CHAPTER TEN

VISIONARY APPROACHES TO RESOLVING LAND USE AND ENVIRONMENTAL DISPUTES

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Visionary Approaches to Resolving Land Use and Environmental Disputes (Creative Resolutions of Cases Headed to or in Litigation)

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I. INTRODUCTION

What role does alternative dispute resolution play in land use conflicts? Frequently... usually...the answer is none. Why?

This paper describes several reasons why ADR is not commonly employed in land use law. A review of common features of typical land use cases helps one's ability to draw generalizations about the usefulness of ADR in different contexts. The extent to which local governments may act to settle cases is often poorly understood. This can be true both at the inception of a dispute and even when settlement seems promising. With a better appreciation of certain characteristics of land use law, lawyers and clients may then be better able to gauge the usefulness of ADR in any given case. Or, better still, lawyers and clients may be able to alter the way that they think about their land use disputes in order to make ADR more useful overall. Local government officials, including elected leaders and planning staff members, may become less skeptical of ADR. Citizens may become more open to consideration of practical interests rather than insistence on perceived rights.

The relative rarity of successful ADR in this area is partly the result of inevitable tensions in the allocation of rights caused by land use law in the first place. Often, land use conflicts seem dysfunctional as a result of the layers of motives and conflicts that they encompass. But resistance of land use disputes to ADR is also partly a matter of the habits and recurring tendencies of land use lawyers and litigants. None of these factors mean that ADR in land use disputes is destined to fail, but all of these factors are reasons why ADR is commonly overlooked as a viable option.

Key difficulties with the use of ADR in this area of law clearly exist. Some of these difficulties are enmeshed with the substantive law, about which more is mentioned below. Other problems with the use of ADR could be more readily overcome through skillful lawyering and client counseling, such as the following:

- There are often no clear definitions or "cookie-cutter" approaches for most ADR options in the land use field.

- ADR options may vary widely, or be practically unavailable, based on the level of government involvement and the type of dispute at issue, regardless of the desires and motives of the parties. This complexity can be difficult and frustrating for litigants and create difficulty in reaching good decisions on the viability of ADR.

- ADR has not traditionally been used in many (most) types of land use disputes.

- Organizations that provide ADR services have not emphasized a role in land use cases.

- There is little or no way to gain clear, objective information regarding the success of ADR activities.

- Local government experience with ADR is often limited, and particularly so in the land use area.

- There is little state-wide leadership to promote the use of ADR throughout local governments.

If ADR proved to be valuable in practice, each of the above perceived "problems" with ADR could be addressed, if not eliminated entirely. One inevitably reaches the question of whether ADR is underutilized in the land use area because it is poorly suited to this field, or whether the perception of ADR's poor suitability is a result of its underutilization?

II. ARE LAND USE CASES REALLY ALL THAT DIFFERENT?

For many years, ADR has been used with success in the personal injury context. Lawyers develop expertise as mediators with special talent in settling these cases. Arbitration of personal injury claims is, to some extent, even built into the court rules, at least with respect to the mandatory arbitration process for claims valued at less than $50,000.[1]

What makes ADR in the land use context so different from a personal injury case?

A. Common characteristics of land use disputes.

In virtually all the ways that matter, a typical ADR-friendly personal injury claim is starkly different from a land use controversy.

In a personal injury case, disregarding class actions, the plaintiff is almost always a private individual. The needs, preferences, and goals of a single person are the benchmark for resolving the dispute. In a land use case, it is common for plaintiffs to be groups of individuals. These groups may consist of individual participants who themselves have little in common other than group membership. Their purpose for becoming involved in a land use case may range from intensely practical concerns to more general opinions of local political leadership. For some, involvement in a land use dispute can represent a commitment to major themes of American national politics.

In a personal injury case, the only real remedy that can be obtained is money. Money is fungible. There is almost no way to generalize about the range of results that a plaintiff may seek in a land use case. Sometimes the desired result is related to the commencement or termination of a project. Sometimes a dispute relates to planning or policy choices and, therefore, is innately a political expression of community preferences. Sometimes far-reaching procedural issues are in controversy, which may relate not only to a specific controversy but also can influence the course of future land use choices.

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[1] Ch. 7.06 RCW, Mandatory Arbitration of Civil Actions.

Land is not fungible. Whether the issue in controversy is a local rezone or a large area-wide planning action, but especially in the former instance, land use decisions affect particular pieces of property in particular regions. Participants may become involved in a controversy because of an extremely narrow concern that is perceived as deeply important. There will be little or no availability of substitute remedies in these cases.

Despite the ADR mantra of interest-based dialogue in order to "get to yes," rights matter, sometimes more than interests. In a personal injury case, the plaintiff's injury cannot be reversed. It can be treated, and functional recovery can perhaps be obtained from medical care providers. The costs of past and future medical care can be awarded. Pain and suffering can also be compensated, however imperfectly. The plaintiff does not have a meaningful right to any other remedies. The plaintiff's rights boil down to whether a tort occurred, and what damages must be paid. The plaintiff's interests are more important than any particular contest over rights.[2]

In land use cases, on the other hand, intensely personal concepts of rights, namely property rights, are often implicated. The catch-all term "property rights" often proves ambiguous. A property owner may believe that property rights entail the ability to make use of his or her property, but a neighbor can just as strongly believe that the same rights confer freedom from impacts caused by the first party's proposed use. This problem of perspective is compounded by the sense that property rights are often talismans of deeper political meaning, and frequently come to symbolize principles that are entirely outside the ostensible scope of land use controversies.

B. <u>Local governments as participants in land use disputes.</u>

Another characteristic of a land use controversy that has little equivalent in other types of dispute is the role of local government. Other units of government can certainly become involved in various types of land affairs, particularly include state agencies in environmental regulatory matters. But the involvement of cities and counties in ordinary actions such as GMA planning, SEPA review, and development entitlement processing is pervasive. The pivotal role of local government has great significance for whether and when ADR can be used.

Many land use matters involve making policy. The policy choices of local governments are almost always legislative in nature. There is no reasonable way for ADR to resolve most legislative policy choices because voters have no effective means to control the delegation of policymaking authority to third parties or to non-governmental processes. The non-delegability of local government decision-making is an almost insurmountable obstacle for ADR of legislative-type land use choices, but may be less of a factor for quasi-judicial land use actions.

Local governments are subject to the state's Public Records Act, Ch. 42.56 RCW, and the Open Public Meetings Act, Ch. 42.30 RCW. To say the least, managing expectations about

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[2] This takes for granted of course, that a plaintiff has a right to a jury trial or other judicial proceeding to fulfill these interests.

confidentiality can present a problem with the use of ADR. Open and confidential discussions are usually considered essential to promoting settlement, but the open government ("sunshine") requirements of the PRA and the OPMA make this difficult if not legally impossible.

C. **Applicability of Washington's Uniform Mediation Act (UMA).** Any alternative dispute resolution process related to land use applications would arguably be subject to Washington's Uniform Mediation Act (UMA) – RCW Ch. 7.07. UMA protects confidentiality of statements made during mediation and broadly applies to most forms of mediation, including a mediation in which the "... mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by person who holds itself out as providing mediation." RCW 7.07.020. Under the UMA, "mediation communications" are privileged and are not subject to discovery or admissibility as evidence in a "proceeding" unless the privilege is properly waived. RCW 7.07.030. The UMA broadly defines "mediation communications" to include any "statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation where is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." RCW 7.07.010. The UMA's definition of a "proceeding" is also broad and includes any "judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or [a] legislative hearing or similar process." *Id.* The mediation provisions would apply to both pre-decision mediation as well as appellate mediation.

Confidentiality will apply unless waived by the parties or are made during a mediation that is open to the public. See RCW 7.07.070; and RCW 7.07.050(1)(b). The scope and extent of participation in the mediation process may impact the confidentiality of settlement discussions.

III. EXAMINING PROBLEMS IN RESOLUTION OF CASES THROUGH ADR.

The factors described above really get at one basic point: land use cases are different from many other kinds of disputes that lawyers encounter. These cases are not inherently private; quite the contrary. They do not relate simply to the allocation of money, but instead deal with scarce and non-fungible real property. They cannot be seen as only the means of setting a compensatory price on certain actions, but are an outgrowth of the wishes of citizens. The voting public quite properly has an expectation that local government actions will occur in a formally open and representative manner.

So, can nothing be done to develop ADR in this area?

The point of this paper is emphatically not that ADR is simply a bad fit for land use disputes. It definitely is a bad remedy – and nearly unlawful – for *certain kinds* of local legislative policy disputes. But even this view may be overstated, because the term "ADR" can be read broadly enough to extend beyond just neutral-facilitated mediation sessions. More commonly, though, ADR may be quite usable in typical quasi-judicial project permit challenges. The main thing, then, is for lawyers and litigants to become more adept at locating a given dispute on a continuum where the suitability of ADR can be evaluated.

A. General considerations for ADR of land use disputes.

As suggested above, land use proposals that concern very large areas and potentially large transfers of property or money tend to have components that require policy choices and legislative processes. Other kinds of land use proposals are more localized, and may involve little or no legislative action by a city or county. And yet other actions, of course, may begin with area-wide planning actions and then subsequently focus on local development entitlement issues.

Correctly assessing not just the type of land use dispute at issue, but also the stage it has reached in the evolution of a given proposal, is critical. Possibilities for alternative dispute resolution may occur very early in the course of a given action and never later re-emerge.

1. Dispute prevention can be dispute resolution.

The point in time where dispute resolution opportunities are first identified can sometimes occur long before irreversible actions and commitments, either public or private, have been made.

If the parties to a dispute perceive the existence of a dispute at all, it is possible to ask whether enough information is known to engage in serious discussions about resolution. If only one of the likely parties to a dispute has adequate information, no reconciliation process can occur. In this manner, dispute resolution can make progress in the guise of dispute prevention. This can be fostered by some or all of the following tools:

- Formation of stakeholder groups with knowledgeable and divergent perspective and interests;
- Early and vigorous public participation efforts designed to allow the public a role in meaningfully affecting decisions, rather than the minimum required to fulfill public participation obligations;
- Emphasis on regional approaches to land use decision-making, with inclusion of neighboring jurisdictions, resource agencies, and other tiers of government;
- Strong public relations and a genuine interest in an informed local media; and
- Early and frequent non-confrontational pre-decision meetings, even ad hoc, with wide dissemination of relevant information in print and electronic form.

Almost all of these approaches can help build consensus. This alone will not preclude the possibility of a litigated dispute. But it can at least make land use choices better informed, and can very possible defeat any claims based on inadequate public notice and public participation opportunities.

2. Customary ADR criteria.

Sometimes a dispute is just a dispute. Not all land use cases pose thorny issues regarding non-delegable legislative authority or intractable property rights dilemmas. It may often make sense to assess a given land use controversy based on the same criteria that apply to exploring ADR for any other dispute. These criteria can include the following:

- Is there a strong mutual desire for the dispute to end, or does the existence of the dispute itself serve other ends?
- Do the parties each have a purpose that would be met by a compromise solution?
- Has the dispute reached a point where a coercive remedy is credible, likely, and imminent?
- Are the parties (persons, organizations) willing to consider a compromise?
- Is flexibility possible, or is a chance for victory more important than resolution or the risk of defeat?
- Is a judicial remedy necessary (e.g., to set a precedent?), or will it even address the primary contentions in dispute?
- Can a non-judicial remedy provide a better mechanism of addressing foreseeable future disputes?
- Are the parties adequately informed to be able to make meaningful and common assessments of the issues in dispute?
- Will a facilitated discussion result in more willingness to share information and exchange positions?

B. Characterizing land use disputes as good or bad ADR candidates.

Some land use cases pose special challenges that can make them entirely incompatible with ADR. Others may not. The key is being able to tell the difference.

1. The relative roles of public and private interests in the dispute.

One of the main points of this paper is to encourage practitioners to simply differentiate between types of land use disputes. Few cases will be as amenable to ADR as a tort claim arising out of a motor vehicle accident. But there is no good reason why ADR should be avoided

in all cases entirely. The extent to which a given case implicates public versus private interests is a key distinguishing characteristic.

A basic conflict underlying zoning and other related land use regulations is the tension between community-wide planning preferences, on the one hand, and the near-sanctity of an individual's right to make use of property, on the other hand. As a general legal proposition, Washington has stated a clear position:

> The basic rule in land use law is still that, absent more, an individual should be able to utilize his land as he sees fit. *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 685, 649 P.2d 103 (1982).

Although this may be the "basic rule" in land use law, the subjugation of private land use to local governments' police powers is extensive and pervasive. It is fair to say that almost the entire point of takings law, let alone Washington's Land Use Petition Act, Ch. 36.70C RCW, is to provide a remedy for perceived abuses of this power.

Moreover, it is precisely because the power to zone and otherwise regulate land is an offshoot of local government police power that the balance between public and private interests is so fraught with controversy. Most zoning, to have widespread legitimacy, must be based on fostering harmony and minimizing incompatibility between land uses. Neither "harmony" nor "compatibility" has ever, to this author's knowledge, been defined with any precision.

But private property rights and public planning choices are not mutually exclusive. Both must coexist within geographically defined areas. An important role of regional planning pursuant to the Growth Management Act, Ch. 36.70A RCW, is to create a semi-uniform, predictable, and regionally consistent framework. In part, GMA does this by governing the way in which zoning divides property rights between individual landowners and community planning interests.

As part of this framework, GMA enables (and, partly, requires) that local governments make certain planning choices as a matter of legislative policy.[3] Local governments are free to plan in any way that they choose, consistent with GMA. But the reality is that many of the basic tenets of GMA are controversial and cannot be altered by local decision-making. Thus, for instance, it is not permissible for a local government to fail to take appropriate steps to protect critical areas.[4] And the protection of critical areas, in order to comply with GMA's "best available science" rule, implicitly incorporates certain irreducible forms of protection, such as riparian buffers of fairly predictable width.

Implications for ADR are obvious. While it may be possible to disagree over whether a certain scientific assessment is correct or not, there can be no mediated debate regarding the duty to protect critical areas. Much the same can be said, for instance, of the wisdom of concentrating

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[3] *See* RCW 36.70A.070 (describing certain mandatory elements of comprehensive plans).

[4] RCW 36.70A.060.

future growth into urban growth areas, or of requiring adequate traffic infrastructure planning to support new developments.[5]

In similar manner, local jurisdictions must make planning decisions that are consistent with, and implement, their comprehensive plans.[6] The GMA forecloses end-runs around this requirement by limiting the timing and manner of altering comprehensive plans.[7]

In short, many regional planning decisions cannot be made a subject of ADR because a key player, the local government unit, may have little or no discretion regarding basic aspects of a particular dispute.

In other cases, where regional planning policies are not directly implicated, but local implementation of those policies occurs on a site-specific basis, there may be more latitude for exploring negotiated settlements. The ability of local jurisdictions to use discretion in *implementing* the requirements of GMA is quite broad, and certainly most zoning decisions occur at a level unaffected by GMA.

Topics that are commonly related to dimensional adjustments, such as density, lot configuration, building height, architectural style, and conditional uses may provide room for ADR. But even here, the opportunities are not unlimited, because any zoning regulation must relate to a legitimate public benefit in order to be a proper use of the police power. *See Rhod-a-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998). A mediated settlement that lessens the protections that were intended to serve the general public benefit implicates the very legitimacy of a zoning decision in the first place. As a practical matter, though not necessarily in a legally correct manner, zoning limits can seem to turn the entire public into a third party beneficiary.

By contrast, there is a particularly useful role for ADR to play when the general parameters of a given land use have met with public acceptance, and an aggrieved party challenges an aspect of a project that is otherwise unexceptional. For example, if the location of an access easement is problematic for a certain neighbor, or group of neighbors, but otherwise a new subdivision makes appropriate provision for traffic, it may be plausible to negotiate a new easement route to settle an appeal. The public as a whole may have little or no protected interest in the specific route chosen.

In the same manner, impacts of a project that arise as part of the public review process under the State Environmental Policy Act, Ch. 43.21C RCW, may be mitigated by agreement, including an agreement as a result of ADR. Under SEPA, it is possible to negotiate the terms of

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[5] *See* RCW 36.70A.110 (requiring urban growth areas); RCW 36.70A.070(6) (requiring adequate transportation infrastructure planning).

[6] RCW 36.70A.040(3) and (4).

[7] RCW 36.70A.130.

mitigation in a determination of significance.[8] It is also possible to use the EIS scoping process, supplemental environmental impact statements, addenda, and other devices to incorporate considerations into environmental review in a meaningful and flexible way. And because SEPA is fundamentally a full-disclosure public participation statute, the flexible adoption of negotiated solutions can be publicly implemented within a framework available for citizen review and comment. This is true even when the citizens individually may not have had a representative at the impact-mitigation bargaining table.

2. The problems of non-delegability and unconstitutional conditions.

Many, if not most, local land use decisions are the result of obligatory consideration of highly divergent land use factors. In other words, local governments are required to make land use decisions based on certain required standards, but these decisions must be made in wide-ranging factual circumstances. Sometimes the factual problems are truly unique. In other instances, the issues may be highly controversial, but hardly unique.

a. Delegation of authority to local legislative bodies.

The feasibility of ADR for land use decisions that require legislative action leads to the problem of delegation of authority. Examples include subdivision approvals, rezones, and various types of planning actions such as GMA-required designation of critical areas, setting urban growth area boundaries, and comprehensive plan amendments.[9] Neither a mediator nor the parties to a dispute can decide issues regarding these sorts of inherently legislative choices in lieu of action by the legislative body itself.

In Washington, the clearest expression of this rule comes from *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 149 P.3d 616 (2006). In *1000 Friends*, the Supreme Court considered the relationship between local ordinance implementing GMA and the referendum process. The challenged ordinances were developed to protect critical areas. The court found this to be a matter delegated by law to the local legislative authority and not the corporate entity of the county acting through its staff. *1000 Friends*, 159 Wn.2d at 175. Because these duties were not delegated to the county as a corporate entity as a whole, initiatives or referenda that modify obligations imposed by state law are invalid. *Id.* at 174.

The ruling in *1000 Friends* did not consider other forms of decision-making influence on local government action. But it is plausible to interpret this holding as a limitation on the extent to which an ADR-based "deal" could be reached for necessarily legislative actions. The decision would likely encompass not only GMA-implementing actions, but also legislative zoning actions, subdivision approvals, and other matters expressly delegated to local legislative bodies. *See Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 881, 188 P.3d 533 (2008)

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[8] *See Hayden v. City of Port Townsend*, 93 Wn.2d 870, 880-81, 613 P.2d 1164 (1980) (process of negotiating terms of DNS was "eminently sensible"); WAC 197-11-350.

[9] *See* RCW 58.17.110 (subdivision approval by "city, town, or county legislative body"); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 889, 795 P.2d 712 (1990) (only code city council has power to rezone, which may not be delegated).

(observing delegation of municipal water system operation to legislative body rather than municipal corporation).

It may be possible for mediation to facilitate the consideration of policy choices by a legislative body. The issue of delegability would seem to be less problematic where a matter nominally touches a legislative policy dispute but has practically boiled down to narrow topics that are essentially site-specific. In such a case the resolution of the dispute may not implicate the values and processes of legislative action. For instance, the process by which a community amends its GMA comprehensive plan is clearly a legislative policy action. However, details of a particular comprehensive plan amendment could be refined by particularly interested stakeholders through an ADR-type process. Such a process would not substitute for legislative action, but could be highly influential in both resolving a dispute and providing for a better legislative policy choice.

Matters that directly require legislative discretion are not suitable for ADR. But ADR can still play a role here, if the use of ADR is carefully considered and integrated into appropriate legislative action.

b. **Unconstitutional conditions.**

A common perception of participants in private ADR, which is sometimes fostered by mediators/facilitators, is that there is no outer limit on what can be considered possible in the service of inducing a settlement. At least when dealing with local governmental agencies, it is emphatically *not true* that "anything is possible." Settlement terms reached on a basis that is not congruent with the limited power of local governments in Washington will likely be unenforceable.

The problem of ADR within Washington's sunshine laws is discussed more fully below. The present section is addressed at the basic limits of authority of local government to enter into essentially contractual settlements. Freedom of contract is circumscribed for local governments. This is an area where generalizations are difficult, but a few examples stand out.

It is clear that development exactions and land use controversy go hand-in-hand. It is also clear that development exactions in Washington may be imposed by local governments only within strictly defined channels. Although it may be unclear whether state law authorizes development exactions by local jurisdictions, subject to limitations, or simply prohibits certain kinds of development exactions, the net effect is much the same: pursuant to Ch. 82.02 RCW, improper development exactions will be struck down.[10]

The fact that an improper development exaction may have been obtained as a result of a consensual agreement (presumably including a mediated settlement agreement) will not cure its illegitimacy. *See Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999) (because city had no authority to impose impact fees outside its borders, agreement with developer was unenforceable).

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[10] *See, e.g., Benchmark Land Co. v. City of Battleground*, 103 Wn. App. 721, 14 P.3d 172 (2000).

3. **Procedural problems.**

Any use of ADR in local government decision-making raises certain procedural problems that are different from purely private disputes. Local governments must, in particular, comply with sunshine laws addressing openness in public records and in public meetings.

Both the Public Records Act ("PRA") and the Open Public Meetings Act ("OPMA") alter assumptions otherwise made in typical uses of ADR. Many of the effects of these laws are obvious. It is not possible to skirt the PRA or the OPMA by employing a confidentiality agreement as part of an agreement to mediate. Documents that are generated as part of an ADR effort would likely be records subject to disclosure under the PRA. This may not be true in some limited circumstances, such as where litigation is pending in superior court. In such a case, where an agency is a party to a controversy, the PRA may exempt records that would otherwise not be available to another party under the rules of pretrial discovery. RCW 42.56.290.

It is certainly clear that there is no general "privacy" exemption under the PRA.

The effects of the OPMA and the Appearance of Fairness Doctrine can also loom large in ADR settings.[11] From slightly different perspectives, both rules further limit the assumption that ADR participants may freely develop ideas, exchange information, and accept compromise solutions. The OPMA's prohibition on action, other than in an open public meeting, combined with limitations on *ex parte* contacts, are foreign to most professional mediators. A local government participating in an ADR setting must be mindful of these rules. Only a mediator who has special expertise, or who has the time and interest to become knowledgeable of these limitations, can realistically structure a mediation process that respects these limits.

IV. DELVING DEEPER: A NOTE ON SOURCES AND SPECIFIC ADR PROGRAMS.

This paper is not the first effort to survey the problems of using ADR in the land use context. Academic and professional publications have discussed the uneasy fit between ADR and land use bargaining. These articles have emphasized the uneasy relationship between property rights, takings law, and community input in land use.[12]

A. Washington ADR opportunities.

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[11] *See* RCW 42.36.010 (statutory appearance of fairness requirements).

[12] *See, e.g.*, Erin Ryan, Note, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 Harv. Negotiation L. Rev. 337 (2002) (provides a good discussion of the implications of bargaining and "dealing" as potentially in conflict with broader and more general justification of public value); Carol M. Rose, *Property—Old and New: New Models for Local Land Use Decisions*, 79 Nw. U. L. Rev. 1155 (1985) (analyzes local land use regulatory disputes based on four "types" or concepts of land use decision-making models); James E. Brookshire, *Complex Dispute Resolution – the Search for Land Use Solutions*, SH025 ALI-ABA Course of Study 37 (2002) (checklist-type considerations for ADR feasibility); Michael A. Zizka, Timothy S. Hollister, Marcella Larsen & Patricia E. Curtin, *Alternative Dispute Resolution – Potential Problems in Using Arbitration and Mediation, State and Local Government Land Use Liability* § 11:11 (2009) (delegability problems and potential loss of judicial deference).

State of Washington has not adopted a specific statutory procedure for mediation or alternative dispute resolutions related to quasi-judicial land use proceedings. Mediation has been recognized, however, in the context of certain agency review processes, Growth Management Act (GMA) and, in some instances, by local jurisdictions.

1. **Administrative Review Procedures – Environmental Hearings Board.** Some state and local governments have attempted to broaden the usefulness of ADR in land use disputes. Unfortunately, the results of these efforts appear to be uneven, at best.

In Washington, the Environmental Hearings Office promotes a mediation program for matters arising out of the Shorelines Hearings Board, (WAC 461-08-4151) the Pollution Control Hearings Board (WAC 371-08-395), and the Forest Practices Appeals Board. Growth Hearing Boards will be integrated into the Environmental Hearings Board effective July 1, 2011. The Environmental Hearings Office provides mediation services free of charge on cases pending before these boards. The mediation program uses administrative appeals judges as mediators. Discussions with a mediator are confidential. Any settlement agreement reached as a result of mediation will be approved by the board, unless it is determined to violate state law.

2. **Growth Management Hearings Board.** Growth Management Hearings Boards encourage and support settlement discussions and dispute resolution procedures. Mediation options (with extensions of time lines) is introduced at the outset of each appellate process and typically discussed of the Pre-hearing Conference.

- Boards are required to issue a final order within one hundred eighty (180) days following receipt of a petition for review. The board is authorized to extend the period of time for issuing a decision in order to allow for settlement discussions and/or mediation processes. RCW 36.70A.300(2)(b). A request for mediation must be filed with the board not later than seven (7) days prior to the date scheduled for the hearing on the merits. The board may authorize one or more extensions for up to ninety (90) days each. Request for multiple extensions may require submission of substantive information regarding settlement negotiations.

- Parties may contract directly with a private mediation service. State of Washington Department of Commerce maintains a list of private mediators which is available to the parties upon request. Costs of hiring a mediator independent of the GMHB is borne by the parties.

- Boards are also authorized to appoint a non participating board member as a mediator. Use of a board member for mediation is at no cost to the parties.

- Any settlement agreement requires the signature of each "party" in the proceeding. Although Intervenors and/or Amici may participate in settlement negotiations, the boards do not require their signature on any settlement agreement in order to dismiss a matter. If the parties settlement negotiations are successful, they must notify the Presiding Officer and file a Stipulated Joint Motion for Dismissal signed by the Petitioner(s) and Respondent(s) no later than seven (7) days prior to the Hearing on the Merits.

- Boards have no authority to enforce a settlement agreement nor may the board review such agreement for compliance with the GMA. Settlements are reviewed and implemented upon remand to the local jurisdiction.

- Settlement agreements will typically condition dismissal of the appeal upon the local jurisdiction's implementation of the settlement terms and conditions. This structure recognizes that any amendments to comprehensive plans and/or development regulations are subject to public process requirements. Local jurisdiction is not obligated to adopt the settlement agreements.

- Mediation can also be utilized to limit and/or resolve specific appellate issues. A dismissal of specific issues can be entered with the Board with remaining issues to be resolved through a hearing on the merits.

- It can be presumed that mediation-based settlement negotiations will remain an emphasis following the transition of Boards to the new Environmental and Land Use Hearings Office effective July 1, 2011.

3. Local Mediation Process. While most local mediation processes are developed on an ad hoc basis, several local jurisdictions have adopted mediation processes in the context of land use applications. Examples include the following:

a. City of Sammamish. City of Sammamish adopted a voluntary land use mediation program. SMC 20.20.010-.170. Mediation is undertaken on a voluntary basis and may be invoked by the municipality or interested party. Any agreements reached through mediation are memorialized by the mediator and signed by agreeing parties or their representatives. If all parties agree, the mediated resolution shall be entered with an order of dismissal by the Hearing Examiner. If less than all of the parties agree, the agreement shall be binding only upon those parties that have agreed thereto but shall become evidence in the public hearing process.

- The mediation procedure has not been utilized on any regular basis. A single mediation involving a code enforcement matter was undertaken successfully. The program has not been utilized for site-specific projects.

b. Kitsap County. Kitsap County adopted a mediation ordinance for municipal land use processes.

c. King County. King County Bar Association, in association with the Washington State Bar Association, has created "focus groups" in different areas of law to explore the current use and future potential for mediation as a means of dissolving disputes. KCBA formed the land use mediation focus group in early 2010. The purpose of the focus group is to discuss mediation and land use matters, including (1) the current use of mediation in land use practice and reasons for this status; (2) whether land use matters generally are appropriate for mediation, the factors that should be considered in determining whether a land use matter is suitable for mediation, and what types of mediation are most appropriate for land use matters;

and (3) how the use of mediation in land use matters could be improved. The focus group had first meeting on March 30, and will meet monthly for the next six (6) months. Published findings and recommendations will be adopted in the fall of 2010.

B. Experience from other jurisdictions.

Alternative Dispute Resolution is an evolving process that has been undertaken at both state and local levels. Significant analysis has been accumulated regarding the structure, process, and efficacy of state and local level programs. See generally R*esponding to Streams of Land Use Disputes: A Systems Approach,* University of Montana and Consensus Building Institute Policy Report No. 5 (2007); Susskind, van derWansem and Ciccarelli, *Mediating Land Use Disputes: Pros and Cons*, Lincoln Institute of Land Policy (2000); Susskind, Amundsen, Matsuura, Kaplan and Lampe, *Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials,* Lincoln Institute of Land Policy (2003) (assessment and evaluation of 100 case studies throughout the country).

State and local programs have been clustered generally into four categories:

- Site-specific disputes: Programs that focus on resolution of site-specific controversies. This process involves both private development applications (subdivisions, conditional use permits and other development permits) as well as focused matters initiated by a public body such as neighborhood or subarea plans. ADR applications have been invoked at both the pre-decision and appellate stages.

- Comprehensive Planning and Growth Management: Resolution of disputes arising through a legislative (as opposed to quasi-judicial) process involving comprehensive and growth management – planning. Policy disputes and compliance with statutory mandates for land use plans is the focus of the process. An example would be State of Washington's appellate process under Growth Management Act (GMA).

- Interagency and Intergovernmental Plans: Conflicts between agencies, jurisdictions or levels of government.

- Natural Resources and Conservation: Issues related to open space, wetlands, or conservation areas.

Several considerations arise regarding the type and nature of adopted programs: (1) who may initiate and be involved in the collaborative process; (2) the time and point when mediation is authorized (pre-application, pre-decision or appeal); (3) type of program or decision (site-specific, comprehensive plan, etc.); (4) statutory authorization and support and (5) cost allocation and responsibilities for mediation process. Literally every approach has been tested over the years with no clear direction or empirical support for any specific program or approach.

Dispute resolution mechanisms have been invoked at virtually every stage of the planning and decision-making process. Land use disputes typically arise in five stages: (1) community planning stage; (2) pre-application review and processes; (3) post-submission and pre-decision

processes; (4) post-decision processes; and (5) legal and administrative appeals. Focus is not necessarily on resolution of a dispute but rather the management of dispute and conflict. Pre-decision alternatives such as open houses, public forums and substantive pre-application conferences can serve as an alternative to formal mediation proceedings. Most formalized mediation processes have focused upon post-decision dispute resolution.

The following are several examples of state and federal level programs:

1. Federal ADR Processes. The US Institute for Environmental Conflict Resolution was created by the Federal Environmental Policy and Conflict Resolution Act of 1997 to assist in the resolution of environmental and land-related conflicts in which the federal government is a stake-holder. Congress passed the Alternative Dispute Resolution Act of 1998, which "requires federal district courts to authorize the use of ADR in all civil actions and to encourage litigants to use the ADR process." Litigants in all civil cases will be required to consider the use of ADR, and courts must provide litigants with at least one ADR process including, but not limited to, mediation, early neutral evaluation, mini-trials and arbitration.

2. Oregon. The Land Use Board of Appeals (LUBA) was established in 1979. In 1989, Oregon created the Oregon Dispute Resolution Commission (ODRC) that addressed, in part, land use and environmental conflicts. In August 2003, the legislature abolished the ODRC primarily due to funding constraints.[13] At the time the ODRC was terminated, twenty-three community centers and a statewide public policy dispute resolution program were in operation. These programs were eventually spun off to the Hatfield School of Government at Portland State University, which now operates the Oregon Consensus Program (OCP). OCP is partially funded through the Department of Land Conservation and Development to assess and provide land use mediation services across the state.

- OCP provides a neutral forum and professional expertise to support collaborative policy development, conflict resolution and community consensus building by public agencies and stakeholders. Referrals are accepted from LUBA.

- Mediation assistance has been provided with respect to a variety of quasi-judicial disputes including conditional use permits for construction of a mixed use development; UGB expansion to accommodate proposed golf course; disputes regarding aggregate mining operations; and other controversial projects. Mediation occurred at the appellate stage.

- OCP also assisted in development of development of pilot projects for counties to develop conflict resolution procedures in quasi-judicial land use cases. 2006 Clackamas County Land Use Pilot Project. Project goals included developing criteria for selecting potentially controversial land use applications; identifying appropriate collaborative approaches for conflict resolution; and identification for consensus/dispute resolution skills and resources. Protocols developed for this project were made available to other local governments for implementation.

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[13] Jenny Carmichael & Elaine Hallmark, *What Happened to Community and Public Policy Dispute Resolution Programs Previously Administered by the Oregon Dispute Resolution Commission*, Alternative Dispute Resolution Section Newsletter, Oregon State Bar, November, 2004.

- OCP also assisted and coordinated in the Exempt Groundwater Well Policy Consensus Work Group. OCP conducted a preliminary assessment to determine feasibility of stakeholder dialogue and identify appropriate participants, subject matter, and structure for the process. OCP also provides a neutral facilitation services. This project is ongoing.

- OCP also assists in development of community plans including resource and transportation planning.

- On a national basis, the consensus is that programs will have more impact where there is a responsible implementing agency. Observers have concluded, however, that without the necessary resources – typically staff and money – statutory authorizations often become symbolic gestures.

3. California. California's Land Use and Environmental Dispute Resolution Act[14] was enacted in 1994, but expired on January 1, 2006. The act was administered by the California superior courts (i.e., the trial courts of general jurisdiction) and dealt with appellate judicial issues. The act primarily authorized the court to recommend voluntary mediation. Costs of mediation remained the parties' obligations. This structure did not offer any assistance that did not already exist through the court system.

4. Idaho. The Idaho Local Land Use Planning Act[15] authorizes mediation during or after the planning process. The legislation was developed in response to intense development pressures in ski communities such as Sun Valley and a concern over the growing role of the courts in land use decision-making.

- Idaho has taken a comprehensive approach and allows the use of mediation (or facilitation) at any point during or after the decision process. These alternatives may be requested by an applicant, an affected person, the zoning or planning commission, or the governing board. The governing board responsible for the planning decision must make the services available if requested.

- If mediation is requested by the governing body or commission, then participation in one session is mandatory; otherwise participation is optional. The governing board selects the mediator and pays for the first mediation session. After the first session, the applicant bears all costs for mediation. State enabling legislation allows local discretion in adoption of mediation ordinances which may allocate costs differently in the future.

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[14] Cal. Gov. Code §§ 66030-66037.

[15] Id. Code §§ 67-6510.

- If mediation occurs after a final decision, any resolution of differences must be the subject of another public hearing before the decision-making body. The mediation process is not part of the official record regarding the application.

- The Idaho law has resulted in only a few mediated cases. The statute has not been effective in encouraging parties to use mediation to settle subdivision and zoning disputes.

5. Connecticut. In 2001, Connecticut passed legislation to enable and encourage mediation for resolution of inland wetland, zoning and planning appeals. Conn. Gen. Stat. Ann. §8-8; 22a-43. The mediation program is administered by the Superior Court and invoked only after the filing of a land use appeal. A court-appointed mediator administers the program which requires agreement of all parties. Other interested parties must obtain leave of court to participate. Fewer than 10% of judicial land use cases have participated in mediation.

6. Florida. In 1995, The Florida Land Use and Environmental Dispute Resolution Act was adopted as a part of private property right legislation. Fla. Stat. Ann. §70.51. Mediation is authorized for any administrative appeal of a "development order" of any state or regional governmental agency, including decisions granting, denying, or conditioning development permits and specific parcel zoning. A grade property owner is required to exhaust all nonjudicial local government administrative appeals. Mediation is handled by an appointed by a "special magistrate", selected by the parties pursuant to statutory procedures. Hearings before the magistrate are informal and open to the public. If the parties are unable to reach agreement, the special magistrate is empowered to make a determination as to whether the challenged governmental action was unreasonable or unfairly burdens the real property. The agency with the decision-making authority may accept, modify, or reject the magistrate's opinion. Judicial review is then available.

7. Austin, Texas. In Texas, the City of Austin oversaw an Office of Dispute Resolution from 1998 to 2003.[16] The program was addressed at zoning, development plans, public projects, and other land use regulatory matters. It relied on both the City's in-house staff and outside mediators to facilitate settlement negotiations. The office and program were eventually terminated because of budget constraints.

8. Albuquerque, New Mexico. In 1994, the City of Albuquerque created the Land Use Facilitation Program as a part of the City's Alternative Dispute Resolution Office. The program provided land use applicants and affected residents the opportunity to identify, discuss and resolve issues prior to the acceptance and implementation of land use decisions. Projects are referred to the program from public agencies and departments, applicants or interested citizens. Participation requires the agreement of all stakeholders. A facilitator arranges and conducts a meeting that results in a report identifying the interests and agreements of the parties reached at the meeting. The report is distributed to the local jurisdiction's planning department. From 1994-2006 approximately 600 cases were referred to the program with an average settlement in

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[16] Details of the Austin program, as well as the review of programs from other states, are taken from Matthew McKinney, Sarah Bates Van de Wetering & Patrick Field, *Responding to Streams of Land Use Disputes: A Systems Approach*, Policy Report # 5, Public Policy Research Institute U. Mont. (2007).

61.5% of the cases. The program was also successful in narrowing the scope of issues in broad or complex cases.

V. LEGAL IMPEDIMENTS/CONSIDERATION IN ADR LAND USE PROCESSES.

Alternative Dispute Resolution (ADR) process as utilized in the context of land use disputes present a range of legal impediments and considerations. Settling land use cases is difficult for a variety of reasons. First, unlike civil actions in which a plaintiff seeks a sum of money from a defendant, land use cases do not typically present an unlimited array of obvious compromise solutions. Second, because municipal officials are politically accountable to their constituents, settlement presents political dilemmas and dispute resolution. Third, necessary parties are not clearly defined at various stages in the application process. And finally, a negotiated resolution is fraught with legal pitfalls. See Stewart E. Sterk, *Structual Obstacles to Settlement of Land Use Disputes* (Cardozo Legal Studies Research Paper No. 292, March 2010, Boston University of Law Review), *available at* HTTP://ssrn.com/abstract=1581737.

The potential delays inherent in legal challenges defeats the primary purpose of dispute resolution which is to expedite the review process with the certainty of final resolution. The legal impediments and considerations are of particular significance in the context of state or local proceedings where there is no statutory authorization or structure.

A. Contract Zoning – Unconstitutional Delegation or Relinquishment of Police Power. Settlements in land use disputes have been challenged on a variety of basis including illegal contract zoning and unconstitutional relinquishment of police power. When a municipality exacts concessions from a land owner in return for municipal promise to approve a land use application, a number of courts have invalidated the resulting zoning amendment is impermissible "contract zoning". *Hale v. Osborne Coal Enters., Inc.*, 729 So.2d 853 (Ala. Civ. App. 1997) (invalidating settlement agreement as illegal contract zoning). In *Dacy v. Village of Ruidoso*, 114 N.M. 699, 845 P.2d 793, 796 (1992) a contract for zoning was defined as follows:

> … an agreement between a municipality and another party in which the municipality's consideration consists of either a promise to zone property in a requested manner or the actual act of zoning the property in that manner. …

A settlement agreement was invalidated in *Chung v. Sarasota County,* 686 So.2d 1358 (Fla. Dist. Ct. of App. 1996) (Adjacent owner challenged settlement agreement reached by land owner and the county in an action challenging the county's refusal to rezone and found that the county had "contracted away the exercise and its police power, which constituted an ultra vires act."); *Trancas Property Owners Association v. City of Malibu*, 138 Cal. App. 4th 172, 180-81, 41 Cal. Rptr. 3rd 200, 206, (2006) (Settlement agreement invalid because "it includes commitments to take or refrain from regulatory actions regarding the zoning of *Trancas's* development project, which may not be lawfully be undertaken by contract"). A municipality may also invoke the prohibition on contract zoning to escape from a settlement agreement. See *Attman/Glazer P.B. Company v. Mayor of Annapolis*, 314 Md. 675, 552 A.2d 1277 (Md. 1986) (Settlement agreement required submission of new application for conditional use permit which was denied.

Land owner brought suit to enforce the agreement and the court held that the city council had no authority to make the agreement citing the "prohibition against contracting away the exercise of the zoning power.").

Some courts have invoked the "reserved powers" doctrine and argued that a municipality may not contract away its power to legislate in a public interest. *Haas v. City of Mobile,* 289 Ala. 16, 19, 265 So.2d 564 (Ala. 1972). Other courts have focused instead on the theory that contract zoning and permissibly applied special rules to benefit some developers, but not others. *Morgran Co., Inc. v. Orange County*, 818 So.2d 640, 642-43 (Fla. Dist. Ct. App. 2002) (quoting earlier Florida case concluding that if "each parcel of property was zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse"). See also Shelby D. Green *Development Agreements: Bargained-For-Zoning That Is Neither A Legal Contract Nor Conditional Zoning, 33 Cap. U. L. Rev.* 383, 407, 488, 496 (2004).

A distinction has been drawn between "contract zoning" and "conditional zoning". The distinction rests upon the point in time at which an agreement is reached – before or after the decision-making process. Conditional zoning is appropriate through development agreements where the agreement memorializes conditions of approval. *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 216, 422 P.2d 790 (1967) (rezoning of property with a concomitant agreement "... should be declared invalid only if it can be shown that there was no valid reason for a change and that they are clearly arbitrary and unreasonable and have no substantial relation to the public health, safety, morals, and general welfare, *or if the City is using the concomitant agreement for bargaining and sale to the highest bidder or solely for the benefit of private speculators.")*; *City of Redmond v. Kezner*, 10 Wn. App. 332, 339, 517 P.2d 625 (1973) (The court rejected an argument that a concomitant agreement limiting the future exercise of a municipality's land use power was per se invalid and rather adopted a balancing test requiring the weighing of the benefits and detriments to the public of an agreement.)

Settlement agreements that contemplate future public process may not involve illegal contract zoning. *Prock v. Town of Danville*, 655 N.E. Second 553 (Ind. App. 1995) (Town's agreement to actively support future projects, including zoning changes, was not a contract to rezone); and *City of Redmond v. Kezner*, 10 Wn. App. 332, 340, 517 P.2d 625 (1973) ("If there is no promise to rezone, there is no promise to relinquish legislative power.") There is a fine line between legal and illegal contractual undertakings. It is imperative, however, that the settlement agreement not dictate the outcome of a land use process that requires public hearing.

B. **<u>Compliance with Public Processes and Procedures</u>**. Any settlement reached through an alternate dispute resolution process must comply with statutory and ordinance procedures for purposes of validation. State and local regulatory schemes set forth procedures for implementing land use actions and determinations. Settlement cannot usurp or avoid the legislative or quasi-judicial decision-making process.

The Ninth Circuit's Decision in *League of Residential Neighborhood Advocates v. City of Los Angeles,* 498 F.3d 1052 (Ninth Cir. 2007) is illustrative. City of Los Angeles denied a conditional use permit for operation of a synagogue in an area zoned for residential uses. The

land use decision was appealed contending that the permit denial violated both the Religious Land Use and Institutionalized Persons Act (RLUIPA) and state law. The case was settled on appeal but challenged by neighbors asserting that the settlement agreement violated applicable state processes such as public notice, public hearing, findings of fact, and potential administrative appeals. The Ninth Circuit held that the city could not allow a use for which the zoning ordinance requires a conditional use permit unless the city complied with the procedural formalities required by ordinance. Because the city did not comply with those formalities, the settlement agreement was invalid and unenforceable. See also *Chung v. Sarasota County*, 686 So.2d 1358 (Fla. Dist. Ct. App. 1996) (holding that settlement agreement was invalid because the county bound itself to an act requested rezoning before the matter was noticed or scheduled for the required hearings.)

A settlement agreement should comply with applicable procedural processes. The problem with this requirement is that the parties lose the certainty of settlement which is typically the reason for engaging in mediation. Growth Management Hearings Boards (GMHBs) have followed this procedure by requiring settlement agreements to proceed through the local jurisdiction's public hearing process.

C. Violation of Appearance of Fairness Doctrine. While no cases have addressed the applicability of the appearance of fairness doctrine to settlement agreements, the doctrine must be considered in the context of any agreed upon resolution prior to public administrative review. The courts of Washington have recognized that the appearance of fairness doctrine provides that "[m]embers of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong they must also give the appearance of impartiality." *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 313, 197 P.3d 1153 (2008); and *Narrowsview Pres. Ass'n. v. City of Tacoma,* 84 Wn.2d 416, 420, 526 P.2d 897 (1974).

A settlement agreement is a contract that requires approval by the legislative body. That body is also, however, the quasi-judicial decision-maker in any remand proceeding. There is certainly a question regarding "appearance of fairness" when the quasi-judicial body is determining the propriety of a previously authorized settlement agreement.

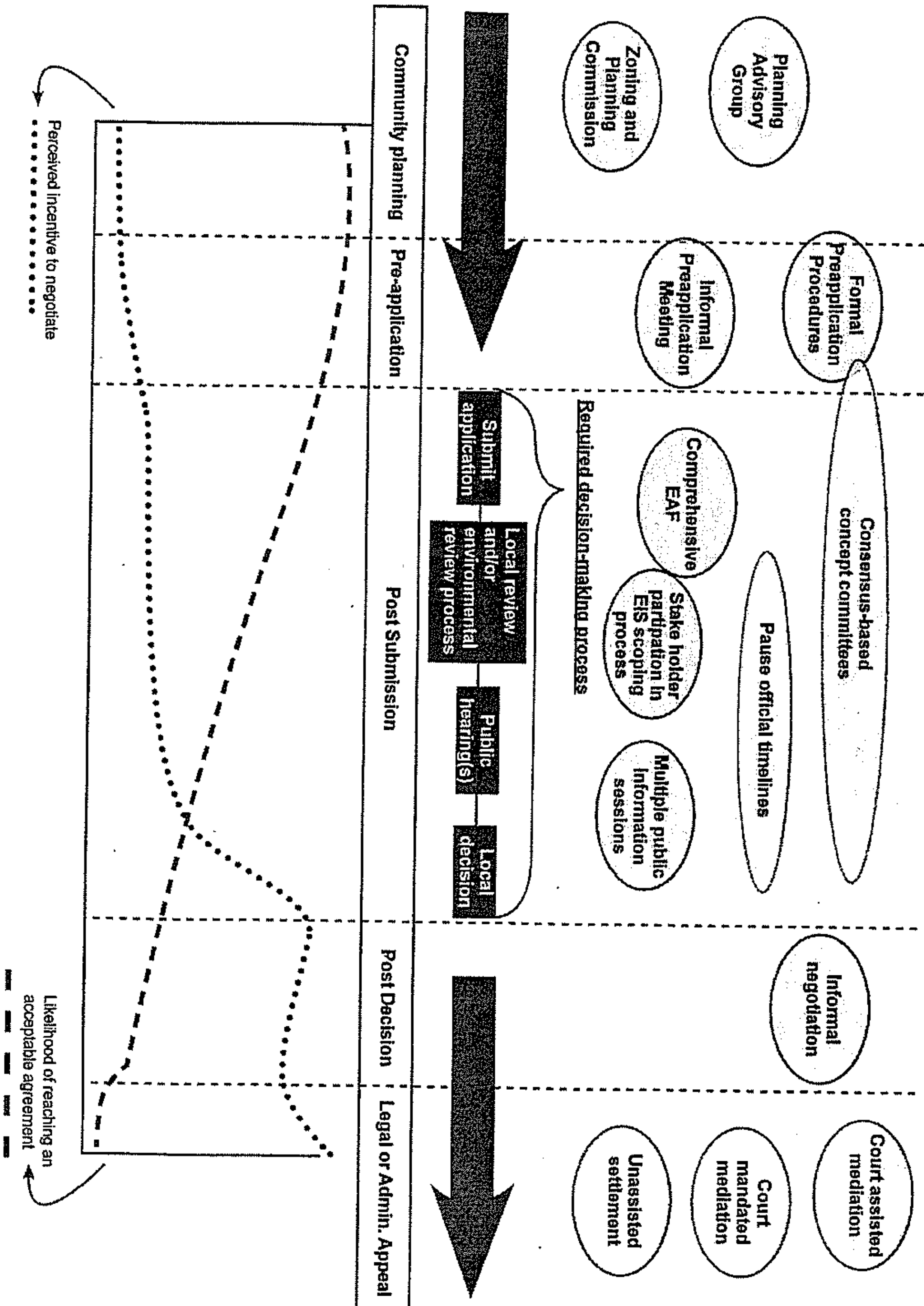
D. Substantive Challenges to the Settlement Agreement. A settlement agreement may be also challenged for substantive compliance with adopted regulations. Such challenges could be based upon (1) that the agreement fails to satisfy the statutory mandate that regulations be for the promotion of public health, safety, morals and general welfare (2) is inconsistent with the adopted zoning ordinance, comprehensive plan or regulatory requirements; or (3) incomplete or insufficient environmental review has been undertaken with respect to the settlement agreement.

The courts have recognized that municipalities, departments and interested parties have standing to challenge the settlement agreements. A municipality may seek to upset a settlement agreement based upon such theories as lack of legal authority, impermissible delegation of authority and similar basis. *Lake County Trust Co. v. Advisory Plan Commission,* 904 N.E.2d 1274 (Ind. 2009) (planning commission lacked authority to delegate settlement authority to its

lawyer); *Martin v. City of Greenville*, 54 Ill. App. 3d, 42, 369 N.E.2d 543 (Ill. App. Ct. 1977) (city lacked legal authority to settle based upon asserted unconstitutional application of zoning ordinance); and *Commco, Inc. v. Amelkin*, 476 N.Y.S.2d 775, 465 N.E.2d 314 (N.Y. 1984) (separate authorities vested in zoning board of appeals).

VI. Appendix

Figure 1



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