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Nicholas Beudert

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## TROUBLE ON THE DEL MAR BLUFFS: THE LATEST USE OF MEDIATION IN LAND USE DISPUTES

*Nicholas Beudert*

The California Coastal Commission<sup>1</sup> has asked the Surface Transportation Board (“STB”)<sup>2</sup> to mediate a dispute between the Commission, the city of Del Mar, California, and the North County Transit District (“NCTD”)<sup>3</sup> over the NCTD’s plan to install a safety fence railing along a train line running along the Del Mar Bluffs.<sup>4</sup> The Coastal Commission and Del Mar residents oppose the plan, saying it will damage the bluffs and ruin the community’s view and access to the beach.<sup>5</sup> The NCTD says that the safety railing is necessary to limit access to the rails and stop people from trespassing and being injured.<sup>6</sup>

The dispute is an example of how an altercation can progress through different methods of ADR.<sup>7</sup> Here, the parties started with negotiation, but when this tactic stalled, one party requested mediation so that a third party might help resolve the dispute. The Coastal Commission’s Request for Mediation stated that the parties had been in discussion and had made “substantial progress in informally resolving its differences” over the fencing product, but the Commission believed “board-sponsored mediation could help the parties resolve their differences without need for further proceedings before the Board.”<sup>8</sup>

States have made efforts to present and codify mediation as an option for land use disputes.<sup>9</sup> The California Statute, California Government Code §§ 66030 et seq., shows that the Legislature intends to “help litigants resolve their differences by establishing formal mediation processes for land use disputes.”<sup>10</sup> The statutes that specify the actions that will be subject to mediation, suggest guidelines for selecting mediators and articulate contingencies in the event that the parties cannot

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<sup>1</sup> *Our Mission*, CAL. COASTAL COMM’N, <https://www.coastal.ca.gov/whowere.html> [<https://perma.cc/RC8T-TQUL>] (last visited Feb. 20, 2022) (“The Coastal Commission plans and regulates the use of land and water in the coastal zone.”).

<sup>2</sup> *Surface Transportation Board*, USA.GOV, <https://www.usa.gov/federal-agencies/surface-transportation-board> [<https://perma.cc/UG64-CPA4>] (last visited Feb. 20, 2022) (“The Surface Transportation Board regulates and decides disputes involving railroad rates, railroad mergers or line sales, and certain other transportation matters.”).

<sup>3</sup> *About Us*, N. CNTY. TRANSIT DIST., <https://gonctd.com/about-nctd/about-us/> [<https://perma.cc/XP3Z-YQWW>] (last visited Feb. 20, 2022) (The North County Transit District “provides public transportation for North San Diego County.”).

<sup>4</sup> *California Coastal Commission Seeks STB Mediation in Del Mar Bluffs Dispute*, TRAINS (Feb. 3, 2022), <https://www.trains.com/trn/news-reviews/news-wire/california-coastal-commission-seeks-stb-mediation-in-del-mar-bluffs-dispute/> [<https://perma.cc/C4ZN-GKHD>].

<sup>5</sup> Phil Diehl, *State Requests Mediation in Del Mar Railroad Fence Dispute*, DEL MAR TIMES (Feb. 1, 2022), [delmartimes.net/news/story/2022-02-01/coastal-commission-requests-mediation-of-del-mar-railroad-fence-dispute](https://delmartimes.net/news/story/2022-02-01/coastal-commission-requests-mediation-of-del-mar-railroad-fence-dispute) [<https://perma.cc/3UHK-S8NK>].

<sup>6</sup> *Our Mission*, *supra* note 1.

<sup>7</sup> *Alternative Dispute Resolution*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](https://www.law.cornell.edu/wex/alternative_dispute_resolution) [<https://perma.cc/93AS-JZRE>] (last viewed Feb. 20, 2022) (“The most famous ADR methods are the following: mediation, arbitration, conciliation, negotiation, and transaction.”).

<sup>8</sup> North County Transit District—Petition for Declaratory Order, California Coastal Commission’s Request for Mediation, FD 36433 at 2 (Jan. 19, 2022).

<sup>9</sup> *See, e.g.*, GA. CODE ANN. § 36-70-20 (West 1997) (providing “a mechanism to resolve disputes over local government service delivery, funding equity, and land use”); HAW. REV. STAT. § 205A-2 (c)(8)(c) (West 1977) (a policy of “mediation to respond to coastal issues and conflicts”); ME. REV. STAT. ANN. TIT 2, § 8 (West 1995) (requiring agencies in the executive branch to participate in mediation over land use disputes).

<sup>10</sup> CAL. GOV’T CODE § 66030 (West 1994).

agree on a mediator.<sup>11</sup> In addition to California’s statutes providing guidelines, should the parties choose to enter into mediation, the Coastal Commission’s Request acknowledges that in certain cases mediation is *mandatory* for disputing parties.<sup>12</sup> Mediation is not the only avenue available, however; the statute specifically states that it is not the Legislature’s intention to remove the option of the courts for disputes,<sup>13</sup> and provides that if mediation is not successful, the court has the discretion to schedule a settlement conference before a judge.<sup>14</sup>

The Lincoln Institute of Land Policy published findings of a study of mediation applied to Vermont land use disputes that “aimed to identify lessons that can inform the land use decision-making process in other states.”<sup>15</sup> The Vermont study supports the claim that mediation was useful in land use conflicts and identified several lessons that could be learned to better implement it.<sup>16</sup> Among other findings, the study stated that mediation might be more effective in reaching a settlement than restoring a relationship, and that even when a settlement wasn’t reached, there was still a resulting satisfaction with the process.<sup>17</sup>

Both points suggest a positive result in the Del Mar dispute. Given that the Del Mar dispute concerns two entities (the Committee and the NCTD) and a group of residents, it is not as concerning if mediation leads to a settlement at the expense of the relationship between the parties. Compared to a dispute between two neighbors over a fence’s location on the property, the Del Mar dispute needs only a satisfactory result; there is no neighborly relationship that must be preserved. Even without such a result,<sup>18</sup> mediation in Del Mar might still lead to success overall. If, as the Vermont study suggests, the faith in the mediation process is maintained even if settlement isn’t achieved, such faith might result in a greater reliance on mediation in land use disputes and a lower burden on the court system. Regardless, the NCTD holds out hope that a licensing agreement will be reached between the parties.<sup>19</sup>

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<sup>11</sup> *Id.* at § 66031.

<sup>12</sup> Alternative Dispute Resolution, *supra* note 7 (The Request for Mediation specifies that the matter at hand is not a rate case, for which mediation is mandatory.).

<sup>13</sup> *See supra* the statutes listed in note 9.

<sup>14</sup> CAL. GOV’T CODE § 66034 (West 1994).

<sup>15</sup> Patrick Field, Kate Harvey, & Matt Strassberg, *Integrating Mediation in Land Use Decision Making*, LINCOLN INST. OF LAND POL’Y (Jan. 2010), <https://www.lincolninst.edu/publications/articles/integrating-mediation-land-use-decision-making> [<https://perma.cc/GL8P-3VZQ>].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> North County Transit District—Petition for Declaratory Order, North County Transit District Reply in Opposition to City of Del Mar’s and California Coastal Commission’s Motions for Board-Sponsored Mediation, FD 36433, at 1 (Mar. 14, 2022) (NCTD suggests that mediation is a waste of resources and is that the request is a delaying tactic by the Coastal Commission).

<sup>19</sup> Diehl, *supra* note 4.