



## Land Use & Environmental Mediation Committee

# Groundbreaking Developments in Washington Land Use Mediation

A Pilot Project Report by the Washington State Bar Association's  
Land Use and Environmental Mediation Committee

FINAL REPORT - September 2016

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*The opinions expressed in this report are not those of the WSBA but are solely those of the Land Use and Environmental Mediation Committee members. The information contained in this report is derived from interviews with mediation parties and focus group discussions and is used with consent for educational purposes. Information from publicly available sources such as media coverage and public agency publications is also utilized.*

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## Land Use & Environmental Mediation Committee

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*“This will provide predictability and certainty if and when it is developed. It is really a win for everybody.”—Owner and Project Developer (Seattle Times)*

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## Executive Summary

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Mediation provides a valuable tool for the resolution of many land use and environmental disputes by allowing the underlying reasons for a dispute to be addressed, making the result more satisfying for all parties. Mediated agreements reduce the cost and delay associated with administrative and judicial appeals and allow the resources otherwise devoted to conflict to be put to better use, often financing project improvements or mitigation.

With these benefits in mind, the Land Use and Environmental Mediation Committee (LUEMC) was formed in July 2011 as a Standing Committee of the Alternative Dispute Resolution and Land Use and Environmental Law Sections of the Washington State Bar Association. The Committee is composed of professionals with skills and experience in dispute resolution as well as land use, natural resource, and environmental issues. The LUEMC’s mission is to promote more efficient, effective, and enduring resolutions in land use and environmental disputes through the use of mediation and related conflict resolution techniques.

In 2014, the LUEMC conducted a Pilot Project in which mediation services were provided on a pro bono basis by independent mediators, sponsoring five mediations within the Puget Sound area of the State of Washington. The mediations were conducted by two mediators, an experienced mediator and a land use or environmental law professional, using a co-mediation model. Pre- and post-mediation interviews were conducted with government representatives, developers, community and neighbor stakeholders, and legal counsel for each of the parties involved. The interviews were designed to assess perceptions about the mediation outcome, process, mediator skills, and relative cost and timing of mediation in land use disputes.

As a supplement to its Land Use Mediation Pilot Project, the LUEMC conducted two focus groups with individuals that have land use mediation experience. Participants included land use attorneys with basic mediation training through various Dispute Resolution Centers (DRCs)<sup>1</sup> or other professional training programs, Washington Mediation Association (WMA)<sup>2</sup>-certified mediators, hearing examiners, land use arbitrators, government representatives, and an administrative appeals judge. Participants discussed their experiences with land use mediation in terms of potential benefits, lessons learned, and perceived barriers. They also provided recommendations for the mediation process and discussed mediator qualifications.

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<sup>1</sup> DRCs are nonprofit organizations created by state statute (RCW 7.75) to provide pro bono or sliding scale alternative dispute resolution services.

<sup>2</sup> WMA is a statewide nonprofit organization offering voluntary certification to mediators meeting certain standards.



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This report reflects key findings from the LUEMC-sponsored mediations and focus groups. Across the pilot project studies and interviews with mediation participants, multiple benefits to mediation were observed, often regardless of whether a settlement was achieved. The following benefits are the basis for this report and the LUEMC’s conclusion that mediation offers a valuable alternative to litigation in a broad range of land use and environmental disputes:

- Mediation parties achieve a better understanding of the issues
- Mediation parties reduce the number of issues in dispute
- Face-to-face meetings build trust and community relationships
- Development and appeal delays and costs are reduced
- Disputed factual issues are resolved
- Outside-the-box thinking and creative solutions are possible



## Land Use & Environmental Mediation Committee

### The Washington State Land Use Process

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The mediation of land use disputes in Washington State requires an understanding of the land use permitting process and legal framework.<sup>3</sup> The underlying permitting process can affect and inform many of the decisions made during the mediation process, such as identifying the parties required for resolution, timing considerations, incorporating technical experts, understanding the balance of power, assisting the parties in evaluating the best alternative to a negotiated agreement (BATNA), and identifying the constraints that may affect the durability of the agreement. With that in mind, this report provides a brief and general summary of the land use process in Washington State as background and context for the Pilot Project discussion that follows.<sup>4</sup>

#### Land Use Planning

In Washington, land use is regulated primarily by local government agencies (cities and counties), which adopt land use regulations consistent with federal, state and common law. Most prominently, the Growth Management Act (“GMA”) (RCW 36.70A) requires most local jurisdictions to plan for growth within their boundaries. The GMA establishes a procedural and substantive framework within which local jurisdictions must plan, but defers to local decision making that is consistent with state law.

A local government’s process for adopting comprehensive plans and land use regulations generally involves public participation through general public notice about the proposed regulations (although this does not typically include individual notice to particular property owners), public workshops, meetings and hearings, and the opportunity for written comment. The regulations are generally considered first by an advisory body such as a planning commission and then considered and adopted by the local legislative body (the city or county council or board of commissioners). While this process allows for public input, the public participation process is not satisfying for some stakeholders, either because they feel there was insufficient opportunity for

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<sup>3</sup> Although the Pilot Project mediations involved land use disputes, it is the sense of the LUEMC that mediation can provide similar benefits in environmental disputes, and may face similar challenges for applicants, stakeholders, and permitting or regulatory agencies. The lessons learned from the Pilot Project are relevant for mediators of environmental disputes.

<sup>4</sup> We reference a few of the more prominent land use laws in this section. An exhaustive discussion of land use law and permit processes is outside the scope of this report. Individuals interested in specific projects or permits should consult with a land use attorney regarding the applicable law and permit process.



input or their input was not properly considered.<sup>5</sup> There is substantial room for the use of facilitation processes, and in some cases mediation, to improve the quality of public participation and the experience of those involved.

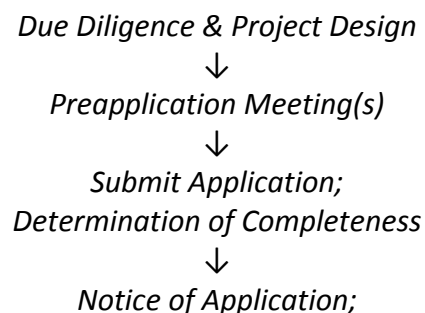
Most land use planning decisions are subject to appeal to a State level appeal body called the Growth Management Hearings Board (“GMHB”). There is an opportunity for mediation during the GMHB appeal process. Decisions of the GMHB may be appealed to Superior Court.

## Project Review

A development project may require many different permits and approvals from multiple local, state and federal agencies. Each of these permits requires a separate application, is evaluated by different decision makers and standards, and has its own timeframe for issuance and appeal. The permitting process can take years.

There are many potential venues for adjudicating permitting disputes. Disputes may be resolved by planning staff, hearing examiners, planning commissions, city and county councils, multiple state hearings boards, and the state and federal courts. Appeal deadlines are typically short (days or weeks after the decision) and procedural requirements strict.

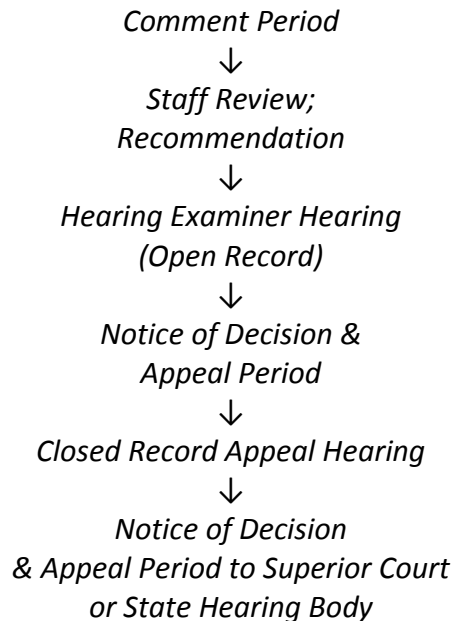
Land use processes vary by the type of permit involved and the jurisdiction. Some minor land use decisions are made by planning staff without any public notice or hearing. More significant decisions typically require public notice of the application and an open record public hearing before a decision making body (such as a hearing examiner), followed by the opportunity for appeal.<sup>6</sup> The following flow chart illustrates one type of permit process for larger projects:



<sup>5</sup> The Local Project Review Act (RCW 36.70B) provides that the fundamental land use planning choices made in comprehensive plans and development regulations determine the type of land use permitted, the density of urban residential development, and the availability and adequacy of identified public facilities. These choices may not be reexamined during review of a specific project.

<sup>6</sup> The Local Project Review Act limits the local government to one open record hearing and one closed record appeal. At a closed record appeal, no or limited new information may be submitted and only arguments are allowed.





As this flow chart indicates, prior to submitting an application, the project proponent conducts due diligence to determine if the project is feasible and prepares preliminary designs for the project. As part of this process, the proponent may meet with local government staff informally or in an optional (or mandatory) pre-application meeting. At these meetings, the applicant and local government discuss requirements for application completeness, review requirements, fees, review process/schedule, and questions. Prior to submitting an application, the applicant has invested substantial time and money.

For larger projects, public notice is given after submission of an application. Neighbors may first learn of a project through this public notice, which usually includes posting a sign on the project site, mailing to neighbors living within a prescribed distance (typically 300–500 feet) of the project, and/or publishing notice in the newspaper. Neighbors and citizens' groups are often frustrated by real or perceived lack of effective notice or the timing of the notice.

Following public notice, there is typically a short (about 14-day) opportunity for public comment. The governmental agency's planning staff reviews these comments and also reviews the application for compliance with applicable regulations. Depending on the type and size of the project, staff may also conduct environmental review under the State Environmental Policy Act ("SEPA") (RCW 43.21C). Following this review, staff makes a recommendation to the decision making body.

After staff makes a recommendation, the application proceeds to the decision making body (frequently the hearing examiner), who holds an open record hearing on the project. At this hearing, anyone can submit



documents or testify about the proposal. Following the hearing, the decision maker issues a decision. Notice is provided and there is typically a short (approximately 14-day) administrative appeal period.

If the decision is appealed, the appellate body (typically the city or county council or board of commissioners) hears the appeal in a closed record hearing. This means that no additional evidence can be taken at the hearing. Following the hearing, the appellate body makes a decision. Notice is provided and there is a short (21-day) appeal period to Superior Court. In Superior Court, parties are limited to the property owner, applicant (if different than the property owner), persons who appealed the decision to the local government appellate body, and the local government.



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### The Mediation Process

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Mediation is a voluntary process in which parties in dispute meet with a neutral third party to resolve their conflict. The mediator does not dictate a result but facilitates the parties' negotiations to assist them to achieve their own mutually agreeable solution.

The Washington Uniform Mediation Act (UMA)<sup>7</sup> governs the mediation process in Washington. The UMA provides that mediation communications are confidential to the extent agreed by the parties.<sup>8</sup> Mediation communications are also as a general rule privileged, and not subject to discovery or admissible in court, with some exceptions.<sup>9</sup>

Mediation provides a structured process that brings the parties together for direct, focused discussions without outside distractions. Discussions at the outset of a dispute can forestall its further escalation. In a surprising number of neighbor disputes, the parties do not communicate with each other before filing complaints or taking other legal action. Even after a dispute is in full swing, mediated discussion provides an opportunity for timely and cost efficient resolution.

The mediator facilitates communication and agreement between the parties. The mediator is in a better position to do this than the parties' attorneys, who act in an advocacy role. The mediator's neutral status also differs from that of government officials. These officials may attempt to resolve differences between parties with varying interests but ultimately must take sides when they take code enforcement action or issue or deny a permit.

The mediator may also encourage settlement by helping the parties identify their best (or worst) alternative to a negotiated agreement based on the merits of the case and the timeframe and cost of litigation. The objective assessment of a case by a neutral third party often motivates parties to consider settlement.

In addition to addressing the immediate conflict, the mediation process can create improved communication and better relationships between the parties, which in turn decreases the likelihood of future disputes.

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<sup>7</sup> RCW Ch. 7.07.

<sup>8</sup> RCW 7.07.070.

<sup>9</sup> RCW 7.70.030.



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### Pilot Project Case Studies

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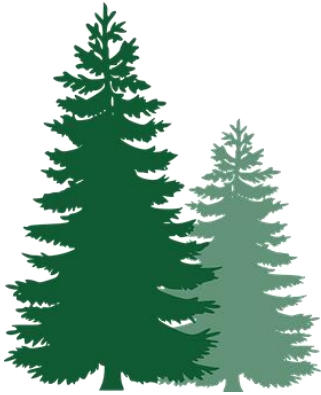
In 2014, the Land Use and Environmental Mediation Committee identified independent mediators who conducted five pilot project mediations across the Puget Sound region. These mediations occurred in a diverse range of settings and at multiple stages in the land use process. Each mediation was conducted by two mediators, an experienced mediator and a land use professional, using the co-mediation model. Neutral observers were allowed in the mediations. Pre and post mediation interviews were conducted with government representatives, developers, community and neighbor stakeholders, and legal counsel for each of the parties involved in each mediation. The interviews were designed to assess perceptions about the mediation outcome, process utilized, mediator skills, and relative cost and timing of mediation in land use disputes.

As a supplement to its Land Use Mediation Pilot Project, the LUEMC conducted two focus groups with individuals that have land use mediation experience in June, 2014. Participants included land use attorneys with basic mediation training through various DRCs or other professional training programs, WMA-certified mediators, hearing examiners, arbitrators, government representatives, and an administrative appeals judge. Participants discussed their experiences with land use mediation in terms of potential benefits, lessons learned, and perceived barriers. They also provided recommendations for the mediation process and discussed mediator qualifications.

This section provides an overview of each of the pilot project mediations.



## Case Study #1: Redmond, Washington



An owner of property in Redmond, Washington proposed replacing an existing 28-acre, campus-like, commercial complex with a denser, mixed-use, transit-oriented development. The project would include a 2.5-acre public park, walking trails, and off-site tree replacement in surrounding neighborhoods. The developer proposed cutting down over 1,000 large trees.

The City Council conducted environmental review under the State Environmental Policy Act (SEPA) (by adopting a prior environmental document) and approved a development agreement and master plan for the proposal. In its approval of the development agreement and master plan, the City Council approved an exception to the zoning code's tree retention standards. The zoning code required preservation of all landmark trees and 35% of significant trees; the exception allowed clearing of all trees and shrubs on the site.

Neighborhood and nonprofit groups and individuals opposed the City Council's decision to allow the developer to cut down over 1,000 large trees on the project site. They filed a land use petition in superior court challenging the City's approval of the master plan and the adequacy of the City's analysis under SEPA. The litigation deadlines were not stayed during the mediation, imposing a tight timeframe on mediation discussions.

Within fourteen days of the parties agreeing to mediate, the mediators met individually with the parties and/or their counsel, and then convened a one-day mediation session at the offices of outside counsel for the Owner. The parties were unable to reach a settlement at the in-person session, but were able to reach agreement in a follow-up shuttle mediation conducted primarily by telephone with the mediators.



## Case Study #2: Seattle, Washington

A property owner proposed a rezone of property adjacent to a Seattle area mall. The existing apartments on the property were private market rate housing but, due to their age and other factors, rents were at affordable levels. The rezone would remove a requirement under the existing zoning to provide affordable housing (or a fee in lieu of affordable housing) to achieve maximum development potential.



The redevelopment would result in the loss of 207 low-income housing units and was opposed by local community groups that work to preserve low-income housing in Seattle, housing that has been adversely effected by rent increases and demolitions of older buildings.

The proposal was reviewed by City staff, which issued a determination of no significant environmental impacts and recommended approval. A community council and affordable housing advocacy organization appealed the environmental determination to the Hearing Examiner. They also indicated they would appear at the public hearing before the Hearing Examiner to oppose the proposal due to its affordable housing impacts.

The Hearing Examiner offered the parties the option of participating in mediation and the parties agreed to mediate. Mediated discussions occurred while the Hearing Examiner process was ongoing, with only a short continuance.

Through mediation, the parties agreed to a condition identifying the number of affordable housing units (priced at 50% area median income) to be created during property redevelopment. This condition was ultimately adopted as a rezone condition by the City Council.



### Case Study #3: Kirkland, Washington



Neighbors and community members opposed a 143-unit apartment development with lower-level retail space on a 1.2 acre lot facing Lake Washington. The developer claimed rights under the zoning in effect at the time of application for a shoreline permit to build the proposed number of units. The City adopted a moratorium on submitting a building permit application (which was required, in addition to the shoreline permit, to develop) and revised the zoning applicable to the site. The developer sought declaratory relief in superior court that its rights had vested. The developer also challenged the revised zoning before the Growth Management Hearings Board (GMHB). While these actions were pending, the parties, including the developer, the City, and community members, engaged in mediation.

The mediation resulted in a tentative settlement agreement that would allow the development to proceed with no more than 100 units and included options for the City to pay the developer to further reduce the size of the project. Some community members did not support the agreement, and ultimately the City Council did not approve the settlement agreement.

The parties then proceeded to litigation. The trial court ruled in the developer's favor on summary judgment. The Washington Court of Appeals reversed, ruling that the developer did not have rights under the zoning in effect at the time of application for a shoreline permit. The Washington Supreme Court denied review.

### Case Study #4: Sumner, Washington

Pierce County amended its comprehensive plan to remove ("de-designate") 125 acres from the Agricultural Resource Lands of Long-Term Commercial Significance designation and 56 acres from the Rural Farm designation, and to include these properties in the urban growth area (UGA) for the City of Sumner. Five non-profit organizations appealed the amendments to the Growth Management Hearings Board (GMHB). The other parties to the appeal were Sumner, Pierce County, the property owner, and a non-profit organization. The GMHB overturned the amendments, and Sumner and the property owner appealed the GMHB's decision directly to the Court of Appeals. The parties agreed to a continuance in the Court of Appeals case to allow mediation to proceed.



Seven of the nine parties before the GMHB agreed to mediate the case and participated in two full days of mediation. They discussed reducing the size of the UGA expansion, non-traditional ways in which surrounding



productive agricultural lands and uses could be preserved and agricultural uses promoted, and ways in which infrastructure, including water, could be provided to the UGA without reducing the viability of agricultural uses. Twenty individuals participated in joint sessions.

By the end of the second day of mediation, the parties had identified five elements that would need to be included in a mediated agreement and agreed to “homework” assignments to flesh out how those elements might look in a mediated agreement. They agreed to complete the homework prior to a third mediation session. Some of the parties completed their homework, some did not. Ultimately, the third mediation session was not held, and no mediated agreement was reached.

### Case Study #5: Orcas Island, Washington

Neighbors on adjoining waterfront property were engaged in protracted litigation and administrative appeals related to the use of and addition to an accessory dwelling unit (ADU) located between the two properties.



The original permit for the structure, obtained by a predecessor owner, was for a storage barn to be built ten feet from the property line. A survey several years later revealed that the structure had been built only 1.4 feet from a neighbor’s property line. To address this issue, the barn owner executed a boundary line agreement and easement with the neighbor that prevented the neighbor from building within 20 feet of the barn.

The subsequent owner of the barn converted it to an ADU without obtaining the necessary building or shoreline permits, but was subsequently allowed to seek after-the-fact permits and to execute a compliance plan with the county. The neighbor filed a number of administrative appeals. At the time of the mediation, the parties were involved in litigation at the trial and appellate court level regarding these issues. The county agreed to stay a related administrative proceeding pending the mediation.

The mediators traveled to Orcas to meet with the parties, and the parties and their counsel later attended a one-day mediation at a neutral location in Seattle. Working in both joint session and caucuses, the parties discussed and reached conceptual agreements on a number of issues related to the neighbors’ use and enjoyment of their respective properties, but were unable to reach agreement on all issues. After the mediation, the mediators engaged in telephone sessions with counsel. Ultimately the parties did not reach a mediated agreement, and litigation continued.





## Land Use & Environmental Mediation Committee

### Lessons Learned

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The five case studies conducted by the Land Use and Environmental Mediation Committee present a number of lessons learned through their successes, failures, and partial progress toward the resolution of complex land use disputes. These lessons shed new light on the potential benefits and obstacles to using mediation in the land use setting; process and timing considerations for introducing mediation in a land use dispute; and implications for the role of the land use mediator.

#### Benefits of Land Use Mediation

Parties achieve a better understanding of the issues

Land use mediation, as with other types of mediation, provides a neutral forum where parties can communicate directly with each other to gain understanding of the core issues underlying the dispute. A professional mediator guides this collaborative process to break down the barriers to communication, which are often exacerbated by litigation or the threat of litigation.

Because land use disputes in Washington State are played out in a litigation context, parties are compelled to raise all of the legal issues that they can present, even if those issues are not relevant to their central concern. The litigation process creates a divide and conquer approach to the conflict where parties tend to stop communicating entirely with each other except through litigation documents.

For example, in the Redmond mediation, the mediation provided the opportunity for direct face-to-face communication between decision makers in each party. Each party was able to explain its perspective to the other parties directly and hear the other parties' perspectives. While differences and conflict remained, by the end of the mediation day, the parties had a far better understanding of the core issues between them. The parties were able to focus on potential solutions to their differences through follow-up caucus discussions with the mediators, who then conducted shuttle negotiations.

The Redmond stakeholders ultimately entered into a written settlement agreement that ended the litigation challenging the City's approval of the plan for site redevelopment. The agreement provided additional



opportunities for public engagement in planning for tree retention, removal or replacement in the public park proposed on the site. It also provided funding for the City to transplant selected trees from the site to public facilities and properties in the neighboring area, or to plant new evergreen trees at those locations.

In the Seattle mediation, the parties were able to focus on the central issue in dispute, the provision of affordable housing. The parties were able to discuss this matter outside of the appeal and political processes, both of which encourage (rather than reduce) conflict. Ultimately, the parties were able to reach what one described to the press as “a win for everybody.”

#### Parties reduce the number of issues in dispute

Even if mediation does not fully resolve a dispute, the parties may be successful in reducing the number of issues between them. For example, in the Seattle mediation, the parties’ appeals to the Hearing Examiner raised multiple issues. The parties chose to mediate only the most significant and potentially contentious and time-consuming issue, relating to affordable housing. The other issues were resolved outside of mediation.

#### Face-to-face meetings build trust and community relationships

Similar to other types of mediation, the land use mediation process provides a forum for stakeholders to address each other in more direct, meaningful ways. This is particularly true in land use decisions where interactions between the parties have previously been limited to the public hearing process. Participants from the case studies described the benefit of “seeing people as people” for the first time at the mediation table. This is especially advantageous when planners and other government experts are present and can address public concerns in an exchange that usually is not available in more traditional public forums.

In the Seattle mediation, past communications between the stakeholders often consisted of skewed discussions that took place through the media, so the mediation session provided the first real opportunity for the stakeholders to meet directly and listen to each other. The Appellants realized that the property owner was highly cooperative because of family roots in the community and a desire to invest in its future. As a less tangible result, the participants in that mediation experienced increased trust and respect, commenting that they would feel more comfortable contacting each other directly to discuss future issues.

*“It sends a message to other developers that there is an alternative to just trying to ram development down a community's throat.”—Low-income Housing Advocate*



Mediation also offers all parties the ability to build relationships, which is valuable for parties who may interact again in the future. The Seattle mediation was considered a success due to its overall positive impact on future relationships between the parties. Despite initial skepticism about the distance between stakeholder positions, mediation participants reported they were ultimately very satisfied by the collaborative efforts of everyone at the table. Community council and affordable housing advocacy participants described mediation as an opportunity for stakeholders who are often left out of the process to have an impact without exhausting significant resources in litigation.

In contrast, in the Redmond mediation, several stakeholders commented on the litigation-based damage to what had previously been more positive public relations between Appellants, the City, and the Owner. Most did not feel that the mediation settlement would help significantly to restore these relationships, outside of the stipulation that the mediation parties issue a joint press release about the settlement and avoid making negative public statements regarding the settlement and/or the parties. Some stakeholders were initially very skeptical about the mediation's potential for success, due to the strong environmental interests in preserving large trees on site. One stakeholder commented that cases strictly involving business decisions and dollar amounts are more appropriate for mediation than cases where there are strong interest-based positions that are difficult to settle with a dollar amount. To have maximum chance of a satisfying outcome, the land use mediation process should be designed to address these underlying interests.

Ultimately, the Redmond mediation may not have provided an adequate avenue for addressing the non-monetary components of the case before transitioning to a mostly financial settlement. This was likely a factor in reducing the overall level of satisfaction with the outcome, even though a settlement was obtained. One stakeholder summarized, "I am not sure if any of us changed. If we ran into each other at the Saturday market, you'd hope there would be a common paradigm, but I am not convinced that happened."

#### Development delays and costs are reduced

Land use mediation is a valuable alternative for developers when the settlement allows them to move forward without further delays and to more accurately predict development costs. The land use process, including appeals, can take years. This delay results in various costs, which may include staff, consultants' and attorneys' fees, property carrying costs, and lost opportunity. The mediation process offers developers the ability to reduce costs and increase certainty.

In the Seattle mediation, the owner/project developer and government stakeholders indicated that they were very satisfied with the mediated outcome, since early mediation provided a clear set of development parameters to meet stakeholder needs, satisfy code requirements, and avoid development delays. In the City



of Seattle's Office of Hearing Examiner 2012 Annual Report, the agreed conditions on affordable housing were considered "in many ways superior to the Director's proposed housing conditions."

*"This will provide predictability and certainty if and when it is developed. It is really a win for everybody."—  
Owner and Project Developer*

Disputed factual issues may be resolved using individual or shared experts

The land use field is ripe for a collaborative approach like the one that is well established in family law cases, where sharing neutral experts for technical expertise can significantly reduce legal costs. Land use disputes often involve disputed factual issues that require expert analysis, such as the amount of traffic generated by a project or the severity of its impacts on the natural environment. Solutions to land use disputes also often involve technical matters that require expert advice, such as developing traffic mitigation or mitigation for impacts to wetlands and other natural features. As a result, land use mediations often require multiple sessions, spaced so that the parties may consult with technical experts between sessions. While none of the pilot mediations utilized shared experts, some parties did consult experts during or between mediation sessions. In addition, several participants across the studies later observed the potential for sharing technical consultants, both prior to the mediation and between sessions. Options for sharing experts should be discussed during pre-mediation activities and may enhance the appeal of using mediation to reduce the overall costs associated with land use disputes.

Outside-the-box thinking and creative solutions are possible

Mediation can provide a forum for considering solutions that are not within the jurisdiction of, or may not be considered by, the local government decision maker. The parties may identify results that cannot be achieved through any other process. Mediation can also provide the opportunity to discuss and resolve land use (and even non-land use) issues that are not directly related to the legal issues that are the subject of litigation. For example, even though the Orcas dispute ultimately did not settle, the issues the parties discussed at the table—and in several instances reached conceptual agreement on—were far broader than the relatively narrow issues the litigation could have addressed. Moreover, mediation can allow the parties to express their fears about impacts from a change of use and come up with mitigation or avoidance measures that would not surface through the permitting process. For example, in the Sumner dispute, the parties discussed a wide range of non-regulatory tools that offered the promise of better long-term protection of the agricultural land base than traditional zoning and comprehensive plan designations.



## Potential Obstacles for Land Use Mediation

Mediation can be a “tough sell”

Even the most sophisticated parties often do not understand the mediation process. Counsel must describe the mediation process and its potential benefits without any guarantees as to the outcome. Because parties to land use disputes are often unfamiliar with mediation, they may be reluctant to engage in a process that is costly and has an uncertain outcome. While litigation has the same drawbacks, it also has more well-understood risks and timelines. Also, both attorneys and others involved in the land use process, such as planners, are sometimes reluctant to hand their cases over to mediation because they feel that they should be able to negotiate a settlement without a third-party neutral. Building awareness by attorneys and government authorities about the mediation process is key to moving appropriate cases to mediation. Hearing examiners and judges of the State Environmental Hearings Office have had some success in suggesting mediation to the parties in their procedural rules and during pre-hearing conferences.

Using mediation for land use disputes requires a cultural shift that is more solution-oriented rather than rights-based. Practitioners are skeptical about how cases are vetted for mediation. Some cases are not appropriate for mediation because the parties are unwilling to settle outside of court.

Litigators gauge the suitability of a particular dispute for mediation using several factors:

1. What is the likelihood of success in litigation? Is one party only interested in “having their day in court,” regardless of the outcome? Are they not entitled to anything more than the legal process, so they insist on going through the process?
2. How flexible are the parties in their willingness to compromise on some aspects of their positions? If one party is inflexible, it may be more efficient to go to a hearing.
3. Are all of the parties represented by counsel? If not, mediation is an efficient tool for balancing the playing field and encouraging organized communication between the parties.
4. To what extent is opposing counsel willing to negotiate? Have past negotiations gone smoothly? If so, it may be more efficient to skip mediation and negotiate directly.
5. How important is it to address the underlying interests between the parties that extend beyond a particular lawsuit, so that all of the issues are fully resolved? Winning one lawsuit is not necessarily the end of a complex land use dispute, and a litigated outcome without a more comprehensive solution may result in “winning the battle but losing the war.”
6. What resources do the parties have available? Are they financially able to “drag things out” for an extended period of time?



## Challenges with identifying parties and mediation roles

Key decision makers in land use mediations can be difficult to identify, even with extensive pre-mediation work. The parties may include the property owner, the property developer, neighbors, environmental groups, and elected and non-elected local, state, and federal agency decision makers. When the property owner and developer are not the same person or entity, the question arises whether both parties should be at the mediation table.

Depending on the stage at which the mediation occurs, it may be difficult to identify all the people necessary for resolution. Sometimes, a project is opposed by an informal group of neighbors that has no established decision making structure and whose members' individual interests and opinions differ. In this case, the most active neighbors may participate and reach an agreement on behalf of most of the others, but one or more neighbors may remain dissatisfied and continue to pursue appeals. In Kirkland, for example, the interested community was large and ultimately some community members opposed a negotiated solution. A neighborhood group or homeowners' association may only have authority to make a recommendation to the ultimate decision makers, but not to authorize a settlement.

In Sumner, for example, the mediation was hindered by the dynamics within certain nonprofit groups, and, in particular, by a representative of one of the groups who did not appear to inform or involve the principals of the coalition he represented about the issues under discussion. The lack of principals at the table for one mediation participant turned out to be very problematic. It was not clear whether the representative kept the principals informed, and whether there would have been a different outcome had the principals been present. In retrospect, the mediation probably should not have gone forward once this problem became apparent in the pre-mediation assessment.

The government representatives in land use mediations often wear multiple hats and are subject to various legal constraints. In the case studies, the local governments tended to view their role as "secondary facilitators," providing the background and context for the permit approval process. However, the appellants often viewed the governmental entity as an opposing party that was responsible for the decision that they opposed, not as neutral facilitators.

Additionally, if a land use matter involves a specific project proposal, then certain agency decision makers (e.g., hearing examiners, city/county councils, county boards of commissioners) are required to conduct business in open public meetings and cannot communicate with third parties about the matter in private. Thus, while a city or county may be a party to a land use dispute, the agency may be unable to participate in a confidential process. In addition, decision makers may not be able to participate directly in mediating the dispute. Because of the constraints on government decision makers participating directly in mediation, often a settlement agreement will be contingent on later formal approval by the appropriate governmental body,



following the process required by the local code, if applicable. This was the case in the Redmond, Seattle and Kirkland mediations.

### Policy issues preclude settlement

In some land use mediations, the underlying interests of parties opposing a specific development may be tied to larger policy issues in the local jurisdiction. Certain stakeholders may be unwilling to resolve the issues presented by a specific development because the narrow solution fails to address larger policy concerns.

For example, in the Sumner mediation, the elements of a reasonable resolution for the specific development at issue were potentially present, but settlement stalled because certain litigants were interested in resolving larger policy issues related to the county's overall treatment and preservation of agricultural lands. These issues were beyond the control of the mediation parties. In some respect, the negotiations fell apart because some stakeholders were, on principle, unwilling to accept any loss of land designated for long-term agricultural use, which any mediated resolution would have required. These individuals expressed concern about the precedent that would be set if the particular project went forward under a mediated set of conditions.

In the Seattle mediation, in contrast, the parties were able to reach agreement on an issue of broad policy interest (affordable housing). The affordable housing advocates viewed the resolution as a positive precedent (stating "it sends a message to other developers that there is an alternative . . .") and the developer obtained the predictability and certainty that it desired.

### Contingent agreements impact settlement durability

Settlement agreements in land use matters are often contingent on discretionary government approvals for their implementation. Depending on the terms of the settlement, subsequent action by the government may be required to implement the agreement. For example, a developer and environmental group may both agree that they can settle their dispute if a number of specific revisions is made to a subdivision proposal. Under state subdivision law (RCW 58.17), these revisions cannot be made without the approval of the city. In order to implement the settlement, the developer must submit an application to the city for these changes, city staff must review them for compliance with the city's code, and the hearing examiner or city council must hold a public hearing on the changes, consider public comment, and approve any changes. This approval is then subject to appeal by third parties. Had the Sumner mediation resulted in a settlement agreement, the agreement would have required that Pierce County and Sumner adopt amendments to their comprehensive plans. Those amendments would have been subject to appeal by third parties, including the non-profit



organization that chose not to participate in the mediation. Both the Redmond and Seattle mediations required further action, of one form or another, by the governmental decision maker. The durability of the settlement agreement depends on these procedural hurdles being cleared successfully.

### Mediation expense

A significant obstacle to using mediation in land use disputes is whether the expense is justified without the guarantee of settlement. Participants who were more familiar with mediation estimated that a full day of mediation could cost thousands of dollars. Generally, mediation for land use disputes was considered to be appropriate if the stakes were high enough to justify the cost. One stakeholder summarized, “It’s a leap of faith and lots of cost if you don’t settle.” The amount of time required to vent frustrations and “hold hands” can also frustrate the process.

Additionally, community organizations may not have the resources to contemplate mediation in addition to preparing for litigation. The financial implications of adding a step might cause these groups to skip mediation and “take their chances” in court. There may be some benefit to having government-funded land use mediation options available, but this could prompt concerns that the mediators are not truly impartial and independent facilitators.

## Process and Timing Considerations

### Early mediation advantages

Multiple timing considerations impact the decision on how and when to use mediation in land use disputes. In a project-specific setting, mediation is usually used after either an administrative or judicial appeal has been filed. However, by that point, substantial money and time have likely been invested by the applicant and potentially by other parties as well.

Judicial appeals of project-specific actions are brought under the Land Use Petition Act (“LUPA”), (RCW 36.70C), which provides for expedited review of land use decision appeals. If the parties do not agree to stay the LUPA litigation deadlines, mediation will be subject to a tight timeframe.

In contrast, some participants observed that there are distinct benefits to early mediation that occurs prior to permitting. Developers participate due to the uncertainty of whether a permit will be issued and to reduce delay and risk associated with future appeals. Government also benefits if resource-consuming controversy is resolved early. In the Orcas mediation, one of the stumbling blocks was that prior to mediation, the litigation had been intense and long-running and had resulted in substantial attorney's fees relative to the





development's dollar value. This made a settlement harder for the parties to swallow than if the mediation had occurred earlier, when the sunk costs were lower. In the Seattle case, mediation occurred during the City permitting process (after staff review but before City Council review). This allowed a contentious issue to be resolved without litigation.

Generally speaking, while mediation at an earlier stage (e.g., before an application is submitted or during the permit review process) holds promise, it also presents logistical challenges, including notice to interested parties and identification of the parties.

#### No one-size-fits-all process

The widely varying experiences from the case studies illustrate that there is no one-size-fits-all model for land use mediation. The timing, intake requirements, number of sessions, need for site visits, and percentage of time spent with all parties in the same room versus in individual caucus with the mediator is very case-specific and depends on the complexity of the dispute. Some parties are prepared to go straight to the issues, while others require lengthy opening statements and opportunities to “vent.” Many disputes also require a mix of attention to the parties’ underlying interests and an evaluation of the substantive merits of the parties’ positions to “reality-test” and ensure that an agreement will be durable.

#### Pre-mediation activities

In each of the pilot project cases, the mediators conducted individual pre-mediation meetings with key stakeholders. These early meetings not only created trust in the mediators as unbiased facilitators, they also allowed for preliminary information-sharing to ensure that there were willing players on all sides who wanted to reach an agreement. This is particularly important in land use disputes, where developers can be perceived as “jumping through the hoops” without a good faith intention to compromise.

The mediators used the pre-mediation meetings to gather information about stakeholders’ respective goals. They prepared the parties to use a flexible process that included direct discussions in a joint session and individual caucuses with mediators, as needed. Some participants were familiar with a shuttle mediation format for litigated civil cases. They were made aware of the potential group session format and of the opportunity to provide opening statements in the group session.

Each of the mediations also required some “homework” on the part of the mediators in terms of reviewing land-use petitions, development agreements, master plans, relevant ordinances, growth management board decisions, and other background material. In some cases, such as the Redmond and Orcas mediations, the



mediators also conducted site visits in order to better understand unique circumstances and the physical layout of the areas subject to dispute prior to the mediation.

### Caucus benefits

While most of the pilot project mediations were initially conducted in joint session, some ultimately transitioned to “shuttle-style” mediation, where the mediators caucused privately with the parties on the mediation date and during follow-up conferences. Many mediation participants felt that the caucus sessions were very important, because they needed the time to “talk with their teams” before continuing in joint session. However, some felt that they were “left in the dark” while they waited for the mediators to return from private caucus sessions, with no time limitations placed on these sessions. This concern was addressed in some pilot mediations by establishing approximate time limits for caucus or having a mediator check in with the other parties during waiting periods.

### Information gathering

Mediation may also result in a discovery that the parties at the table do not have all of the information they need, in which case they may need time to gather that information. For example, if project modifications are explored, the participants may need the opportunity to assess the potential financial impact, timing, planning requirements, and implementation of settlement alternatives. Scheduling subsequent mediation sessions offers stakeholder groups an opportunity to brainstorm internally, gather factual information that would be useful in evaluating potential solutions, and then respond with options in a more productive open exchange. The most significant downside to scheduling subsequent mediation sessions is the additional cost of these sessions. However, several of the case studies highlighted the potential for a multi-session format for complex land use cases to result in better consensus-building and improved post-settlement relationships.

In the Redmond case, stakeholders observed that they were somewhat surprised by the settlement, since the initial, full-day mediation session was terminated at the end of the day, after it appeared that compromise and a non-litigated resolution were very unlikely. (The impasse was due to the parties maintaining differing positions regarding the desirability and feasibility of tree retention and the strong opinions and emotions of participants at the table.)

Several stakeholders later attributed the settlement outcome, in part, to the extensive efforts of the co-mediators, who successfully re-opened negotiations following the formal mediation session. During multiple post-mediation telephone caucuses and email exchanges, the co-mediators assisted the stakeholders in exploring off-site tree transplantation and mitigation options. These options could not be fully evaluated on the mediation day due to the need for additional factual information, so the post-mediation period offered



stakeholders the opportunity to assess the potential financial impact, timing, planning requirements and implementation of settlement alternatives.

#### Time “lag” between sessions

While there are benefits to allowing some time between mediation sessions, too much time lag can result in loss of momentum and stalled negotiations. In the Sumner case, the ideas for a potential solution generated at the mediation sessions resulted in information gaps that required further research by the parties. The parties agreed to “homework” assignments in between sessions, but the negotiations ultimately floundered when not all participants completed and reported back to the group on their assigned homework. The parties had momentum going after the first two mediation sessions, but that momentum dissipated with a long gap in scheduling due to the participants summer vacations.

#### Role of the Land Use Mediator

The pilot project utilized a co-mediation model. Each mediation was conducted by a team of mediators: one with substantial land-use expertise and the other with extensive experience mediating a broad range of disputes. Stakeholders consistently appreciated that the mediator with land use expertise was able to effectively summarize what each party was willing to offer, a technique that helped keep the mediation moving forward. There were also points in the negotiations when having land use expertise allowed the mediator to provide a reality check about what actions could realistically be accomplished. Stakeholders agreed that this “assertive” mediation style was highly effective in building consensus around key issues and in creating the underlying expectation that a resolution could be accomplished.

#### Technical expertise

Land use projects generally require multiple technical analyses, such as critical areas, hazardous materials, geologic hazards, air quality, and traffic. Lack of resources to engage an expert can obviously affect the balance of power, but technical expertise on the part of the mediators may help mitigate the imbalance.

In the Redmond mediation, the strong mediation team was considered to be a very significant part of the settlement. In addition to re-opening negotiations after the mediation was formally terminated, the team’s extensive legal background in land use matters was viewed as a critical component of idea generation and reality-testing within municipal limitations. This was particularly true for Appellants, whose representatives ultimately shifted from a fixed position of requiring on-site tree retention to contemplating more creative transplantation and mitigation options to achieve environmental goals. Stakeholders from each group agreed



that it was desirable to have the mediators provide evaluations of the case merits and pose solutions, and did not feel that this compromised neutrality, particularly when conducted in caucus. Some would have appreciated additional mediator direction to move the mediation quickly from opening statements into a joint-brainstorming session.

In the Sumner mediation, most of the participants were highly sophisticated negotiators and were deeply knowledgeable about the issues. The majority of the mediation was held in joint session, with participant caucuses occurring during breaks. This worked effectively, given the familiarity of the participants with the subject matter and each other. Subject matter expertise by the mediators allowed them to (a) stay out of the way of creative ideas and (b) expand upon options offered by the participants.

#### Mediation experience

Some mediation participants noted benefits in having a co-mediator without a land use background. This mediator could explore options without assumptions about litigated results. Advocacy groups were given opportunities to describe how their mission and core values impacted desired outcomes and bottom lines. They explained that their actions were not anti-development efforts, but reflected a desire to set precedent for larger causes.

From the developer standpoint, having an experienced mediator is highly valuable where the dispute is “partly technical but largely emotional,” and technical skills will not be helpful in overcoming the emotional issues. An attorney for one developer observed that finding a suitable mediator will be challenging for land-use cases because there is no established track record, unlike areas with a rich history of mediation, such as labor and construction.

#### Maintaining a fair process

As with any type of mediation, land use mediators are responsible for overseeing the process and ensuring fairness. There is often an imbalance of power between the parties in a land use dispute, although these roles can shift over time. The developer may have the upper hand due to superior financial resources and expertise. Conversely, the neighborhood or citizens’ group may have the greatest power due to its political clout or ability to delay project implementation.

In the Redmond mediation, most participants felt that the co-mediators effectively maintained a fair process by carefully restating multiple stakeholder positions and managing interactions throughout the mediation. The mediators provided a setting in which all of the stakeholders were able to face each other, voice their positions, clarify interests, and increase overall understanding of the issues.



Land Use & Environmental  
Mediation Committee

Beyond reaching a settlement, mediation can produce superior outcomes to the win-lose results generated by the legal system. With the help of neutral mediators and a carefully controlled process, all of the parties emerge from mediation believing that a fair resolution is achieved.



## Land Use & Environmental Mediation Committee

### Conclusion

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While not every case will be resolved through mediation, mediation offers a valuable alternative to litigation in a broad range of land use and environmental disputes, offering the following benefits:

- Mediation parties achieve a better understanding of the issues
- Mediation parties reduce the number of issues in dispute
- Face-to-face meetings build trust and community relationships
- Development and appeal delays and costs are reduced
- Disputed factual issues are resolved
- Outside-the-box thinking and creative solutions are possible