



Alternative Dispute Resolution: Why, When and How

Overview: What is ADR?

Alternative Dispute Resolution (ADR) is a voluntary, non-adversarial problem-solving process. Appropriate municipal panels (AMPs), courts, applicants, and those potentially affected by a development project may use ADR to facilitate the development process and develop plans that benefit the community while minimizing time and expenses.

An Appropriate Municipal Panel is a Planning Commission exercising development review, a Zoning Board of Adjustment, or a Development Review Board.

Stakeholders in the project development process have a variety of interests and positions. Experienced applicants identify these interests and potential conflicts early on by involving the community in project design even before submitting an application. Vermont law does not require applicants to participate in ADR, but ADR is available as a tool to resolve conflicts before and during the development review process.

Interests (as defined in the ADR context): A party's needs, desires, hopes and fears that lead them to take a particular position. An interest is the reason, underlying need or concern that motivates people to ask for certain outcomes. The parties' interests serve as the motive for their positions.

Positions: A party's ideal, unilateral solutions to a dispute, describing possible outcomes or solutions.

ADR promotes solutions unavailable in the traditional project development process. ADR exists in various forms, with each offering a unique formula for identifying a solution that both satisfies as many interests as possible and represents a position satisfactory to everyone involved.

Types of ADR Processes:

Negotiation: A voluntary process of resolving disputes without a third-party's involvement or binding resolutions.

Mediation: A negotiation that utilizes a third-party process manager to assist disputants in collaborating to produce an outcome based on consensus. Mediation is non-binding.

Arbitration: Less formal than adjudication, this method empowers a neutral decision-maker to decide how to resolve a dispute. The results can be binding or non-binding.

For the multi-party disputes commonly arising in the project development process, the most effective form of ADR is mediation because it is voluntary, non-binding, and confidential. Unlike arbitration the non-binding nature of mediation allows parties to reach a mutually satisfactory agreement without the pressure of the decision being permanent. Mediation may provide a more formal structure than negotiation, and can be confidential.

Collaborate: Interested persons assume collective responsibility for achieving jointly agreed upon objectives.

Consensus: A mutually acceptable agreement that takes into consideration the interests of all parties.

Process Manager: An individual who has no conflict of interest or bias toward any party to the dispute, and oversees a process to facilitate collaborations between parties to reach a consensus. Though any neutral trusted third-party may perform this role, a list of mediators can be found at the bottom of:
<http://www.vermontjudiciary.org/GTC/Environmental/mediation.aspx>.

Why use ADR?

Many applicants never consider using ADR, but those who do often credit ADR with saving them time and money, as well as improving their community relationships. Those involved in an ADR process learn to collaborate with one another to develop a plan that satisfies all interests instead of solidifying stakeholders' already polarized positions. By encouraging a collaborative instead of adversarial method of resolving disputes, ADR facilitates communications that often improves relationships as well as the process's effectiveness and fairness.

AMPs can assist in promoting ADR's ultimate goal of achieving a win-win for the applicants, relevant stakeholders, and the municipality. The applicant wins because the development may be approved faster and at a lower cost. The community wins because its concerns may be taken into account earlier or may be given more weight in the ultimate design of the development. The municipality wins because the development process works more efficiently when interests are clearly identified and the concerns of potential opponents are resolved early in the process. While the AMP will not conduct ADR, design the project for the applicant or weigh in on the community's concerns, the AMP may encourage an applicant to use ADR to promote consensus. Conversely, the regulatory review process and court appeals create an adversarial climate where positions often become inflexible and the results perpetuate existing disputes.

Illustration: Imagine two cooks having a disagreement of who deserves the last orange. A judge would listen to both cooks reasoning and award the orange to one of the cooks. Alternatively a judge might split the orange in half. In contrast, a process manager would allow each cook to explain their interests in receiving the orange. At this point, the process manager could discover one cook needs zest from the peel to make marmalade, while the other requires the flesh to create juice. A process manager might then produce a result that satisfies both cooks by giving the rind to the first cook and the flesh to the second cook.



When to use ADR?

Before the Hearing: Though applicants, AMPs, and relevant stakeholders can initiate ADR at various points throughout a project's life, an applicant anticipating the need for ADR could identify potential stakeholders and begin ADR prior to submitting an application.

In general, applicants and other participants in the development review process are more likely to be flexible in their positions before having spent significant time and resources on planning a project. An applicant is more likely to have solidified its position if it submits an application prior to identifying and meeting with community stakeholders. At this point, reaching a consensus proves difficult and unlikely.

Though it may often be difficult for an AMP to contact the parties and encourage ADR prior to the hearing, staff may be in the position to do so. Thus, ADR is most effective in producing consensus-based development projects when used as early as possible in the site development process. By waiting for conflicts such as neighborhood opposition to emerge, an applicant is gambling that the project will not be delayed or appealed, either of which would cost time and money.

An applicant proposing a project that will dramatically alter a community's landscape might organize an optional, applicant-driven "community planning" phase, or charrette process.

If the applicant fails to do this pre-submission, the municipality may have an opportunity to require ADR post submission. If the municipality has provided a foundation for utilizing ADR in its plan, adopted bylaws, an ordinance or a resolution of the legislative body, the municipality may create an advisory commission to promote ADR post submission. An advisory commission can perform facilitative functions such as identifying stakeholders within the community along with their positions and interests.

A municipality's legislative body may "create one or more advisory commissions to assist the legislative body or the planning commission in preparing, adopting, and implementing the municipal plan." 24 V.S.A. §4433. An advisory commission must perform the functions outlined in statute. For example, the commission must comply with the open meeting law, but these meetings are not public hearings before a quasijudicial body. 24 V.S.A. §4464(d). The advisory commission may review the application and prepare recommendations for consideration by the AMP at the public hearing, according to the procedures adopted in the bylaws. By providing the community with an opportunity to resolve disputes, all relevant stakeholders' interests can be worked out with the applicant before the applicant spends time and money completing an application.

During the Hearing: Though much less likely to be effective once the public hearings have convened, AMPs may allow for ADR in the context of a statutory hearing process. The AMP may suspend the hearing to provide participants the opportunity to submit a written agreement stating that they will participate in ADR. At this time, the parties will agree to return to the AMP within a certain period of time. The applicant can then resubmit the application or submit an amended application based on the agreed upon terms. AMPs or their staff should consider requiring or promoting ADR prior to a public hearing in all complex, multi-party development plans that potentially affect community interests.

ADR is a voluntary process; therefore if the applicant and other stakeholders agree, it can be used effectively under subdivision, site plan and conditional use review.

After the hearing. After the hearing the AMP makes a decision. The parties are invested in the determination of whether the findings, conclusions, and conditions represent their interests.

Parties with a still unresolved dispute, who discover they “lost,” may now have an incentive to negotiate. Unfortunately, at this point positions may be too polarized, entrenched and adversarial. Unless there exist particular grounds for an AMP to reconsider, it is too late in the process to voice one’s objections at the local level. At this point in the process parties with existing disputes may file an appeal with the Environmental Division of Vermont Superior Court. The court can then require ADR under the Environmental Division’s rules of procedure.

An agreement reached through consensus may not satisfy each participant’s interests equally or receive similar levels of support from all participants. However, employing ADR early can prevent polarization from occurring during the development review process because ADR addresses all participants and their interests.

Application: How to use ADR?

The most effective method of encouraging ADR is for an applicant or municipality to convene formal meetings to identify community interests and positions prior to submitting an application. This effectively adds a “pre-submission” phase to the development review process, the results of which the applicant can draft into its application and plans before submitting them to the AMP.

Having experienced such meetings’ influence on producing consensus-based projects, Burlington’s Department of Planning and Zoning may soon require applicants to discuss projects with neighborhood planning associations or potential stakeholders prior to submitting applications.

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However, because Vermont’s enabling statute neither requires nor encourages this step before submitting an application, applicants often do not realize potential conflicts until after spending significant time and money. One way to prevent this is through the scoping process. Convening a scoping process allows for an applicant to better understand and prevent potential community disputes. Often, though, the applicant wishes to avoid this process because of the up-front expenses. An applicant hopes to move an application through a local development review process without interested persons contesting the plan. If that seems likely, the applicant would skip the scoping process. However, as mentioned before, this is a gamble. The scoping process and ADR may improve the likelihood that development projects will be approved more quickly and at a lower cost to the applicant by addressing potential opposition at an early stage.

Scoping Process: At the applicant’s request, all interested persons may collaborate prior to formal hearings for a “scoping” process that may lead to consensus on certain issues. At the beginning of this process is a public meeting wherein “the applicant or a representative of the applicant shall present a description of the proposed project and be available for questions from the public concerning the proposed project. The purpose of the meeting shall be to provide public information and increase notice about the project, allow discussion of the proposed project, and identify potential issues at the beginning of the project review process.” 3 V.S.A §2828(f).

Another option to encourage ADR is for the AMPs to call a recess to encourage and allow time for dispute resolution to occur. 24 V.S.A §4464(b)(1). By providing for this pause in time, an AMP may allow for ADR in the hearing process. To require ADR, it must be incorporated into the municipal bylaws. If an agreement is reached during a recess, the application may be resubmitted or amended to reflect agreed upon changes. Additionally, though ADR often eliminates the need for appeals, its non-binding nature does not preclude appeals.

If its members find that the development project resulting from the agreement complies with local regulations, the AMP will grant the permit. At this point, relevant stakeholders may appeal. The appeals court encourages mediation in all cases because mediation addresses issues frequently not addressed in municipal regulations. Since the Environmental Division of Vermont Superior Court may require ADR on appeal anyway, an applicant could use ADR earlier. All parties to complex development decisions can benefit from encouraging the ADR option at the start.

For examples of successful applications of ADR, see the case studies in Smart Growth Vermont’s Community Toolbox at: <http://www.smartgrowthvermont.org/toolbox/casestudies/>

Considerations:

AMPs may encourage ADR.

Vermont’s legal framework empowers AMPs with significant responsibility in determining the future of Vermont’s built landscape based on fairness, stability, efficiency, and cohesiveness within their communities. Inexperienced applicants may particularly benefit from AMPs encouraging ADR because of its capacity to offer superior solutions in

some situations. Ultimately, applicants gain wisdom from witnessing and learning from the benefits that ADR provides.

Encourage the use of a competent, neutral process manager whom all parties trust. This is integral to ensuring procedural fairness. Dispute resolution processes are more effective when they ensure procedural fairness, promote stability and efficiency, and evolve through experiential learning. An effective process manager can identify potential stakeholders and convene informal meetings prior to filing an application, to make certain all concerns are heard.

Recommend the use of ADR early on. By encouraging collaboration early in the process, AMPs can assist in promoting responsible development and less adversarial and divisive development review. Identifying shareholders early is an effective means of preventing conflicts from arising after the applicant has spent time and money drafting and submitting an application.

Encouraging ADR throughout the development review process, and especially as a precursor to an application, can be a positive force for the community and make the development review process more efficient.

Resources:

Consensus Building Institute
<http://cbuilding.org/>

“Integrating Consensus-Building – A Chart & Narrative”
www.seannolon.com

The Lincoln Institute
<http://www.lincolnst.edu/>

Smart Growth Vermont toolbox on ADR
<http://www.smartgrowthvermont.org/toolbox/tools/alternativedisputeresolution/>

Vermont Judiciary Mediation Resources
<http://www.vermontjudiciary.org/GTC/Environmental/mediation.aspx>

Credits

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