



Green Mountain
Environmental Resolutions, LLC

Integrating Mediation in Land Use Decision Making

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LINCOLN INSTITUTE
OF LAND POLICY



Abstract

The benefits of using mediation, including cost and time savings and better outcomes, have been well documented in negotiation literature over the past three decades. This study reinforces the theory that mediation is useful in land use conflicts and takes a closer look at land use mediation practice from a state-wide perspective, from local land use decisions up to state-wide court decisions.

This study evaluated over three hundred Vermont land use cases at the local, Act 250, and Environmental Court level, to determine if (and how) mediation screening is (and could be) an effective tool for targeting cases that could benefit from mediation. Our experience resulted in the following lessons learned:

- *Screening for Mediation Assists with Settlement*
- *Screening Criteria are Useful but not Fully Determinative*
- *Screener's Qualifications and Credibility Matter*—a mediation screener for land use disputes requires a specific skill set, knowledge base, and credibility
- *Screening Program Design is Important for Legitimacy Among Many Users Including Other Mediators*—considerations include where the screener should reside, can the screener mediate, and who should pay for the screening
- *Land Use Mediation Is More About Identifying Interests and Options and Reaching a Settlement, Rather than Restoring Relationships or Building “Community”*
- *Even When Land Use Mediation Does Not Result In Satisfying Agreements, There May Be Satisfaction In The Process*—the evaluation also raised a need to better define best practices for pro se participation in mediation processes
- *Encouraging Mediation at the Local Level Remains Very Challenging*—there are multiple barriers to encouraging mediation at the local level including the timing of mediation interventions, local understanding of mediation and its benefits/challenges, town budgets and administrative resources

- *Environmental Court Influence—The Upstream Effect*—the Environmental Court’s embrace of mediation as a key tool to its proceedings appears to be having an affect upstream on municipal land use decisions (despite the challenges at the local level noted above) and has salutary effects on settlement earlier and upstream

Given our findings and experience, we have identified the following recommendations for designing a mediation screening program:

- First, mediation screeners and mediators, whether they are independent professionals or court judges, should be trained and informed in land use issues, law, and the regulatory structure into which mediation outcomes must fit.
- Second, a screening program’s process must be transparent and clear.
- Third, a screening program should allow parties’ choice in selecting a mediator, should mediation be recommended.
- Fourth, the screening program needs feedback on its recommendation of cases for mediation.
- Fifth, while acknowledging the many barriers to establishing effective local screening and mediation programs, there are options for making the mediation screening at the local level more effective.

As disputes become more complex and as 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 the efficient and reliable resolution of land use disputes.

About the Authors

The Consensus Building Institute (CBI) has been providing a variety of consensus building services to a range of clients involved in complex disputes since 1993. Building on the Mutual Gains Approach to negotiation, a framework developed at the MIT-Harvard Public Disputes Program (a part of the Program on Negotiation at Harvard Law School), CBI offers conflict management assistance, negotiation training, advice on dispute systems design, and evaluative research to public agencies, corporate clients, and non-governmental agencies on five continents. CBI is a 501(c)3 organization located in Cambridge, MA. For more information, please visit www.cbuilding.org

Green Mountain Environmental Resolutions (GMER) was established in 2005 to provide mediation, facilitation, early neutral evaluation and permit consultation services to parties in environmental and land use disputes. GMER also works with governmental agencies, permitting bodies and courts to develop and integrate mediation programs for environmental and land use disputes. GMER was founded on the premise that all environmental and land use permitting cases need not be adversarial proceedings that end up in costly and protracted litigation. GMER's experience in consensus building techniques can help you resolve your environmental or land use dispute in a timely and cost-effective manner that satisfies all parties' interests.

For more information, please visit www.gmer.org

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Table of Contents

Introduction	1
1. Background	2
Mediation and Land Use Disputes	2
Land Use Mediation in Vermont	3
Developing Mediation Screening and Evaluation Programs	3
Vermont Environmental Court Mediation Screening and Evaluation Process	3
Local and Act 250 Mediation Screening and Evaluation Programs	4
2. Findings from Vermont Environmental Court Mediation Screening and Evaluation Processes	5
Overview of Cases	5
Mediation Screening Criteria Findings	6
Mediation Evaluation Findings	11
Summary of Court Mediation Screening and Evaluation Findings	16
3. Findings from the Act 250 Screening and Evaluation Processes	18
Overview of Cases	18
Mediation Screening Criteria Findings	19
Summary of Act 250 Mediation Screening Findings	26
4. Local Mediation Screening and Evaluation Program Findings	27
Overview of Cases	27
Summary of Local Mediation Screening Findings	28
5. Synthesis and Lessons Learned	30
Conclusions	40
Appendix A: Program Descriptions	
Appendix B: Screening Forms	
Appendix C: Evaluation Protocols	
Appendix D: Focus Group Findings	

Introduction

Across the country, decision makers at the local and state levels are increasingly turning to new methods for resolving conflicts that arise during land use decision making processes. For disputes over land uses, such as ones that arise in permitting and enforcement of local and state land use regulations, mediation is considered an effective alternative to litigation. Although mediation has successfully resolved many land use disputes, its use has typically been *ad hoc*, applied from jurisdiction to jurisdiction, case by case, as inclination and resources determine.

To evaluate the use and applications of mediation in land use decision making, the Consensus Building Institute (CBI) and Green Mountain Environmental Resolutions (GMER) conducted an eighteen-month screening and evaluation study in the State of Vermont. The study sought to evaluate mediation across the land use decision making system within the state, from local boards to the state court level. The CBI-GMER team worked with land use decision makers at the municipal and Act 250 levels to: identify cases for mediation screening, screen targeted cases, evaluate mediation outcomes, and identify barriers and opportunities for mediation and mediation screening. CBI also worked with the Vermont Environmental Court to: capture screening data from Environmental Court judges, evaluate cases that proceeded to mediation, and analyze mediation outcomes.

While the study focused on land use decisions in Vermont, it sought to identify lessons that can inform local land use decision making processes in other states and across the country. The study supports the findings of previous research on the appropriateness of mediation for land use conflicts. It also makes the case for mediation screening as an effective tool for targeting cases that could benefit from mediation at various junctures in the decision making process. It suggests that effective mediation screening requires a combination of “art” and “science” and that there are no perfect, reliable criteria that can be used to systematically evaluate a case for mediation. Finally, it offers lessons learned in mediation screening, best practices, and possible streams of future research.

1. Background

Mediation and Land Use Disputes

Several 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. *Mediating Land Use Disputes*¹ and *Using Assisted Negotiation to Settle Land Use Disputes*² show that mediation and other facilitated processes offer useful tools for resolving land use permitting and enforcement conflicts. *Responding to Streams of Land-use Disputes: A Systems Approach*³, offers best practices in land use mediation practice from around the U.S., including the State of Vermont. From these and other studies, we've learned that a successful mediation program requires selecting the right cases for mediation, at the right time, and matching them with appropriate mediation assistance.

Although mediation is widely used in some areas of law such as family or employment law, its use in land use law seems below its full potential. There is no systematic program that integrates mediation into the land use permitting process at all levels, from local planning boards to state courts. Across the country, many permit decisions on small, local land use applications unnecessarily end up in protracted litigation. Some of these disputes may require litigation because of the complexity of the issues or the zealousness of the parties. However, many of these cases end up in litigation because the parties never considered a way other than the courthouse to resolve their dispute.

While opposing parties in these disputes typically disagree about almost everything, they uniformly agree that the time it takes to pursue a permit application through a final judicial appeal can be excessive and frustrating. In addition, the financial cost of the proceedings can be very high; the expense of multi-day and sometimes week-long hearings prevents many opponent groups from participating in a hearing or appeal. Increasing the use of mediation and integrating it into the land use permit application and appeal processes can reduce the burden on valuable judicial resources, save the parties time and money, and perhaps most importantly, resolve disputes that otherwise would divide the community into opposing camps.

¹ Susskind, van der Wansem, Ciccarelli, 2000. *Mediating Land Use Disputes: Pros and Cons*. Cambridge, MA; Lincoln Institute of Land Policy.

² Susskind, Amundsen, Matsuura, 1999. *Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials*. Cambridge, MA: Lincoln Institute of Land Policy.

³ McKinney, Van de Wetering, Field, 2007. *Responding to Streams of Land-use Disputes: A Systems Approach*. Missoula, MT: Public Policy Research institute, University of Montana.

Land Use Mediation in Vermont

The manageable size of Vermont, its diversity of small cities and rural towns, and the frequent use of mediation by parties across the state, especially at the court level, made Vermont the ideal laboratory in which to experiment and learn how better to integrate mediation into different levels of land use decision making.

In Vermont, land use decisions are made at multiple levels. Depending on the nature of the project, an applicant may need to obtain a local permit, an Act 250 Permit, and a permit from the State Agency of Natural Resources. Decisions on local land use permits are made by municipal planning officials (volunteers or paid staff). Decisions on cases related to the state's Act 250 statute—a state statute that requires land use permits for commercial, industrial developments, and major residential subdivisions over a certain jurisdictional threshold—are made by the regional District Commissions. Decisions are also made by the judges at the Vermont Environmental Court, a statewide court that hears appeals from municipal boards and commissions, and Act 250 decisions, Agency of Natural Resources, Natural Resources Board, and municipal enforcement cases.

As in most states, land use disputants in Vermont end up utilizing mediation via one of two routes. First, disputants utilize mediation when there is consensus to try it. However, universal agreement between the parties is rare and as a result many cases that would benefit from mediation end up in litigation. Moreover, many parties do not suggest mediation as an alternative to litigation because of a fear that it might be interpreted as a sign of weakness. The other route is when a judge orders mediation or a hearing officer suggests mediation at a prehearing conference. Although the intuitive skills of an experienced judge or seasoned land use professional may be impressive, the question remains whether there are earlier methods to target cases that would benefit from mediation prior to judicial filing.

Developing Mediation Screening and Evaluation Programs

This study investigated two methods for identifying cases that are appropriate for mediation. First, CBI in collaboration with the Vermont Environmental Court developed a screening and evaluation process for land use cases in the Court. Second, GMER and CBI developed a mediation screening protocol to determine whether it was possible to identify cases prior to the appeal stage where engaging in mediation may be appropriate, both at the local and Act 250 levels.

Vermont Environmental Court Mediation Screening and Evaluation Process

As part of the pre-trial conference, Vermont Environmental Court judges regularly conduct an evaluation of cases to determine if mediation could help participants reach a mutually satisfactory settlement. Based on their findings, they order mediation, do not order mediation, or defer their decision.

For this study, during the initial case conference, Environmental Court judges recorded their evaluations of “mediation screening criteria” that were jointly identified by CBI and the Environmental Court judges and staff at the launch of the project. These criteria included related case information; the existence of determinative legal issues; the history of relationship between case parties; the judge’s perception of the parties’ positions on mediation; and the judge’s evaluation of the importance of a series of factors, such as the legal, relationship, and willingness factors. The judges also recorded their decision to order mediation.

Participants in cases that went to mediation were asked by the Court to evaluate their experience using evaluation forms developed for the project. Participants then mailed their evaluation forms, without attribution, to CBI, who recorded them in a central project database for further analysis.

CBI and the Environment Court judges and staff communicated periodically to discuss findings and ensure accurate recording of data. The screening and evaluation programs were active for eighteen months. The Environmental Court mediation evaluation process collected data from July 1, 2006 through December 31, 2007 with follow-up gathering of data and discussion of findings through June 2008.

Local and Act 250 Mediation Screening and Evaluation Programs

CBI and GMER established a screening and evaluation program for the mediation of: 1) local land use cases in selected Vermont municipalities and 2) Act 250 land use cases in Vermont’s nine regional District Commissions. Working closely with the Chair and staff of the Natural Resources Board (NRB), which administers the Act 250 land use permitting process, and local government planning directors, CBI and GMER established an eighteen-month mediation screening program. The program identified disputed cases and offered parties a voluntary and free mediation screening. GMER conducted the screenings, which involved confidentially interviewing the parties to determine where they agreed and disagreed, which issues were priorities for each party, and whether there were any obstacles to using mediation. Based on this information, the screener then provided a non-binding assessment on whether a case would benefit from mediation. The parties, in consultation with the permitting board, could then make an informed decision on whether to pursue mediation.

Parties who were interested in mediation were referred to the Environmental Court’s roster of approved mediators. The study experimented with two approaches. During the first year, the evaluator was listed on the roster of mediators and was available to mediate the cases upon request. During the last six months of the study, the project had the evaluator state that he was precluded from mediating cases.

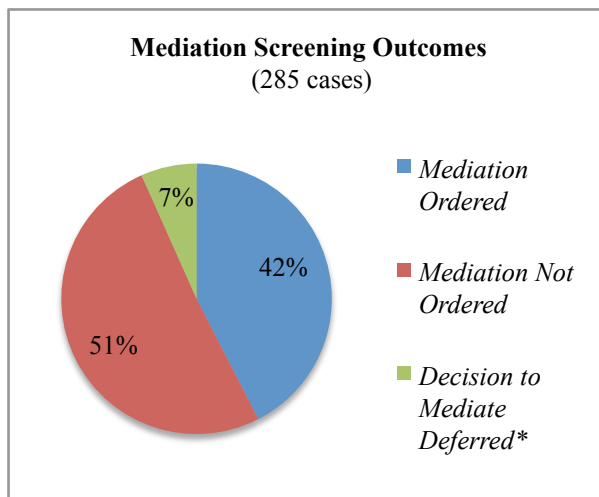
Parties in cases that proceeded to mediation were asked to evaluate their experience with the mediation process. Data from the screenings and mediation evaluations were recorded and corroborated in a central project database for further analysis.

2. Findings from Vermont Environmental Court Mediation Screening and Evaluation Processes

Mediation screening and evaluation data gathered from the Environmental Court indicate that mediation screening is an effective tool for targeting cases that could benefit from mediation. These data also suggest that there may not be a systematic approach, or set of determining criteria, for effectively evaluating a case for mediation. However, the study finds that there are best practices for structuring a mediation screening program.

The following are findings produced from data gathered by the Vermont Environmental Court during initial case conferences, which for the purposes of this report we will call mediation screening.

Overview of Cases



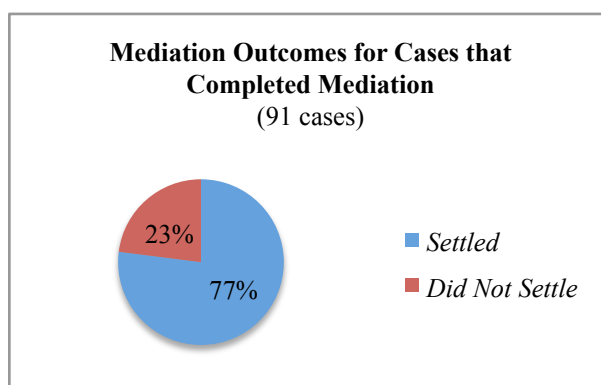
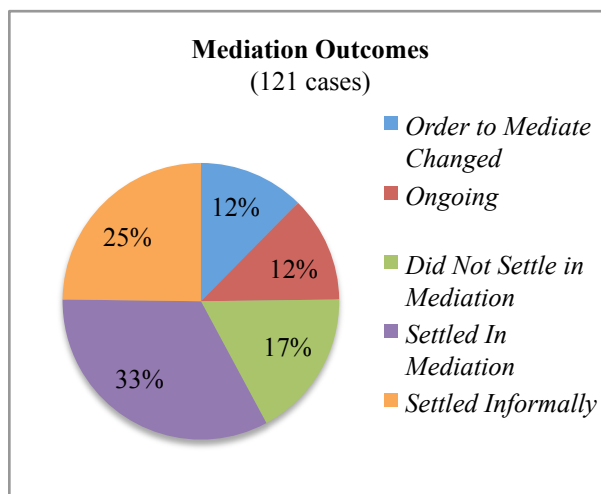
Over the eighteen-month study period, the Environmental Court judges screened 285 land use cases for the appropriateness of ordering mediation. Of 285 cases, mediation was ordered for 42% (121), mediation was not ordered for 51% (145), and for 7% (19) the decision to order mediation was deferred (* as of June 1, 2008). Judges deferred their decision on mediation when there were pending legal issues that needed to be settled first. Once that issue was resolved, a final decision about mediation was made and recorded. Qualitative data gathered through the

mediation screening forms and conversations with Environmental Court judges and staff suggests that in most cases, mediation was *not ordered* because the case was resolved through a motion for summary judgment—a determination issued on a question of law—or through a decision on a related case or appeal. In very few cases, mediation was not ordered because the parties had tried mediation in the past, without success, and were reluctant to pursue mediation again.

Of 121 cases ordered to mediation, 33% (40) settled in mediation; 25% (30) settled informally after mediation was ordered; 17% (21) did not settle in mediation; 12% (15) were ongoing at the end of the study period; and 12% (15) did not mediate because their order to mediate was changed by a judge

We believe that cases that settled after the mediation sessions concluded likely settled as a result of the mediation, and therefore can be counted as a successful settlement.

Looking only at cases that completed mediation by excluding those cases that had not yet finished their mediation by the close of this study (15) and those that did not mediate because their order to mediate was changed by the judges (15), 77% settled successfully through mediation (40 through mediation and 30 subsequent to mediation), while only 23% (21) did not settle successfully through mediation.



These data suggest that mediation can be an effective tool for resolving land use disputes. These data also indicate that the Court's process for identifying cases for mediation is effective. When mediation is ordered and completed, significantly more cases are settled through mediation (77%) than not settled through mediation (23%).

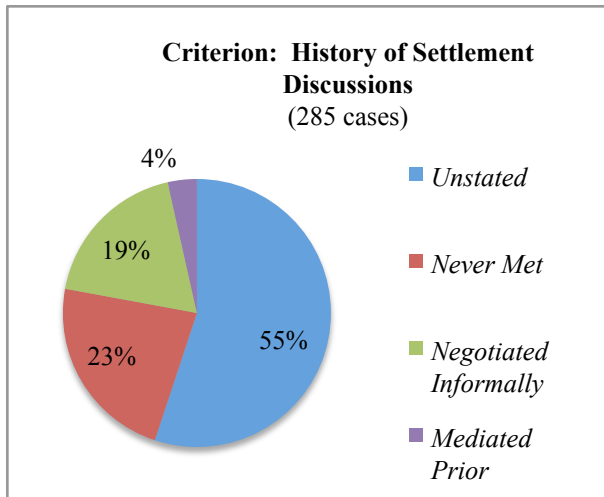
Mediation Screening Criteria Findings

The following section evaluates the screening criteria used by the Court against the data collected for all cases.

Criterion: History of Settlement Discussions

Judges were asked to note the history of settlement discussions, if known. Of 285 cases screened, a majority, 55% (157), did not note any prior history of settlement discussions in the screening evaluation, indicating that the judge may not have asked the question in the conference about prior interaction. In 23% (65), parties had never met prior to the appeal. It may also indicate that other factors are more important to the judges than history of settlement discussions.

Where there are data on history of settlement discussions, for cases where mediation was ordered, it was equally likely that parties had negotiated informally or never met.



For cases where mediation was not ordered, it was slightly more likely that parties had negotiated informally or had never met.

These data indicate that history of settlement discussions may not be the most important criteria for targeting cases for mediation. However, they also indicate that when parties have negotiated informally, the judges may sense that the case could settle with the help of an experienced mediator.

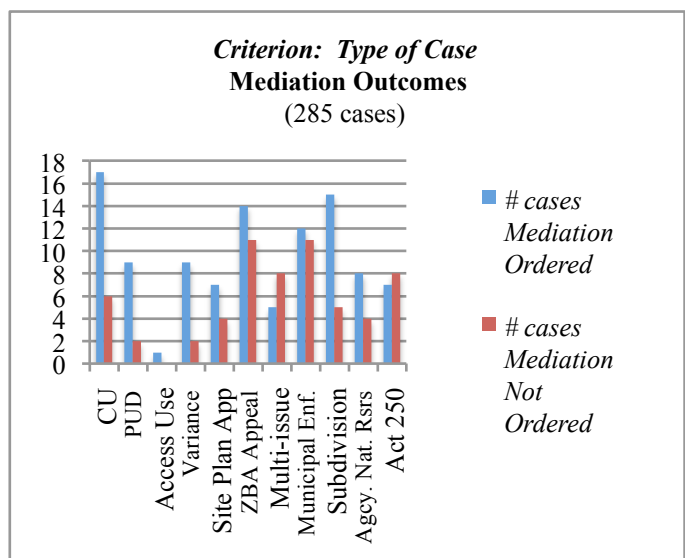
It is important to note that in the cases where the history of settlement negotiations was noted by the judges, in roughly half of the cases the parties had never engaged in settlement negotiations. The significant percentage of cases that reach the appellate level without the parties ever talking to each other underscores the need to promote greater communication between the parties (and mediation where appropriate at the local and Act 250 level).

Criterion: Type of Cases

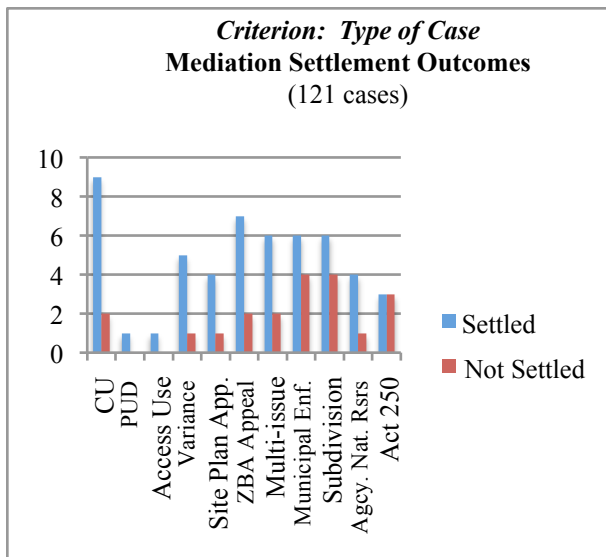
Using an abbreviated version of the Court’s case categorizing system, the CBI team organized cases into categories including: conditional use (CU), planned development (PUD), accessory use permit, variance, site plan approval, ZBA appeal, multiple issues, municipal enforcement, subdivision, Agency of Natural Resources, or Act 250. The team hypothesized that some types of cases might be more amenable to mediation than others due to factors such as the nature of the conflict (what type of permit or action) or when in the development process it was sought (early in the permitting stage or late in the development process).

The size of the data set does not offer statistically significant observations; however, some qualitative insights can be observed. Mediation was more likely to be ordered in cases dealing with permitting issues such as conditional use permits, planned development permits, variances, and subdivisions. Mediation was less or equally likely to be ordered in cases dealing with enforcement issues.

Of cases ordered to mediation, permitting cases (conditional use, planned developments, variances) were most likely to settle than not to settle through



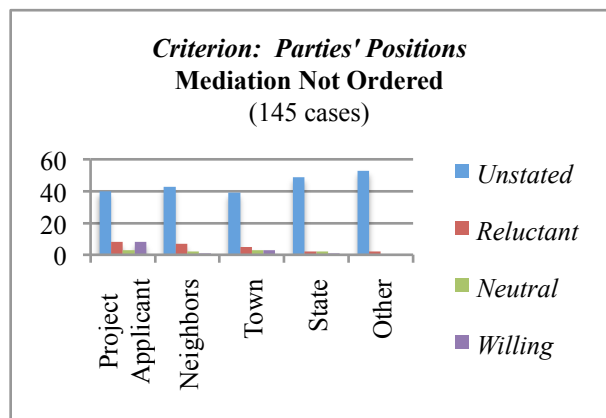
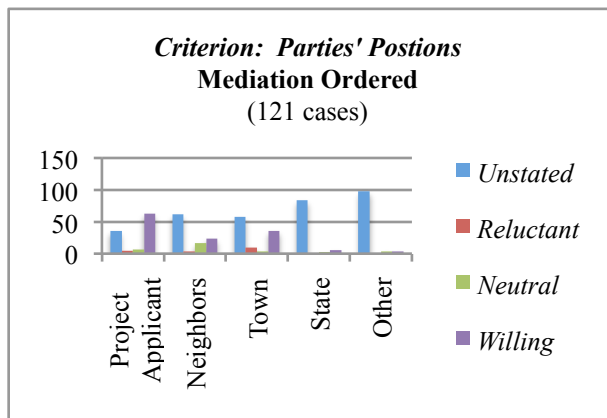
mediation. Enforcement cases were also more likely to settle, though more enforcement cases did not settle than permitting cases did not settle.



These data indicate that type of case may not be the most important criteria for targeting cases for mediation, however further evaluation of this hypothesis with a larger data set is needed. The CBI team's limited data indicate that mediation is more likely to be ordered in permitting cases and less likely in enforcement cases. However, enforcement cases that, through evaluation of other criteria such as parties' willingness to engage in mediation, are considered appropriate for mediation have as reasonable chance of settling through mediation as permitting cases.

Criterion: Parties' Positions on Engaging in Mediation

Judges were asked to evaluate their sense of the parties' positions on engaging in mediation. Parties could include the project applicant, neighbors, Town representatives, State representatives, or others. For those cases where the parties' positions were noted, mediation was more likely to be ordered if parties, particularly the applicant, expressed a willingness to participate in mediation.



However, willingness did not seem to be the only factor considered, as parties who expressed reluctance were both ordered to mediate and not ordered to mediate. Though the data is not overwhelming, when this information was available, this criterion in

addition to the overall judge’s judgment appears to be most decisive in determining if mediation is ordered.⁴

The absence of data on parties’ positions on engaging in mediation, may suggest that parties’ positions is not the most significant criterion for evaluating whether mediation will be ordered or not. However, these data also indicate that when parties express a willingness to engage in mediation that a judge is more likely to conclude that the case could settle through mediation.

Additional Criteria

The judges evaluated the importance of a series of list criteria in making their decision to order or not order mediation. Criteria included:

- Issue of Law
- Judge's Sense of Settlement Potential
- Parties’ Openness to Explore Options
- Subject Matter Amenable
- Parties' Willingness to Mediate
- Developer's Willingness to Consider Modifications
- Judge's Sense of Need for Future Relationship
- Parties' Desire for Future Relationship
- Need for Addressing Community Concerns

For each case, the judges evaluated these criteria as: Very Important, Somewhat Important, Not Important, or Not Applicable. The criteria were not evaluated for all cases, but when they were evaluated, *Issue of Law* was most frequently identified as “Very Important,” followed closely by *Judge’s Sense of Settlement Potential*. *Subject Matter Amenable* was most frequently identified as “Somewhat Important” followed by *Judge’s Sense of Settlement Potential*. *Need for Addressing Community Concerns* was most frequently identified as “Not As Important,” followed by *Developer’s Willingness to Consider Modifications* and *Parties’ Desire for Future Relationships*.

RANKING	VERY IMPORTANT	% of total VERY IMPORTANT RESPONSES
1 st	<i>Issue of Law</i>	20%
2 nd	<i>Judge's Sense of Settlement Potential</i>	19%
3 rd	<i>Parties’ Openness to Explore Options</i>	15%
4 th	<i>Subject Matter Amenable</i>	11%
5 th	<i>Parties' Willingness to Mediate</i>	9%
5 th	<i>Developer's Willingness to Consider Modifications</i>	9%
5 th	<i>Judge's Sense of Need for Future Relationship</i>	9%
6 th	<i>Parties' Desire for Future Relationship</i>	4%
6 th	<i>Need for Addressing Community Concerns</i>	4%

⁴ As time goes on and success of mediation is known, a larger number of parties might be willing to mediate.

RANK	SOMEWHAT IMPORTANT	% of total SOMEWHAT IMPORTANT RESPONSES
1 st	<i>Subject Matter Amenable</i>	28%
2 nd	<i>Judge's Sense of Settlement Potential</i>	22%
3 rd	<i>Issue of Law</i>	14%
3 rd	<i>Parties' Willingness to Mediate</i>	14%
4 th	<i>Parties' Openness to Explore Options</i>	11%
5 th	<i>Developer's Willingness to Consider Modifications</i>	6%
5 th	<i>Judge's Sense of Need for Future Relationship</i>	6%
6 th	<i>Parties' Desire for Future Relationship</i>	
6 th	<i>Need for Addressing Community Concerns</i>	

RANK	NOT AS IMPORTANT	% of total NOT AS IMPORTANT RESPONSES
1 st	<i>Need for Addressing Community Concerns</i>	20%
2 nd	<i>Developer's Willingness to Consider Modifications</i>	19%
2 nd	<i>Parties' Desire for Future Relationship</i>	19%
3 rd	<i>Judge's Sense of Need for Future Relationship</i>	14%
4 th	<i>Parties' Openness to Explore Options</i>	12%
5 th	<i>Parties' Willingness to Mediate</i>	7%
6 th	<i>Issue of Law</i>	5%
7 th	<i>Subject Matter Amenable</i>	3%
8 th	<i>Judge's Sense of Settlement Potential</i>	1%

While data on these additional criteria were not available for many (approximately 50% of cases), the data that the team did collect offer interesting insight into the evaluation process of Environmental Court judges.

First, the above data coupled with the review of screening data overall, *suggest that three components factor most into determining if a case is ordered to mediate; 1) the judge's sense of the potential for settlement; 2) the issue(s) of law; and, 3) the parties' willingness to mediate.*

This suggests that the order to mediate is a judgment derived from reviewing the case in context, informed by the many cases that preceded it, and is not a formulaic process. In short, it may be based more on “intuition” derived from years of experience. The second criterion suggests, not surprisingly, whether the case is primarily one turning on a definable point of law, or on a host of factors, of which a legal question is important but not central. The third criterion is an interesting one. Conversation with many Vermonters revealed that many believe that the Court “orders” mediation, even by fiat. In fact, the Court takes into account the parties’ willingness to do so in rendering that order. It would appear that although mediation can and may occasionally be mandatory, the Court does take into account one of the principal tenets of class mediation—the parties desire for self-determination and the “voluntariness” in the sense of “willingness.”

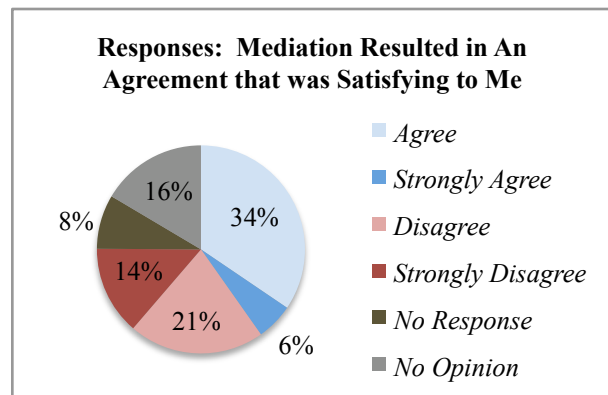
Second, while proponents of mediation may stress the value of addressing community concerns, improving future relationships, and the options for modification and trading (i.e., negotiation), these are not used as key criteria, at least by the Vermont Environmental Court, in practical consideration of mediation in the real world context. Third, it may be that in their professional training judges learn to ask questions that mediators might not ask, such as questions about points of law or parties' estimations of their alternatives. A mediator as screener may, in fact, focus more on options for solution, willingness of parties to trade various issues or points, and even relationships. We do not, however, have any data to compare judges as screeners versus mediators as screeners. Furthermore, it may be that testing "the bargaining range" of the parties is only possible in private confidential conversations, which are "luxuries" that the Court does not have in the pre-hearing conference.

Mediation Evaluation Findings

The following are findings produced from data gathered by CBI through post-Court ordered mediation evaluation forms. Evaluation forms were solicited from all people who attended the mediation including, attorneys, applicants, neighbors, town or state officials, or pro se (often neighbors or family members who are self-represented), excluding the mediator. Evaluations were submitted without attribution to any individual. CBI collected 254 evaluation forms, for a 71% response rate.

Findings: Mediation Satisfaction

Parties were asked to evaluate if "the mediation resulted in an agreement that was satisfying to me?" Of responses to this question, 40% agreed that mediation resulted in an agreement that was satisfying to them (88 agreed and 15 strongly agreed), while 35% disagreed (55 strongly disagreed and 36 disagreed). This satisfaction rate is lower than in other studies on mediation more generally. For instance, 65% of 361 respondents to a multi-year study of the Alberta Environmental Appeal Board's (EAB) mediation program note some measure of satisfaction with the mediated agreement.

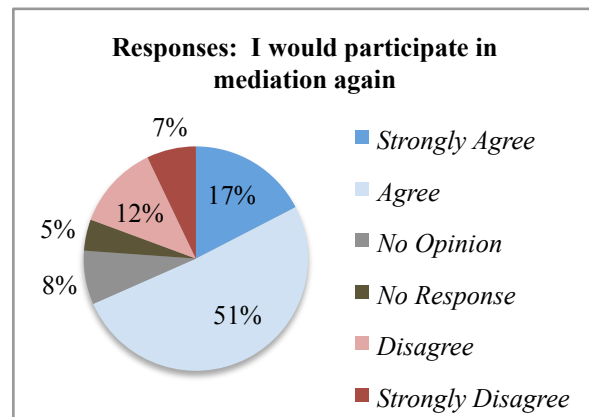


Interestingly, of these responses, representatives from towns were most likely to disagree or strongly disagree (56%) that the mediation resulted in an agreement that was satisfying to them versus applicants that disagreed or strongly disagreed that the agreement was satisfying to them (36%) followed by agencies (36%) and then interested parties (35%). The large number of no responses and no opinions by "others" is believed to be attributable to responses from attorneys representing various clients who likely did not deem it appropriate to answer this question.

<i>Satisfying to Me</i>	<i>No Response</i>	<i>Strongly Disagree</i>	<i>Disagree</i>	<i>No Opinion</i>	<i>Agree</i>	<i>Strongly Agree</i>
<i>Applicant (81 responses)</i>	10% (8)	16% (13)	20% (15)	10% (8)	37% (30)	9% (7)
<i>Interested Party (40 responses)</i>	15% (6)	10% (4)	15% (6)	4% (2)	42% (17)	13% (5)
<i>Town (60 responses)</i>	0	23% (14)	33% (20)	20% (12)	20% (12)	3% (2)
<i>Agency (12 responses)</i>	0	0	36% (4)	36% (4)	36% (4)	0
<i>Other (61 responses)</i>	11% (7)	7% (4)	15% (9)	30% (18)	38% (23)	0

In discussions with Act 250 focus group participants, phone calls with town representatives, and conversations with Environmental Court staff, many were not surprised that representatives from towns were least satisfied with mediation agreements. Some commented that by the time cases, especially enforcement cases, reach the Environmental Court, town officials may feel that they have already tried to accommodate applicants and, as a result, are less enthusiastic about mediation with parties who, in their perspective, have been “difficult” or “recalcitrant.” Some noted that the resolution by the Environmental Court rarely resolves an entire case or application. Thus, the town or city is left to continue to wade through any unresolved issues and the remaining aspects and variables of the case in order to reach a final, comprehensive decision. In short, an agreement in court may not be an agreement in full and practical terms on the ground. The split among applicants’ responses is not surprising given that their responses seemed to correlate with the outcome of mediation (dissatisfaction was more likely to result when mediation did not result in settlement and vice versa).

Despite these findings related to satisfaction with the agreement or outcome, when asked to evaluate “Would I participate in a mediation again?” 68% responded that they would participate in mediation again (51% (131) agreed and 17% strongly agreed (45) while 19% responded that they would not (12% (30) disagreed and 7% (19) strongly disagreed).



This result is more in keeping with other studies. In the Alberta Study, 77% of the respondents report that they would participate in mediation again. In the Lincoln Institute for Land Policy study of 1999, some 86% of respondents in 100 diverse land use cases across the U.S. rated the process very favorable or favorable (in these cases, many did not necessarily involve litigation in front of a court or appeal board).

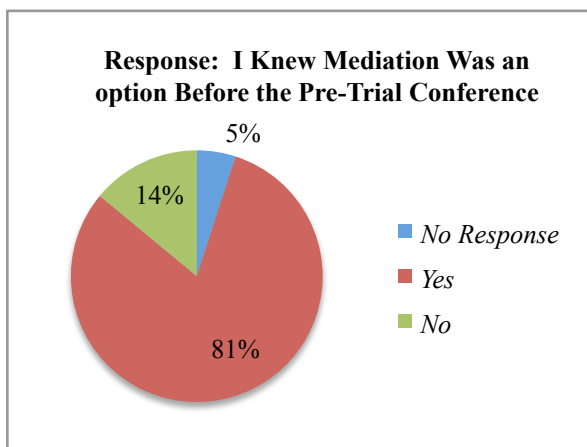
Across all categories, respondents were more likely than not to agree that they would participate in mediation again. Applicants were most likely to agree that they would

participate in mediation again, while town representatives had the largest percentage of respondents who disagreed that they'd participate in mediation again (although most town respondents were more likely to agree than not).

<i>Mediation again</i>	<i>No Response</i>	<i>Strongly Disagree</i>	<i>Disagree</i>	<i>No Opinion</i>	<i>Agree</i>	<i>Strongly Agree</i>
Applicant (81 responses)	2% (2)	7% (6)	15% (12)	4% (3)	57% (46)	15% (12)
Interested Party (48 responses)	11% (5)	0	15% (7)	11% (5)	38% (18)	26% (13)
Town (61 responses)	5% (3)	13% (8)	12% (7)	23% (14)	33% (20)	15% (9)
Agency (10 responses)	0	0	0	38% (4)	63% (6)	0
Other (61 responses)	5% (3)	0	3% (2)	23% (14)	50% (31)	18% (11)

Despite some participants' earlier expression of negative feelings about the agreement reached in mediation, it seems that most participants were supportive of mediation as a process. In post study discussions with the Environment Court judges, staff and others, some reasoned that positive experiences and cost savings with mediation begets support for mediation in the future.

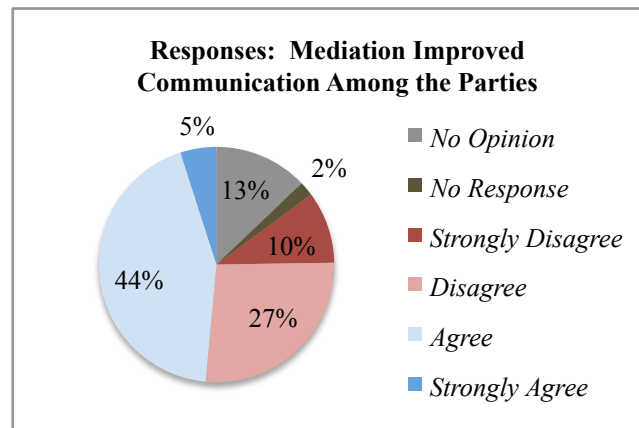
Others felt there is general support for the idea of mediation among Vermonters, who believe that mediation, in theory, is a better alternative to litigation. They argued that the responses reflect respondents' tendency to distinguish between their recent experiences and their general support for the process. In fact, many respondents offered comments that supported this theory, noting that they were supportive of mediation, but felt that their particular mediation was not satisfying to them due to behaviors attributable to "the other parties."



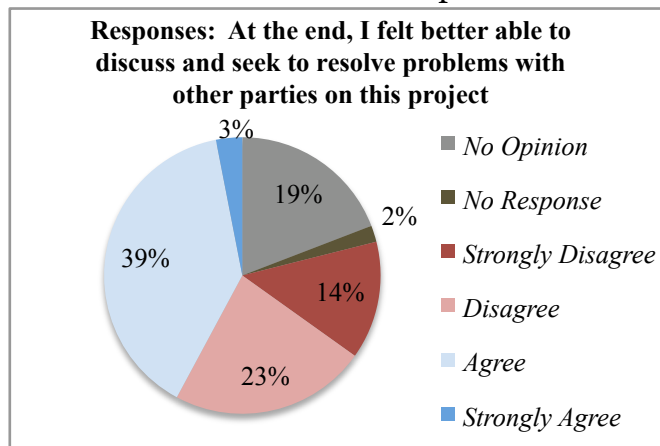
If the theory of general support for mediation is true, then it is not surprising that 81% (212) of respondents noted that they knew mediation was an option before their pre-trial conference. While some questioned this statistic, it does support the idea heard several times throughout this study that Vermont's courts push to promote mediation is well known and may have impacts throughout the state, including at the local and regional levels, on the support, use, and understanding of mediation.

Findings: Outcomes of the Mediation Process

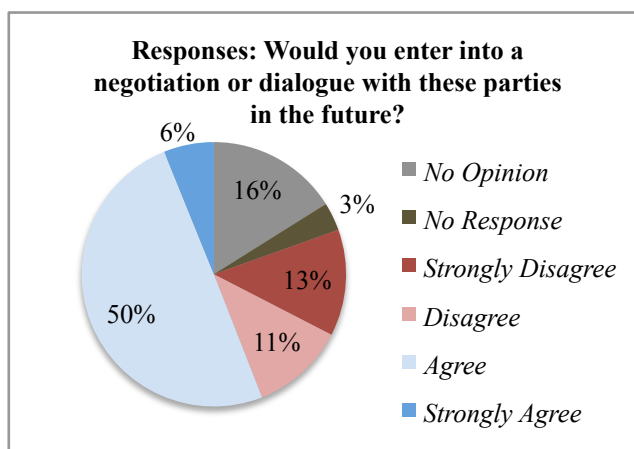
Mediation participants were asked a series of questions about outcomes of the mediation process, including improved communication, better understanding and sharing of interests, and generation of options. Slightly less than half of evaluation respondents (49%) felt that the mediation process improved communication among the parties (44% (114) agreed and 5% (12) strongly agreed), while 37% felt that the mediation process did not improve communication among parties (27% (70) disagreed and 10% (27) strongly disagreed).



While more believed mediation did, rather than did not, improve communication, this result is somewhat contrary to the often-lauded claim that mediation improves communications among parties. It may be that some kinds or forms of mediation do so, while others are primarily, brokered, outcome-focused processes. It may be that some don't value or are not seeking "improved communication" but rather simply "settlement given the choices."



Less than half, or 42% 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% (102) agreed and 3% (8) strongly agreed), while 37% disagreed (23% disagreed (60) and 14% (36) strongly disagreed).

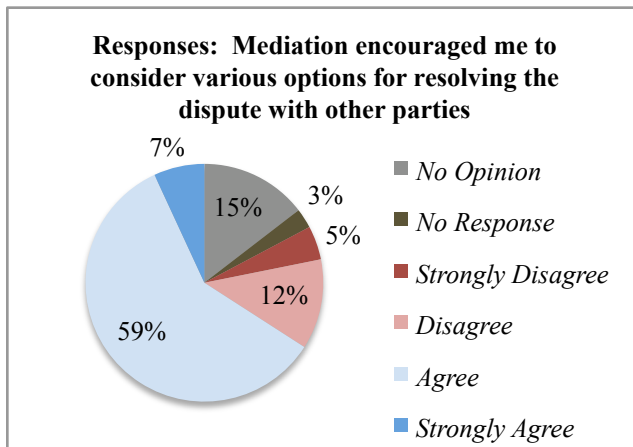


These findings suggests that mediation as a means to improve problem solving among the parties, at least in the court context, is not as effective as some might hope or claim.

When asked if, given their experiences, respondents would enter into a negotiation or dialogue with the other parties in the future, 56% responded that they would (50% (130) agreed and 6% (16) strongly agreed), while 24% responded

that they would not (13% (34) strongly disagreed and 11% (30) disagreed).

Several participants commented, that if they “had to”, they would enter into a negotiation or dialogue with the other parties, indicating that they might not initiate that interaction on their own. In post-study conversations, some pointed out that many parties have not spoken to each other before the mediation process. They suggested that once they had met, many parties probably would speak to each other, and that mediation facilitated that introduction which otherwise may not have ever been made.



A larger percentage of mediation participants, 66%, reported that the mediation process encouraged them to consider various options for resolving the dispute with other parties (59% (154) agreed and 7% (18) strongly agreed), while 17% felt that the mediation process did not encourage them to consider various options for resolving the dispute (12% (32) disagreed and 5% (12) strongly disagreed). These responses are more supportive of the theory that mediation

can identify or help surface possible options for consideration.

Evaluation respondents reported that, in their opinions, the top barriers to reaching settlement were:

Barriers	% of total Responses
Parties Goals Were Unrealistic	33%
Parties Did Not Have the Authority to Settle	18%
Missing One or Two Key Parties	13%
Parties' Incentives to Settle Were Too Low	11%
Was Not Sufficient Information	9%
Parties Were Unreasonable	7%
Mediation Came Too Late in Dispute	6%
Mediation Process Itself	3%

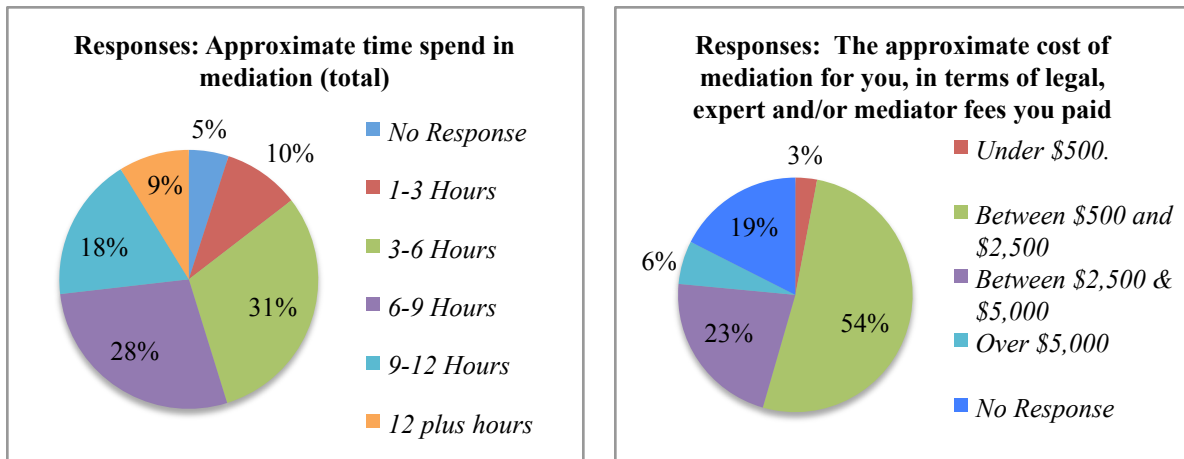
This relatively strong result on barriers, suggests perhaps, that a more evaluative kind of mediation may be appropriate for land use cases. In evaluative mediation, the mediator’s job is to more actively inform and shape the parties’ sense of the merits of the case. Theoretically, at least, an evaluative mediation program would encourage (or, some would say, cajole or pressure) the parties to have a more “realistic” sense of their goals given their practical and legally-constrained choices.

Interestingly, the barrier of parties not having the authority to settle may point to the tension raised earlier around the town’s representation at the mediation and the town’s implementation body. Respondents who indicated that parties did not have the

authority to settle and that the mediation was missing one or two key parties, most frequently identified the town representative as missing or without authority to settle.

Findings: Mediation Process Logistics

Most evaluation respondents (59%) reported that they spent between 3-9 hours total in mediation, including preparation. 10% (25) spent 1-3 hours; 31% (60) spent 3-6 hours; 28% (73) spent 6-9 hours; 18% (47) spent 9-12 hours; and 9% (23) spent 12 plus hours.



Most evaluation respondents (54%) reported that the approximate cost to them for the mediation was between \$500-\$2500. Most non-respondents were attorneys who noted that the question was not applicable to them, however, some attorneys may have tried to estimate their costs. Overall, it was unclear how respondents calculated those costs and if they were including the cost of the mediator only or the cost of other services rendered by attorneys and other professionals in the case.

Summary of Court Mediation Screening and Evaluation Findings

Data gathered through mediation evaluation forms offer a somewhat surprising reflection on the value that mediation participants give their 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. Somewhat surprising was parties’ support for mediation and their willingness to participate in mediation again, despite indications by many that their most recent experience with mediation did not result in an agreement that satisfied them. We interpret these data to mean that the agreement reached was perhaps tolerable, given their constrained choices, however satisfying the process itself might have been. Interestingly enough, the mediation process, more often than not, seems to have offered enough benefits, either cost or time savings, that about two-thirds or respondents would be willing to participate again.

The data also suggest that more research could be done into the reported less positive experience of towns (or local level officials) with the mediation process. As discussed

further in this study, there may be opportunities for building the capacity at the local level to resolve cases earlier in the dispute or how better to integrate the litigated portions of a case with overall, complex, multi-factorial decision making by municipalities. Under Vermont law, Town Selectboard Members are the only ones who can participate in litigation proceedings, and subsequently, court-ordered mediations. However, the Planning, Zoning, and Development Review Boards very often play an essential role in the implementation of a mediated agreement, and therefore could play an important role in the mediation process.

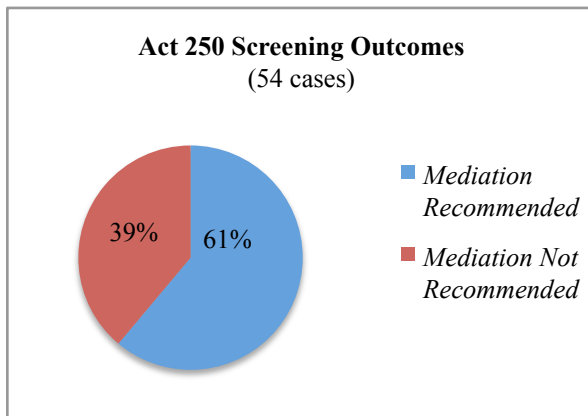
Finally, the data suggest that the Environmental Court, through its push for mediation, has had a significant impact on the knowledge, and likely success of mediation throughout the state.

3. Findings from the Act 250 Screening and Evaluation Processes

Before they reach the Vermont Environmental Court, many cases begin as cases before the District Commissions in Act 250 proceedings. The Act 250 statute is a state statute that requires land use permits for commercial developments, industrial developments, and major residential subdivisions over a certain jurisdictional threshold. Disputes arising from Act 250-related decisions are first heard by the state’s District Commissions. To determine whether mediation screening could be effective at a regional level, GMER and CBI ran an Act 250 mediation screening and evaluation program from January 1, 2006 through June 30, 2007 with follow up interviews conducted with NRB staff and District Commissioners and staff through October 2007.

The following are findings produced from data gathered by GMER during the mediation screening of Act 250 permitting cases and from data gathered by CBI during post-screening evaluation efforts.

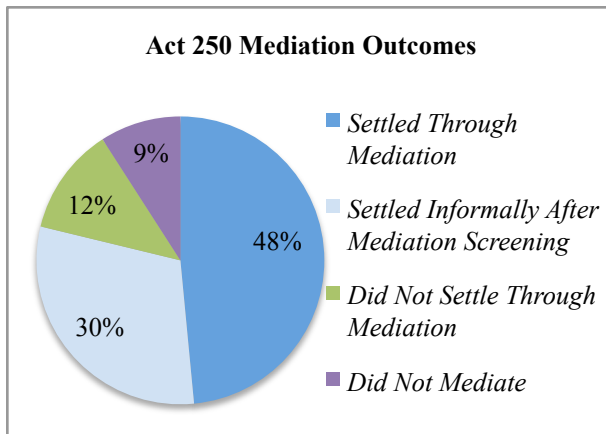
Overview of Cases



Over an eighteen-month period, GMER screened 54 contested Act 250 permit applications for mediation. Of the 54 contested applications screened, 61% (33 cases) were recommended for mediation, while 39% (21 cases) were not recommended for mediation. Unlike the Environmental Court mediation program, the Act 250 mediation screening program was voluntary and the evaluator could only suggest, rather than compel, that the parties engage in mediation.

Of cases recommended for mediation, 48% (16) settled through mediation, 30% (10) settled informally through mediation screening, 12% (4) did not settle through mediation, and 9% (3) did not choose to pursue mediation. A surprising finding was the significant number of cases where the mediation screening process itself facilitated a settlement. Many of the screenings were essentially informal phone mediations and included discussions of the parties’ interests and possible options to satisfy those interests. Counting these cases along with cases that settled through formal mediation,

the data indicate that mediation screening facilitated settlement of 78% (26) of cases that it recommended for mediation. In addition, mediation and mediation screening resulted in settlements in 87% (26 out of 30) of cases where the parties were willing to engage in mediation.



These findings are consistent with the Court’s screening process in the pre-hearing conference: mediation screening itself can increase the odds that the parties settle the case, even if mediation is not ultimately implemented.

What we cannot determine is: 1) how many mediations would have occurred voluntarily; 2) how many cases would have settled anyway; 3) how many cases would have not settled and had gone on through the Act 250 process or the Environmental Court if no screening process was in place. Thus, while additional research would be needed to confirm the statistical significance of these findings, the data offer a rough picture of the potential of mediation screening for assessing and targeting cases that have a higher likelihood of settling through mediation or other facilitated negotiation processes.

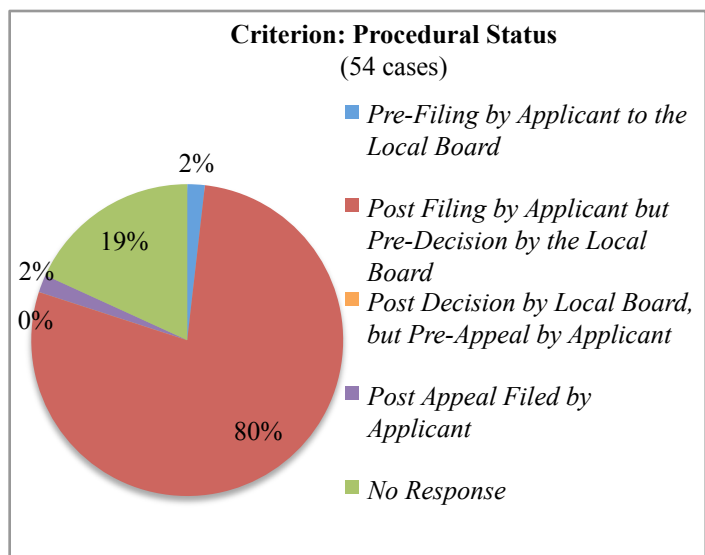
Mediation Screening Criteria Findings

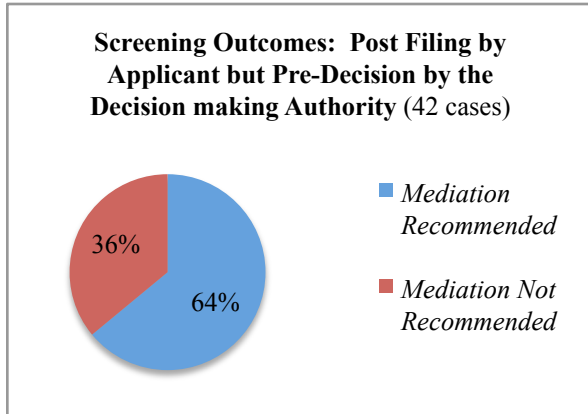
The following analysis further examines the data gathered through the mediation screening and evaluation processes of Act 250 permitting cases. The data reflect the judgment of the mediation screener, a trained neutral and experienced mediator, on a set of criteria that were considered in the evaluation of each case. These criteria included: the project’s procedural status, the type of case, the number of parties, the nature of the dispute, and the parties’ experience with mediation and their feelings about engaging mediation. Given the sample size, these data are not statistically significant, but they offer some insights on the value of mediation screening and the relative importance of various screening criteria.

Criterion: Project’s Procedural Status

Of the 54 cases screened, 80% (42) were screened *after the applicant had filed for a permit with the decision making body, but before a decision by that body had been made.*

This is not entirely surprising given the process for identifying cases for screening—in many cases the District Commission staff notified the

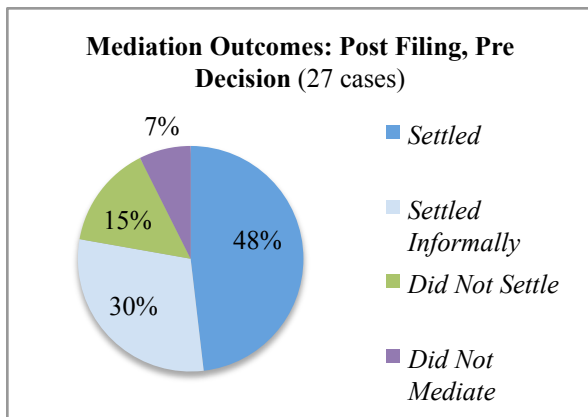




screeners when they received a case that they knew was in dispute. Only one case was screened before the applicant had filed for a permit with the decision making body, and one was screened after an appeal had been filed by the applicant with the decision making body. Of the 42 cases in this stage of procedural process, 64% (27 cases) were recommended for mediation while 36% (15) were not recommended for mediation.

These data may offer some insight into the timing of mediation screening in the Act 250 process. They indicate that this juncture between filing and decision making may be an appropriate time for mediation screening. The case is securely in the formal administrative process and the proponents can be sure their legal right to a hearing will be granted. At the same time, a final, formal decision has not been reached, precluding dialogue and potential project modification, and the parties have not staked out positions in formal, often contentious, and frequently non-problem solving formal hearings. If the parties know of potential concerns and/or opposition, this may be the ideal time to try dialogue with limited risk or cost.

Of the 42 cases screened during the post-filing, pre-decision stage, most but not all of cases were recommended for mediation. The screener frequently cited the applicant’s willingness to consider modifications to the project as a key factor in his recommendation. If applicants were unwilling to consider potential changes, or were opposed to engaging in a dialogue, then mediation was not recommended.



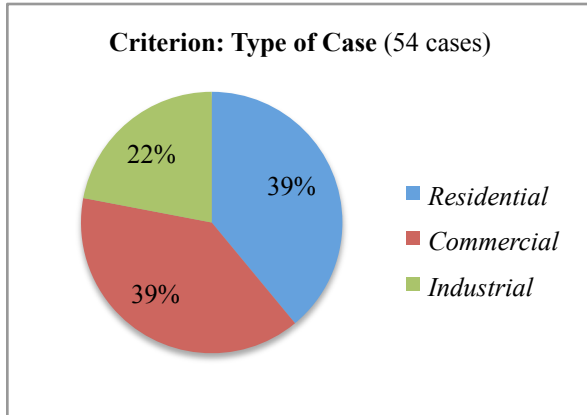
Of the 27 “post filing, pre decision” cases recommended for mediation, 48% (13) settled through mediation with an additional 30% (8) settling after mediation screening without mediation. Only 15% (4) did not settle through mediation and 7% (2) did not mediate.

These data support the position that screening accurately assessed the appropriateness of mediation or facilitated settlement in most of the cases screened.

Or, one may conclude, that a facilitative intervention at this point – mediation screening in this case – provides the appropriate incentive or trigger to bring parties “to the table” for constructive dialogue. It is worth remembering here that the Court findings where data was available, in approximately half the cases screened by the Court, the parties had not met prior to the pre-hearing conference. It may be that, for complex institutional and psychological reasons, parties need extra assistance in engaging in the mere act of sitting down and talking, even without a mediator.

Criterion: Type of Case

Of 54 cases screened, 39% (21 cases) dealt with a dispute over a residential project (property improvements, subdivisions), 39% (21 cases) dealt with a dispute over a commercial project (business property improvements), and 22% (12 cases) dealt with a dispute over an industrial project (natural resource extraction, utilities).



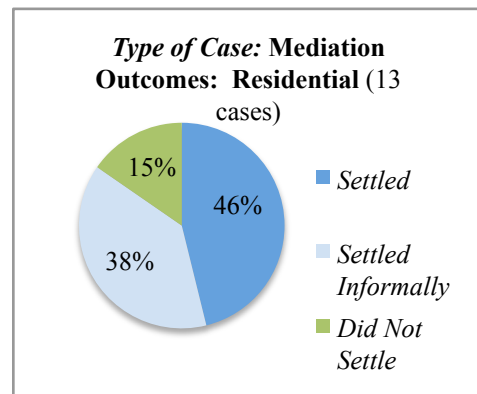
Among the 54 cases screened, industrial cases were least likely to be recommended for mediation. Commercial cases were most likely to be recommended for mediation and residential cases were more likely than not to be recommended for mediation.

TYPE OF CASE	<i>Mediation Recommended</i>	<i>Mediation Not Recommended</i>
Residential (21 cases)	62% (13)	38% (8)
Commercial (21 cases)	76% (16)	24% (5)
Industrial (12 cases)	33% (4)	67% (8)

While evaluation of “type of case” alone is likely not to offer sufficient information to be able to determine the appropriateness of mediation, when combined with evaluation of additional criteria—such as number of parties, nature of dispute or willingness to explore options—type of case may be useful in evaluating the appropriateness of mediation. For example, industrial permitting disputes, such as resource extraction, often involve dozens of parties because they have community-wide impacts. In addition they raise questions about multiple issues, including economic development, public health, and noise. The complexity of many of these disputes, the level of investment, along with the strong emotions that often accompany these issues, may make industrial cases less amenable to mediation. Alternately, many residential and commercial permitting disputes involve at least somewhat fewer parties, more generally perceived public “goods” (a new store, a new office, new homes) rather than “public bads” (a power plant, landfill, etc.), a more focused scope and implications (traffic, aesthetics, etc.), and possibly for more limited public health risks and nuisances (noise, smell).

Of cases that were recommended for mediation, between 75-84% of cases across all three case types settled either through mediation or through mediation screening.

Of 13 residential cases, 46% (6) settled through

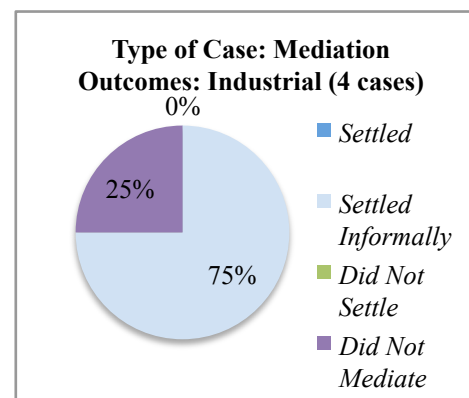
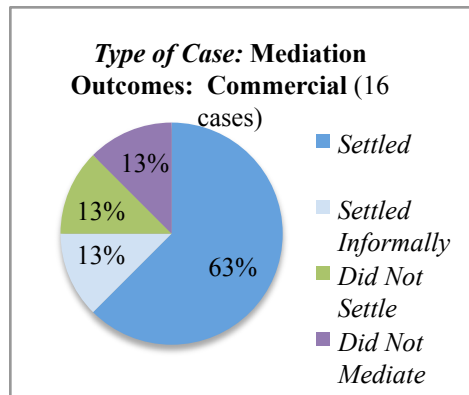


mediation, 38% (5) settled through mediation screening, and 15% (2) did not settle through mediation.

Of 16 commercial cases recommended for mediation, 63% (10) settled through mediation, 13% (2) settled through mediation screening, 13% (2) did not settle through mediation, and 13% (2) did not mediate.

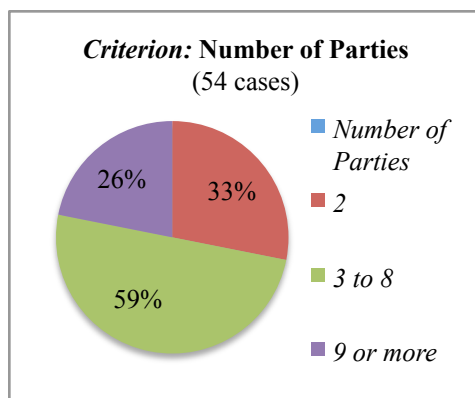
Of four industrial cases, 75% (3) settled through mediation, and 25% (1) did not mediate.

These data suggest that mediation screening is effective across all types of cases for targeting cases that are likely to settle using mediation or facilitated dialogue processes. Additionally, mediation screening effectively screens out cases more appropriate for other resolution forums (particularly industrial ones). As noted earlier, we believe that the mediation screening alone significantly increases the likelihood that a case will settle, even if a formal mediation session is not convened. In these cases (10 total), the screener facilitated conversation between the parties by listening to key interests and suggesting that they explore possible options for settlement.



Criterion: Number of Parties

Of the 54 cases screened, 33% (18) had just two parties, 59% (22) had three to eight parties, and 26% (14) had nine or more parties.



Cases with two parties and cases with nine or more parties were more likely to be recommended for mediation than not recommended for mediation. Cases with three to five parties were slightly more likely to be recommended for mediation than not recommended for mediation.

These data are not compelling enough to suggest that number of parties plays an important role in the screener’s evaluation of the appropriateness of mediation.

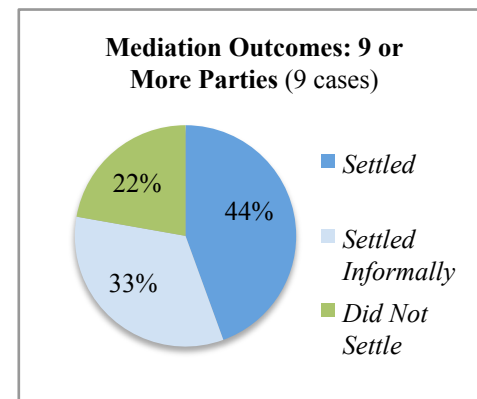
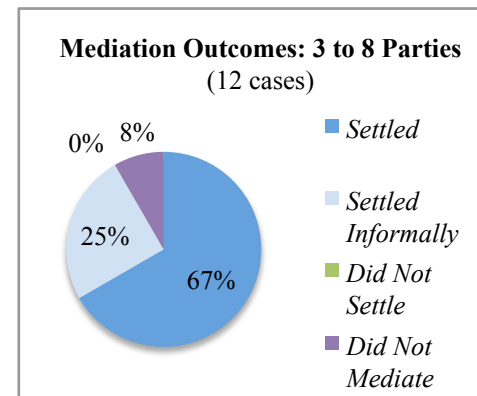
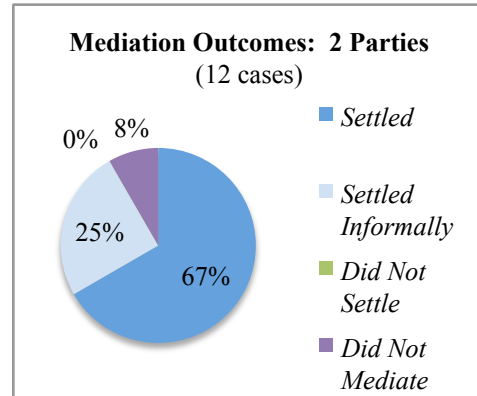
NUMBER OF PARTIES	<i>Mediation Recommended</i>	<i>Mediation Not Recommended</i>
2 (18 cases)	66% (12)	33% (6)
3 to 8 (22 cases)	55% (12)	45% (10)
9 or more (14 cases)	64% (9)	36% (5)

Of the 33 cases that were recommended for mediation, between 66-92% of cases across all numbers of parties settled either through mediation or through mediation screening.

Of two party cases, 67% (8) settled through mediation, 25% (3) settled through mediation screening, 8% (1) opted not to mediate, and there were no cases that mediated but did not settle.

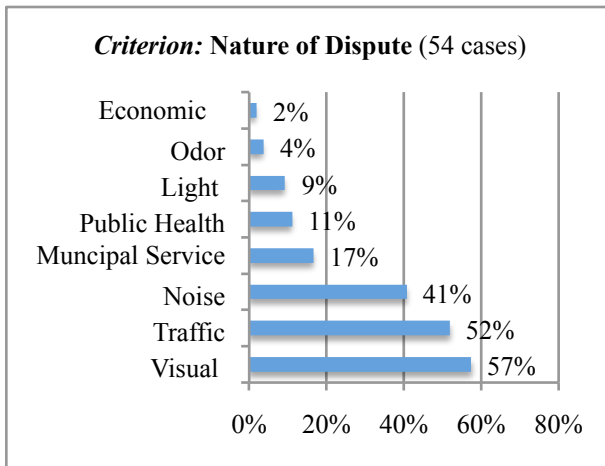
Of three to eight party cases, 33% (4) settled through mediation, 33% (4) settled through mediation screening, 17% (2) did not settle through mediation, and 17% (2) did not mediate. Of nine or more party cases, 44% (4) settled through mediation, 33% (3) settled through mediation screening, and 22% (2) did not settle through mediation.

These data support the earlier suggestion that mediation screening is effective across all types of cases, in targeting cases that are likely to settle using mediation or facilitated negotiation processes, regardless of number of parties. It is interesting that mediation screening alone (without formal mediation) assisted in the settlement of a relatively large number of cases involving nine or more parties. This is somewhat counterintuitive in that one might assume the increased complexity of increased numbers of participants might make a mediator more necessary. These limited data do not suggest that.



Criterion: Nature of the Dispute

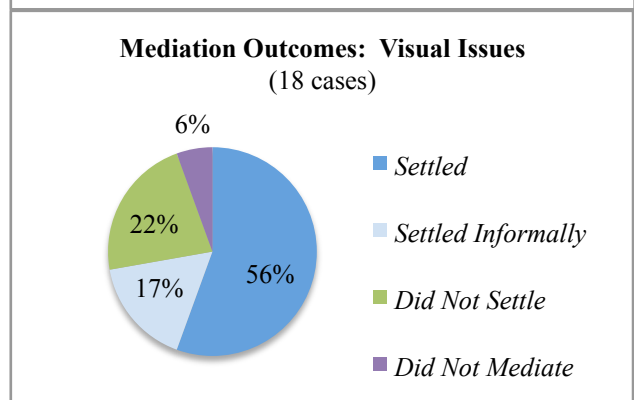
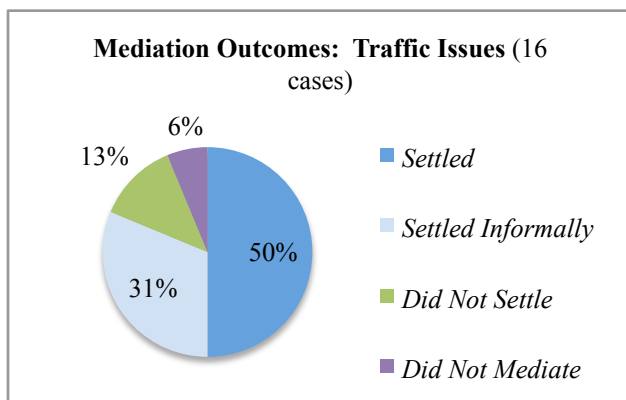
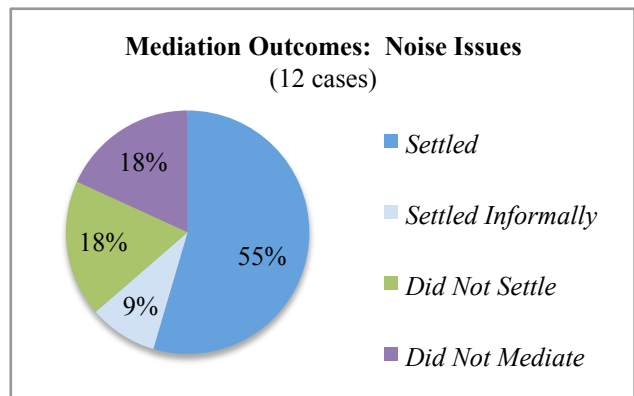
Many cases involved multiple issues, which is reflected in these data. The mediation screener, who could identify multiple issues per case, as appropriate, characterized the nature of the dispute. Of the 54 cases screened, 57% (28) involved concerns about visual impacts, 52% (28) involved concerns about traffic impacts, 41% (22) involved concerns about noise impacts, 17% (9) involved concerns with impacts on municipal service costs,



11% (6) involved concerns with public health impacts, 9% (5) involved concerns with light impacts, 4% (2) involved concerns with odor impacts, and 2% (1) involved concerns with impacts on economic development. These data, given the range of number of cases, don't suggest any particular trend.

NATURE OF DISPUTE	Mediation Recommended	Not Recommended
Traffic (28 cases)	57% (16)	43% (12)
Public Health (6 cases)	83% (5)	17% (1)
Economic Development (1 case)	0	100% (1)
Municipal Service Costs (9 cases)	33% (3)	67% (6)
Visual (31 cases)	58% (18)	42% (13)
Noise (22 cases)	55% (12)	45% (10)
Light (5 cases)	100% (5)	0
Odor (2 cases)	100% (2)	0

Of five cases dealing with public health issues, 40% (2) settled through mediation, 20% (1) settled through mediation screening, 20% (1) did not settle though mediation and 20% (1) did not mediate. Of sixteen cases dealing with traffic issues, 50% (8) settled through mediation, 31% (5) settled through mediation screening, 13% (2) did not settle through mediation, and 6% (1) did not mediate. Of five cases dealing



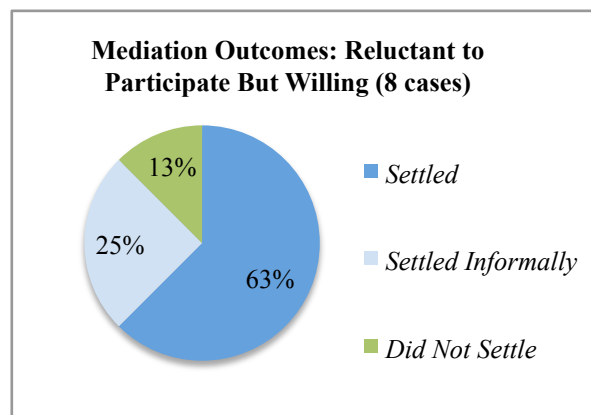
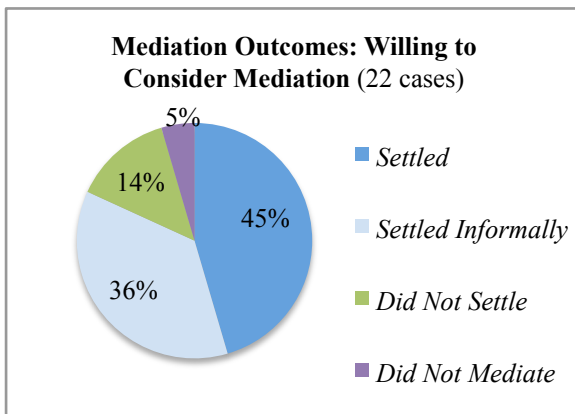
with light issues, 80% (4) settled through mediation and 20% (1) did not mediate. Of twelve cases dealing with noise issues, 55% (7) settled through mediation, 9% (1) settled informally, 18% (2) did not settle through mediation, and 18% (2) did not mediate. Of eighteen cases dealing with visual issues, 56% (10) settled through mediation, 17% (3) settled informally, 22% (4) did not settle through mediation, and 6% (1) did not mediate. Of the two cases dealing with odor issues, 50% (1) settled through mediation and 50% (1) settled through mediation screening.

Criterion: Group’s Position on Engaging in Mediation

For each case, the screener assessed parties’ positions on mediating their case, and then noted the group’s general attitude on pursuing mediation for their case. Of 54 cases screened, 50% (26) seemed willing to consider mediation; 24% (13) seemed willing, but reluctant to participate in mediation; 19% (10) seemed to have some parties that were not willing to participate in mediation; 6% (3) seemed to have differing views on the scope of the problem itself; and 4% (2) were waiting for action on their case from a decision making body.

GROUP’S POSITION ON ENGAGING IN MEDIATION	<i>Mediation Recommended</i>	<i>Mediation Not Recommended</i>
<i>Waiting for Action (2 cases)</i>	50% (1)	50% (1)
<i>Willing to Consider Mediation (26 cases)</i>	85% (22)	15% (4)
<i>Reluctant to Participate in Mediation (13 cases)</i>	61% (8)	38% (5)
<i>Different views among parties on the scope of problem or problem itself (3 case)</i>	0	100% (3)
<i>Not all willing to Consider in Mediation (10 cases)</i>	10% (1)	90% (9)

Mediation was most likely to be recommended when parties were willing to consider mediation, and least likely to be recommended when not all parties were willing to consider mediation. When parties were willing, but reluctant to participate in mediation, mediation was recommended more often than not recommended. This



indicates that additional factors, including parties willingness to consider modifications and an amenable subject matter, are also important considerations when recommending mediation.

In cases where parties were willing to consider mediation, 45% (10) settled through mediation, 36% (8) settled through mediation screening (settled informally), 14% (3) did not settle through mediation, and 5% (1) did not mediate. In cases where parties were reluctant, but willing to participate in mediation, 63% (5) settled through mediation, 25% (2) settled through mediation screening, and 13% (1) did not settle through mediation.

It is interesting that the percentage of cases that reached settlement where the parties were willing to consider mediation (81%) was nearly identical to the percentage of cases that settled where the parties were reluctant to engage in mediation (88%). While the sample sizes for the two are very different, these data suggest that the willingness of the parties to engage in mediation does not appear to be an important indicator of the likelihood of reaching settlement. These data raise the question of whether permitting boards should have the authority to order or at least encourage parties to engage in mediation in appropriate circumstances.

These findings, while more limited in number than for the Court, suggests that the willingness of the parties, short of outright rejection, to participate in mediation perhaps should not be as strong a factor in recommending mediation. Similar to the findings from the Court data, the Act 250 mediation screening data suggest that a mediation screener should give somewhat less deference to the parties' willingness to participate in mediation and more to other relevant criteria.

Summary of Act 250 Mediation Screenings

Although there is no singular determinative factor in the screening process, the most important factors were the applicant's willingness to consider modifications to the project and the opponent's willingness to agree to some kind of development. If the applicant refused to consider any modifications or the opponents had an "over my dead body" approach to any development, mediation was not recommended.

If the applicant and opponent demonstrated flexibility, then mediation was generally recommended. In most of these cases the parties never spoke to each other prior to the screening. The screening created the opportunity for the parties to engage in a dialogue. When the issues were straightforward and the screener believed the parties could easily reach settlement, the screener assisted the parties to reach a settlement without a formal mediation session. When the issues or the dynamics between the parties were more complex, formal mediations were necessary to reach settlement. In 87% of the cases where mediation was recommended and the parties were willing to engage in a dialogue, the parties reached a settlement.

4. Local Mediation Screening and Evaluation Program Findings

Most cases that make their way to the Act 250 and Vermont Environmental Court dispute systems have their origins at the local level. However, despite many efforts by GMER to identify local level cases to be screened, only a modest number of local cases (thirteen) were screened during the eighteen-month project. Instituting more active mediation at the local level remains challenging.

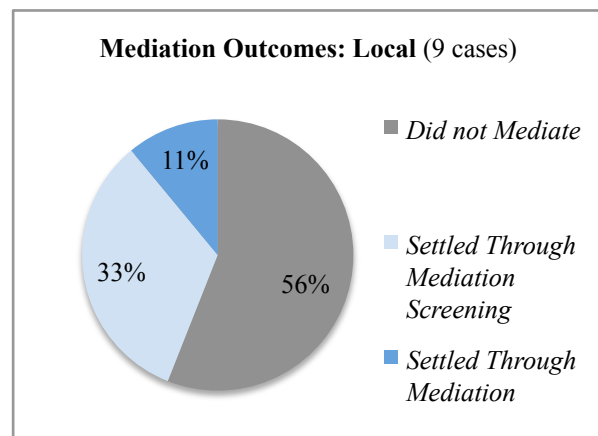
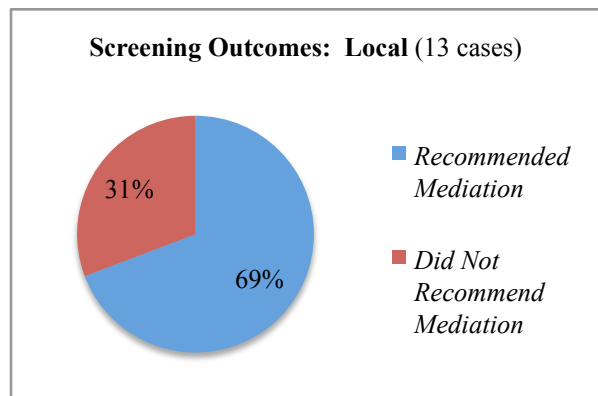
The following are findings produced from data gathered by GMER during the mediation screening and from focus groups held at the project mid-point.

Overview of Cases

Of the thirteen cases screened, 69% of cases (9) were recommended for mediation, and 31% (4) were not recommended for mediation.

Of nine cases recommended for mediation, 56% (5) did not mediate, 33% (3) settled through mediation screening, and 11% (1) did not settle through mediation. Similar to the Environmental Court and Act 250 screening experiences, mediation screening promoted informal settlement of several cases, indicating that screening, at all levels, may have valuable contributions to make to reducing the load of traditional land use dispute resolution systems.

The low number of local cases available to participate in the mediation screening program and the low number of cases that were recommended for mediation and subsequently pursued mediation do not provide sufficient data for analysis.



However, the difficulties encountered with local level cases prompts some analysis on the current barriers to mediation screening at the local level.

Summary of Local Findings

Given our difficulties in instituting mediation screening more systematically at the local level, GMER and CBI organized three focus groups to assess the use of mediation and mediation screening at the local level. The focus groups were conducted with city and town planners, Development Review Board and Planning Commission members, NRB staff, Act 250 Commissioners and District Coordinators, and lawyers and engineers who regularly participate in the screenings and land use disputes. Key findings on the use of mediation at the local level and challenges to utilizing mediation screening include the following:

Timing of Local Hearings: Most local zoning cases are heard in one day and most opponents show up for the first time at the hearing. As a result, there is often no advance notice that a hearing may be contested. There was some consensus among focus group members that it would be difficult to increase the number of local zoning screenings due to the fact that it is often not known whether a case is contested until after the hearing begins. Since most hearings only last one session, there may be no opportunity to conduct the screening prior to the hearing. Once the parties have gone through the hearing, they are likely to await the decision rather than engage in mediation.

Local Capacity: Many town boards are comprised of volunteers with limited experience with complex land use decisions. Many do not understand well or know all of their own land use ordinances, let alone how to deploy mediation in their decision making processes. Some felt that local officials would be concerned about when mediation could occur, how a mediated settlement would fit into their permitting process, how to explain a mediation process to their constituents, and, if it were useful, how a mediation screening program could be sustained over the long-term in their community. In small municipalities who may only see a few substantial cases a year, a local screening and mediation program may not be practical. Additionally, our focus groups suggested that many local boards are resistant to “handing over” authority to separate mediated processes prior to their final and formal decision making. Whether this is due to inexperience or a sense of territoriality is unclear. This is consistent with findings from other work, such as a study of land use decision making on Martha’s Vineyard and its six municipalities and one regional commission.⁵

Perception of “Ripeness”: Some parties believe that cases are not “ripe” for resolution until a full hearing in a formal process, even when stakes and conflict are high. Most focus group participants recognized that mediation is most effective and efficient early in the decision making process, although some noted that parties might not be ready for

⁵ 2008. *Development Permitting Processes on Martha's Vineyard*. Martha’s Vineyard: MA. Martha's Vineyard Commission

it until there was some “blood on the ground.” In these instances, some parties may ignore recommendations to engage in mediation until they feel vulnerable that they may lose. This raises a challenging question as to what is the best entry point for mediation screening. We know that the sooner parties engage in constructive dialogue (assisted or not through mediation or facilitation), the more likely it is that at least some if not all interests can be surfaced and addressed.⁶ At the same time, the current land use decision making process does not typically encourage (and may discourage) this engagement. Proponents focus on ensuring that their application fulfills the local (and other) requirements. Land use bodies, particularly staff, generally focus, as is their duty, on whether or not the submittal meets the various requirements. Only at the local hearing, do the politics and underlying community interests (and concerns) emerge, often to shrill and positional effect. And by this time, the tone and course is somewhat set, for better or worse.

⁶ McKinney, Field, Bates, 2008. *Responding to Streams of Land Use Disputes: A Systems Approach*. Planning & Environmental Law Vol. 60 No.4, 3-11

5. Synthesis of Findings and Lessons Learned

This study aims to identify lessons that can inform local land use decision making processes in other states and across the country. Given the results of the Environmental Court, Act 250, and local screening and mediation processes, CBI and GMER have identified the following lessons.

Lesson 1: Screening for Mediation Assists with Settlement

Mediation screening—or an evaluation of the appropriateness of mediation—prior to proceeding with traditional avenues of land use decision making is an effective tool for: 1) encouraging settlement broadly; 2) encouraging mediation specifically; 3) targeting cases that are more amenable to resolution than those that require more formal quasi-judicial or judicial decision making. Given the barriers to mediation currently—from knowledge of mediation to jointly finding a mediator to even contacting the opposing party—screening is an effective tool to increase its use.

At the Act 250 level, mediation screening recommended 61% of cases screened for mediation. Of those cases that were recommended for mediation, mediation screening resulted in the settlement of 78% of cases either through formal mediation or informal facilitated processes—“phone mediation.” Focusing on the cases where mediation was recommended and the parties were willing to engage in mediation, 87% of the cases settled.

At the Environmental Court level, mediation was ordered for 42% of cases. Of those that completed mediation, 77% settled successfully through mediation or informally after the pre-trial conference.

These figures indicate that a properly trained mediation screener, or in the court context a judge, can effectively evaluate a case for its likelihood to settle through mediation.

Lesson 2: Screening Criteria are Useful but not Fully Determinative

The data on screening suggest that there are at least a few key criteria that are important in determining if a case is more likely to be recommended for mediation.

- First, does the case turn on a particular issue of law?
- Second, the type of case does matter, to some extent. Permit cases tend to be more amenable to mediation than enforcement cases, and general commercial and residential cases more amenable than industrial cases, especially those involving major public health or nuisance issues (noise, odor). However, enforcement cases often require an interpretation of legal issues, and these cases may be more amenable to mediation after a legal issue is resolved through summary judgment.
- Third, the parties' openness to explore options and ideas is important.
- Fourth, the willingness of parties to mediate may influence a screener's recommendation to mediation. However, given the data from the Act 250 cases, it's not clear if willingness to mediate (short of outright objection) should be given particular weight. Parties who are reluctant to mediate, when recommended to mediate even without compulsion, do mediate and do settle.
- Fifth, timing is important in terms of when one screens. Though the timing will vary by jurisdiction, in general, screening is probably best done after filing (of an application or appeal) but before any formal proceedings have occurred (an administrative hearing or court hearing).

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

- First, whether the parties have talked or not, or even tried to settle informally, does not indicate that the parties should not consider mediation.
- Second, the need or desire for future relationships is not an important criterion for mediation, at least as practiced in this context in this state (however, proponents of more transformative mediation could argue that this criteria is very important, even if undervalued by parties).
- Third, the kind of issues involved do not seem to be that important for considering mediation, be it traffic, noise, visual impact, odor, or other issues. What is more important is the intensity and breadth of the issue's impacts (e.g. a case with ongoing noise for many years may be less amenable to mediation than a case with a shorter duration of noise).
- Fourth, the number of parties does not appear to be a particularly compelling criterion. A case with two parties may be highly mediatable as may be a case with a number of parties.

Though the above findings are useful in providing guidance, we did not identify a more "rationalized" set of criteria that can be more formulaically applied. It may be because of insufficient data or lack of more in-depth statistical analysis. However,

we conclude that nothing substitutes for the informed judgment of seasoned professionals. This conclusion therefore implies that screening cannot effectively be done by administrative staff nor through some kind of computer-based or self-administered check list. Mediation screening, in our view, for better or worse, remains more of an art of professional practice than a science of repeatable and highly predictable results.

Lesson 3: Screener’s Qualifications and Credibility Matter

Given this study’s findings on mediation criteria, a mediation screener for land use disputes most requires a specific skill set, knowledge base, and credibility.

At the Environmental Court level, judges’ expertise in land use issues, law, and regulatory structure allows them to make an informed assessment as to cases amenable to mediation. While there may not be a singular, “rationalized” formula for what cases are appropriate for mediation, judges’ intuition based on their depth of experience provides the calculus to recommend whether or not mediation is desirable. Furthermore, their authority as judges gives their determination legitimacy. And, this screening can take place quickly and as part and parcel of standard court practices, such as the pre-hearing conference. At the same time, there may be reasons for courts to consider screening apart from judicial proceedings. The judge has less time to conduct a more lengthy and detailed assessment, as is the case with a screening program as established with the District Commissions. Having a single screener may bring more consistency to mediation determinations. Because the judge has authority and may hear the case should it not be settled, parties may be less willing to “show their cards” during screening. Unlike a screening process conducted by a judge, a neutral evaluator can communicate individually and confidentially with each party, which may enable parties to reveal more openly their underlying interests and settlement flexibility.

In a non-judicial setting such as a permitting body, a screener without legal authority or stature can also be an effective screener. Many (not necessarily all) parties will participate and take seriously the recommendations of the screener. We do suspect, that given an outside screener’s lack of authority, it is all the more important that they instill confidence and legitimacy through professional behavior and substantive knowledge. For instance, focus group participants confirmed that the screener’s professional experience with the Act 250 statute and land use mediation gave them confidence in the screening program and the screener’s ability to evaluate cases effectively. They commented that both for themselves and the well-being of case participants that it was important for the screener and mediator to be knowledgeable of land use issues, law, and the regulatory structure into which their permits must fit.

Lesson 4: Screening Program Design is Important for Legitimacy Among Many Users (Including Other Mediators)

In addition to the data collected, the experience of establishing and implementing the screening program for the District Commissions was highly instructive. Unlike the

courts, where the screening is done by the judges themselves, the Act 250 screening was offered at no-cost as an independent service for the participating District Commissions and their stakeholders. In the implementation of this program, some key issues arose.

Where Should the Screener Reside?

Because the project was independent of the Natural Resources Board and District Commissions, it was at times challenging to coordinate among Commission staff to ensure there was a steady and on-going effort to refer cases for screening. Because the project screener had a strong relationship with numerous staff due to prior work within state government, this assisted trust and action. However, some District Commissions participated more than others and the screening program depended on the good graces of the staff to refer cases for screening. Secondly, some parties who were screened raised concern or at least nervousness about an outside entity screening a case intended for the District Commission. They suggested that they would be more comfortable if the screening were done in-house and by Commission staff. Thus, both administration and party comfort raise the question of whether, ideally, a screening program should be located within the institution, rather than separate and independent. In our experience with other similar programs, either arrangement is possible. In Albuquerque, New Mexico, the screening and facilitation (not mediation) program for land use disputes is housed within the municipality and conducted by a city employee. In Denver, a non-profit serves as a screening of cases referred by City Council and some other municipal entities.⁷ We offer the following chart as considerations for where to house a screening program:

Consideration	Inside	Outside
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 w/o prior relationships to ensure on-going coordination and steady stream of referrals from the land use body. Outside screen must expend time in coordination, communication, and trust building to ensure a steady stream of 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 or may be less fearful or skeptical of an outside entity and its motives. On the other hand, an outside screening entity maybe seen as less likely to be influenced by internal politics of a	An outside organization, by itself, will at least 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 screening (as well as mediation).

⁷ McKinney, Van de Wetering, Field, 2007. *Responding to Streams of Land-use Disputes: A Systems Approach*. Missoula, MT: Public Policy Research institute, University of Montana.

	land use body.	
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 removed 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 and occasional re-compete of a paid program may provide.	Provides a greater opportunity for innovative 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 may practically 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, though 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 assigned to one job, focus on the effort and quality of the work may suffer.	Cost may be more, depending on salary structure, overhead, etc. However, contracting for service may ensure more dedication to the effort and its quality.

Can the Screener Mediate?

As the program was implemented, a few within the mediation community in Vermont raised concern that the Act 250 screener was also eligible to mediate the cases screened. The concerns raised included two primary issues, one about ethics and one about the marketplace: 1) 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; 2) is it fair to and competitive for other mediators for a screener to have an “inside track” on cases merely because they are screening. These concerns gave the project an opportunity to test two different approaches to screening. During the first half of the project, the screener was available to mediate cases if requested as a member of the Environmental Court’s roster of mediators. During the second half, because of this concern, the screener referred the parties’ to the Court’s roster and was not available to mediate cases. We also undertook a mid-course survey evaluation of the Act 250 screening program to test the quality and effectiveness of the program as it was implemented. The focus group revealed no significant concerns with the quality of the mediation screening program, however, through these conversations and on-going

consultation with the Natural Resources Board and District Commissions, we learned several important lessons:

- *Access and Practical Effects.* The change in screener as potential mediator to screener not available as mediator led to fewer cases taking up mediation. Because the total cases are limited, it is difficult if this finding is verifiable over a larger number of cases and what factors may have led to the decline. However, it is our assumption, at least in part, that the parties, having to take the extra step of finding a mediator, and when not compelled to do so by a land use body (the Court, for example), found this a meaningful barrier to mediation. During the screening process, throughout the process, a number of parties asked if they could use the screener as the mediator because they: 1) had ready access to him; and/or 2) the screening process provided a kind of “interview” process to increase at least some parties’ confidence in the screener as mediator.
- *Ethical Considerations.* The screener as mediator does raise a reasonable and interesting ethical question: can a screener objectively, fairly, and professionally judge a case by its merits without being unduly affected by the incentives, financial or professional (the opportunity to practice one’s craft), to recommend mediation more often than not? Recent literature in ethics and business suggests that people, however ethical they may believe themselves to be, are influenced by financial and other incentives to behave different than their professed ethics would suggest.⁸

Thus, we take as a given, that a screener as mediator may be influenced by the opportunity, if they are eligible, to mediate. We would argue that this incentive isn’t merely financial, but is also professional in the sense that one wishes to practice one’s craft. Nonetheless, there are countervailing arguments to suggest that a strict separation of screening and mediation poses an equally difficult set of problems. They include the following issues.

1) Screeners are likely to become better and more seasoned if they actually experience the results of some of their choices by mediating. They will obtain on-going feedback about their screening analysis by the actual mediation and thus will hone their ability to screen cases that are more likely to be mediatable.

2) Parties are likely to gain trust in a capable screener and this allows a stronger entry point into mediation. Since use of mediation faces a number of barriers, including the time and effort to find a jointly agreeable mediator, one can argue from a building trust stand point and an efficiency standpoint (the screener is already up to speed on the case and has done case intake/assessment), that the screener should be eligible to mediate.

⁸ Banaji, Bazerman, Chugh, 2003. *How (Un)ethical Are You?* Cambridge: MA. Harvard Business Review. December 2003.

3) Though mediators perhaps should not judge their professional performance by number of cases settled (after all, if one follows strictly the dictate that the mediator should not have a stake in the outcome other than good process, seeking an outcome to increase one's settlement rate would be unethical), many do. And since this is often the case, there is an incentive to not recommend mediation for cases that will lower one's successful rate of settlement of those cases. One could argue that this incentive may, in some cases, actually result in fewer recommendations for mediation, thus depriving parties in difficult but important cases the opportunity to seek a reconciliation.

4) At least in the current practice of public policy mediation, screener as mediator is standard practice. In such cases, the mediator who assesses a public policy/sector case, often, if the case goes forward, mediates the case, partly because of the time it takes to understand the complexity of parties, relationships, issues, and politics in such cases.

- *Marketplace Considerations.* The screener as mediator does raise a question regarding a fair marketplace and competitiveness: does allowing the screener to mediate create an unfair competitive advantage for the screener? This question is an on-going one in the mediation world, where often there are far more mediators than cases. Roster managers in general face this question and employ a variety of methods to provide a rationalized system of mediator selection. Some use a set of criteria – kinds of cases, expertise in substance, etc. – to narrow the field. Others allow roster members to bid on cases submitted by stakeholders. Others simply offer each new case to the next mediator on the roster list.

These concerns are almost never raised by consumers of mediation – they are raised by those wishing to practice mediation. We would argue that it is the right of the land use body deploying screening to make this choice. If a land use body decides it wants to screen and mediate cases solely “in-house,” then it has a reasonable right to do so (for instance, the Alberta Environmental Appeal Board both screens cases and assigns them to one of their Board members – who, of course, cannot hear the case formally should the mediation fail). A land use body may decide to screen cases, but refer them to a small or large roster (the Albuquerque program does this while the Denver program, an independent program of the land use body, carefully fits the mediator to the case as they understand it, including assigning their own staff when they deem it appropriate).

- *Who should pay for screening?* This project found, we believe, that screening programs, whether done by judges or an independent entity without any authority to compel mediation, are effective in increasing the use of mediation and likely even settlement without mediation. At the same time, it is clear to us, that given the difficulty of determining how and who pays for mediation, screening for mediation should be a no-cost activity. The cost needs to be borne by the land use body in order for parties' to participate at all. The barriers to mediation, at least currently, are sufficient to preclude any hope the parties might

also be willing to pay an assessment or screening fee. One can argue from a public policy standpoint that, in fact, land use bodies have a responsibility to help ensure their users have informed choice about the best forums for resolving their issues and concerns.

Lesson 5: Land Use Mediation Is More About Identifying Interests and Options and Reaching a Settlement Than It Is About Restoring Relationships or Building “Community”

Data gathered through the Court mediation evaluation forms offer a somewhat surprising reflection on the value that mediation participants give their 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 (and this is consistent with “relationships” as a criterion for screening). Slightly less than half of evaluation respondents (49%) felt that the mediation process improved communication among the parties, however, and less than half (42%) 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. However more respondents (61%) felt that the process helped them to evaluate their options, and 68% responded that they would participate in mediation again. While one might wish, optimistically, for a mediation program that restores relationships and rebuilds social capital, it seems participants are more interested in exploring options for settlement and reaching settlement, given their choices, than larger, broader social or relational goals.

Lesson 6: Though land use mediation may not always result in satisfying agreements, it does generally result in satisfaction in the process

Perhaps somewhat surprising, parties support mediation and their willingness to participate in mediation again, despite indications by many that their most recent experience with mediation did not result in an agreement that satisfied them. We interpret these data to mean that the agreement reached was perhaps tolerable, given their constrained choices. Interestingly enough, the mediation process, more often than not, seems to have offered enough benefits, cost or time savings or some other benefit, that about 66% of respondents would be willing to participate again.

Additionally, the evaluation process revealed some concerns about the role of pro se parties in the mediation process. 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 issues that concerned them. Some noted that they felt excluded from the process and were unclear how their voices could be heard. Other parties expressed their own frustration with the pro se parties, whom they felt slowed down the process and demanded too much time and explanation from the mediator. We interpret these findings to mean that additional research on best practices for defining and communicating the role of pro se parties could improve overall satisfaction with the mediation process.

Lesson 7: Mediation of particular issues does not relieve the larger burden on municipalities to make complex, often time-consuming decisions on complex projects

Though maybe not surprising, the lower levels of satisfaction expressed by the Towns suggest that mediation in and of itself, as currently practiced, is not assisting local officials to the extent one might hope.

By the time cases, especially enforcement cases, reach the Environmental Court, town officials may feel that they have already tried to accommodate applicants and, as a result, are less enthusiastic about mediation with parties who, in their perspective, have been “difficult” or “recalcitrant”. A decision by the Court, even if the decision adopts a mediated settlement may not resolve an entire dispute. A few local officials also expressed concerns about the closed-door nature of mediations and subsequent settlements that were not achieved transparently, and that the public nature of ideal land use decision making was therefore diminished. 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 narrowed issues, but in more comprehensive consensus building or public participation efforts. In such processes, more complex issues and impacts and trade-offs between them can be potentially aired, discussed, considered, and resolved. Such processes promise more transparency than traditional mediation and may include more parties, more issues, more interests, and more options than might arise in a land-use-body-sponsored mediation alone. Of course, such processes are fraught with their own risks and challenges, and can be time consuming and expensive. Thus, as we have found elsewhere, land use decision-makers need, ideally, a full range of dispute resolution tools at their disposal, from public participation to intensive, court-sponsored mediation. Any one tool is likely necessary but not sufficient in the complex, multi-layered, and often multi-jurisdictional context of land use decision making.

Lesson 8: Encouraging Mediation at the Local Level Remains Very Challenging

Instituting a more programmatic approach to mediation at the municipal level remains very challenging. Despite intensive outreach, 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, we were not successful in instituting any systematic local approaches to screening and mediation. The barriers are many.

In our case, a screener building and managing relationships with ten or more jurisdictions is time consuming and may still result in few referrals. Mediation, as it is commonly understood, may be too early for parties wishing to see how they can and will do through the standard administrative process. Local officials may view

mediation as usurping their role. The status quo of existing administrative processes may simply be “good enough” and although it may be far from perfect, it is a known and predictable process (or, at least, are less risky than the uncertain risk of mediation). Town budgets may account for potential litigation, but not be flexible enough to fund mediation. Some may not know enough about mediation and simply be uninformed about its benefits (though in Vermont, given the courts’ support, this seems less likely). Towns may not have the resources to engage in mediation, struggling as they may be to keep up with their standard administrative procedures. Additionally, towns are often not a party at local mediation cases. There may be simply too few cases in most municipalities in a rural state like Vermont to establish any programmatic approach.

Lesson 9: Environmental Court Influence - The Upstream Affect

The Environmental Court’s embrace of mediation as a key tool to its proceedings appears to be having an interesting effect upstream on municipal land use decisions (despite the challenges at the local level noted above). It is widely perceived among local and regional land use professionals across the state, that if a case proceeds to the Environmental Court, that it “almost always” will be ordered into mediation. Consequently, our focus groups reported that in some cases, permitting boards are encouraging parties to settle to avoid “having the case land back in our laps anyway.” This finding points to at least two interesting implications for a more rigorous, system-wide approach to mediation and dispute resolution. First, the data suggest that, a powerful land use body’s support of mediation has a meaningful impact on perceptions of mediation. The Court is, in fact, quite careful about referring cases to mediation, and less than half of the cases in our study period were referred to mediation by the Court. However, the perception by at least some at the municipal level is that many or most cases are sent to mediation. Second, the active support of mediation by a body such as the Court has likely salutary effects on settlement earlier and upstream. This suggests, 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

The benefits of using mediation, including cost and time savings and better outcomes, have been well documented in negotiation literature over the past three decades. This study reinforces the theory that mediation is useful in land use conflicts and takes a closer look at land use mediation practice from a state-wide perspective, from local land use decisions up to state-wide court decisions.

Upon evaluation of over three hundred Vermont land use cases at the local, Act 250, and Environmental Court level, this study has found that mediation screening is an effective tool for targeting cases that could benefit from mediation. At all levels, there were high settlement rates for cases that were evaluated to be appropriate for mediation, due to a combination of factors including willingness of parties to engage in mediation and explore settlement options, the nature of a case and the number of settlement options that are possible. Additionally, in many cases, the mediation screening processes facilitated informal settlement.

Though we found interesting data on criteria for evaluating the appropriateness of mediation for a given case, we did not identify a more “rationalized” set of criteria that can be more formulaically applied. We also found that among participants in this study, the land use mediation process was more about reaching settlement than building community or restoring relationships.

Given our findings and experience, we have identified the following recommendations for designing a mediation screening program:

- **First**, mediation screeners and mediators, whether they are independent professionals or court judges, should be trained and informed in land use issues, law, and the regulatory structure into which mediation outcomes must fit. CBI and GMER recommend that mediation screeners and case mediators be required to demonstrate qualifications beyond basic mediation training, including knowledge of land use issues and regulatory frameworks, and professional experience dealing with land use disputes, either through training or professional practice. Screening cannot effectively be done by untrained staff, a computer-based program, or self-administered check list.
- **Second**, a screening program’s process must be transparent and clear. Whether the screener has some role in mediating assessed cases or not, the role of the screener, the process for selecting the mediator, the authority or lack thereof of

the screener, should all be clear to all stakeholders in the program, from mediators to users to staff and decision makers of the land use body.

- **Third**, a screening program should allow parties' choice in selecting a mediator, should mediation be recommended. Whether or not the screener may mediate the case, parties should have ready access to any number of mediators from which they can select an appropriate mediator. Given that confidence in the mediator is essential to successful mediation, preserving choice increases the parties' chances they will trust the mediator and also preserves the general mediation principle of self-determination (i.e., you choose rather than we choose for you). A screening program has a range of choices for ensuring the integrity of the screening process, including:
 - *The screener is not eligible to mediate.* This approach protects against the potential, real and perceived bias of a screener as mediator, as noted above. However, also as noted above, it poses certain other problems. Thus, if a program opts for this approach, then two responsibilities need to be met. One, the program can and should provide some limited facilitation or mediation assistance, if the screening alone is likely to help the parties settle without a mediation. Where to draw that line between assistance and mediation is not entirely clear, so some guidelines would need to be provided. Second, the screener has the responsibility to help the parties efficiently identify and select a mediator. Contending parties are less likely to jointly select a mediator unless they have some assistance doing so, both to overcome their mutual distrust of one another as well as their potential uncertainty about mediation itself.
 - *The screener is eligible to mediate, but only under clear, well-communicated and transparent procedures.* If the screener is available as a mediator, procedural safeguards should be adopted to address the concerns. It is important that mediation screening programs are not perceived as simply a method of generating cases for any mediator, including the screener and all members of the roster. For instance, a roster protocol should be established that prevents any one mediator from handling a disproportionate percentage of cases.
- **Fourth**, the screening program needs feedback on its recommendation of cases for mediation. Since the screeners may not be privy to the soundness of their judgment in recommending mediation in the mediations themselves, a screening program needs to provide feedback to the screener on their recommendations. This might come in the form of a mediator feedback form to the screeners on each case and how appropriate the mediator felt the case was for mediation. The feedback might be simply an expectation of mediators that, should they receive a case they believe is/was inappropriate for mediation, they report this to the screener and confidentially talk through the reasoning and identify lessons learned.

- **Fifth**, while acknowledging the many barriers to establishing effective local screening and mediation program, mediation screening at the local level might be more effective if:
 - It is generally available to multiple municipalities through some kind of regional or even state-wide approach;
 - The tools it deploys are broader than mediation alone, and might include access to public participation, consensus building, facilitation, and other services;
 - It were better integrated into the standard land use decision making process through local ordinances and procedures;
 - It is sponsored by a trusted intermediary for local municipalities like the state chapter of the American Planning Association, the Chamber of Commerce, or a state's league or organizations of cities and towns.

Given the apparent success of mediation screening, we would encourage further research into options for establishing and supporting permanent mediation screening programs, especially at the local level. CBI and GMER are continuing research into the use of mediation in land use disputes at the local level. CBI is also exploring strategies for incorporating mediation screening into land use ordinances and bylaws. We would also encourage further research into the types of cases that may be more or less appropriate for mediations, taking a closer look at permitting versus enforcement cases. Finally, additional research is needed on best practices for defining and communicating the role of pro se parties and town representatives in the mediation process.

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 the efficient and reliable resolution of land use disputes.

APPENDIX A: Program Descriptions



Overview & Protocol for Vermont Environmental Court Program

Background: The Consensus Building Institute (CBI) is working with the Vermont Environmental Court to conduct a pilot project aimed at identifying appropriate land use permitting cases for mediation. The two Environmental Court Judges are voluntarily documenting their decisions whether or not to order mediation which will enable us to learn more about their considerations about the types of situations where mediation might be appropriate. The Environmental Court also supports CBI efforts to solicit mediation evaluations from participants in court-ordered mediations. The JAMS Foundation is funding this project with additional support from the Orton Family Foundation and the Lincoln Institute of Land Policy.

Screening Process Protocol: CBI has established the following protocol for Vermont Environmental Court mediation screenings:

- *Roles & Responsibilities* – CBI is the initial point of contact for all communications with the Environmental Court. CBI works closely with the Environmental Court’s Case Manager to coordinate the screening and evaluation program. The Environmental Court’s participation in the screening program is voluntary. CBI is responsible for the overall management and evaluation of the program. CBI receives guidance and advice from a Program Advisory Board, consisting of independent mediation and research project management professionals.
- *Case Identification* – All cases scheduled to appear in the Environmental Court are eligible for potential mediation.
- *Mediation Screening* – Environmental Court Judges conduct pre-trial conferences with all case participants to determine if mediation could help participants reach a mutually satisfactory settlement. A formal part of Environmental Court proceedings, the pre-trial conferences allow the Judges to identify relevant issues, where the parties agree and disagree, and whether there are any obstacles to using mediation.
- *Mediation Recommendation* – Judges use their professional opinions to make decisions about subsequent use of mediation. If mediation is ordered, participants are given a list of Vermont Environmental Court’s roster of mediators. The roster is furnished only as a convenience; the parties are free to hire any mediator they want.
- *Screening Data Collection* – For each screened case, Judges fill out a mediation screening form. The form was developed by CBI and the Environmental Court, and poses a set of conditions and criteria that Judges might consider in their evaluation of a

case for mediation. The Judges evaluate the importance/relevance of each condition and criterion considered in their determination; the Environmental Court's Case Manager collects the forms and sends them, along with a copy of the docket sheet for each case, to CBI each month. CBI then enters each form into a web-based database, managed internally. Individual judges' reflections on mediation referral for individual cases are held strictly confidential and will not be released during or after the study is complete. These data will be compiled to analyze lessons learned about screening criteria across numerous cases.

- *Mediation Evaluation* – After a case has been mediated, the Environmental Court requires the mediator to file a Mediation Report Form. The Case Manager sends CBI a copy of this Report Form upon receipt. The Report Form includes a summary of the outcome of the mediation, and a list of participants and their contact information. The Environmental Court's Case Manager sends a copy of the Report Form to CBI, and sends all mediation participants a mediation evaluation form to fill out. (She also notifies CBI, using the case docket number as a reference, that the mediation evaluation forms have been sent). The mediation evaluation form was designed by CBI and asks participants to evaluate their experience with mediation. Evaluation responses are confidential and are returned via mail to CBI. CBI then enters each form into a web-based database, managed internally.
- *Data Collection Follow-up* – Three weeks after mediation evaluation forms are sent to participants, if the forms have not been returned, CBI makes a round of follow-up reminder calls to all participants asking them to return the evaluation forms.
- *Data Management* – Data from screening and evaluations are managed and processed by CBI staff. CBI holds hard copies of evaluation forms. CBI manages all data entered into the program's web-based database, and will also manage evaluation of the data.
- *Outreach & Evaluation* – CBI periodically seeks input and suggestions from Environmental Court Judges and staff, screening and mediation participants, the program's Advisory Board, and other interested stakeholders. The purposes of these check-ins are to surface any concerns that program partners may have and to make adjustments to improve program processes. Quarterly progress reports are also offered to the Program's staff, Advisory Board and funders. The data gathered throughout this program will be used to write a publishable final report, which will be made available to all program participants, partners, funders and the public at large.



**LAND USE
SCREENING &
MEDIATION
PROGRAM**



Overview & Protocol for Act 250 Mediation Screenings

Background: The Consensus Building Institute (CBI) and Green Mountain Environmental Resolutions (GMER) are working with the regional Act 250 District Commissions in the state of Vermont to conduct a pilot project to target appropriate land use permitting cases for mediation. CBI/GMER use a free and voluntary screening process to identify and evaluate cases for which mediation might be appropriate. The Windham Foundation and the JAMS Foundation are funding this project with additional support from the Orton Family Foundation and the Lincoln Institute of Land Policy.

Screening Process Protocol: CBI/GMER have established the following protocol for Act 250 mediation screenings:

Roles & Responsibilities – GMER is the initial point of contact for all Act 250 mediation screenings. GMER works with Act 250 District Coordinators to identify potential cases, conduct screening evaluations, and make recommendations for mediation. GMER is an independent entity and not directly affiliated with the Natural Resources Board or the District Commissions. Participation in the screening process is voluntary and all GMER recommendations are non-binding. CBI is responsible for the overall management and evaluation of the program. CBI/GMER receive guidance and advise from a Program Advisory Board, consisting of independent mediation and research project management professionals.

- **Case Identification** – Potential cases are identified one of two ways:
 - 1) Act 250 District Coordinators contact GMER when they learn that a permit application is contested.
 - 2) GMER receives notice of all hearings and regularly is in communication with the Act 250 District Coordinators.
- **Contacting Screening Participants** – Act 250 District Coordinators provide GMER with telephone contact information for participants in potential screening cases. GMER contacts participants via phone, explains the screening process, and offers to conduct a free and voluntary mediation screening with a non-binding recommendation for mediation.
- **Mediation Screening** – Using a set of standard interview questions, GMER conducts brief confidential interviews with all case participants, where possible, to determine if mediation could help participants reach a mutually satisfactory settlement. The interviews are generally conducted over the phone. The interview questions were designed by CBI/GMER to allow the evaluator to determine where the parties agree and disagree, which issues are priorities for each party, and whether there are any obstacles to using mediation.
- **Mediation Recommendation** – Using the mediation screening data and the screeners' professional opinion, GMER provides participants with a non-binding recommendation on whether a case would benefit from mediation. Participants receive this recommendation via email, also copied to CBI. If mediation is recommended,

participants are given a link to the Vermont Environmental Court's roster of mediators. Should the participants choose to engage in mediation, they are free to hire any mediator they want, excluding the GMER screener.⁹

- *Screening Data Collection* – For each screened case, GMER uses the interview results to fill-out a mediation screening form. The form was developed by CBI/GMER and poses a set of conditions and criteria that GMER might consider in its evaluation of a case for mediation. GMER evaluates the importance/relevance of each condition and criterion used in its determination. GMER then enters each form into a web-based database, managed by CBI. These data will be compiled to analyze lessons learned about screening criteria across numerous cases.
- *Mediation Evaluation* – CBI keeps a list of cases that are recommended for mediation by GMER. Three-four weeks after GMER sends screening participants a mediation recommendation, also copied to CBI, CBI contacts the participants to see if the participants engaged in a formal mediation.¹⁰ If the case was mediated, CBI sends participants a mediation evaluation form. The mediation evaluation form was designed by CBI/GMER and asks participants to evaluate their experience with mediation. Evaluation responses are confidential and are returned to CBI. CBI then enters each form into a web-based database, managed by CBI.
- *Data Collection Follow-up* – Two weeks after mediation evaluation forms are sent to participants, CBI makes a round of follow-up reminder calls to all participants asking them to return the evaluation forms.
- *Data Management* – Data from screening and evaluations are managed and processed by CBI staff. CBI holds hard copies of evaluation forms. CBI manages all data entered into the program's web-based database. CBI and GMER will manage evaluation of the data.
- *Outreach & Evaluation* – CBI and GMER periodically seek input and suggestions from Act 250 District Coordinators and staff, screening and mediation participants, the program's Advisory Board, and other interested stakeholders. The purposes of these check-ins are to surface any concerns that program partners may have and to make adjustments to improve program processes. The data gathered throughout this program will be used to write a publishable final report which will be made available to all program participants, partners, funders and the public at large.

⁹ This protocol was adopted January 1, 2007. Prior to this date, GMER referred participants to the Vermont Environmental Court's roster of mediators, and participants could chose to hire GMER to mediate their case. From January 1, 2007 until the end of the data collection period GMER will no longer mediate cases that it screens.

¹⁰ This protocol was adopted in November, 2006. Prior to this date, GMER provided CBI with contact information for all cases that GMER mediated.

Appendix B: Screening Forms

Case Name:
Case Number:
Screening Date:
Town:

1. Kind of Case

Local Government _____
Act 250 _____

2. Number and type of parties:

Applicant _____ []
Opposing Parties (Individuals, such as abutters) _____ []
Neighborhood/Environmental Group _____ []
Local Government _____ []
State Agency _____ []

3. Municipality's knowledge/experience of mediation before hand:

Never heard of it _____ []
Heard of it, but unsure _____ []
Know what it is _____ []
Been through non-land use mediation before _____ []
Been through land use mediation before 1 or 2 times _____ []
Been through land use mediation before 3 or more times _____ []

4. Municipality's experience of land use litigation beforehand:

None _____ []
1 or 2 prior land use litigations _____ []
3 or more prior land use litigations _____ []
Prior non-land use litigation experience _____ []

5. State Agency's knowledge/experience of mediation beforehand:

Never heard of it _____ []
Heard of it, but unsure _____ []
Know what it is _____ []
Been through non-land use mediation before _____ []
Been through land use mediation before 1 or 2 times _____ []
Been through land use mediation before 3 or more times _____ []

6. State Agency's experience of land use litigation beforehand:

None _____ []
1 or 2 prior land use litigations _____ []
3 or more prior land use litigations _____ []
Prior non-land use litigation experience _____ []

7. Applicant's knowledge/experience of mediation beforehand:

Never heard of it _____ []
Heard of it, but unsure _____ []
Know what it is _____ []
Been through non-land use mediation before _____ []
Been through land use mediation before 1 or 2 times _____ []

Been through land use mediation before 3 or more times _____ []

8. Applicant's experience of land use litigation beforehand:

- None _____ []
- 1 or 2 prior land use litigations _____ []
- 3 or more prior land use litigations _____ []
- Prior non-land use litigation experience _____ []

9. Opposing Parties' knowledge/experience of mediation beforehand:

- Never heard of it _____ []
- Heard of it, but unsure _____ []
- Know what it is _____ []
- Been through non-land use mediation before _____ []
- Been through land use mediation before 1 or 2 times _____ []
- Been through land use mediation before 3 or more times _____ []

10. Opposing Parties' experience of land use litigation beforehand:

- None _____ []
- 1 or 2 prior land use litigations _____ []
- 3 or more prior land use litigations _____ []
- Prior non-land use litigation experience _____ []

11. Do the opponents oppose the application because:

- Oppose all development on this site _____ []
- Oppose this kind of development on this site _____ []
- Oppose the scale of this development on this site _____ []
- Oppose some details, but not the development in general, on this site _____ []

12. Nature of application

General description

- Residential _____ []
- Commercial _____ []
- Industrial _____ []

Permit sought

- Act 250 _____ []
- Zoning Permitted Use _____ []
- Variance _____ []
- Conditional Use _____ []
- Special Permit (please specify) _____ []
- Site Plan _____ []
- Other (please specify) _____ []

Procedural status--the latest procedural stage is:

- Pre-filing of formal application to local Board _____ []
- Post-filing, but pre-decisional of that Board _____ []
- Post-decisional, but prior to appeal being filed _____ []
- Appeal filed _____ []

Nature of Dispute

- Traffic _____ []
- Public health _____ []
- Economic development _____ []
- Municipal services costs _____ []

- Aesthetics (please specify below) _____ []
- Visual _____ []
- Noise _____ []
- Light _____ []
- Odor _____ []
- Environmental impact (water, air soil) _____ []
- Process issues (we weren't informed, etc) _____ []
- Relationships (they treated me poorly) _____ []
- Insufficient information _____ []
- Other (please specify) _____ []

Parties in dispute

Number: _____
 Kinds: _____
 Kinds of representation/agents: _____

13. Was there a town/local comprehensive or master plan in place that helped guide the proposal and provided parameters to reduce or minimize conflict around the proposed project?

- No plan in place _____ []
- Yes _____ []
- No _____ []
- Not sure _____ []

Comment _____

14. With respect to sharing information and obtaining feedback on the proposal, the planning board, commission, developer, or other entity: (check all that apply)

- Hosted informational or neighborhood meetings on the proposal _____ []
- Held one or more site meetings to which the public was invited _____ []
- Used innovative tools (photo simulations, computer visualizations, impact analysis tools, interactive web sites, keypad polling, etc) to share information and obtain feedback _____ []
- Compiled (apart from the developer) its own technical information and/or analysis of the issues _____ []
- Utilized an independent, non-partisan facilitator or mediator _____ []

Comment _____

15. Upon obtaining input of the public, the applicant's response was:

- To substantially alter the proposal to incorporate the input _____ []
- To somewhat alter the proposal to incorporate the input _____ []
- Did not alter the proposal to incorporate the input _____ []
- Other (please explain) _____ []

Comment _____

16. Given the process of review in this case, do you feel that dispute could have been avoided or reduced in scale if: (check all that apply)

- There had been more information about how this proposal relates to overall community goals and needs? _____ []
- There had been more information about what the proposal would look like? _____ []
- There had been more information about anticipated environmental and/or economic impacts? _____ []
- There had been more public or neighborhood meetings about this proposal? _____ []
- There had been more use of local newspapers, web sites, television and other media to share information about the proposal? _____ []
- There had been more use of interactive tools to obtain input, such as interactive web sites, public surveys, keypad polling, or other interactive methods to allow citizens to voice their opinions? _____ []
- Other (please explain) _____ []

SCREENING DATA SCREENER QUESTIONS

Did party raise any concerns about mediation? If so, what and to what degree?

Recommendation and Rationale:

Screeener's time to screen in total (hours) _____

Environmental Court Mediation Considerations Form

Case Name: _____
 Docket: # _____ Initial Pre-Trial Conference Date: _____
 Related Docket #s (if relevant): _____

History of settlement discussions:

Unstated Never met Negotiated informally Mediated Prior

Parties' positions on engaging in mediation:

	NA	Unstated	Reluctant	Neutral	Willing
Project Applicant	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Neighbors/Abutters	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Town	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
State Agency	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Weight given to criteria in determining whether to order mediation:

	Important	Relevant	Not so Important	NA
Issue of Law, Precedent, Jurisdiction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Subject matter amenable	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Parties' willingness to mediate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Parties' openness to explore settlement options	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Developer/Applicant's willingness to consider project modifications	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Parties' desire for future relationship	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Judge's sense of need for future relationship	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Judge's sense of settlement potential apart from parties' stated positions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Need for addressing wider community concerns	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Potential for settlement based on information known at initial pretrial conference:

	Unknown <input type="checkbox"/>	Unlikely <input type="checkbox"/>	Possible <input type="checkbox"/>	Likely <input type="checkbox"/>
Mediation Ordered	<input type="checkbox"/>		Mediation will be Ordered	<input type="checkbox"/>
Mediation Not Ordered	<input type="checkbox"/>		Decision Deferred to later date	<input type="checkbox"/>

Decision or Mediation Deferred because:

Parties already in settlement/mediation discussions
 Awaiting a related appeal/case

Motion for Summary Judgment to be Decided First
Other

[]
[]

Other considerations in determining whether to order mediation (please comment as you see fit on the back):

Appendix C: Evaluation Forms

Vermont Land Use Mediation Screening and Evaluation Project

This questionnaire is aimed at better understanding the role of mediation in helping resolve land use disputes. It provides you an opportunity to express your level of satisfaction with the mediation process you were involved in. To fill out this questionnaire, you only have to check the statement that most closely matches your opinion for each question. Your response will be kept confidential. This work is sponsored by the JAMS Foundation, the Windham Foundation, and the Lincoln Institute for Land Policy.

Research Case Number: _____

I represent:

- | | | | |
|--|--------------------------|----------------|--------------------------|
| A project applicant (developer, landowner, etc.) | <input type="checkbox"/> | A municipality | <input type="checkbox"/> |
| An adjoining neighbor or other interested person | <input type="checkbox"/> | A state agency | <input type="checkbox"/> |
| Other | <input type="checkbox"/> | | |
- Please state what, if other:
-

1. Did you reach an agreement in the mediation?

- Yes
- No agreement was reached, but some progress made.
- No agreement was reached & no significant progress made.

2. The mediation process resulted in an agreement satisfying to me.

- | | | | | |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>Strongly</i> | <i>Disagree</i> | <i>Indifferent</i> | <i>Agree</i> | <i>Strongly</i> |
| <i>Disagree</i> | | | | <i>Agree</i> |

3. The mediation process improved communication among the parties.

- | | | | | |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>Strongly</i> | <i>Disagree</i> | <i>Indifferent</i> | <i>Agree</i> | <i>Strongly</i> |
| <i>Disagree</i> | | | | <i>Agree</i> |

4. The mediation process improved my understanding of the other parties' issues, interests and concerns.

- | | | | | |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>Strongly</i> | <i>Disagree</i> | <i>Indifferent</i> | <i>Agree</i> | <i>Strongly</i> |
| <i>Disagree</i> | | | | <i>Agree</i> |

5. The mediation process encouraged me to make my reasons and rationales clear for what I wanted and/or needed?

Strongly Disagree *Disagree* *Indifferent* *Agree* *Strongly Agree*

6. The mediation process encouraged me to consider various options for resolving the dispute with other parties.

Strongly Disagree *Disagree* *Indifferent* *Agree* *Strongly Agree*

7. At the end of the mediation, I felt better able to discuss with and seek to solve problems with the other parties.

Strongly Disagree *Disagree* *Indifferent* *Agree* *Strongly Agree*

8. Given my experience with this mediation, I would enter into a negotiation or dialogue with these parties in the future?

Strongly Disagree *Disagree* *Indifferent* *Agree* *Strongly Agree*

9. The process was efficient. It was time well spent.

Strongly Disagree *Disagree* *Indifferent* *Agree* *Strongly Agree*

10. About how many hours in total did you spend in mediation?

Between 1 and 3 hours
Between 3 and 6 hours
Between 6 and 9 hours
More than 9 hours

11. The process was efficient. It was money well spent.

Strongly Disagree *Disagree* *Indifferent* *Agree* *Strongly Agree*

12. The approximate cost of mediation for you, in terms of legal, expert and/or mediator fees you paid, was:

Under \$500.
Between \$500 and \$2,500

Between \$2,500 & \$5,000
 Over \$5,000

13. How would you compare the time and cost of mediation with your estimate of the time and cost of your alternative to mediation, such as a hearing, further litigation, etc.?

Cost less and took less time
 Cost less and took more time
 Cost more and took less time
 Cost more and took more time

14. Were there any significant barriers to resolving the agreement? You may fill in more than one barrier, as needed.

Parties' goals unrealistic
 Parties' incentives to settle were low
 All the key parties weren't present
 There wasn't sufficient information
 The party(ies) didn't have authority to settle
 The mediator's professional ability
 The mediation was too early in the dispute
 The mediation was too late in the dispute
 Other (please explain)

Comments

15. Given what I know from this experience, in similar circumstances, I would participate in mediation again.

Strongly Disagree Disagree Indifferent Agree Strongly Agree

16. I knew mediation was an alternative prior to the Environmental Court's initial pre-trial conference on my case.

Yes No

17. I would have considered mediation and possibly initiated it, even without the Environmental Court's initial pre-trial conference and order to mediate.

Strongly Disagree Indifferent Agree Strongly Agree

Any Final Comments?

Please return this form to: **The Consensus Building Institute, c/o of the Vermont Land Use Mediation Project, 238 Main Street, 4th Floor, Cambridge, MA 02142.**

Thank you for your help in better understanding and improving the use of land use mediation.

Appendix D: Focus Groups Findings

In December 2006- January 2007, CBI and GMER initiated a mid-project evaluation of project protocol and participation. Project staff initiated the following:

- Developed screening evaluation forms for all participants in Year 2006 Act 250 and local Screenings
- Developed interview protocol for evaluation interviews with Act 250 District Coordinators

Screening Evaluations - Kate Harvey sent screening evaluation forms to 50 Act 250 and local screening participants. The questions asked participants to comment on their experience, the usefulness of the screening, and any concerns they had about the screening process. She followed up with a reminder postcard.

CBI received 33 of 50 evaluations sent. The following table summarizes these mid-course evaluation results.

QUESTION	YES	NO	No response
Did the screening process help to inform you about the option of utilizing mediation to resolve the dispute.	29	1	3
Did the screening process help you to make an informed decision about whether to engage in mediation.	27	4	2

Two of (33) evaluations indicated concern about the screening protocol, while the remaining had no specific comments of concern. Those concerns were 1) “what protocol? The EB/NRB staff told me that mediation was my only option; and, 2) the screener should not mediate cases—conflict of interest.

Several comments indicated that the process was useful. Comments made included: 1) “It helped to clarify disputes. We gained useful insights into neighbors.” 2) “It is a good service.” 3) “Although it did not result in a break-through for us, it remains a good concept that parties in opposition try to further identify sticking points and try to work out a settlement to avoid the expense and time consuming hearing process.” And, 4) “The attempt to work through a process other than court was useful.” The screening evaluations also indicated that a few participants (4) were not clear on why they had been selected to participate in mediation and how the process worked. The results prompted the development of new protocol documents that can be distributed to participants that clearly explain the process and how it works.

Interviews - Kate Harvey also conducted phone interviews with six Act 250 District Coordinators from districts that had participated in the mediation screening project. During the interviews, Kate asked about their experience with the mediation screening, the usefulness of the screening, and any concerns they had about the screening process. The District Coordinators stated that the process is working well from their perspective. The direct interaction with participants in the screenings is increasing the odds that parties will mediate. No significant

problems were reported by those interviewed. Two interviewees did note concern has been raised that the screening process may unfairly advantage the screener since he also mediates, potentially adversely affecting other potential mediators. All coordinators noted that they want to help the mediation screener obtain better background information on potential cases more quickly, but are not sure how to do that. Most coordinators suggested that they'd like to have a brochure that explains the process to participants (in color, short, compelling) so that when the mediation screener cold calls potential screening participants, the participants have a better sense of what the project is about.