conduct technical modeling, perform surveys and studies, and draft and finalize official CEQA documents.

CEQA consultants and legal counsel both have a common skill—they can "speak CEQA." Legal counsel should consider offering to establish regular meetings where staff, counsel, and consultants can check in and discuss projects' progression from initial feasibility studies all the way to public hearings. Establishing connections between legal counsel and CEQA consultants can streamline review by allowing consultants to focus on meeting procedural milestones and conducting technical studies, while legal counsel focuses on ensuring that the CEQA process and analyses meet all substantive legal requirements. A productive partnership between counsel and consultants can ensure that controversial and complex problems can be resolved strategically, early in the process, and without exposing the agency to liability.

Furthermore, encouraging counsel and consultants to collaborate frees agency staff to focus on the big-picture implementation of the project: Are agency decisionmakers informed? Is the agency prepared for public outreach and response? Are non-CEQA prerequisites or preliminary messaging required before the project is adopted? Allowing counsel and consultants to collaborate early in the CIP's CEQA process will allow agency staff to devote time and energy to these issues.

Inevitably, some tension may arise between legal counsel and consultants during preparation of the CEQA analysis. As noted above, legal counsel's review of the draft CEQA documents should be performed with the mindset of a rigorous challenger. The consultants who assembled the draft CEQA document may bristle at this level of inspection, but both parties should endeavor to accommodate each other's needs: ultimately, legal counsel is reviewing the document in detail to improve and strengthen the document in anticipation of judicial review, not to undermine the consultant. Care should be given to help consultants understand that there are collaborators with counsel, not adversaries, in assisting the common agency client.

Be Flexible and Adaptive In Project Design And CEQA Evaluation

Perhaps you expected your project would be exempt from CEQA, but now learn it will need an environmental impact report (EIR)? Perhaps your high-profile project is eligible for streamlined CEQA procedures, but you are concerned about public backlash if the project is approved without open hearings? Perhaps you expected to perform a full EIR, but now learn there is a prior analysis you can incorporate into your environmental review to dramatically reduce time and expenses?

Legal counsel can assist staff early in the CEQA process by helping to evaluate all options and strategies, explore new alternatives, assess liability risks, and otherwise help to ensure that the agency is protected from legal exposure as much as possible for whatever decisions it makes. Agency staff should be prepared to be flexible with the CEQA evaluation and procedures for their project, and be willing to adapt if necessary to ensure the project is successfully approved.

Legal counsel should encourage agency staff to be flexible if the CEQA process does not develop as originally planned, particularly if initial analyses show that the project will have additional or more severe environmental impacts than anticipated. If the agency was committed to an exemption or an addendum, but the preliminary analyses show the project could actually cause new or more severe impacts, or includes activities that would nullify an exemption, legal counsel should explain the costs and risks of proceeding, while being sensitive to concerns that performing additional analysis or changing the CEQA strategy adds time and expense to the project. After all, the potential liability and expenses of proceeding with a risky project should be compared to the costs of a challenge to the project, rather than the agency's initial financial and timeline projections for the project.

II. TEN STEPS FOR SUCCESSFUL RESOLUTION OF CEQA LITIGATION[2]

Notwithstanding best efforts in project design and CEQA evaluation, and early engagement of experts and counsel, your agency may still be served with a petition for writ of mandate alleging violations of CEQA

This paper provides a 10 step overview of statutory requirements and best practices to help make CEQA litigation go as smoothly and painlessly as possible. This guidance is intended as a high-level discussion of what may happen in a typical CEQA case; it does not, nor could it, discuss every conceivable twist and turn that may arise.

1. Think About the Administrative Record Early and Often

CEQA lawsuits are won (or lost) on the administrative record of the agency's proceedings. The administrative record includes "…pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 8.)

Except in rare circumstances, the items in the administrative record are the only evidence the court may consider. Consequently, it is critical to ensure relevant documents and studies are prepared, and maintained in the City's records *before* the City takes final action on a proposed project. Once the project is approved, there is little chance of augmenting the record with any post-approval documents or other evidence.

When served with a CEQA lawsuit, public agency counsel should consider both the content of the record and the process by which the record will be prepared. Public Resources Code section 21167.6 governs the timing, process, and content of the administrative record. Read it carefully.

[2] Authored by Nicole Hoeksma Gordon, Principal, Meyers Nave.

A few items to keep in mind:

- Pursuant to 2023 legislation (SB 149), lead agencies now have five (5) business days from receipt of a CEQA petitioner's election to prepare the record to reject the election. (Pub. Resources Code, § 21167.6, subd. (b)(3).) Rejecting a petitioner's election to prepare may enhance the speed and efficiency of record preparation. Importantly, however, exercising this option means waiving the right to recover record preparation costs that would otherwise be recoverable as a prevailing party.

- Be on the lookout for California Public Record Act ("CPRA") requests. Petitioners often use such requests to obtain documents to prepare the administrative record. While the CPRA does not require agencies to organize or explain the context for documents produced, it may be beneficial to do so, since the ultimate responsibility to certify an organized record in CEQA litigation lies with the lead agency.

- Check the local court rules for any provisions relevant to CEQA and administrative records.

- Collection, review, and production of email records can take a long time. E-discovery platforms can help. Seek out the advice of paralegals and e-discovery specialists.

- Consider reducing the scope of the record. The parties may stipulate to a "partial record of proceedings" that does not contain all the documents listed in Public Resources Code section 21167.6, subdivision (e), if approved by the court. (Pub. Resources Code, § 21167.6, subd. (b)(1)(B).) But make sure the record includes all the evidence needed to support and defend the City's conclusions.

- The record "shall not" include communications that are of a logistical nature, such as meeting invitations and scheduling communications, nor shall in include any material that is subject to privileges contained in the Evidence Code or exemptions contained in the CPRA. (Pub. Resources Code, § 21167.6, subd. (e)(10).)

- The record must be prepared and certified by the respondent agency within 60 days after service of a request for preparation. This deadline can be, and often is, extended by stipulation of the parties. Extensions over 60 days require court approval.

2. Communicate Early with Opposing Counsel

As described below, several deadlines come up very quickly in CEQA litigation. Acquainting yourself with opposing counsel early in the process, and establishing a civil relationship, can help these deadlines go smoothly and set the stage for a more productive settlement discussion.

For example, it is helpful to communicate at the outset regarding:

- a date for the early settlement meeting;
- the deadline for the answer or other responsive pleading; and
- the scope of the record.

3. Serve the Notice of Responsible Agencies

The respondent agency must provide the petitioner with a list of responsible agencies and agencies having jurisdiction over a natural resource affected by the project, not later than 10 business days following service on the Agency. (Pub. Resources Code, § 21167.6.5, subd. (b).) Petitioner then has 15 days to notify the responsible agencies of the pending litigation and serve them with a copy of the Petition. (*Id*., subd. (c).) This can be in letter or pleading form and need not be filed with the court.

4. File Notice of Mandatory Settlement Meeting

The respondent agency must serve a "Notice of Settlement Meeting" within 20 days after service of the petition. The settlement meeting itself must occur within 45 days of service of the petition. (Pub. Resources Code, § 21167.8.)

In many instances, 20 days may not be enough time to have confirmed a workable settlement meeting date with opposing counsel. In that case, it is acceptable to notice a settlement meeting date and time that works for you and your client and update it later if needed.

CEQA settlement meetings are relatively informal and do not typically take place in the courtroom (except where local rules require it, see, e.g., San Francisco Local Rule 6.11(f)).

Note that some counties, e.g., Los Angeles, Alameda, Fresno, have local rules observing that an early settlement meeting may be premature and recommending a second meeting be held after the administrative record is certified. In section 3 this paper, we discuss best practices and tips for making the early settlement meeting as productive as possible – including in-person participation by the parties and use of a neutral mediator.

5. Evaluate Merits of the Case and Settlement Options

Take a hard look at the case. If you are already familiar with the record, it may be easy to assess its strengths and weaknesses right away. In other cases, you may need time to review the record before determining the likelihood of prevailing.

In connection with this evaluation, consider settlement options, including mediation. If the parties are truly interested in resolving the case, a mediator can help enormously in getting the parties to the table and identifying a path to resolution. Research shows the benefits of early mediation to save costs and try to resolve disputes before parties are dug in. If the other parties are willing to sit at the table early in the case – consider taking that opportunity. The final section of this paper on dispute resolution strategies explores negotiation and settlement strategies in greater detail.

6. Consider Responsive Pleading and Defenses

A CEQA petition that fails to allege facts sufficient to state a claim may be attacked by a general demurrer. (See Cal. Code Civ. Proc., § 430.10 et seq.) Common grounds for demurrer include failure to exhaust administrative remedies, failure to file the petition within the applicable statute of limitations period, and mootness.

Before demurring, consider whether a demurrer will completely dispose of the case or a cause of action, or whether it may simply give the petitioner an opportunity to amend the petition with additional facts and allegations. In many cases, arguing affirmative defenses during briefing on the merits, with the benefit of the administrative record, may prove to be a better strategy.

Regarding timing, whereas the answer or other responsive pleading in civil litigation is typically due within 30 days of service of the complaint, because CEQA claims almost always involve an administrative record, they are governed by Code of Civil Procedure, section 1089.5. That section provides that the respondent and real parties in interest must file a responsive pleading within 30 days after receipt of a copy of the record. Where a lawsuit involves both CEQA and non-CEQA causes of action, it is a good idea to get confirmation from opposing counsel on the response date. If opposing counsel will not agree, it may be necessary to seek a court order to establish the date for filing a responsive pleading.

Be sure to calendar 90 days from the filing of the petition for petitioner to request a hearing. If a request for hearing is not filed within 90 days, respondents can file a motion to dismiss the case, or the court may dismiss it on its own motion. (Pub. Resources Code, § 21167.4; CEQA Guidelines, § 15232.)

7. Certification of the Administrative Record, Prepare for Briefing

Typically, once the respondent agency certifies the administrative record, the court will set a trial date and a briefing schedule. In some cases, court will permit parties to submit a proposed briefing schedule and propose page limits. Generally, the most important thing to the court is that the judge receive the briefs and the record with sufficient time to prepare for the hearing on the merits.

It is common practice to stipulate that the briefs on the merits will satisfy CEQA's requirement to file a separate "statement of issues." (See Pub. Resources Code, § 21167.8, subd. (f).) Sometimes, however, respondents may want to receive a statement of issues in hopes of limiting the issues to be briefed and raised at the hearing. Note that CEQA does not prohibit parties from briefing or raising issues not mentioned in the statement of issues.

Once the briefing schedule has been established, counsel should continue to evaluate the merits of the case. If the case has weaknesses, it is not too late to revisit settlement. In deciding whether to reopen settlement discussions, counsel should weigh the downside of signaling potential doubts about the case against the upside of potentially settling the case before more attorneys' fees are spent. We analyze settlement strategies in greater detail in the final section of this paper.

Assuming the case proceeds to briefing on the merits, be sure to write a clear, concise brief. Adhere to any ordered page limits, but consider going into court ex parte if there is good cause to request more pages, e.g., the need to brief an affirmative defense. The brief should respond to all arguments raised, provide clear citations to the administrative record, and raise any applicable affirmative defenses. Some courts appreciate briefs that include hyperlinks to cited pages of the record and legal authority. It is worth inquiring with the court whether this is something the judge would prefer. If the court welcomes it, a hyperlinked brief can greatly facilitate judicial review.

8. Preparing for The CEQA Trial

A CEQA trial typically consists of a hearing before the judge on the merits of the case. Hearings typically last between half a day to three days. Many judges require the parties to file a joint appendix of administrative record pages cited in the parties' briefs. Even if the court does not require it, filing a joint appendix may be a good idea to ensure the judge sees and touches the relevant evidence.

Before trial, refamiliarize yourself with the administrative record. Have the complete record available electronically in case opposing counsel, or the judge, raises something unanticipated. Consider bringing hard copies of any critical documents to trial. This can be especially helpful if the case turns on interpretation of a map or other figure that may require explanation. Be sure any pages you wish to submit on the day of the hearing come directly from the certified administrative record, and bring copies for all counsel.

In some cases, the court will issue a tentative decision prior to the hearing on the merits. In that case, counsel should carefully study the tentative and direct their argument to any factual or legal issues that require clarification. With or without a tentative ruling, counsel should be prepared to discuss any and all legal and factual issues argued in the parties' briefs.

Following the hearing on the merits, the court will issue a final ruling.

9. Judgment for Respondent

If the court denies the petition, the respondent agency will typically be ordered to prepare a proposed judgment. The judgment should also include the court's decision on the matter of costs, or include a blank space for costs to be entered at a later date.

Often, the court or the local rules will require the draft judgment to be sent to opposing counsel for approval as to form. Following a reasonable period for such approval (e.g., five days), the proposed judgment should be submitted to the court. Once the court approves and enters the judgment, the respondent agency should file a Notice of Entry of Judgment.

If the court does not award the petitioner any relief, the respondent and any real parties are considered the prevailing parties and are entitled to costs as a matter of right. (*Chaparral Greens v. City of Chula Vista* (1996) 50 CA4th 1134, 1152.) A prevailing respondent may file a memorandum of recoverable costs within 15 days (plus 2 court days for service by electronic means) of service of the notice of entry of judgment or a file-endorsed copy of the judgment. (Cal. Rule of Court, 3.1700(a)(1); Code Civ. Proc., § 1010.6(a)(3)(B).)

The parties have 60 days from service of the Notice of Entry of Judgment to appeal the trial court's decision. (Cal. Rule of Court, 8.104(a).) If an appeal is filed, the rules governing appeals in civil actions generally apply to appeals in CEQA cases.

10. Judgment for Petitioner

If the court grants the petition, in whole or in part, the petitioner will typically be ordered to prepare a proposed judgment. The judgment will order issuance of a peremptory writ of mandate, which is also typically drafted by the petitioner. A peremptory writ of mandate orders the respondent agency to perform the act that was the subject of the lawsuit. A peremptory writ of mandate will also order the respondent agency to file a return to the writ describing the action it has taken to comply with the writ and a date by which the return must be filed. (Pub. Resources Code, § 21168.9, subd. (b).)

Where a court finds the public agency has not complied with CEQA, Public Resources Code section 21168.9, subdivision (a) limits the remedies a court may order to one or more of the following mandates:

- That the agency void its determination, finding, or decision, in whole or in part;
- That the agency and any real parties in interest suspend all or part of the activities under the agency's determination, finding, or decision, that could result in an adverse change to the physical environment, until the agency has brought its determination, finding, or decision into compliance with CEQA; and/or
- That the agency take specific action that may be necessary to bring its determination, finding, or decision into compliance with CEQA.

Code of Civil Procedure section1021.5, also known as the "private attorney general statute," provides for recovery of attorneys' fees by a successful party in public interest litigation that might otherwise be infeasible to pursue. Within 15 days of service of the notice of entry of judgment or file-endorsed copy of the judgment, an unsuccessful respondent agency should expect to receive a motion for attorneys' fees.

As stated above, the parties have 60 days from service of the Notice of Entry of Judgment to appeal the trial court's decision. (Cal. Rule of Court, 8.104(a).) If an appeal is filed, the rules governing appeals in civil actions generally apply to appeals in CEQA cases.

The Ten Tips "In a Nutshell"

The steps above provide a useful guide for steering a CEQA case from the initial challenge through trial court judgment. Ultimately, successful resolution of a CEQA case requires:

- Familiarity with the substance of the law
- Considering the content of the administrative record before litigation is filed
- Familiarity with CEQA's procedural requirements
- Attention to the trial court's local rules and requirements
- Objective evaluation of the case's strengths and weaknesses
- Objective evaluation of potential settlement options
- Distillation of complex concepts into clear legal arguments

III. SETTLING CEQA CASES: NEGOTIATION TIPS AND MEDIATION STRATEGIES[3]

Fostering A Culture of CEQA and Land Use Dispute Resolution

Recognizing the need to expeditiously resolve CEQA and land use disputes, the legislature has adopted a host of reforms to speed housing and infrastructure permitting and CEQA litigation. Examples are the SB 7 Environmental Leadership Project law for gubernatorial streamlining of priority California infrastructure projects and the SB 149 and AB 205 energy, water and transportation infrastructure packages. As we seek to resolve disputes around infrastructure permitting and CEQA, mediation is an arrow that should not be left in the quiver. Land use, environmental and related public policy disputes can be complicated and often fraught with emotion. It is precisely for these reasons that mediation can help build understanding and trust among the parties.

[3] Authored by Gideon Kracov Esq., Mediator, ADR Services, Inc.

Mediation is extremely common and well-accepted in all types of real estate cases, with proven results.

Take the CEQA Settlement Meeting More Seriously

One existing, underutilized tool is the CEQA early settlement meeting process in Public Resources Code section 21167.8. As mentioned above, 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*, *too informal*, abbreviated, and does not meaningfully assist in resolving the dispute. The CEQA early settlement meeting can be taken more seriously. Consider an in-person meeting including the litigants with a neutral mediator who "speaks CEQA."

Use The Planning and Zoning Law Mediation Provisions

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*. authorizes permissive mediation in ten specified types of litigation matters including general plan decisions, mitigation fees, zoning matters, and an expansive catch-all for "*the approval or denial by a public agency of any development project*."

Yet today, these decades-old Government Code mediation are rarely invoked, largely because the provisions are permissive. Many attorneys and government agencies do not know they even exist even though land use, environmental, and related public policy cases are particularly suited to incorporate the culture of ADR and mediation. Consider invoking these provisions in appropriate cases.

Mediation Fosters Reciprocity Among the Parties

Mediation – especially with a trained neutral who "speaks CEQA" – bring the parties with authority to settle to the table – no small feat. By having the clients personally attend the mediation session, they focus on key interests and are forced to engage. Zoom and remote meetings are becoming the norm for reasons of convenience, and are good platforms for agreement, but there also are advantages to convening in-person. Time, travel and personal presence make for a more meaningful investment in reaching a deal – even on small reciprocal things like sharing an elevator or holding the door open on the way in.

Mediators De-Escalate and Reduce The Parties' Reactivity To Eachother

A skilled mediator will maximize the chance to settle by utilizing facilitation skills that promote better understanding and trust. They will de-escalate tension and actively listen to all parties. The facilitator or mediator will have time to separately call or zoom counsel or the parties beforehand to distill the key issues. A mediator performs "shuttle diplomacy" between the parties and the expansive mediation confidentiality enable parties to speak candidly to tell the mediator things they would never tell each other. A trusted mediator motivates parties to reveal their core interests and demands – among even the most reluctant participants. 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.

Settlement Gets The Parties To Focus On Interests Not Positions

Once the mediator has established rapport, and the parties are de-escalated to be less reactive to the other side's arguments, the mediator is able to discuss choices and alternatives. The mediator can review the parties' BATNA – the best alternative to a negotiated outcome. Or the WATNA – the worst alternative to a negotiated outcome. For example, if a CEQA petitioner insists on complete victory or drawn-out trial, a mediator with subject-matter expertise can perform some "shock treatment" – and discuss the complex and increasingly contested remedy provisions of Public Resources Code section 21168.9 and identify a range of logical outcomes. A skilled and knowledgeable mediator will help petitioner understand it is not going to be able to "kill" the project or re-open all the approvals, and instead focus on mitigation measures that meet its interests.

Mediation Looks "Below the Iceberg"

Mediators use the analogy of an iceberg. We see the iceberg. It's the lawsuit and the parties' litigation positions or money demands. But what is "below the iceberg" – the parties' motivations and interests? 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 agreements, or conservation matters such as tree and open space protection. Mediation allows for creative brainstorming of the non-monetary terms.

Embrace Scrupulousness For Mediations and Settlement Talks Too

Prepare your clients and experts before your CEQA mediation. Study the underlying zoning approvals and identify technical constraints. Know what may be possible so you can be best prepared to make a deal. Like everything else, you get from the mediation process what you put into it. One good tip for this is to prepare a draft term sheet before you engage in settlement talks or mediation. Put the work in to identify the key components of a deal. Even if this just for internal use and internal decisionmakers. This will give you a potential roadmap of where you may end up and give counsel the authority to make a deal.

Settling Attorneys' Fees

Attorneys' fees can be a key element of CEQA cases pursuant to Code of Civil Procedure section 1021.5. There are techniques the mediator can use with attorneys' fees disputes to help get cases settled. For example, the desire for fees can be used at the end of a long day of mediation to close the deal – to leverage global resolution of the case on favorable injunctive terms. In some cases the substantive terms are resolved but the fees demand become the sole barrier to a deal. In these situations, experienced mediators can help creatively get cases settled.

Best Practices For Post-Mediation

The parties want the deal to be durable. However, they cannot always anticipate what can happen in the future. For future disputes, consider adding a meet and confer or dispute resolution process – mediation or arbitration. Also, not every case settles at mediation. In these situations, the mediator can ensure the parties agree to next steps with a timeline. The tenacious, flexible mediator does not give up, extending "shuttle diplomacy" for days, weeks, months after the mediation session – sometimes re-engaging with the petitioners and relying on the rapport created during the mediation – to try to get to "yes."