Integrating Mediation in Land Use Decision Making

A STUDY OF VERMONT

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Across the country, decision makers at the local and state levels increasingly are turning to new methods for resolving conflicts that arise during land use decision making processes. For disputes over permitting or enforcement of local and state land use regulations, mediation is considered a reasonable alternative to at least some litigation. Although mediation has successfully resolved many land use disputes, its use typically has been applied *ad hoc* as inclination and resources determine.

To better understand the use of mediation across a land use decision-making system within a single state, the Consensus Building Institute (CBI) and Green Mountain Environmental Resolutions (GMER) conducted an 18-month screening and evaluation study in Vermont.

Mediation and Land Use Disputes

Previous studies by the Lincoln Institute of Land Policy and the Consensus Building Institute have demonstrated that negotiation and mediation can be effective in resolving land use disputes. A successful mediation program requires selecting suitable cases for mediation at the right time in the process, and matching them with appropriate forms of mediation assistance.

Although mediation is widely used in some areas of law, such as family or employment cases, its application in land use law has been limited. There is no systematic program or set of programs that integrates mediation into the land use permitting process at all levels, from local planning boards to state courts. Increasing the use of mediation and integrating it into the land use permit application and appeal process can reduce the burden on valuable judicial resources, save the parties time

and money, and, perhaps most important, resolve disputes that otherwise could divide a community into opposing camps. This study of Vermont aimed to identify lessons that can inform land use decision-making process in other states.

Methodology

Vermont's manageable size, its diversity of small cities and rural towns, and the frequent use of mediation, especially at the court level, made it an ideal laboratory in which to learn how mediation might be better integrated into different levels of land use decision making. Vermont also has a strong land use planning law, Act 250, passed in 1970 to protect the environment, balance growth and development needs, and provide a forum for neighbors, municipalities, and other interest groups to voice their concerns. Depending on the nature of a proposed development project, an applicant may need to obtain permits from a local board, a regional commission, various state agencies, or federal agencies.

As in most states, land use disputants in Vermont may utilize mediation via one of two routes: when there is consensus to try it, or in court when a judge orders mediation or a hearing officer suggests mediation at a prehearing conference.

This study investigated two methods for identifying cases that might be appropriate for mediation. First, we sought to better understand action at the state court level, after other opportunities for consensus building and mediation had failed. In collaboration with the Vermont Environmental Court, CBI developed a screening and evaluation process for 285 active land use cases in the court between July 1, 2006 and December 31, 2007. Judges were asked to fill out a form to identify why and how they screened each case for mediation, and the parties were asked to complete an evaluation form after the mediation ended.

Second, GMER and CBI developed a protocol to determine whether it was possible to identify cases appropriate for mediation at both local and Act 250 levels prior to the appeal stage. Over the 18-month study period, GMER screened 54 contested Act 250 permit applications. Most cases that make their way to the Act 250 and Vermont Environmental Court dispute systems start at the local level. However, despite many efforts by GMER to identify local-level cases to be screened, only 13 local cases were reviewed.

Nine Lessons Learned

1: Screening for mediation assists with settlement.

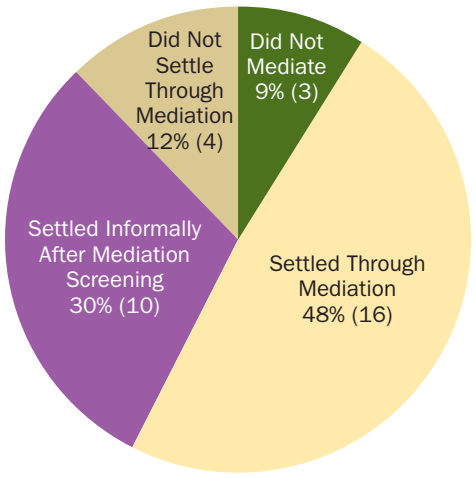
Mediation screening—that is, evaluation of the appropriateness of mediation for a particular case—prior to proceeding with traditional avenues of land use conflict resolution is an effective tool for encouraging settlement as a general approach; encouraging mediation specifically; and distinguishing among cases that are more amenable to resolution and those that require more formal quasi-judicial or judicial decision making. Given the current barriers to mediation—lack of knowledge about mediation, jointly finding a mediator, and simply communicating with the opposing party—screening is an effective tool to increase its use.

In the Act 250 cases, the act of screening itself seemed to encourage informal negotiations and settlement in some instances (figure 1). Many of the screenings were essentially informal phone mediations that included discussions of the parties' interests and possible options to satisfy those interests.

2: Screening criteria are useful but not fully determinative.

There is no simple formula or correlation between key factors in a case and the parties' willingness to mediate as a way to successfully resolve issues. However, the data on screening do suggest a few key criteria that are important in determining if a case is more likely to be recommended for mediation.

FIGURE 1
Act 250 Outcomes of 33 Cases Recommended for Mediation



- Does the case turn on a particular issue of law?
- The type of case matters. Permitting cases tend to be more amenable to mediation than enforcement cases, and general commercial and residential cases are more amenable than industrial cases, especially those involving major public health or nuisance issues (e.g., noise, odor).
- The parties' willingness to explore options and ideas is a key indicator for whether mediation is more or less appropriate.
- Timing is important. Screening is generally best done after filing (of an application or appeal) but before any formal proceedings have occurred (an administrative hearing or court hearing).

The data also suggest that some criteria are *not* important in determining whether mediation is appropriate for a specific case.

- Whether the parties have talked or not, or even tried to settle informally, does not indicate that the parties should not consider mediation. Surprisingly, parties in many cases had simply not communicated with one another once the case was filed, but when encouraged by a mediator or screener, they were amenable to doing so.
- The need or desire for future relationships is not an important criterion, at least as practiced in this context in this state. Most parties appear to be seeking an end to litigation and a settlement or agreement, not necessarily desiring to repair or maintain a relationship.
- The kind of issue, such as traffic, noise, visual impact, or odor, does not seem to be as important for considering mediation as the intensity and breadth of the issue's impacts on abutters and other interested stakeholders.
- The number of parties does not appear to be a factor. A case with two parties is as likely to be mediated as one with many parties.

3: The screener's qualifications and credibility do matter.

A mediation screener for land use disputes requires a specific skill set, knowledge base, and credibility. At the Environmental Court level, a judge's expertise in land use issues, law, and regulatory structure allows a more informed assessment of cases amenable to mediation. Analysis of the court's screening data concluded that the two most important factors in determining the appropiateness of mediation were the issue of law at stake and the judge's "sense" of settlement potential. Both are professional judgments rather than more rote or formulaic means of determining appropriateness. Furthermore, the judge's authority gives the resulting determination legitimacy.

In a nonjudicial setting such as a permitting body, a screener without legal authority or stature can also be effective. Most parties will participate and take seriously the recommendations of the screener, as long as the screener has the express support and legitimacy provided by an official governing body.

4: Screening program design is also important for legitimacy.

As part of the research, we established and implemented the screening program for the District Commissions, entities that provide review under Act 250. This screening program was highly instructive because it raised several key issues. The primary question was whether screeners should be part of or separate and independent from an appropriate government agency (table 1). A secondary concern was whether a screener might also later mediate the case. Protocols can be used to avoid or minimize the perception of any potential conflict of interest.

A few survey respondents raised concern that the Act 250 screener was also available to mediate the cases screened, though the screener always provided the parties a roster of mediators from which to choose. The concerns were about ethics (Can one conduct a fair and neutral screening when one has both the economic and professional incentive to recommend mediation in order to then mediate?) and the marketplace (Is it fair to and competitive for other mediators if the screener has an "inside track" on certain cases?).

We assume that screeners as mediators may be influenced by the opportunity to mediate, if they are eligible. We would argue that this incentive is not merely financial, but also professional in the sense that one wishes to practice one's craft. Nonetheless, countervailing arguments suggest that a strict separation of screening and mediation poses an equally difficult set of problems.

- Though mediators perhaps should not judge their professional performance by the number of cases settled, many do. As a result, there is an incentive to not recommend mediation for cases that will lower one's success rate of settle-

TABLE 1
Considerations for Who Screens Cases on Behalf of a Public Agency

	Inside the Agency	Outside the Agency
Referral frequency and ease	More likely to have day-to-day contact, trust from other staff, and "ear to the ground" on cases. May be more efficient in ensuring a steady and regular stream of cases for screening.	More challenging to ensure ongoing coordination and steady stream of referrals from the land use body without prior relationships. Outside screener must expend time in coordination, communication, and trust building to obtain case referrals.
Administration	Can be administered effectively inside or outside the organization.	Can be administered effectively inside or outside the organization.
Legitimacy with parties	Parties may trust a screening process from inside the land use body and may be less fearful or skeptical of an inside entity and its motives. On the other hand, an outside screening entity may be seen as less likely to be influenced by internal politics of a land use body.	An outside organization, by itself, will have to gain trust and reputation over time in terms of conducting screenings, and this outside status may affect some parties' willingness to participate in a screening (as well as in mediation).
Willingness of parties to talk about underlying interests	Parties may be reluctant to reveal willingness to compromise or consider modifications before staff of the permitting body.	Parties may be more willing to openly discuss their willingness to compromise or consider other options before a screener who is separate and distinct from the decision-making process.
Longevity and flexibility	Incorporating screening into standard operating procedures is likely to increase the longevity of a screening program. However, it may also reduce the flexibility, adaptability, and learning that an outside organization or occasional re-compete of a paid program may provide.	Provides a greater opportunity for innovation and adaptation, especially if the program is competed from time to time. On the other hand, the outside status of such a program makes it more susceptible to budget cuts, avoidance by staff, and waning interest over time.
Authority	Depending on the legal structures, a land use body may have the power to "order" mediation, which in practice may result in more settlements, even with reluctant parties.	No land use body is likely to delegate authority to an outside entity to "order" mediation. Thus, although voluntary screening can and does work, as this study shows, outside entities may be limited by their inability to compel parties to act.
Cost	Cost may be less, depending on salary structures, but if multiple tasks are assigned to one job, focus on the effort and quality of the work may suffer.	Cost may be greater, depending on salary structure, overhead, and other factors. However, contracting for services may ensure more dedication to the effort and its quality.

ments. No mediator likes to recommend mediation only to later fail in resolving the case.

- Screeners are likely to become better and more seasoned if they actually experience the results of some of their choices by later mediating them.
- Parties are likely to gain trust in a capable screener, and this allows a quicker entry into the mediation process. A screener who either provides mediation if desired or offers assistance in identifying a mediator is more efficient and can help overcome the reluctance of parties to proceed.
- In public policy mediation, a screener as mediator is standard practice in many cases.

5: Land use mediation may be more effective in helping parties reach a settlement than in restoring relationships.

Data gathered through the court mediation evaluation forms offer a somewhat surprising reflection on how participants value their mediation experience. While mediation is often lauded for its contributions to improving relationships among parties, evaluation survey results suggest that parties valued mediation more for its ability to make them consider options than for its impact on their relationship with other parties.

Sixty-six percent of participants reported that the mediation process encouraged them to consider various options for resolving the dispute (59 percent [154] agreed and 7 percent [18] strongly agreed). On the other hand, 42 percent of respondents felt that at the end of the mediation process they were better able to discuss and seek to resolve problems with other parties on this project (39 percent [102] agreed and 3 percent [8] strongly agreed). While one might wish, optimistically, for a mediation program that restores relationships and rebuilds social capital, it seems that participants are more interested in exploring various options for settlement than in broader social or relational goals.

6: Land use mediation may not always result in satisfying agreements, but it generally results in satisfaction with the process.

Parties support mediation and are willing to participate again, despite indications by many that their most recent experience did not result in an agreement that satisfied them. Figure 2 shows that 40 percent agreed that mediation resulted in an agreement that was satisfying to them (88 agreed and 15 strongly agreed), while 35 percent disagreed (55 strongly disagreed and 36 disagreed).

Despite these findings, when asked if they would participate in a mediation again, respondents show more varied results (figure 3). More than 50 percent (131) agreed and 17 percent (45) strongly agreed, while only 12 percent (30) disagreed and 7 percent (19) strongly disagreed.

We interpret these data to mean that the agreement reached was tolerable, given their constrained choices. The mediation process more often than not seems to have offered enough benefits, cost or time savings, or some other advantage that many respondents would be willing to participate again.

The evaluation process did reveal some concerns about the role of pro se parties (who represent themselves without an attorney). Some pro se parties expressed frustration with the mediation process, which they felt did not provide an adequate forum for exploring and resolving the full range of issue that concerned them. Other parties expressed their own frustration with the pro se parties, whom they felt slowed down the process and demanded too much time from the mediator. Additional research on best practices for defining and communicating the role of pro se parties could improve overall satisfaction with the mediation process.

7: Mediation of particular issues does not relieve the larger burden on municipalities to make complex decisions on land use projects.

Lower levels of satisfaction were expressed by town officials than other parties, which suggests that mediation in and of itself is not assisting local officials to the extent one might hope. Town representatives were more likely to disagree or strongly disagree (56 percent) that the mediation resulted in an agreement that was satisfying to them than were applicants (36 percent), agencies (36 percent), and interested parties (35 percent).

FIGURE 2
Responses in Environmental Court Cases: Mediation Resulted in An Agreement that Was Satisfying to Me

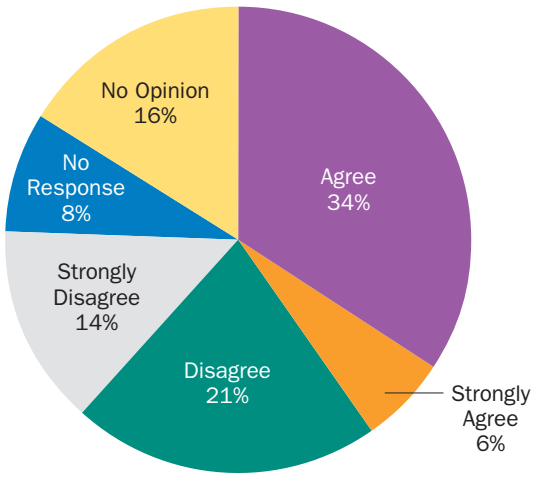
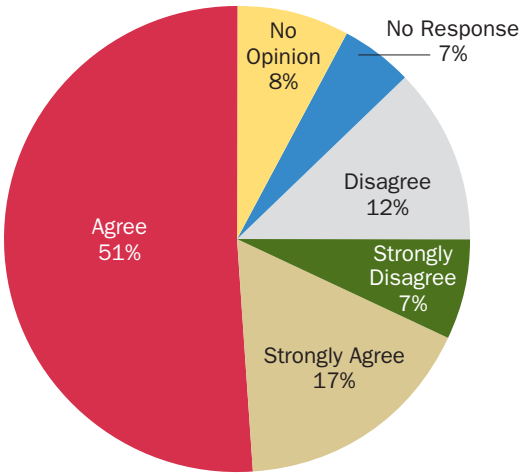


FIGURE 3
Responses in Environmental Court Cases: I Would Participate in Mediation Again



By the time cases, especially enforcement cases, reach the Environmental Court, town officials may feel they have already tried to accommodate applicants and thus are less enthusiastic about mediation with parties who, in their perspective, have been "recalcitrant." A court decision, even if it adopts a mediated settlement, may not resolve an entire dispute. Mediation may resolve issues pending before the court, but does not resolve all barriers to implementation of an agreement at the local level. This finding suggests that municipalities may need more assistance, not only in mediation of

specific issues, but also in more comprehensive consensus building or public participation efforts.

8: Encouraging mediation at the municipal level remains challenging. The research team was not successful in instituting any systematic local approaches to screening and mediation, despite an intensive outreach effort; a no-cost screening service; the support of mediation at the Act 250 and court levels; a state generally amenable to alternative forms of dispute resolution; and a relatively vigorous development climate during the study.

Various factors may explain this resistance. The single largest obstacle on the local level is that in most cases the permitting bodies do not know if an application will be opposed until the hearing begins. Furthermore, most applications have only one hearing day, so there is little opportunity for mediation screening. Hearings that last multiple days clearly have other options.

Other obstacles include the fact that mediation as commonly understood may be introduced too early for parties wishing to see how they might fare in the standard administrative process. Local officials may view mediation as usurping their role. The status quo of existing administrative processes may simply be considered "good enough." Town budgets may account for potential litigation, but not be flexible enough to fund mediation. Some officials may not know enough about mediation or simply be uninformed about its benefits. There may be too few cases in most municipalities in a rural state like Vermont to establish any programmatic approach.

In any case, this study reinforced the assumption that administering mediation at the local level is difficult, however promising the "idea" of mediation may be in assisting communities.

9: The Environmental Court can influence attitudes toward mediation. The Environmental Court's embrace of mediation as a key tool to its proceedings appears to have an interesting effect on municipal land use decisions, despite the challenges at the local level. It is widely perceived (though inaccurately) among local and regional land use professionals across the state that if a case proceeds to the Environmental Court it "almost always" will be ordered into mediation. The court, in fact, is quite careful about referrals. During our study period, the court referred fewer than half of its cases to mediation.

This finding points to at least two interesting implications for a more rigorous, system-wide approach to mediation and dispute resolution. First, a powerful land use body's support of mediation has a meaningful impact on perceptions of mediation across the system. Second, the active support of mediation by a body such as the court has likely salutary effects on settlements that can occur earlier in the process. This also suggests that when enough of a land use system's regulatory bodies support and encourage mediation, a culture of settlement and dispute resolution may take hold.

Conclusions

This study supports the assertion that mediation is useful in land use conflicts. Upon evaluation of nearly 300 Vermont land use cases at the local, Act 250, and Environmental Court levels, this study found that mediation screening and actual mediation are effective tools for targeting and resolving many cases. As disputes become more complex, and resources, time, and money for resolving land use disputes become scarcer, it will be important to find efficient and reliable methods for settling cases. Mediation and mediation screening hold great potential for meeting those goals.

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RELATED PUBLICATIONS

Susskind, Lawrence, Ole Amundsen, and Masahiro Matsuura. 1999. *Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials*. Cambridge, MA: Lincoln Institute of Land Policy.

Susskind, Lawrence, Mieke van der Wansem, and Armand Ciccarelli. 2000. *Mediating Land Use Disputes: Pros and Cons*. Cambridge, MA; Lincoln Institute of Land Policy.