

# Alternative Dispute Resolution in Land Use Disputes—Two Continents and Two Approaches

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## I. Introduction

SUPPORT FOR ALTERNATIVE DISPUTE RESOLUTION (“ADR”) has been gaining popularity in the legal profession over the last few decades. ADR is any type of procedure or combination of procedures voluntarily used by parties in dispute to resolve issues in controversy. The main types of ADR are (1) negotiation between or among the parties,<sup>1</sup> (2) mediation,<sup>2</sup>

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1. For a general definition, see *Negotiate Definition*, OXFORD ENGLISH DICTIONARY, [www.oed.com](http://www.oed.com) (last visited Oct. 5, 2011) (“Negotiate: To communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some compromise or settlement”). For a public international law determination, see *North Sea Continental Shelf* (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Reports 3, 48, ¶¶ 86-87 (Feb. 1969), available at <http://www3.icj-cij.org/docket/files/51/5535.pdf>; see also ROGER FISHER, WILLIAM URY AND BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1983).

2. For a general definition, see *Mediate Definition*, OXFORD ENGLISH DICTIONARY, [www.oed.com](http://www.oed.com) (last visited Oct. 5, 2011) (“Mediate: To act as a mediator or intermediary with (a person), for the purpose of bringing about agreement or reconciliation; to intercede with”). According to the National Association for Community Mediation, “[m]ediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict with the consent of the disputants and assists them in negotiating a consensual and informed agreement. In mediation, the decision-making authority rests with the parties themselves. Recognizing variations in styles and cultural differences, the role of the mediator(s) involves assisting the disputants in defining and clarifying issues, reducing obstacles to communication, exploring possible solutions, and reaching a mutually satisfactory agreement. Mediation presents the opportunity to peacefully express conflict and to ‘hear each other out’ even when an agreement is not reached.” *About NAFCM*, NAT’L ASS’N FOR CMTY. MEDIATION, <http://www.nafcm.org/about/purpose> (last visited Oct. 5, 2011).

and (3) arbitration.<sup>3</sup> As judicial dockets are becoming more crowded and the cost of litigation continues to increase, ADR presents itself as an increasingly important framework to ensure access to the rule of law. Among other reasons for its use, ADR is both less expensive and more time-efficient than litigation, and offers parties the confidence of a mutually satisfactory outcome, in contradistinction to the unpredictability of litigation.<sup>4</sup> Expertise in the subject matter of the dispute on the part of the mediator or arbitrator is often essential in dealing with disputed issues. The benefits of ADR make it an attractive dispute resolution model in land use cases. In wide-area planning where parties to a dispute can number in the thousands, an impartial mediator or arbitrator may be able to explore shared areas of concern and negotiate an agreement that is fair and beneficial to the interests of the majority of the parties.<sup>5</sup> Similarly, the efforts of a local government to enact land use regulations can often be met with stiff resistance from property-rights advocates, and ADR may provide an avenue for effective governance.<sup>6</sup> ADR can prevent protracted litigation with nearby landowners over disputes such as siting locally unwanted land uses (“LULUs”)<sup>7</sup> and determining individual permit applications and conditions of approval.

3. For a general definition, see *Arbitrator Definition*, OXFORD ENGLISH DICTIONARY, [www.oed.com](http://www.oed.com) (last visited Oct. 5, 2011) (“Arbitrator: One who is chosen by the opposite parties in a dispute to arrange or decide the difference between them; an arbiter”). According to the American Arbitration Association, “[a]rbitration is a time-tested, cost-effective alternative to litigation. Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an ‘award.’ Awards are made in writing and are generally final and binding on the parties in the case.” *Arbitration*, AM. ARBITRATION ASS’N, <http://www.adr.org/sp.asp?id=28749> (last visited Oct. 5, 2011).

4. The California courts offer several reasons for the use of ADR including saving time and money, increasing control by the parties of the process and outcomes, preserving relationships among the parties, increasing satisfaction with outcomes, and improving the attorney-client relationship by allowing attorneys to be seen as “problem solvers.” *ADR Types & Benefits*, CAL. COURTS, <http://www.courts.ca.gov/3074.htm> (last visited Oct. 5, 2011).

5. States recognize the utility of ADR in regional planning disputes. See, e.g., *When to Use Alternative Dispute Resolution*, VT. NATURAL RES. COUNCIL, <http://www.smartgrowthvermont.org/toolbox/tools/alternativedisputeresolution/whentousealternativedisputeresolution/> (last visited Oct. 5, 2011); Florida Land Use and Environmental Dispute Resolution Act, FLA. STAT. ANN. § 70.51 (West Supp. 2011).

6. In Oregon, for example, to offset concerns arising over applications of regulations, including land use regulations, the state has established a system for ADR involving state agencies. See *Appropriate Dispute Resolution (ADR)*, OR. DEP’T JUSTICE, <http://www.doj.state.or.us/adr/index.shtml> (last visited Oct. 5, 2011).

7. Frank Popper coined the phrase “Locally Unwanted Land Use”—LULU—to describe development projects that tend to arouse community opposition, such as hazardous waste disposal facilities or nuclear power plants. *Siting LULUs*, 47 *PLANNING*, no.4, 1981 at 9. See also Sanda Kaufman & Janet Smith, *Locally Unwanted Change: The Case of GSX*, 16 *J. PLAN. & EDUC. RES.* 188, 200 (1997), available at <http://urban.csuohio.edu/~sanda/papers/gsx97.htm> (documenting problems caused by LULU siting disputes).

There are numerous benefits to the adoption of ADR in land use cases across the globe. Local governments face a challenging task in dealing with competing interests from a multitude of stakeholders when a local government's plan, policy, or regulation affects a number of different properties. This paper compares the ADR system used in the State of Oregon in the United States of America with the ADR regime in England. It is notable that ADR in Oregon is less structured in terms of legislative provisions, but provides more practical examples than England, while the English ADR system is more structured in terms of statutory provisions, but offers fewer examples in practice.

## II. Oregon: An Advanced U.S. Planning System with Pragmatic Problem-Solving

### A. *The Oregon Land Use System*

Oregon's mandatory statewide land use planning system differs from that of most other American states.<sup>8</sup> Senate Bill 100, as the 1973 enabling law has come to be known,<sup>9</sup> created the Land Conservation and Development Commission ("LCDC") to oversee and standardize city and county planning legislation.<sup>10</sup> LCDC is comprised of seven unpaid members who are chosen by the Governor and confirmed by the Senate.<sup>11</sup> Senate Bill 100 resulted in the adoption of nineteen statewide planning goals establishing state land use policy, ranging from citizen participation to the protection of farm and forest lands,<sup>12</sup> and entrusted LCDC and its administrative agency, the Department of Land Conservation and Development ("DLCD"), with ensuring that local governmental plans and regulations are compliant with these goals.<sup>13</sup> LCDC regularly reviews local plans and regulations and sets policy.<sup>14</sup>

8. See Robert Liberty, *Planned Growth: The Oregon Model*, 13 NAT. RESOURCES & ENV'T. 315 (1998).

9. Act of May 29, 1973, ch. 80, §§ 4-5, 1973 Or. Laws 127.

10. See *Land Conservation Development Commission*, OR. DEP'T LAND CONSERVATION & DEV., <http://www.oregon.gov/LCD/lcdc.shtml> (last visited on Oct. 5, 2011) (official website of LCDC). Records of meetings are open to the public and available online. *Public Meetings*, OR. DEP'T LAND CONSERVATION & DEV. <http://www.oregon.gov/LCD/meetings.shtml#LCDC> (last visited Oct. 5, 2011).

11. OR. REV. STAT. § 197.030 (2007).

12. Oregon's Statewide Planning Goals & Guidelines, OR. ADMIN R. 660-015-0000(1), (3), (4) (2010), available at [http://www.oregon.gov/LCD/docs/goals/compilation\\_of\\_statewide\\_planning\\_goals.pdf](http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf).

13. See OR. DEP'T LAND CONSERVATION & DEV., <http://www.lcd.state.or.us/> (last visited Oct. 5, 2011) (official website of DLCD). The DLCD provides five areas of service (community services, planning services, ocean and coastal services, Measure 49 development services, and operation services) to cities, counties, and state and federal agencies, and also manages land use coordination programs among twenty five state agencies and administrative departments.

14. See *Land Conservation Development Commission*, OR. DEP'T LAND CONSERVATION & DEV., <http://www.oregon.gov/LCD/lcdc.shtml> (last visited on Oct. 5, 2011).

Oregon cities and counties must adopt comprehensive plans and land use regulations that implement the nineteen goals,<sup>15</sup> and a process of periodic review permits them to update their plans as needed.<sup>16</sup> Local governments amend their plans or regulations during the “post-acknowledgement” process in which DLCD receives advanced notice of any change in a plan or regulation. Notice of the proposed changes is subsequently relayed to any interested parties on a subscription list.<sup>17</sup> Thereafter, DLCD determines if the proposal complies with the state-wide planning goals, and approves or rejects it accordingly.

Judicial review plays an important role in the consistency of Oregon land use planning. Citizens who wish to challenge a local government’s land use action or ordinance must file a petition for review with the Land Use Board of Appeals (“LUBA”).<sup>18</sup> Though LUBA is not a court of law, its three administrative board members have land use expertise, review evidence on the record and issue decisions on matters of local land use regulation within 120 days.<sup>19</sup> Dissatisfied parties may appeal LUBA decisions to the intermediate Oregon Court of Appeals.<sup>20</sup> This process ensures that the parties’ concerns are heard in an expeditious manner, and that decision-making on the local level is made in accordance with existing comprehensive plans.<sup>21</sup>

### B. Discretion, Appeals, and Deadlock Possibilities

While Oregon’s statewide comprehensive planning requirement provides some certainty in the resolution of challenged decisions, a great deal of discretion nonetheless exists at the local level.<sup>22</sup> While their recommendations and decisions must conform to plan policies and regulatory standards, planners and decision-makers have discretion in the interpretation and application of those policies and standards, and may be influenced by the economic interests at stake, the degree to which the

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15. OR. REV. STAT. § 197.175

16. *Id.* § 197.251.

17. *Id.* §§ 197.610-.625.

18. *Id.* § 197.830. See LAND USE BOARD OF APPEALS, <http://www.oregon.gov/LUBA/index.shtml> (last visited Oct. 5, 2011) (official LUBA website); see also Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program 1979-1999*, 36 WILLAMETTE L. REV. 441 (2000).

19. OR. REV. STAT. §§ 197.810-.840.

20. *Id.* § 197.850(3)(a).

21. Oregon requires local government decisions in land use matters to be decided within 120 or 150 days after it determines the application is complete, *id.* §§ 215.427(1), 227.178(1), and for oral argument in the first appellate review to occur within 49 days of the filing of the administrative record and to result in a decision “with the greatest possible expediency,” *id.* §§ 197.850(7), (10).

22. See generally John Forester, *Planning in the Face of Conflict: Negotiation and Mediation Strategies in Local Land Use Regulation*, 53 J. AM. PLAN. ASS’N 303 (1987).

neighborhood opposes a permit application and their relationships with adversarial parties.

Oregon's first statewide planning goal is to promote citizen participation in the planning process. It therefore permits *any* interested citizen to file an appeal, provided that they have participated orally or in writing at some point during the decision-making process.<sup>23</sup> As the common American "standing" doctrine—that in order to file suit, an individual must stand to be injured by the matter at issue<sup>24</sup>—does not apply in the Oregon land use system, individuals and other stakeholders may repeatedly challenge local government decisions. When local governments and opposing parties stake out divergent positions, even if no direct injury is involved, litigation may stretch out for years.<sup>25</sup> ADR provides an opportunity for parties to negotiate mutually agreeable solutions and avoid the expenses of protracted litigation.

### C. Mediation in Oregon—A Real Alternative to Litigation

Oregon state guidelines are designed to encourage the use of mediation and other types of ADR. Oregon's comprehensive mediation<sup>26</sup> and arbitration<sup>27</sup> policies are echoed in many areas of law.<sup>28</sup> Chapter 36 sets

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23. OR. REV. STAT. § 197.830(2).

24. The concept of standing originates in Article III, Section 2 of the U.S. Constitution, which provides that the "judicial power shall extend to all cases . . . [or] controversies. . . ." Section 2 further specifies that purview. U.S. CONST. art III, *Frothingham v. Mellon*, 262 U.S. 447 (1923), is considered the Court's earliest decision interpreting standing requirements. Subsequent case law and statutory provisions have evolved to require that a plaintiff must demonstrate (1) a concrete injury has been or will be suffered, (2) that injury has been caused by the action at the heart of the complaint, and (3) that it is likely that a favorable outcome for the plaintiff will redress the injury. More recently, the U.S. Supreme Court has elaborated upon the standing doctrine in the field of environmental law and heightened the three requirements. See *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Lujan v. Defenders of Wildlife*; 504 U.S. 555 (1992); and *Mass. v. EPA*, 549 U.S. 497 (2007).

25. See, e.g., *Wetherell v. Douglas Cnty.*, No. 2010-053, 2010 WL 3925435 (Or. LUBA Sept. 16, 2010), where LUBA was unable to use its customary legal citation method due to the number of cases the individual petitioner had filed against the respondent county.

26. Under section 36.110(5), "mediation means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated." See also *supra* note 2 (citing general definitions for mediation).

27. Under section 36.110(1), "arbitration means any arbitration whether or not administered by a permanent arbitral institution." Oregon has also adopted the Uniform Arbitration Act in section 36.600-36.740, but does not provide a specific definition of the term. See also *supra* note 3 (citing general definitions for mediation).

28. See generally § 36 (prescribing rules to foster alternative resolutions to legal disputes).

forth a framework for the creation of the Oregon Office for Community Dispute Resolution (“OOCDR”) and its dispute resolution centers,<sup>29</sup> as well as management and funding guidelines to ensure their continued operation.<sup>30</sup> OOCDR serves as an umbrella organization for twenty dispute resolution centers around the state, and is a resource for volunteer training and continuing education for professionals.<sup>31</sup> It provides state-funded grants to train mediators and maintains an online list of center referrals and educational resources on alternative dispute methods. OOCDR and its centers provided mediation services in approximately 10,998 cases between 2007 and 2009, and 86% of these cases were resolved with a 90% satisfaction rate.<sup>32</sup> Nearly 30,000 Oregonians were involved in ADR services through OOCDR during that time.<sup>33</sup> The availability of this resource in land use disputes provides a means to resolve these disputes in a less expensive and efficient manner.

To foster public trust in the use of ADR in Oregon, the Dean of the School of Law of the University of Oregon is charged with overseeing the effectiveness of the subsidiary centers.<sup>34</sup> Though each circuit court charges claimants a dispute resolution fee by law,<sup>35</sup> the revenue collected from such fees are deposited into the state’s general fund.<sup>36</sup> Because those revenues are insufficient to support ADR programs, additional funding must be allocated by the state government’s treasury and appropriated through the University’s overall budget.<sup>37</sup> As a result, they remain dependent upon overall state budget allocations.

All parties must agree to the use of mediation.<sup>38</sup> To encourage participation, trial timelines are stayed in the interim.<sup>39</sup> Legal counsel for each side is prohibited from participating in mediation sessions, except in very limited circumstances.<sup>40</sup> Mediation proceedings are also not confidential unless parties consent in advance to refrain from disclosing the outcome.<sup>41</sup> Different standards apply for participating public and non-

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29. *Id.*

30. §§ 36.145, 36.150, 36.155.

31. *See* OR. OFF. FOR COMMUNITY DIS. RESOL., <http://oocdr.uoregon.edu> (last visited Oct. 5, 2011).

32. OR. OFF. FOR COMMUNITY DISP. RESOL., 2007-2009 BIENNIAL REPORT, *available at* <http://oocdr.uoregon.edu/docs/biennialreport.pdf> (last visited Oct. 5, 2011).

33. *Id.*

34. § 36.160.

35. § 36.400(4).

36. § 21.335.

37. *See* § 36.150 (setting forth the procedures for accepting additional funding).

38. § 36.190(1).

39. § 36.190(3).

40. § 36.195(1).

41. § 36.220.

public agencies due to open records requirements.<sup>42</sup> From the use of this service, it appears that ADR offers credible and viable alternatives to litigation in Oregon. At the very least, ADR provides additional time for the parties to reevaluate their options.

#### D. *Mediation in Oregon Planning Appeals*

Oregon law provides for mediation at each step of a land use appeal.<sup>43</sup> LUBA is required to provide notice to the parties of their right to mediation within 10 days of the filing date of a case.<sup>44</sup> If the decision is appealed to the Court of Appeals, parties are permitted to enter into mediation at any time before the Court issues its final opinion.<sup>45</sup> At the highest level, the Oregon Supreme Court evaluates cases individually to determine if mediation would be effective in settling a dispute.<sup>46</sup>

Created by the Oregon court system in 1995 to provide a confidential settlement opportunity for parties, the Appellate Settlement Conference program applies to land use cases and provides pre-screened parties with a structured mediation process led, for a fee, by a Court of Appeals judge.<sup>47</sup> As of 2010, that fee was set at \$350 for five hours of mediation, and a default rate of \$150 per hour thereafter.<sup>48</sup> To ensure the judge's impartiality, parties are assigned a judge who is not participating in hearing their case.<sup>49</sup> Parties are given a reasonable extension to resolve their dispute in a satisfactory fashion, or the case is reactivated on the court's docket.<sup>50</sup> Successful mediation in such cases prevents the incurrence of further attorneys' fees and other costs.

#### E. *The Consequences of the Lack of ADR in Wide-Area Planning—The Bull Mountain Example*

*Friends of Bull Mountain v. City of Tigard*<sup>51</sup> provides an illustration of the importance of building trust between community members and

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42. §§ 36.226—36.230.

43. § 197.860.

44. § 197.830(10)(b).

45. § 197.860.

46. *See generally* *Mediation of State Court Appellate Cases*, OR. ST. B., [http://www.osbar.org/public/legalinfo/1222\\_MediationStateApp.htm](http://www.osbar.org/public/legalinfo/1222_MediationStateApp.htm) (last visited Oct. 5, 2011) (describing the appellate settlement program).

47. OR. R. APP. P. 15.05, *available at* <http://courts.oregon.gov/COA/settlementprogram/SettlementProgram.page>.

48. Or. Court Order 2010-12 (amending ORAP 15.05(7)). The \$350 figure for five hours of a mediator is easily comparable to one hour of attorney time for one side of the mediation, which demonstrates the economic importance of mediation to the parties.

49. *Id.*

50. OR. REV. STAT. § 197.860.

51. No. 2006-005, 2006 WL 156076351, (Or. LUBA May 25, 2006), *petition for judicial review dismissed*, 144 P.3d 965 (Or. Ct. App. 2006).

elected representatives in land use planning.<sup>52</sup> The City of Tigard had long planned to integrate the rural Bull Mountain neighborhood into its boundaries.<sup>53</sup> In 2001, Tigard and Washington County convened a focus group of Bull Mountain residents to survey their concerns regarding the annexation process.<sup>54</sup> Citizens' responses were incorporated into *The Bull Mountain Annexation Study*,<sup>55</sup> a planning document that was to guide the process. An issue foreshadowing the acrimony that would develop between the parties was buried in the study: when asked how Tigard would identify what Bull Mountain residents wanted, the city replied that that annexation was subject solely to the City Council's discretion.<sup>56</sup>

In 2003, the Tigard City Council unanimously approved a resolution to bring Bull Mountain's 1,378 acres within Tigard city limits over a period of several years.<sup>57</sup> Under Oregon law, such annexations are subject to a public vote. The City planned to use the single majority vote<sup>58</sup> to govern the process so that the votes of Tigard and Bull Mountain residents would be counted together. Partially because the number of Tigard voters was much greater, the Bull Mountain community was overwhelmingly unreceptive to Tigard's annexation plan, considering it a "hostile takeover."<sup>59</sup> When it realized the misconception of the plan by local residents, the City postponed the vote until further public comment could be solicited.<sup>60</sup> While the City's analysis had focused on taxes, growth, police numbers, and sewer hookups, citizens were primarily concerned with parks, libraries, and the plan's effect on their neighborhood school districts.<sup>61</sup>

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52. *Friends of Bull Mountain v. City of Tigard*, 144 P.3d 965, 965 (Or. Ct. App. 2006).

53. *Id.*

54. CITY OF TIGARD, THE BULL MOUNTAIN ANNEXATION PLAN (November 17, 2003), available at [http://www.tigard-or.gov/city\\_hall/city\\_council/docs/packets/031202Packet.pdf](http://www.tigard-or.gov/city_hall/city_council/docs/packets/031202Packet.pdf) (Exhibit "A").

55. *Id.*

56. Minutes from Tigard City Council Meeting (September 9, 2003), available at [http://www.tigard-or.gov/city\\_hall/city\\_council/docs/minutes/030909Minutes.pdf](http://www.tigard-or.gov/city_hall/city_council/docs/minutes/030909Minutes.pdf).

57. See generally OR. REV. STAT. § 195.205 (2009) (describing the process required by cities or districts to submit an annexation plan to vote).

58. Minutes from Tigard City Council Meeting (December 12, 2003), available at [http://www.tigard-or.gov/city\\_hall/city\\_council/docs/minutes/031202Minutes.pdf](http://www.tigard-or.gov/city_hall/city_council/docs/minutes/031202Minutes.pdf).

59. *Id.*

60. *Id.*

61. Memorandum on Bull Mountain Annexation Plan Public Hearing Testimony from Jim Hendryx, Cmty. Dev. Dir., to Mayor and City Council (Aug. 3, 2004), available at [http://www.tigard-or.gov/city\\_hall/city\\_council/docs/packets/bull\\_mtn\\_testimony.pdf](http://www.tigard-or.gov/city_hall/city_council/docs/packets/bull_mtn_testimony.pdf).



Five-hundred seventy-eight pages of largely negative public comment faced the City Council when it reconvened some months later.<sup>62</sup> The city decided instead to pursue the vote under an alternative, double-majority process.<sup>63</sup> Bull Mountain residents rejected the annexation plan in November 2004, with 88.62% voting against the ballot measure.<sup>64</sup> Their “no” vote negated the “yes” vote of Tigard residents, and brought Tigard’s years of large-scale annexation planning to an end.

Due to the lack of trust and communication between the parties in this process, today Bull Mountain property owners must still individually apply for plot annexation in order to be incorporated into Tigard.<sup>65</sup> With ADR procedures in place, the shared interests between Bull Mountain residents and city government—well-maintained streets, safe neighborhoods, and orderly growth, among others—may have led to a more satisfactory resolution and long term planning solution. There is currently no plan to re-attempt a large scale annexation of the Bull Mountain area. Perhaps a future crisis, such as a permit approval or lack of public facilities or services, will trigger the next conflict resolution opportunity.

#### F. *ADR and Administrative Litigation in Oregon Water Law*

Like land, water is also closely regulated in Oregon. A water use permit is legally enforceable once granted, and litigation over this finite resource can be costly. Moreover, the availability of water significantly affects the use of land in numerous areas of Oregon. ADR has been integrated into water management in Oregon: first, at the individual water right application level,<sup>66</sup> and second, at the state administrative agency level between the Water Resources Department (the “Department”) and other land use agencies and local governments.<sup>67</sup> If ADR is

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62. OR. REV. STAT. § 222.170(2). This process allows for annexation without an election if a majority of electors and the owners of more than one-half of the property owners in the area proposed for annexation consent in writing to the annexation.

63. Minutes from Tigard City Council Meeting (December 12, 2003), available at [http://www.tigard-or.gov/city\\_hall/city\\_council/docs/minutes/031202Minutes.pdf](http://www.tigard-or.gov/city_hall/city_council/docs/minutes/031202Minutes.pdf).

64. OR. REV. STAT. §§ 222.120(4)(b), 222.125, 222.170.1.

65. See generally OR. ADMIN. R. 690-310-0000 through 690-310-0280 (2011) (discussing standards to be applied when evaluating applications for a permit to appropriate surface water, ground water, and construction of reservoirs).

66. See generally OR. ADMIN. R. 690-005-0010 through 690-005-0060 (2011) (stating policies and procedures for assuring compliance with state standards, including informing departments of local activities and issues, periodic reviews of project proposals and compiling water resources data and studies). The official website for the Oregon Department of Water Resources may be found at <http://www.wrd.state.or.us/>.

67. OR. ADMIN. R. 690-310-0040 (2011).

unsuccessful, then one may resort to administrative litigation through contested case procedures.

Each individual application for a new water use permit is evaluated on a case-by-case basis. Once an application is submitted,<sup>68</sup> the Department makes a preliminary evaluation of the application's lawfulness and disseminates notice of the application to the public. The Department then appraises the application's potential effect on the public interest,<sup>69</sup> and if approved, the Department will issue a final order granting the permit within 60 days of the initial application.

When neighbors and other stakeholders challenge the permit application during this process, Oregon's ADR processes are indispensable. If a permit is contested during the public notice period, the Department takes those comments into account in issuing its proposed final order.<sup>70</sup> Stakeholders may challenge the order during this time by paying a fee and filing a written protest with the Department.<sup>71</sup> The Department will review any new materials and issue a new final order, or will schedule a contested case hearing.<sup>72</sup> Thereafter, a Department hearings officer assigned to the case oversees the proceedings and issues a final order. Provided that the order does not differ considerably from the previously proposed final order and that agency objections are not filed,<sup>73</sup> a decision on the permit application is made within 180 days of initial application.<sup>74</sup> The Department's role in employing an efficient and impartial hearings officer (who acts like a judge) in this capacity is paramount to sparing the applicant and opposing parties the time and expense of litigation, particularly given the importance of water to new development and industry.

Where two areas are so heavily regulated, conflicts are also bound to arise in statewide policy and resource management. At the state administrative agency level, Oregon law provides for cooperative information sharing between local governments, the Water Resources Commission and the Department so that inconsistencies in agency action are identified early on. Under Oregon's land use planning program, water management practices must yield, as long as water resources remain

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68. *Id.* 690-310-0120.

69. *Id.* 690-310-0120(3)(a) and (4).

70. *Id.* 690-310-0160.

71. *Id.* 690-310-0170.

72. *Id.* 690-002-0175.

73. *See generally* OR. ADMIN. R. 690-310-0200 through 690-310-0230 (2011) (documenting the process by which a contested case may be protested once the Director initially rejects the proposal).

74. *Id.* 690-005-0020; OR. REV. STAT. § 536.360 (2009).

unaffected, to state-acknowledged local comprehensive plans to the maximum extent possible.<sup>75</sup> When conflicts arise, Oregon law provides for the ADR process described above.<sup>76</sup> In a process close to mediation, each side's position is first reviewed, and Department representatives must explain to stakeholders at the local governmental level the reasons for water use approvals or policies that seemingly conflict with land use policies to explore alternatives. Stakeholders then exchange information on comprehensive plans and regulations to explore the inconsistencies in detail. The Department is directed to modify its action or select an alternative plan of action to avoid conflict.

When those measures are insufficient, the Department may "request LCDC mediation or enforcement."<sup>77</sup> Alternatively, the Commission may step in and choose a different route, including a plan of no action. If these measures fail to resolve the discrepancy between the two areas of interest, the conflict is ultimately resolved through a variety of options, including a local government's amending its comprehensive plan.<sup>78</sup> This detailed and flexible dispute resolution policy is particularly important as water rights are tied to economic activity, and Oregon's approach brings confidence and more certainty to the intersections between its management of water and land use policies.

#### G. *Negotiation in Facility Siting—Mt. Hood Meadows Resort Expansion*

Mount Hood is a dormant volcano that rises more than 11,000 feet above sea level near the Portland metropolitan area. Numerous environmental groups aim to protect its National Forest from encroaching development. In 2001, when Meadows North, LLC, an operator of an existing nearby ski resort, purchased lease rights to the Cooper Spur Ski Area and nearby inn, these groups resorted to litigation in an effort to halt new development. However, by 2006, the stakeholders in this case recognized the futility in endless litigation, and were able to strike a balance between residents' concerns and the corporation's economic interests.

The Cooper Spur area pre-dates 1973, when a statewide land use system was established, affording the company an opportunity to build new

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75. OR. ADMIN. R. 690-005-0040.

76. *Id.* 690-005-0040(7)(a).

77. *Id.* 690-005-0040(7). At this point, there has been no outcome that has involved a plan amendment.

78. Kristian Foden-Vencil, *Concerns Over Possible Expansion at Mt. Hood Meadows*, OR. PUB. BROADCASTING (Dec. 6, 2001), available at <http://www.cooperspur.org/documents/press/OPB20011206.pdf>.

condos and overnight housing developments there.<sup>79</sup> Between 2001 and 2002, the company sought to build a 450-unit development, expand ski trails, and provide year-round destination resort amenities such as a golf course, shops, and boutiques.<sup>80</sup> In order to develop the area further, the company negotiated a land swap with Hood River County to provide it with more buildable land at the Cooper Spur site,<sup>81</sup> and the county paid \$1 million for the difference in the value of Meadows North's acreage. Concerned that development would encroach upon the region's watershed and cause damage to its drinking water quality, local residents formed the "Hood River Valley Residents Committee, Inc." When discussions between the group and company were unfruitful, the group sued to challenge the valuation of the swap and block the exchange.<sup>82</sup>

Litigation failed to provide either side with the relief they sought. The developer wanted to construct their development at Cooper Spur immediately, but the Residents Committee was successful in preventing that from happening. A stalemate arose. The parties agreed to appraise the properties, undergo a new public process, and make concessions on either side in a process termed "Clean Sweep."<sup>83</sup> After several years of negotiations, U.S. Senator Ron Wyden and U.S. Representative Earl Blumenauer facilitated a new land exchange proposal that would trade approximately 120 acres in the Mt. Hood National Forest for the 769-acre Cooper Spur property.<sup>84</sup> In 2009, the Mt. Hood National Wilderness bill providing for this exchange passed the U.S. Senate and became law. The next steps in arranging the trade are expected to follow in 2012. The Cooper Spur example is a rare, but excellent, example of the use of negotiation for facility siting in Oregon.

### III. ADR in Land Use Planning in England

The use of ADR has been relatively slow in England. A study of the mediation pilot at the Central London County Court indicates that in only

79. RaeLynn Gill, *County challenged over Meadows timber trade*, HOOD RIVER NEWS (Mar. 6, 2002), available at <http://crag.org/content/news/mh20020306.pdf>.

80. *Id.*

81. Hood River Valley Residents' Comm. v. Bd. of Cnty. Comm'rs of Hood River Cnty., 91 P.3d 748 (Or. Ct. App. 2004).

82. Pamphlet, Cooper Spur Wild and Free Coalition (Oct. 26, 2010), available at <http://crag.org/wp-content/uploads/2010/11/Cooper-Spur-Opening-Document.pdf>.

83. Meeting Notice for Mt. Hood National Forest, Or.; Cooper Spur-Gov't Camp Land Exchange, 75 Fed. Reg. 197 (October 13, 2010), available at <http://www.federalregister.gov/articles/2010/10/13/2010-25698/mt-hood-national-forest-oregon-cooper-spur-government-camp-land-exchange>.

84. H. GENN, CENTRAL LONDON COUNTY COURT MEDIATION PILOT: EVALUATION REPORT, LCD RESEARCH SERIES 15 (1998).

five percent of cases did the parties agree to mediate.<sup>85</sup> The main reasons of this phenomenon are lack of experience in this field by lawyers, fear of showing weakness by accepting ADR, and resistance to the idea of compromise.<sup>86</sup> Public awareness of ADR is also low.<sup>87</sup> This section explores the slower adoption of ADR in land use planning in England.

A. *Background—The Evolution of Town and Country Planning in England*

1. TOWN AND COUNTRY PLANNING ACT OF 1947

Before 1947, the use of land and development in England was largely uncontrolled by the central government.<sup>88</sup> In 1947, the Town and Country Planning Act was enacted, providing the first framework for the control of development and land uses.<sup>89</sup> This Act introduced a system for land use planning and since then—with some specific exceptions—no land owner has been entitled to carry out any development without first obtaining the necessary planning permission. This early legislation has evolved over the last fifty years into a complex web of inter-related laws and policy guidance that today provide a comprehensive framework for the assessment of development in virtually every context.<sup>90</sup>

2. TOWN AND COUNTRY PLANNING ACT 1990 AND ITS REVISIONS

a. Planning and Compensation Act 1991 and Planning and Compensation Act 2004

The most recent legislation is encapsulated within the Town and Country Planning Act 1990,<sup>91</sup> as amended by the Planning and Compensation Act 1991,<sup>92</sup> and updated by the Planning and Compulsory Purchase Act

85. *Id.*

86. A survey on public awareness of various ADR schemes concluded that one quarter of the population had not heard of any of the schemes: Lord Chancellor's Department, *Alternative Dispute Resolution: Discussion Paper*, para. 5.8, (Nov. 1999), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/civ-just/adr/indexfr.htm>.

87. Some legislation was in place including the first Housing and Town Planning Act 1909, which had been followed by the Housing and Town Planning Act 1919, Town Planning Act 1925, and Town and Country Planning Act 1932.

88. Town & Country Act, 1947, 10 & 11 Geo. 6, c. 51 (Eng.).

89. The Town and Country Planning Acts, 1971 & 1972, c. 78 (Eng.) amended by Land Compensation Act, 1973, c. 26 (Eng.) amended by Local Government Act, 1972, c. 70 (Eng.).

90. Town and Country Planning Act, 1990, c. 8 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1990/8/contents>.

91. Planning and Compensation Act, 1991, c. 34 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1991/34/contents>.

92. Planning and Compulsory Purchase Act, 2004, c. 5 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2004/5/contents>.

2004.<sup>93</sup> These Acts are supported by a range of detailed planning policy guidance notes (“PPG’s”) and Statements (“PPS’s”), dealing with specific issues such as the Green Belt (PPG.2), Housing (PPS.3) or Flood Risk (PPS.25).<sup>94</sup> Individual aspects of planning law are also explained more fully in Government Circulars and are subject to specific Rules and Orders. The General Permitted Development Order (“GPDO”) 1995 is one such order, which deals with forms of development that do not necessarily require planning permission.<sup>95</sup>

b. Town and Country Planning (General Permitted Development) Order 1995

The GDPO 1995 sets out what is “permitted development,” that is, what may be built without obtaining planning permission.<sup>96</sup> The Order sets out eighty-four separate classes of development for which a grant of planning permission is not required (permission is deemed granted). These are spread across thirty-three parts as set out in Schedule 2 to the Order. The Order also sets out a number of broad categories of permitted development, and it applies to each of these a more detailed definition and exceptions to the broad permission.

c. Planning and Compulsory Purchase Act 2004

The Planning and Compulsory Purchase Act 2004 substantially reforms the town planning and compulsory purchase framework in England. It both amends and repeals significant parts of the existing planning and compulsory purchase legislation in force at the time, including the Town and Country Planning Act 1990, and introduces reforms such as the abolition of “local plans” and “structure plans,” and their replacement with “local development frameworks.”

3. OTHER RELEVANT PLANNING ACTS

a. Planning (Listed Buildings and Conservation Areas) Act 1990

The Planning (Listed Buildings and Conservation Areas) Act 1990 altered the laws on granting planning permission for building works,

93. For a comprehensive list of current policy and guidance documents related to the operation of the Town and Country Planning Act 1990, see *Current Policy and Guidance*, PLANNING PORTAL, <http://www.planningportal.gov.uk/planning/planningpolicyandlegislation/currentenglishpolicy> (last visited Oct. 23, 2011).

94. The Town and Country Planning (General Permitted Development) Order, 1995, No. 418 (Eng.), available at <http://www.legislation.gov.uk/ukxi/1995/418/contents/made>.

95. *Id.*

96. Planning (Listed Buildings and Conservation Areas) Act, 1990, c. 9 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1990/9/contents>.

notably including those of the listed building system.<sup>97</sup> The Planning (Listed Buildings and Conservations Areas) (Amendment No. 2) (England) Regulations 2009 amend The Planning (Listed Buildings and Conservations Areas) (England) Regulations 1990. By substituting Schedule 4 of the 1990 Regulations (notices that a building has become listed or that a building has ceased to be listed), the amended regulation reflects the fact that English Heritage (a nonprofit organization) now compiles lists of buildings of special architectural or historic interest, and the Secretary of State is responsible for approving them.<sup>98</sup>

b. Planning (Hazardous Substances) Act 1990

The Planning (Hazardous Substances) Act 1990 consolidates certain enactments relating to special controls with respect to hazardous substances and certain amendments to give effect to recommendations of the Law Commission.<sup>99</sup>

c. Planning (Consequential Provisions) Act 1990

The Planning (Consequential Provisions) Act 1990 makes provision for repeals, consequential amendments, transitional and transitory matters, and savings in connection with the consolidation of enactments in the Town and Country Planning Act 1990. The Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990 and the Planning (Hazardous Substances) Act 1990 (including provisions to give effect to recommendations of the Law Commission) resulted.<sup>100</sup>

## B. Appeals

### 1. THE PLANNING INSPECTORATE: PROCESSING OF PLANNING AND ENFORCEMENT APPEALS

a. The Planning Inspectorate

The Planning Inspectorate is a joint Executive Agency of the Department for Communities and Local Government and the Welsh Assembly Government.<sup>101</sup> It reports to the Secretary of State for Communities

97. The Planning (Listed Buildings and Conservation Areas) (Amendment No.2) (England) Regulations, 2009, No. 2711 (Eng.), available at: <http://www.legislation.gov.uk/uksi/2009/2711/contents/made>

98. Planning (Hazardous Substances) Act, 1990, c. 10 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1990/10/contents>.

99. Planning (Consequential Provisions) Act, 1990, c. 11 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1990/11/contents>.

100. Planning Portal (Planning Inspectorate), <http://www.planningportal.gov.uk/planning/appeals/planninginspectorate> (last visited Oct. 5, 2011).

101. See, e.g., PLANNING INSPECTORATE, ANNUAL REPORT AND ACCOUNTS 2009/10 (July 14, 2010), available at <http://www.official-documents.gov.uk/document/hc1011/hc01/0146/0146.pdf>.

and Local Government and the Welsh Assembly Government under the terms of a Framework Document.<sup>102</sup> It serves the Department for Communities and Local Government (“CLG”)<sup>103</sup> and the Welsh Assembly Government<sup>104</sup> by dealing with Local Development Frameworks in England and Local Development Plans in Wales as well as other casework under planning, housing, environment and allied legislation. It also carries out similar work for other government departments, particularly the Department for Environment, Food and Rural Affairs (“DEFRA”) on access, rights of way and environmental appeals,<sup>105</sup> and the Department for Transport (“DOT”) on highway orders and related work.<sup>106</sup>

The Planning Inspectorate processes planning and enforcement appeals, and holds examinations of development plan documents.<sup>107</sup> The Inspectorate also deals with a wide variety of other planning-related casework including listed building consent appeals and advertisement appeals.<sup>108</sup> The Planning Inspectorate has achieved performance targets, which include deciding eighty percent of written representation appeals within eighteen weeks.<sup>109</sup>

#### b. Planning Inspectors

In England, an applicant may appeal against a refusal of planning permission to the Secretary of State for Communities and Local Government. Such appeals are heard by planning inspectors, who are appointed by the Secretary of State. They are said to stand in the shoes of the Secretary of State, and are given power to determine the appeals, which primarily involve challenges to refusals of local planning authorities to

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102. DEP’T FOR COMMUNITIES & LOCAL GOV’T, <http://www.communities.gov.uk/corporate/> (last visited Oct. 5, 2011).

103. WELSH GOV’T, <http://wales.gov.uk/?lang=en> (last visited Oct. 5, 2011).

104. DEP’T FOR ENV’T, FOOD & RURAL AFFAIRS, <http://ww2.defra.gov.uk/> (last visited Oct. 5, 2011).

105. DEP’T FOR TRANSP., <http://www.dft.gov.uk/> (last visited Oct. 5, 2011).

106. *What We Do*, PLANNING INSPECTORATE, [http://www.planning-inspectorate.gov.uk/pins/statement\\_purpose/02\\_what\\_we\\_do.htm](http://www.planning-inspectorate.gov.uk/pins/statement_purpose/02_what_we_do.htm) (last visited Oct 5, 2011).

107. *Id.*

108. Barry Cullingworth & Vincent Nadin, *TOWN AND COUNTRY PLANNING IN THE UK* 46 (14th ed. 2006).

109. Town and Country Planning Act, 1990, c. 8, sch. 6 (Eng.); *see also* Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations, 1997, No. 420 (Eng.).



grant planning permission.<sup>110</sup> They also have the power to hear enforcement action appeals.<sup>111</sup>

## 2. LOCAL AUTHORITY OMBUDSMAN

Neighbors who object to an application for the granting of a planning permission have no right to appeal to a planning inspector. They can, however, file an appeal with the local authority ombudsman if they can make a case of maladministration by the local authority.<sup>112</sup> In such a case, the ombudsman has no power to enforce a retraction of the permission, but it may sanction the local authority.

### C. *ADR in England*

Beginning as early as 1996, mediation has been used as a form of ADR within the planning system in England, particularly in relation to appeals.<sup>113</sup> The English legal system has taken small steps towards starting to embrace ADR processes. Nevertheless, calls for greater use of ADR in land use planning have frequently been made.

#### 1. GREEN PAPER ON THE REFORM OF THE PLANNING SYSTEM RECOMMENDATIONS (2001)

A 2001 Green Paper on the Reform of the Planning System constituted an early effort to introduce mediation in the planning system. As a fundamental part of the planning system, it recommended that public involvement be encouraged, as well as experiments with mediation to resolve objections during the planning process. It asserted that there is a spectrum within participatory planning, such as negotiation,<sup>114</sup>

110. It should be noted that enforcement action can only be taken in respect of a defined breach of planning control which is under the terms of Town & Country Planning Act, 1990, §171A (Eng.) either:

(A) the carrying out of development without the required Planning Permission; or  
(B) the failing to comply with any condition or limitation subject to which Planning Permission was granted. It should be noted that enforcement action is defined in Section 171A(2) as:

A. The issue of an Enforcement Notice under Section 172 of the 1990 Act; or  
B. The service of a Breach of Condition Notice under Section 187A of the Town & Country Planning Act 1990.

111. See *Making a Complaint*, LOCAL GOV'T OMBUDSMAN, <http://www.lgo.org.uk/making-a-complaint/> (last visited Oct. 5, 2011).

112. LEONORA ROZEE & KAY POWELL, *MEDIATION IN PLANNING: REPORT COMMISSIONED BY THE NAT'L PLANNING FORUM & THE PLANNING INSPECTORATE* 7 para. 1.14 (2010).

113. DEP'T OF TRANSP., LOCAL GOV'T, AND THE REGIONS, *GREEN PAPER* 46 para. 5.68 (2001).

114. *Id.* at 51.

pre-mediation (planning authority-led, seeking to resolve potential disputes between other parties to reach agreements that can be built into the plan), and mediation by a neutral third party when the planning authority is a party to the dispute.<sup>115</sup>

## 2. TREND TOWARDS ADOPTION OF ADR PROCESSES IN ENGLAND

England has taken a few steps towards adopting ADR processes that demonstrate the value of mediation. The 2004 Planning and Compulsory Purchase Act focuses on early and effective community engagement in both plan-making and decisions on planning applications, and the 2008 Planning Act provides a new regime for major infrastructure projects. These acts emphasize effective pre-application processes as the key to achieving the efficient examination of major schemes.<sup>116</sup> In 2010, the Coalition Government suggested that a more consensual process, including the use of mediation where appropriate, would assist in the delivery of a more locally focused and effective planning system.<sup>117</sup> Nevertheless, formal dispute resolution technique mediation is not yet embedded in the English planning system.

## 3. MEDIATION IN PLANNING REPORT COMMISSIONED BY THE NATIONAL PLANNING FORUM AND THE PLANNING INSPECTORATE (JUNE 2010)

The Mediation in Planning Report, which was commissioned by the National Planning Forum and Planning Inspectorate (June 2010) examined the following issues:

- a. How should mediation in planning be defined—what should it embrace?

The Report defined mediation as “a process involving an independent third party, whose role is to help parties to identify the real issues between them, their concerns and needs, the options for resolving matters and, where possible, a solution acceptable to all concerned.”<sup>118</sup> Simply stated: “Mediation is a flexible method of achieving consensus in the planning system such that the outcome of any mediation is reached by the parties themselves with the help of an independent mediator.”<sup>119</sup>

115. See ROZEE & POWELL, *supra* note 111, at 7-8 para. 1.16.

116. See generally Elizabeth II, Her Majesty the Queen, 2010 Queen’s Speech (May 25, 2010) (referring to the proposed Decentralization and Localism Bill which focused on localism and empowering communities to take more responsibility for the planning issues in their area).

117. ROZEE & POWELL, *supra* note 111, at 20 para. 4.3.

118. *Id.*

119. *Id.* at 20 para. 4.4.

Four critical elements should be embraced by mediation in planning.<sup>120</sup> First, the defining characteristic of mediation is that it aims to resolve disputes in a timely manner and in a way that encourages mutual understanding and recognition of the interests of participants and confidence in the outcome. Second, the defining quality of a mediator is independence or neutrality; that is, having no personal interest in the case or the outcome of the dispute. Third, the defining requirement for the parties is willingness to enter mediation. Fourth, the defining factor in planning is the statutory process that allows for democratic decision-making, inclusion, and transparency.

- b. What service might the mediator be asked to provide?

Mediation is most often ‘facilitative,’ where the parties formulate their own propositions, but can sometimes be ‘evaluative,’ where the mediator is asked by the participants to use expertise to offer neutral views to the parties at the same time.<sup>121</sup> However, the real benefit of either approach is that it is a flexible tool that can be adapted to suit the circumstances of a case and the needs of the parties. Additionally, an essentially facilitative approach will usually require the mediator to offer neutral evaluations to the parties.

- c. In what ways could mediation in planning be funded?

With potential savings to the public and private purse, mediation in planning provides a cost-effective alternative to the formal appeal process or to litigation.<sup>122</sup> The report suggests that in planning appeals the parties involved normally meet their own expenses.<sup>123</sup> Other potential ways of funding are identified: public subsidy, either directly or via a special mediation body; single party payment (e.g., a developer, or LPA, or objector); payment by all parties where each funds, with exceptions for the disadvantaged parties’ ‘payment’ by non-cash means, such as providing the venue, giving professional time, and the creation of a ‘mediation fund’ from a system of penalty payments when parties are unwilling to use mediation (e.g., through changes to the costs regime).<sup>124</sup>

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120. *Id.* at 20-21 para. 4.6.

121. *Id.* at 22-23 para. 4.14.

122. *Id.*, at 23 para. 4.15.

123. ROZEE & POWELL, *supra* note 111, at 23 para. 4.16.

124. *Id.* at 24-26 paras. 4.19-27.

- d. With regard to the evidence collected and to the evaluation report, what factors encourage or inhibit the potential use of mediation in planning?

Factors that could inhibit the potential use of mediation in planning are: the lack of awareness of the mediation process, the differing definitions of terms when individuals have specialized knowledge or work in different professions, poor skills in inter-personal communication or negotiation, lack of diversity (including gender imbalance), the relatively low number of mediators, the lack of a system of appropriate support to cases, and finally the lack of a mechanism for funding the process.<sup>125</sup>

Factors that encourage the potential use of mediation in planning are the successful use of alternative dispute resolution techniques in civil and administrative law, a greater desire to find more cost-effective means of dispute resolution, and finding a good fit with the spatial planning system and with the localism agenda.<sup>126</sup>

- e. Recommendation for adoption of ADR in land use planning

This report concludes that mediation provides an effective tool to tackle a wide range of planning issues.<sup>127</sup> It recommends that mediation be strongly encouraged by Government by providing a policy framework, creating capacity to allow its benefits to be realized, and establishing an appropriate regime of incentives and penalties to support the delivery of this new approach to planning.<sup>128</sup> The report concludes that requiring parties to consider mediation in planning disputes, as is the case in the American civil justice system, is a sensible approach.<sup>129</sup>

#### IV. Evaluating the Two Approaches

##### A. Evaluation

1. GREEN PAPER ON THE REFORM OF THE PLANNING SYSTEM RECOMMENDATIONS (2001)—THE OREGON CONTRAST

ADR in Oregon benefits from several distinct advantages over the system in England: supportive legislation, a reputation for success, and

125. *Id.* at 27-28 paras. 4.29-4.31.

126. *Id.* at 3.

127. *Id.*

128. *Id.*

129. The State of Oregon has authorized state agencies to establish alternative methods of dispute resolution by arbitration, mediation "or any other collaborative problem-solving process designed to encourage parties to work together to develop mutually agreeable solutions to disputes." OR. REV. STAT. § 183.502(1) (2011).

skilled, readily available facilitators.<sup>130</sup> As evidenced by the ADR procedures provided for in civil, criminal, and natural resource disputes,<sup>131</sup> mediation and arbitration are recognized as important components of dispute resolution between parties. Although the incorporation of these alternatives is still comparatively new,<sup>132</sup> ADR has nonetheless been a proven success in resolving land use disputes in Oregon.<sup>133</sup> The cadre of professional mediators is equally central to its success in the building of trust and respect between the parties in dispute. Oregon is exceptionally fortunate to have a number of experienced former judges and professionally-trained experts who can lend their expertise to such situations.<sup>134</sup>

Even so, ADR in Oregon faces many difficulties. First, due to the statute legislature's framework for OOCDR funding, ADR processes are under-supported and underleveraged in Oregon. While OOCDR's survey estimated that 10,000 individuals are served by its programs each year,<sup>135</sup> this is only 0.002 percent of the state's overall population.<sup>136</sup> In contrast, 610,334 cases were filed in the Oregon court system in 2008.<sup>137</sup> With improved funding, many more parties might have access to mediation services. Second, litigation remains the first recourse for wealthy or obdurate individuals and parties. Finally, when non-binding ADR is unsuccessful in resolving a dispute, the time and financial cost of its failure may be great. The price of mediation is comparatively much less than that of litigation,<sup>138</sup> but if individuals must

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130. See *supra* Sections II.C, II.D, and II.F.

131. The Oregon program mentioned in *supra* note 128 has been in operation since 1993. See OR. REV. STAT. § 183.502 (2011). The program involves the use of state employee mediators, who are specially trained in ADR, and a host of forms and evaluation methods. See *Appropriate Dispute Resolution*, OR. DEP'T JUSTICE, <http://www.doj.state.or.us/adr/adr10.shtml> (last visited Oct. 23, 2011).

132. Jonathan Davidson & Susan Trevarthan, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705, 708 (2001).

133. More than 350 registered mediators are available in Oregon. The Oregon Mediation Association permits one to search by language spoken, geographic area, subject material, or type of services requested. See OR. MEDIATION ASS'N, <http://www.omediate.org/> (last visited Oct. 23, 2011).

134. See *supra* note 32.

135. In 2008, Oregon's population survey indicated that there were 3,784,821 persons residing in the state. OR. PROGRESS BD., 2008 OR. POPULATION SURVEY (2008), *available at* [http://www.oregon.gov/DAS/OPB/popsurvey.shtml#2008\\_Oregon\\_Population\\_Survey](http://www.oregon.gov/DAS/OPB/popsurvey.shtml#2008_Oregon_Population_Survey).

136. Oregon Judicial Department, *2008 State of the Oregon Courts*, *available at* [http://courts.oregon.gov/OJD/docs/OSCA/2008\\_Oregon\\_Annual\\_Report.pdf](http://courts.oregon.gov/OJD/docs/OSCA/2008_Oregon_Annual_Report.pdf).

137. See OR. R. APP. P. 15.05, *available at* <http://courts.oregon.gov/COA/settlementprogram/SettlementProgram.page>.

138. LAWRENCE SUSSKIND ET AL., *MEDIATING LAND USE DISPUTES: PROS AND CONS*, LINCOLN INST. LAND POL'Y 13 (2000), *available at* [https://www.lincolninst.edu/pubs/dl/46\\_Mediating%20Land%20Use%20Disputes%20PF009.pdf](https://www.lincolninst.edu/pubs/dl/46_Mediating%20Land%20Use%20Disputes%20PF009.pdf).

resume or resort to litigation, the delay in the resolution of the dispute may carry a much higher cost.<sup>139</sup>

## 2. THE REFORMED ENGLISH SYSTEM

In contrast, ADR in England is valued more for its greater emphasis on confidentiality,<sup>140</sup> especially where parties are concerned about the effect the dispute may have on its business or personal reputation and financial bottom line. Nevertheless, the outcome from any mediation has to proceed through the statutory planning system, which requires disclosure of any matter relevant to the decision. This, however, does not prevent the mediator from having private meetings with the parties in dispute, which remain private and confidential.<sup>141</sup>

The amount of time that litigation takes up only serves to emphasize the attractiveness of ADR as an alternative. For example, a complex mineral case involving the Green Belt, which was due to be heard at a three-week planning inquiry and was also the subject of an interim injunction due to be considered by the Court of Appeal, was successfully mediated in two days leading to the inquiry being called off and the saving of “a massive amount of management time.”<sup>142</sup>

Mediation is also cost-effective. The Jackson Report on the “Review of Civil Litigation Costs” argues that ADR has a vital role to play in reducing the costs of civil disputes.<sup>143</sup> ADR, particularly mediation, is a tool that can be used to reduce costs.<sup>144</sup>

Furthermore, ADR contributes to the building of trust between or among the parties in dispute.<sup>145</sup> Efficient decision-making is facilitated when trust exists between developers and local planning authorities, citizens and ‘experts,’ elected members and officials.<sup>146</sup> Mediation is based on cooperation, and offers parties the opportunity to build trust among them.

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139. Edward J. Costello, Jr., *To Mediate or Not to Mediate*, 1 *ARB. & DISP. RESOL. L.J.* (U.K.) 25, 27 (1998).

140. ROZEE & POWELL, *supra* note 111, at 10 para. 2.6.

141. Henry Brooke, *Mediation and Planning: The Role of Mediation in Planning and Environmental Disputes*, 10 *J. PLAN. & ENVTL. L.* 1390, 1406 (2008).

142. RUPERT JACKSON, *REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT* (Dec. 2009), xxii para. 6.3 (2010), available at <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>.

143. *Id.* at 355 para. 1.3.

144. Lucie Laurian, *Trust in Planning: Theoretical and Practical Consideration for Participatory and Deliberative Planning*, 10 *PLAN. THEORY & PRAC.* 369 (Sept. 2009).

145. ROZEE & POWELL, *supra* note 111, at 8 para. 1.17.

146. The rules of “standard disclosure” apply in the majority of English civil cases. See *Disclosure and Inspection of Documents*, *CIV. P. R.* 1998, pt 31, r. 311-320, available at <http://www.legislation.gov.uk/uksi/1998/3132/contents/made>.

Conversely, ADR is not always the ideal solution to all disputes. If a party wishes to publicize the dispute, or is interested in setting a new precedent, litigation remains the primary avenue through which these goals can be accomplished. Likewise, where the full discovery and disclosure of information in one party's possession is required to resolve a conflict, only litigation can provide an absolute mechanism through which that information can be obtained.<sup>147</sup> ADR should not be undertaken in every possible case, but it should have a significantly greater role to play in the English legal system than is currently recognized.

### B. *Lessons Learned: Reform Proposals*

#### 1. AMELIORATING THE OREGON SYSTEM

If the use of ADR in Oregon is to expand, it is essential that its funding mechanisms be improved. As this paper described in Section II.C, funding is partially dependent upon state budget allocations. Currently, Oregon faces an estimated \$3.2 billion deficit in its next two-year budget due to the recession,<sup>148</sup> and the future of many programs remains uncertain.<sup>149</sup> This situation must be rectified if OOCDR's resources are to continue to expand.

Second, litigation continues to be the primary method of resolving disputes in the U.S., in part because of the "American Rule" for attorney fees which rarely allows the prevailing party to recover the cost of its attorneys' fees from the opposing side. Alternatives should be explored to equally incentivize the use of ADR, without detracting from its foundation in mutual cost-and information-sharing.

Finally, the value of the ADR profession's services should be more widely recognized and respected. Though practitioners' rates may vary, the fees of an ADR professional are far less than a comparable attorney's hourly rate.<sup>150</sup> In a profession that is largely built on the notion that "time is money,"<sup>151</sup> a lawyer might view the efficiency that ADR provides to be economically harmful. Instead of viewing ADR as

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147. Harry Esteve & Michelle Cole, *Hard choices: Something must give in Oregon's budget*, OREGONIAN, Sept. 25, 2010, available at [http://www.oregonlive.com/politics/index.ssf/2010/09/hard\\_choices\\_something\\_must\\_gi.html](http://www.oregonlive.com/politics/index.ssf/2010/09/hard_choices_something_must_gi.html).

148. Harry Esteve, *Gov. John Kitzhaber says his budget would put Oregon on stable financial footing*, OREGONIAN, Feb. 1, 2011, available at [http://www.oregonlive.com/politics/index.ssf/2011/02/kitzhaber\\_says\\_his\\_budget\\_woul.html](http://www.oregonlive.com/politics/index.ssf/2011/02/kitzhaber_says_his_budget_woul.html).

149. OR. R. APP. P. 15.05, available at <http://courts.oregon.gov/COA/settlementprogram/SettlementProgram.page>.

150. Debra Cassens Weiss, *More Top Lawyers Break Through \$1,000 Hourly Billing Barrier*, ABA J., Feb. 23, 2011, available at [http://www.abajournal.com/weekly/article/more\\_top\\_lawyers\\_break\\_through\\_1000\\_hourly\\_billing\\_barrier](http://www.abajournal.com/weekly/article/more_top_lawyers_break_through_1000_hourly_billing_barrier).

151. See *supra* Section III.C(2)(d).

inferior to traditional lawyering, ADR should instead continue to be encouraged by courts and lawyers alike as a complementary, rather than distinct, method of resolving disputes.

## 2. AMELIORATING THE ENGLISH SYSTEM

Mediation should be developed as a crucial part of participatory planning to enhance the long-term creation of sustainable communities. Additionally, the recommendations contained in the Mediation in Planning Report<sup>152</sup> should be implemented to the maximum extent possible. Specifically, the report sets out actions that the range of participants in the planning system, from government to education providers, need to take to enable and support the use of mediation as part of normal business in the planning system.<sup>153</sup> First, the report recommends the developing and building of a “market” for mediation, that is to develop public awareness of the process, develop cost/benefit models to assess the value of mediation generally, foster mediation practices in the jurisdiction by supporting pilot projects, promote the use of mediation as a dispute resolution tool, and assess its effectiveness by monitoring satisfaction levels among participants and analyzing all subsequent appeals.<sup>154</sup> Second, it recommends that governments and professionals provide advice and guidance about the scope of mediation in planning, ensuring the process is inclusive, and integrating mediation into the statutory planning process. It also recommends that governments and professionals offer advice and guidance on the skills and expertise required by mediators. Third, it recommends that governments provide a policy framework for mediation, develop the infrastructure to support its use, and lastly, working in conjunction with professionals, develop the skills and knowledge of all players in the planning system by offering a range of training opportunities.

The recommendations contained in the Jackson report should also be implemented to improve the use of ADR in the English legal system.<sup>155</sup> First, there should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.<sup>156</sup> Experienced mediators should play an active part in delivering training to judges and lawyers who lack first-hand experience of mediation.<sup>157</sup> Second, the public and small businesses who

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152. ROZEE & POWELL, *supra* note 111, at sec. 5.

153. *Id.*

154. JACKSON, *supra* note 141, at xxii para. 6.3.

155. *Id.* at 362 para. 3.6.

156. *Id.* at 363 para. 4.1.

157. *Id.*



become embroiled in disputes should also be made aware of the benefits of ADR.<sup>158</sup> Third, an authoritative handbook for ADR should be prepared, explaining what ADR is and how it works, listing reputable providers of ADR services.<sup>159</sup> This handbook could be used as a starting point for the training of judges and lawyers. The Jackson Report also argues that mediation should be judicially encouraged.<sup>160</sup> What the court should do is (a) encourage mediation and point out its considerable benefits; (b) direct the parties to meet and/or to discuss mediation; and (c) require an explanation from the party which declines to mediate, though such explanation would not be revealed to the court until the conclusion of the case.<sup>161</sup>

## V. Conclusion

The efficiency of ADR remains too dependent upon the local political and legal culture. As the cost of litigation continues to grow, ADR therefore presents itself as a beneficial alternative to filing a lawsuit. The field will not experience necessary widespread acceptance, however, until both private parties, and governmental authorities dedicate resources to provide the financial and legal foundation and framework to allow ADR to develop into a fully-fledged and practicable alternative.

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158. *Id.* at 362 para. 3.8.

159. It nevertheless does not endorse this as a recommendation, but rather discusses it as a future possibility. *Id.* at 361 para 3.4.

160. *Id.*

161. U.S. Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies* (prepared for presentation to Comm. on Rules of Practice and Procedure, U.S. Judicial Conference, May 10-11, 2010), available at <http://lfcj.digidoq.com/BLAP/Lawyers%20for%20Civil%20Justice/FRCP%20DATA%20Litigation%20Cost%20Survey%20of%20Major%20Companies%202010.pdf> (stating companies reported annual 9% increase in litigation costs).

