Evaluating the Use of Mediation to Settle Land Use Disputes: A Look at the Provincial Facilitator's Office of Ontario

by

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ABSTRACT

The Province of Ontario is one of the few jurisdictions in North America where a government office has been set up to mediate land use disputes. The Office of the Provincial Facilitator (OPF) has handled over 600 planning and development disputes since 1992. In parallel with the OPF, the Ontario Municipal Board (OMB) has continued to serve as the province’s land court, with an administrative tribunal rendering decisions on land use cases. The co-existence of a mediation office and a court, both dealing exclusively with land use issues, provides an ideal setting to explore the use of mediation to resolve land use disputes.

The author selected 15 cases handled by the OPF and involving development disputes with important environmental dimensions. The author interviewed 34 participants, including at least one involved in each case. While the developments were usually allowed to move forward as a result of mediation, most proponents agreed to substantial modifications of their plans in order to protect the environmental resources at stake. Almost all participants perceived that the settlements reached through mediation met their interests. When comparing their experience at the OPF with what they thought might have happened at the OMB, most participants thought mediated settlements were more fair and as stable as tribunal decisions, and almost all felt that the OPF saved them substantial amounts of time and money.

The OPF was instrumental in bringing government officials to the table, narrowing the conflict, and proposing mutual gains solutions to problems. In a number of cases, the OPF convinced environmental ministries to agree to more flexible settlements that went beyond their usual regulations and guidelines. This flexibility was demonstrated by the parties’ ability to react over time to new information, improvements in technology, and diverse local circumstances. While the evidence is not conclusive, the author suggests that institutionalizing mediation may add value to governmental decision-making.

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Introduction

Although this study implicitly compares mediation with litigation as alternative means of resolving land use disputes, the sample of cases I chose is insufficient to sustain a full-fledged comparison. That would require “matched pairs” of cases: one set litigated, the other set mediated, with each “pair” dealing with nearly identical issues. Due in part to the difficulty of finding matched pairs, this sample contains only mediated cases. Similarly, I cannot conclusively compare the institutionalization of mediation within a government office with the use of private mediators to resolve similar land use disputes, at least not with data available in Ontario. The cases analyzed were all handled by the OPF; none were handled by private mediators.

My sample is quite small. Of over 600 disputes handled by the OPF since 1992, these 15 cases represent a very thin slice. I visited the OPF in person and looked through a list of all 600 cases to find cases in which environmental issues were central. Based on summaries of the cases provided by the OPF, I found about 35 cases that concerned environmental matters. I then selected 15 from the 35 based on the availability of information. In essence, these cases were recent enough for OPF staff to remember the issues involved and to locate files; most of the 15 were mediated since 1994.

I have no information with which to gauge whether the 15 cases are representative of the other 20 that concerned environmental issues, or of the parent sample of 600 cases. Similarly, I cannot conclude that the sample is representative of the universe of all land use disputes in Ontario. Nevertheless, my sample does illustrate that a number of significant environmental issues, often found in disputes between developers and environmental agencies, can indeed be mediated to the satisfaction of the parties.
Critics may wonder if the 15 cases represent only the “best candidates” for mediation: in other words, disputes where interests were easy to identify and mutual gains easy to achieve. My view is that several of the 15 were among the most complicated and time-consuming mediations that the OPF ever encountered, while others in the sample were simpler and easier to resolve. This variation in complexity may be sufficient to rebuff suspicions that the sample is skewed.

There are problems in using a small sample of Ontario cases to generalize about the use of mediation to settle land use disputes in the United States. While there are significant parallels between land use decision-making systems in both countries, there are significant differences as well. The plan approval process is stricter and involves more levels of government in Ontario than in most of the U.S. While OMB decisions are essentially final, U.S. court decisions are subject to numerous appeals. I can only generalize about the use of mediation in Ontario. On the other hand, I feel that my research has important implications for the use of mediation to resolve land use disputes (and the need for further evaluative research) within the United States.

Despite these limitations, interviewing participants in these 15 cases provided a valuable picture of the use of mediation to settle land use disputes. The breadth of experience that the participants had at both the OPF and the OMB allowed me to make some interesting comparisons, even if they are primarily based on perceptions of the participants rather than independent assessments. I relied on opinions of the participants to determine how fair and stable mediated settlements were. I was able to use participants’ estimates of the time and cost of OPF mediations compared with OMB hearings. I also learned how an institutionalized mediation office can conduct an effective practice, and how mediated settlements can be structured to meet interests and add flexibility to the application of regulations and guidelines.
Chapter 1: Evaluating Mediation of Land Use Conflicts

Typically, there are conflicts surrounding land use decisions. These decisions may involve either a specific project or a wider policy. They affect a variety of stakeholders, including individuals like property owners and neighbors, larger groups of residents or activists, and various levels of government.

There are many competing demands that dictate land use. In the United States, market forces are a primary consideration. Developers (and most local planners) typically want to raise a property to its “highest and best use,” one that maximizes its revenue-producing potential. Market forces can often work to the benefit of the public; this is evident in the case of “clustering,” where related industrial or commercial developments sprout up side by side to take advantage of economies of scale, improved efficiency, and innovation. However, in some instances, other interests come into play to oppose private sector goals. These interests are often represented by public bodies or activist groups that fear that the “public good” will be overlooked. Environmental considerations, for example, are often raised when the development threatens a resource area that is used for recreation, groundwater recharge, wildlife habitat, or agriculture.

A town’s particular social or economic goals are often expressed through zoning ordinances or affordable housing requirements that developers may find burdensome. Towns are frequently torn between the ideals of preservation and the need for growth; while residents want to prevent externalities like traffic, pollution, and school overcrowding, they usually need the tax revenue that new development brings in order to maintain infrastructure and services. Often there are also conflicts between various levels of government; a land use decision that seems positive for one town may have adverse economic or environmental
impacts on other towns, the region, or the state. Policies among jurisdictions may be poorly coordinated, leading to problems of procedure and implementation.

For these reasons, land use conflicts often involve multiple parties and different levels of government. There are a number of stakeholders typically involved in such disputes. Owners and developers are intent on attaining the “highest and best use” of their properties. Abutters and neighbors are most often concerned with particular impacts a proposed development will have on their properties. Citizen’s groups may protest against a project for environmental reasons or to limit growth when the pace has been especially fast. Local government officials may have one agenda, while regional or state officials may have other conflicting mandates. We can conclude, therefore, that land use conflicts are often multi-party, and that more than one party can have a legitimate interest in a piece of land.¹

In the United States, most states have enacted legislation that allows localities to adopt zoning bylaws to control land use. Within this framework, a developer may apply for a building permit from the local planning and zoning authority. At the local level, there are usually opportunities for public comment, especially with larger projects. After the local body has issued its decision to approve or deny the permit, any of a number of affected parties may appeal the decision to the courts. In theory, the court decisions can also be appealed up to the U.S. Supreme Court. For sufficiently large projects, especially those funded by government agencies, opponents can also demand an Environmental Impact Statement. In some cases, the EIS process has been successfully used to stall projects indefinitely.

¹ There are many published case studies of land use disputes, especially with regard to facility siting. The reader may want to peruse studies by a number of authors, including Chapin, Bacow, Susskind, Wondolleck, and Crowfoot.
Critics of the “traditional” U.S. dispute resolution system point out a number of weaknesses. Although many of these criticisms are aimed at the court system in general, they apply equally well to land use disputes. Many complaints concern efficiency; there is a popular perception that the courts take too long and place too high a financial burden on participants. Susskind and Cruikshank (1987) point out another drawback; legal decisions are commonly “winner-take-all” in nature (p.71). Therefore, the courts tend to overlook the mutual gains that are possible in many land use decisions. With regard to environmental cases, Bacow and Wheeler (1984) question the technical and scientific expertise of judges, who tend to focus only on whether procedural requirements were met rather than on how “correct” the actual decisions were (p.360). Another weakness of the legal system in handling land use disputes is its two-party nature; multiple parties or various governmental agencies that fail to work out their differences out of court must bring suit individually, resulting in a long, poorly coordinated process. Lastly, land use conflicts are often based on local circumstances and are therefore highly variable. Since “setting precedent” is a high priority of the courts, they may not have the flexibility to deal with the changing circumstances and knowledge that impact the recommendation and implementation of land use decisions. There are two conclusions worth keeping in mind with regard to land use disputes. First, multi-issue, multi-party conflicts are difficult to adjudicate in a rigid system. Second, interjurisdictional conflicts and concerns limit any single agency’s administrative effectiveness.

Frustration with the courts has led many social scientists to search for a new dispute resolution framework. Susskind, Bacow, and Wheeler (1983) lament:

The costs of delay and contentiousness, measured in dollars, human suffering, environmental destruction, or any other terms, are a terribly high price to pay for our inability to address the legitimate concerns of those upon whom the burdens of regulation are visited.
If we could find a speedy and effective means of settling regulatory disputes, one that acknowledged the legitimate claims of the victims of regulation as well as society's need for protection, the country would benefit enormously. (p.1)

Although the authors are referring to environmental regulatory disputes, their commentary applies to land use conflicts as well.

Mediation, or assisted informal negotiation, has been put forward by many as a cure for the ills of traditional dispute resolution. Many authors have put forth arguments that apply to all categories of disputes, not only land use. In theory, consensual approaches are better than litigation or administrative decision-making because they are cheaper, faster, and by taking all the interests of affected parties into account, they facilitate the implementation of any decision. Susskind and Cruikshank (1987) state: “Consensus, defined and developed by the stakeholders, is more likely to resolve a dispute than a vote of a legislative body, a decision by an administrative agency, or a court decree because it is likely to meet more of their interests.” (p.81) Bingham (1986) states that the problem with litigation and administrative procedure is not that decision are not reached, but that these decisions are frequently appealed. On the other hand, if parties voluntarily agree to a decision, satisfaction and implementation are more likely (p.75).

In a recent synopsis of past findings by proponents of mediation, Dukes (1996) points out significant savings in costs versus litigation, and that mediation gives parties the opportunity to deal with “underlying issues,” thereby relieving tension and building acceptance of the outcome (p.93). Carpenter (1989) states that mediation gives parties the opportunity to learn directly from one another, and such joint thinking encourages greater creativity and better-quality solutions. In addition, she points to a greater acceptance of the outcome, faster implementation of agreements, and new networks of constructive relationships.
that may help deal with any future issues that arise (p.4). Susskind, Bacow, and Wheeler (1983) list the advantages of informal negotiation as: 1) reducing risk to parties as compared to the "winner take all" scenario in the courts; 2) reducing costs to the parties; 3) increasing the efficiency and acceptance of the outcome; and 4) increasing the outcome's stability (p.2). They insist that the learning that takes place during mediation is the key to maximizing joint gains, and that while court decisions make no provisions for contingencies, negotiation is far more flexible (p.257).

Dukes (1996) suggests that one mediation session can present a model for solving future controversies, and that it can provide a means of educating public officials and changing their behaviors (p.93). Even when a final settlement is not reached, mediation may produce a host of other benefits. Dukes points to a number of studies where mediation helped to clarify interests, generate new options, demonstrate good will, ease the work load of regulators, and educate parties about negotiation (p.94).

Although their publications are outnumbered by those of proponents, critics of mediation also exist. Although the criticisms are often aimed at mediation in general, they are especially important with respect to land use disputes. Dukes (1996) summarizes some critical findings. Critics have claimed that mediation can be extremely time-consuming, that agreements may lack a sturdy enforcement mechanism, and that negotiations may continue indefinitely without the authority of a judicial decision. Negotiations may lead to poorly informed choices, and a settlement may leave fundamental issues unsettled or ignore potentially extensive future liability. In some cases, parties may misuse the mediation process merely to delay opponents. These potential weaknesses are especially applicable to land use disputes, where good information, a timely approval process, and enforcement authority are very important. Finally, Dukes
(1996) suggests that the use of mediation works against the reform of conflict resolution, because it lets the courts avoid the need to confront their own weaknesses (p.98).

Although these criticisms are entirely valid, it is interesting to note that all can be equally well applied to the court system, especially with respect to land use disputes. Court proceedings can be extremely time-consuming, judicial decisions may also lack enforcement mechanisms, judges may also make poorly informed choices or leave fundamental issues unsettled, and litigants often use the courts to delay opponents. Therefore, we can only conclude that the downsides of mediation and litigation are similar. It is still worth asking whether the upside potential of mediation can be matched by the legal or administrative alternatives.

Some critics demonstrate a deep mistrust of the “informalism” of negotiation as a substitute for the “formalism” of courts, legislation, or administrative procedure.2 This informalism may actually work against the public interest, by extending the power of the state while decreasing its visibility and accountability. Bacow and Wheeler warn against the potential for win/win/lose deals that benefit the parties at the expense of the public (Dukes, 1996, p.99). This potential sacrifice of the public interest is especially important with land use disputes, since development projects typically have large positive or negative externalities for the surrounding communities.

Douglas Amy, perhaps the strongest critic of environmental mediation, insists that “consensus” is often the product of powerful pressures applied in political forums. He claims that powerful business interests can use mediation to distract environmentalists from more effective political or legal strategies, to distort the real issues at stake, to influence the mediator, or to give the illusion of legitimacy to development projects (Dukes, 1996, p.100). Amy (1987) blames

these dangers on power imbalances; while effective mediation requires a balance of power among the parties, this balance is not commonly found (pp.80-82). In opposition to the popular “nonadversarial, hot-tub understanding of mediation,” negotiators often take a “hard-ball” approach, using power and threats to force a compromise (p.86). Amy insists that mediation is just another form of power politics: “Politics is not simply about communication, it is also about power struggles. It is not only about common interests, but about conflicting interests as well.” (p.228) Amy also warns of the dangers of informality. He claims that mediation has no procedural safeguards, that the absence of lawyers increases the chances that some parties will be taken advantage of, and that citizen and environmental groups have little protection against exploitation (p.107). He points to the danger of “liking your opponent too much;” he claims that in informal settings environmentalists tend to want to be “too reasonable.” (p.110) People may in fact lose the “legitimate angers and frustrations” that make them good negotiators (p.113). Amy claims that the modest delay caused by litigation may actually be desirable, in light of developers who hurry decisions without due concern for environmental impacts (p.74).

Some of these criticisms are addressed by mediation’s proponents. Bacow and Wheeler (1984) admit that negotiation is perceived as inconsistent as opposed to the law, but they argue that good negotiators always keep the law, precedent, and past history in mind. Furthermore, judicial decisions only have the illusion of the “right answer,” while negotiation “lays bare the uncertainties and complexities of environmental policy.” (p.364) They also admit that there is no such thing as a pure “neutral” party; mediators themselves usually have a natural bias towards settlement (p.270-271).

Both proponents and critics seem to agree that mediation and litigation are not perfect substitutes, but that mediation may in fact rely on the threat of
litigation to reach an effective agreement. This viewpoint is particularly applicable to land use disputes, where developers may prefer a faster compromise to endless appeals. Amy (1987) insists that without litigation, mediation would not be used as much; the ability to litigate creates the stalemates that foster mediation efforts (p.89). Amy says that litigation creates the situation of high risk that drives parties to negotiate: “It is a win-lose process in which each party risks losing their entire case. Judges and juries are notoriously unpredictable, and even with a very strong case, it is difficult to be certain of victory.”(p.90) Amy thinks that conflicts must be “ripe” for mediation, while Susskind, McMahon, and Rolley (1986) suggest that incentives to negotiate may be stronger later in the dispute (p.25), and in precedent-setting situations, a formal court decision may be more desirable to certain parties (p.25).

Little empirical evidence exists to support many of these stated advantages or criticisms of mediation with respect to land use disputes. Dukes (1996) complains: “There is a predominance of studies assessing processes in terms of cost, time, and disputant satisfaction, in part because these factors can be operationalized and analyzed relatively easily.”(p.103) However, the number of studies that focus on land use or environmental conflicts is small. The most comprehensive study undertaken thus far is by Bingham (1986), who looks at a large number of environmental mediation efforts over a ten-year period, and attempts to make some comparisons between mediation and litigation. With regard to efficiency claims, she concludes that there is very little evidence on how long it takes to mediate or litigate (p.xxv), and she points to the difficulty (or near impossibility) of finding comparable samples (p.xxvi).

Bingham does present some interesting conclusions based on a year’s worth of lawsuits filed before June 30, 1983. For cases that settled before trial, the median number of months from filing to disposition was 7 for civil cases and
10 for environmental cases. For cases that went to trial, the numbers jump to 19 for civil cases and 23 for environmental cases. Amy (1987) uses this evidence to support his claim that fears about the length and cost of environmental cases are largely unfounded (p.72). He also cites a $2 million dollar study by the Wisconsin Civil Litigation Research Project that found that of all suits filed, 92% settle out of court before going to trial (p.69). But Amy ignores Bingham’s discussion of the most extreme 10% of cases that settle or go to trial; for those that settle, 10% of environmental cases took over 42 months, while 10% of environmental cases that went to trial took over 67 months (or 5 1/2 years). Bingham concludes that the very real threat of protracted litigation helps to create the popular conception that mediation is faster and cheaper than litigation (p.xxvi). Although the data presented by these two authors is inconclusive and draws on a wide range of case types, it suggests that “environmental cases,” which include a large subset of land use cases, take more time to litigate than the “average” case.

Although existing evidence tends to be more anecdotal (or case study-oriented) than quantitative, a number of authors have put forth frameworks for evaluative research on mediation efforts. The question most often addressed is how to define and measure “success” in mediation. Dukes (1996) states that mediation should be judged on the basis of expectations, especially when a written agreement is not the goal. Conversely, even when a written agreement is achieved, it is difficult to ascertain the exact role mediation played in achieving it (p.95). There may be categories of gains besides settlement, dealing with improvements in content, relationships, and process (p.96). An evaluator must also move beyond the interests of the disputants and the mediator to consider how well the public interest was addressed; the agreement may only be an “uncertain beginning” subject to public scrutiny (p.96). Some better indicators
of success, according to Dukes, are how well the agreement was implemented, whether necessary changes were made in agency programs or procedures, whether parties worked together to face implementation challenges, and whether parties continued to be satisfied with their agreement (p.96). Other criteria for “success” that Dukes puts forward are the accessibility and affordability of the process, the protection of rights against power imbalances, cost and time efficiency, fairness consistent with justice, finality and enforceability of the settlement coupled with the opportunity for review, and the credibility of the settlement in the public eye (p.97).

Tailoring her evaluative framework to environmental cases, Bingham (1986) states that any evaluation of “success” must compare the results of mediation with what the people involved hoped would occur (p.65). She suggests basing evaluations on: 1) the outcome and the extent to which it satisfies interests; 2) the fairness, legitimacy, and efficiency of the process; and 3) improvements in the quality of relationships, at least among those who wish to have a continuing relationship (p.68). Questions she asks (or considers worth asking) are: Was an agreement reached? How stable was it? How much did the process cost and how long did it take? Were interests satisfied? Were joint gains maximized? Was the process and outcome equitable? Was future dispute resolution enhanced? (p.69)

Bingham points out that a negotiated agreement may not be considered successful if certain parties achieved less than they would have through another strategy (p.70). She insists that an evaluator must test how well any agreement met the parties’ interests. The stability of the agreement is a good indicator of how satisfied the parties really were, and of how inclusive the process was (since excluded parties tend to make trouble later). Other intangible factors worth measuring are to what extent parties gained insights into other positions, whether
communication lines were opened, whether issues were clarified, and how mediation helped the parties reach resolution even by conventional means (p.71).

Although Bingham does not present any findings about how often mediation leads to this type of “success,” she does make some interesting conclusions as to which factors contribute towards success. The most significant factor determining the success of implementation was, not surprisingly, whether those with the authority to implement the decision participated directly in the process (p.xxiv). Furthermore, the experiences she analyzed strongly dictate that the participation of public agencies with decision-making authority in a dispute has major importance in increasing the likelihood of success in reaching and implementing agreements (p.104). Bingham also concludes that agreements in site-specific cases are more successfully implemented than those in policy dialogues (p.77), and at least in site-specific cases, there is little relationship between the types of issues involved and the likelihood of reaching resolution (p.117).

Susskind and Cruikshank (1987) identify four requirements for a good mediated settlement: fairness, efficiency, wisdom, and stability. They insist that “what counts most in evaluating fairness of a negotiated outcome are the perceptions of the participants.” (p.21) Four conditions of fairness are provided: 1) the offer to participate must be genuine, and all the stakeholders must be given a chance to be involved; 2) the stakeholders must be given opportunities to review and improve the decision process; 3) the process should be viewed as legitimate before it begins and after it ends; and 4) in the eyes of the community, a good precedent should be set (pp.24-25). A “wise settlement” must contain “the most relevant information” and “the best possible technical evidence,” and all the parties must cooperate to “minimize the risk of being wrong.”(p.30) Susskind and Cruikshank point to “joint fact-finding” as one way to achieve this
To ensure stability, a settlement should be feasible, with realistic time tables (pp.31-32). Agreements should include provisions for contingencies and renegotiation in light of new information (p.32), and implementation and monitoring agreements should always be included (pp.130-132). All of these requirements are echoed by Madigan, McMahon, Susskind, and Rolley (1986).

Susskind, McMahon, and Rolley (1985) identify a few additional requirements for effective mediation of development disputes. First of all, any party with the power to block implementation of agreements must be at the table (p.23). All the parties must have a good understanding of their BATNA, or best alternative to a negotiated agreement (p.24). Fundamental value differences are not good topics for mediation, but cases that deeply concern the public are good candidates (pp.25-26).

The evaluative theories put forward by proponents and critics to measure “success” in a wide range of mediation efforts present the researcher with a sound basis for evaluating the mediation of land use disputes. Fairness, stability, and efficiency are all important criteria used by the author to evaluate mediated land use settlements; the wisdom of settlements, although equally important, was not substantially investigated, due to the difficulty of measuring “wisdom” on the basis of interviews with participants. The next chapter presents the author’s evaluative framework for the sample of 15 land use cases.
Chapter 2: The Creation of an Evaluative Framework

Description of Research Area

This study attempts to measure the success of mediation in settling land use disputes that involve significant environmental issues. Mediation is defined as the use of a neutral who helps the stakeholding parties reach agreement. I have chosen 15 land use disputes that were handled by the Office of the Provincial Facilitator (OPF) in Ontario, Canada. The OPF is one of the few attempts in North America to institutionalize the use of land use mediation within a government entity.\(^3\)

In May 1992, the OPF was created by the New Democratic Party (NDP), after coming to power in Ontario in 1990. Although its creation was announced in the Premier's Throne Speech and a Minister's Order (Municipal Affairs and Housing), the OPF was never formally adopted by Ontario's Parliament. Dale Martin, an ex-politician from Toronto, served as the Provincial Facilitator for the period of time in which these 15 cases took place. During most of his time as Facilitator, Martin had close ties with Bob Rae, who was Premier of Ontario under the NDP. Some time after the Progressive Conservative Party took over in April 1995, Martin left the Office. The OPF has remained open (although it was temporarily closed down for a few months), but its staff has been drastically reduced, and it is rumored that the OPF will soon be closed.

Although the NDP was a socialist party, it attempted to cater to business interests who complained that the provincial approval process was hopelessly bureaucratic and slow. The official purpose of the OPF was to “facilitate” development projects that could benefit the province but were caught in “red

\(^3\) Some examples of institutionalized land use mediation within the U.S. exist in Oregon, Florida, and Montana.
tape.” By the early 1990s, the provincial planning process was bogged down, and a special commission was studying potential reforms.4 The OPF may have been a temporary measure to help developers find their way through the system until a new framework was put in place.5

The 15 cases I have chosen are but a small sample of over 600 land use cases the Office has handled between 1992 and 1997. I selected the 15 at OPF’s Toronto offices with the assistance of Randy Hodge, at present the only full-time OPF employee. As I mentioned earlier, I went through a list of 600 cases that had been mediated by the OPF, and chose 35 that concerned environmental issues. The selection of the 15 from the 35 was based on the availability of information. I have no evidence that the 15 are representative of the 35 environmental cases, nor of all 600 cases the OPF handled. Nevertheless, I felt confident that the experiences of participants involved in the 15 cases would allow me to make some interesting analyses and conclusions.

The 15 cases I selected represent a clash between development and the protection of environmental resources. They involved major residential or tourism projects that were held up by approval agencies concerned with environmental impacts. Most of the cases occurred in the suburbs of the Toronto metropolitan area, which experienced tremendous growth in the 1980s, partially as a result of Quebec’s flirtation with separatism. These disputes are highly relevant for communities throughout North America that are experiencing growth pressure that threatens groundwater, wetlands, agricultural land, or other natural resources.

The cases I looked at can be categorized into 5 case types by the kind of environmental resource at stake. There are also 5 participant roles that are found in the cases (although not all the roles are found in each case). In the

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4 This was the “Commission on Planning and Development Reform in Ontario.”
5 See Dale Martin’s interview in Appendix 2.
interests of confidentiality, the actual names of cases or participants will not be mentioned in this study.

Case Types (and # of each):

- **Contamination (3):** These cases involved severe soil or groundwater contamination on-site prior to construction of the proposed project. The most concerned party was the Ontario Ministry of Environment (MOE).

- **Impacts (2):** These cases revolved around the presence of existing industrial facilities or sewage plants which might have adverse impacts on new residents in the proposed project. The most concerned party was the MOE.

- **Natural areas (5):** These cases concerned the need to protect valuable habitat, wetlands, or forests from a proposed development. The most concerned parties were either the Ontario Ministry of Natural Resources (MNR) or environmental activists (often referred to as Citizens).

- **Septic servicing (4):** These cases involved major new developments with undemonstrated septic servicing capacity and/or an uncertain water supply. The most concerned party was the MOE.

- **Agricultural land (1):** This case concerned a tourism project within the buffer zone of an existing agricultural facility. The most concerned party was the Ontario Ministry of Agriculture (MAFRA).

The following participant roles were interviewed (with the # for each):

- Development Consultants (10)
- Provincial Ministry Staff (9)
- Regional Planners (4)
- Local Planners (9)
- Environmental Citizens Groups (2)
In total, 34 interviews were conducted over the phone with the participants in these cases. These interviews were scheduled ahead of time, and the interviewees were faxed all the questions (see Appendix 1) and given a few days to consider their responses. There was a reasonably good distribution of interviews over the 15 cases, with at least one participant from each case interviewed. The five roles I interviewed represent the interests commonly found in land use disputes in Ontario. The length of the interviews ranged from 45 minutes to 1 hour and 15 minutes. Dale Martin was also interviewed for 30 minutes (see Appendix 2 for questions and transcript).

In these 15 cases, the developer or the town were usually responsible for contacting the OPF with their case. The OPF would then identify and call all the stakeholding parties to the table. The stakeholders were usually fairly obvious. Dale Martin pointed out that "public participation" was not the OPF's goal, and he made no effort to "search out every potential stakeholder." He noted that there are statutory requirements for public participation in Ontario, and projects the OPF helped to get approved would still have to go through such a process. The average number of parties involved in the cases was 4. At least one meeting would be held under OPF's auspices, with a number of additional phone calls and side meetings. In nearly all the cases, at least a partial settlement was reached, allowing the project to move forward.

I do not assume that a mediation effort that reaches any settlement is necessarily successful. A settlement can still be unfair, inefficient, or unstable in the eyes of one or more parties. Altogether, I have tried to minimize my own role in judging success. I have instead relied heavily on the perceptions, opinions, and judgements of the participants involved. The purpose of my research was to determine, by means of 34 interviews with participants, the fairness, efficiency, and stability of the settlements that were reached. I decided not to analyze the
“wisdom” of the settlements, due to the difficulty of defining the term in a way all the participants could easily understand and comment on.

My research question was as follows: does the use of mediation in land use disputes lead to more effective and satisfying settlements? My hypothesis is that mediation leads to settlements that are perceived by participants to be more fair, efficient, and stable than the conventional process. The definition and measurement of fairness, efficiency, and stability is discussed below.

**Hypothesis: Mediated settlements are fair.**

Fairness is defined as the extent to which the participants perceived that the settlement met all the relevant interests. After I asked participants to explain the conflict, their interest, and the settlement, I asked them to respond to the statement: “My interests were well met by the settlement.” I gave them a number of possible choices for a response, including “strongly agree,” “agree,” “disagree,” or “strongly disagree.” Although these were the suggested responses, the questions were not presented in a “multiple choice” format, and interviewees were not bound by the four categories. In a similar fashion, I asked participants to gauge how well the other interests at the table were met by the settlement. Finally, as a check on their previous answers, and also to account for interests that may not have been at the table, I asked participants to categorize the fairness of the settlement as “very fair,” “fair,” “unfair,” or “very unfair.” Again, these were only suggested responses. At this point in the interview, I asked the participants to compare the fairness of the mediated outcome with what they thought might have happened at the OMB.
Hypothesis: Mediation is an efficient process for resolving disputes.

For the purposes of this study, efficiency is determined by the resources the participants expended to reach settlement. In the case of the OPF, the direct costs for the mediator were covered by the provincial government’s tax revenues. However, each participant incurred varying costs for studies by consultants, time away from other work, and travel to meetings. Another measure of efficiency was the time it took to arrive at a settlement, once the OPF became involved in a dispute. Participants were asked how long the OPF was involved in the case, how much money was spent for purposes related to the mediation, and to compare the time and cost with what they thought might have been necessary if the case had gone to the OMB.

Hypothesis: Mediated settlements are stable.

Stability relates to the perceived permanence of the settlement, and the ease with which it was implemented. Since many have theorized that the quality of relationships between the parties is an indicator of stability, I asked if the parties perceived any improvements in relationships as a result of the mediation. Participants were asked if implementation and monitoring agreements were included in the settlement, how realistic and easy to administer those agreements were, and whether parties followed through on their commitments. They were also asked to identify any legal challenges to the settlement that may have emerged, and to evaluate how well the settlement was implemented over time. Another issue that relates to stability (and also to “wisdom” if one were to measure it) is the flexibility of the settlement to account for new information, technology, or local circumstances that may come up in the future. Participants also tried to compare OPF settlements to OMB decisions with respect to stability.
Since not much time has elapsed since these settlements, stability is difficult to measure. However, most of the settlements specifically related to steps in the approval process. Therefore, although some projects may not have been built yet, the participants were able to judge the stability of the conditions, approvals, and other agreements that allowed projects to move forward.

The results of this study are analyzed, when appropriate, by role and by case type. Statistics for responses to a number of questions are presented in Appendix 3. In addition to fairness, stability, and efficiency, I investigated some other areas of interest. I looked for the characteristics of disputes best suited to mediation, the potential advantages of government-sponsored mediation, and any impact the OPF might have had on the application of regulations and guidelines by environmental agencies.

I looked for disputes best suited to mediation. A dispute may be characterized by the technical nature of the conflict, by the importance of the resource at stake, or by the interests and values of the groups involved. I hypothesized that some disputes may be too trivial for mediation, while others may be too complex. My analysis suggested some important implications for the types of land use disputes best suited to the use of mediation. Participants were asked to give their own opinions about the characteristics that make a case a good candidate for mediation.

I was interested in whether an institutionalized mediation program can make government decision-making more responsive. I asked participants to describe their perceptions of the OPF’s role in the provincial government, and any procedural advantages that government-sponsored mediation provided. I was interested in their preconceptions of the strengths and weaknesses of OPF mediation, with particular reference to how Dale Martin reached settlements. I
also asked them if they thought mediation was an effective tool to resolve their dispute types, and to gauge how necessary the mediator really was to reach resolution. From my initial conversations with experts from Ontario, I realized the perception of bias might be an important issue in the evaluation of the OPF’s work. I asked the parties about any expectations they may have had based on prior knowledge of the OPF’s activities. I also wanted to compare any perceived bias with the perceived fairness of the settlements.

I also wanted to see how the OPF might have altered the usual application of regulations and guidelines by environmental agencies at the provincial level. I asked participants whether the settlements were considered “radical” or “unusual” by the provincial agencies involved, and if so, why. I inquired whether mediated settlements contained the harbingers of planning reforms to come. My interview with Dale Martin shed some light on this connection.
A basic understanding of Ontario’s planning procedure (at the time these cases took place) is useful in interpreting the results of this study. For a major subdivision, a developer had to obtain three layers of approvals. First, he applied for an Official Plan Amendment (OPA), to have the proposed use written into the Official Plan for the area. The OPA was especially important when a zoning change was involved. From the developer’s standpoint, the OPA was crucial to attract investors to finance a project. The next approval needed was the subdivision agreement, which laid out the number of units, any restrictions on uses, and other conditions related to site servicing. The last step was the site plan control process, whereby local planners approved the actual layout of proposed buildings on the site.

All of these applications were made directly to the local municipality. However, under the Planning Act for most of the OPF’s tenure, the provincial Ministry of Municipal Affairs (MMA) had to approve all OPAs. The MMA was basically a “paper-pushing” agency, and any real objections to a project would come through the MMA from other “commenting” ministries, like the Ministry of the Environment (MOE) or the Ministry of Natural Resources (MNR). When a developer learned of a particular ministry’s objection, he would often try to work out any differences on an informal basis. If that effort failed, and he refused to fulfill the ministry’s requirements, he could take the case to the OMB, to the OPF, or to both. After an OPA was granted, the region would get involved with the details of the subdivision agreement. Site plan control was within the domain of the local municipality.

6 Unlike in the U.S., regions in Ontario are given approval authority over local plans.
The Conventional Land Use Dispute Resolution System in Ontario

One implicit purpose of this study is to try and compare the use of mediation with that of conventional dispute resolution systems to resolve land use disputes. As previously mentioned, the conventional system in the United States is the court, where development applicants, approval agencies, and third parties can appeal decisions, potentially up to the Supreme Court. In Ontario, the conventional system consists of the Ontario Municipal Board (OMB), an administrative tribunal that functions essentially like a land court. OMB decisions may not be appealed to a civil court, but under rare circumstances they may be reviewed by Cabinet, Ontario’s highest-ranking ministerial body.

The U.S. legal process and the one used at the OMB are very similar. For OMB hearings, the parties must hire attorneys, schedule dates far in advance, present their positions one at a time, and expend large amounts of time and money. OMB decisions are final, and their verdicts tend to be one-sided, favoring one party over another. For this reason, parties are motivated to take extreme positions rather than compromise. Although my data set contains only mediated cases (although a few went before the OMB as well), the participants in these cases all have substantial experience taking cases before the OMB. Furthermore, since both the OMB and the OPF only handle land use cases, comparison is relatively straightforward. Therefore, it was valid to ask participants to compare the OPF and the OMB with respect to fairness, efficiency, and stability.
Chapter 3: Results and Analyses

Section 1: The Nature of Conflicts

It is useful to understand the types and levels of conflicts that went before the OPF. The level of conflict was usually high. After developers had applied to local authorities for zoning changes, the conflicts were often initiated by a letter sent to the local municipality from a commenting agency (MOE, MNR, or MAFRA). This letter would highlight the concerns that the agency had with regard to a project and its associated environmental impacts. Commenting agencies could hold up approvals by requesting additional reporting or technical work from the developer, and by taking time to review and comment on any information the developer submitted. Developers could not move forward without receiving approvals for their projects, and disagreements with agencies cost them substantial amounts of time and money. Agencies felt they could not approve development plans that might result in environmental harm.

Many development consultants reported that they had gone through a lengthy “back and forth” with agencies to try and address any concerns. They made phone calls, set up informal meetings and negotiations, and sent memos. One developer spent 2 years in meetings with the city and MOE, and spent $50,000 on additional reports before the OPF got involved. Another developer already had been through 7 public meetings before MOE informed him of their concerns. Another reported meeting with MMA and the town twice a year for 4 years. Yet another spent 2 years in technical staff meetings coordinated by MMA. Some developers contacted local politicians to try and get their support for projects. A few developers of large projects affecting natural areas presented general plans in public meetings, with unproductive results; instead of generating support, the plans actually bolstered public opposition. In a few cases,
developers, ministries, citizens groups, and local officials sat down for extensive informal negotiations before the OPF was ever involved.

Developers were above all interested in speedy approvals, and they often complained that the “back and forth” process was frustrating and slow. They claimed that it was very difficult to identify the right technical people at the agency to speak to, and that it was often hard to talk to them on the phone or in person. Calls were often unanswered, and the agency was usually reluctant to meet as quickly as the developer might have wanted. Even when some contact was made, developers perceived little movement in their cases. One consultant who worked on a smaller project complained that every time she had to submit something, the file automatically went to the bottom of the agency’s pile. Some developers found it difficult to get the agency to take a clear position, while others found the agency’s position overly rigid and unrealistic. In many cases, developers could not find someone at the agency who could “exercise some judgement;” at the staff level, some agency personnel seemed inflexible and unable to make decisions.

Before the OPF got involved, local officials often acted as intermediaries between developers and provincial agencies. They made numerous site visits as part of their local approval process. They inspected the sites, evaluated the need for habitat protection, and ironed out boundaries for wetlands buffers. Local officials were usually pro-development for a number of reasons: to enhance their tax assessment base, to provide low-income housing, or to “infill” vacant parcels. They were also sensitive to public support for environmental features like wetlands and forests, and wished to preserve them in a practical fashion that would still allow development to move forward. In a nutshell, their greatest concern was to bring “closure” to the project.
Ministry officials provided some counter-arguments to the developers’ complaints. One official said that the MOE had shied away from setting up quick meetings with developers; the preferred practice was to take an adequate amount of time to review the development application and provide written comments before any meeting was held. This individual claimed that the MOE had been “burned” at the OMB by informal promises and comments made at such a meeting, and that written comments better served the MOE’s interests. Other ministry officials insisted that they had made their concerns clear, but that the developer had failed to provide additional technical information to address doubts about a project. In a soil contamination case, an MOE staffperson visited the site and saw rusted drums that raised the Ministry’s suspicions; the developer still refused to perform additional testing. In septic servicing cases, MOE wanted further proof from the developer regarding occupancy of the new units, predicted septic flows, and demonstrated capacity of either a private or public treatment system to handle the waste. In one case that involved both groundwater contamination and septic servicing, the MOE wanted extensive groundwater modelling (to be paid for by the town) to determine the effect of a new development on a sole-source aquifer.

Participants were asked to explain the failure to reach resolution before the OPF became involved. A number of clear reasons emerged. One factor referred to by all roles was the downsizing underway at the provincial ministries during the early 1990s. This resulted in a shortage of staff time, and increased the likelihood that developers would feel frustrated and impatient. MOE was understaffed and overworked, and as a result they tended to exercise even more caution towards projects. Faced with a growing number of projects to review, MOE staff were unable to apply much discretion and relied more heavily on strict guidelines and uniform regulations. Another offshoot of downsizing was that the
personnel assigned to a case might change suddenly, thereby cancelling any prior negotiations and forcing developers to start from scratch. Developers complained that they received piecemeal feedback, and that they were never sure they were meeting with the right person who could make important decisions. Perhaps due to a lack of resources, ministries would not review development proposals before they were formally submitted, often resulting in a significant waste of the developer’s time.

Although some informal negotiations did occur, there was a general failure to get all the stakeholding parties to the table simultaneously and work in a cooperative fashion. One activist mentioned that the memos sent back and forth were accusatory in nature, and only managed to entrench positions. A local official said that individuals made individual efforts to negotiate; parties met with one another haphazardly, but there was no holistic effort to work together. Instead of reaching reconciliation, parties found that positions were becoming more entrenched and disagreements over environmental protection were more pronounced. In some cases, developers or citizens groups angered other parties by threatening to take the case to the OMB (or by actually filing with the OMB), with negative consequences for cooperation. Pre-OPF negotiations were usually stalled primarily by one or two of the parties involved in the conflict. In the cases involving natural areas, environmental citizens groups typically wanted no development at all, refused to compromise at the local level, and felt no qualms about obstructing the process for as long as possible.

Developers, local and regional officials, and even a few ministry officials pointed to an inherent lack of flexibility in agency regulations and guidelines as the reason for failure to reach resolution. This was often referred to as a rigid, bureaucratic mindset. One MOE staffperson said the agency was not inclined to compromise until forced to, while another said MOE had no choice but to follow
the requirements of policy guidelines. A regional planner said there was no flexibility in ministry regulations; ministries could not react to individual proposals. In one case, a vacant barn neighboring the project site triggered MAFRA to request an official zoning redesignation of the developer's land as agricultural, even though the developer promised that none of the new buildings on his property would be within the mandated buffer zone around the barn. In general, ministry bureaucracies were hesitant to apply any "flexibility;" they preferred the use of precedent, guidelines, and regulations to make decisions on cases. However, some developers and agency staff pointed out that there was little information available on how best to apply guidelines, and as a result the implementation of guidelines was carried out on an individual basis, depending on which staffperson was assigned a case. The most common complaint from developers was that the ministry "wouldn't budge."

When asked about patterns in the disputes he mediated, Dale Martin supported the notion of a "lack of accountability" in provincial agencies:

There was a lack of clear lines of authority, and there was no coherent, consistent policy. Decisions were too arbitrary and individual, and the decisions were isolated; one agency person's decision could have no connection to what another agency person might say. They went well beyond the mandate they were given, in a way they abused their positions. There was this kind of culture within the agencies, coupled with a lack of clearly articulated policy.

In some of the cases, personalities, lack of trust, and value differences were responsible for perpetuating conflict. Some developers felt that the ministry personnel assigned to their cases had "vendettas" against their projects and were applying regulations irresponsibly and irrationally. On the other hand, some ministry officials felt some developers had a history of dangerous environmental practices and therefore represented a real threat to the public. Development
consultants pointed out that their clients were often frustrated with the time taken by the approval process, and had little motivation left to cooperate with agency demands. Conflicts erupted over the real value of some natural areas, how much protection was really necessary to accommodate birds or deer, and whether private or public stewardship would best protect the environment. Some values were taken to an extreme, as with citizens groups who fought for no development at all. For the most part, disagreements were technical in nature, with ministries demanding more information, and developers insisting that they had already taken environmental concerns into account. But some developers accused MOE of being fundamentally opposed to development, apart from any findings that their technical studies were inadequate.

Finally, there was the question of money: the ministries’ demands often carried a high price tag for developers, regions, and towns. Additional testing and reporting would cost developers thousands of dollars in consulting time as well as the carrying costs of their land. For example, in one case involving a zoning change to residential use, the developer refused to test the soil under an existing industrial building, because he would have had to tear down a perfectly usable building before the zoning change had been officially approved. In septic servicing cases, MOE often wished to download responsibility for sewage to the region and municipality, who might then have to foot the bill for new sewage plants, groundwater modelling, or private well remediation. In natural area cases, regions and towns wanted to avoid having to purchase land for protection, and they wanted to maximize developable land to augment their tax base.

In conclusion, these conflicts had no clear winners or losers. A number of valid positions were present in each conflict, and the OPF’s job was to convene all the parties and attempt to work out an equitable, speedy, and stable solution.
In the next section, I will evaluate the specific techniques the OPF used to resolve conflicts.

Section 2: The Practice of Mediation at the OPF

I asked participants to elaborate on the process of mediation at the OPF. I was interested in their initial impressions of mediation at the OPF, their views on the greatest obstacles to settlement in their cases, and their perspectives on what the OPF did to break the impasse.

71% of respondents were initially in favor of trying mediation to settle their disputes. All of the development consultants and local officials were in favor of going to mediation. These participants wanted to speed up the approval process, and a number of them had previously obtained favorable results from the OPF. To developers, the OPF was most helpful in getting the right agency people to the table. Most of the ministry staff interviewed were initially against going to the OPF. Ministry officials felt coerced by the process; they perceived that the OPF was traditionally biased towards developers, and that OPF settlements often compromised agency mandates to protect the environment. Activists and regional officials were generally positive, hopeful but not certain that mediation would resolve disputes.

Participants were asked to give their initial impressions of the strengths and weaknesses of mediation. Although the question referred more to their views on mediation in general, participants were quick to tailor their answers based on their perceptions of the OPF. Developers and local officials, most of whom were responsible for taking the cases to the OPF, were optimistic about the benefits of mediation and the ability of the OPF to cut through red tape. In many cases, there was a clear expectation of success with moving the project forward, based on prior experience with the OPF. The key to the OPF’s success was its ability to
break the bureaucratic log jam and to bring the right ministry decision-makers to the bargaining table:

The OPF had a good reputation, and we had had prior success with them. They could work across ministries, they saw the bigger picture, and they cut through red tape.

The OPF had the reputation of putting their fingers on the right people. In fact, the exact solution the developer wanted had already been brokered by the OPF in another case. In general, we found success with them with cases involving applications of procedure and policy.

The OPF could help developers avoid the time and expense of an OMB hearing:

The OPF was a great alternative to the OMB. An OMB hearing would have required a 6 month to 1 year delay, and substantial additional costs. The OPF seemed to be getting good, unbiased results. They brokered reasonable solutions to bureaucratic obstacles.

Some developers were very pleased when the OPF accepted their cases, because to them it signalled a provincial interest in the success of their projects:

Going to the OPF helps bring attention to the matter; there is automatic pressure on all parties, because the OPF signals a provincial interest in the case. Martin was considered to be close to the Premier.

Other developers just wanted a neutral party present to soften hardened positions:

Mediation could expose the irrationality of MOE’s position. We needed an objective third party to act as a witness.

A neutral party seemed quite attractive; we thought an outsider would bring in a fresh perspective.
Bureaucratic inertia, intransigence of the parties, and the time and cost of OMB hearings were often given as reasons for going to mediation.

A few developers and local planners conditioned their support for the OPF with some criticisms. One criticism was the lack of a driving mandate at the OPF; the lack of deadlines and accountability for smaller agreements could conceivably result in more wasted time:

The OPF was good at interministerial matters, and they also happened to be very supportive of this development. However, I was concerned that mediation takes too long, since there’s no driving force in that office, so I recommended that my client file papers with OMB to start the clock ticking.

Mediation has no status; parties can easily change their minds or delay the process.

Others mentioned the lack of openness in the OPF’s procedure:

The OPF was becoming bureaucratic themselves, and they didn’t like when we spoke to technical staff at the ministry without their knowledge.

Mediation is quicker and cheaper, but the exact role of the OPF was not clear, and the process was not very open.

Some mentioned the possibility of an unfair solution, and the adversarial nature of meetings at the OPF:

Mediation is often able to refine issues, but sometimes the solution may be unfair to one party or another.

Mediation allowed a reassessment of positions that would be impossible at the OMB, but OPF meetings were somewhat adversarial as well.

Some developers worried that the success of mediation depended upon the willingness of parties to cooperate:
We definitely wanted to avoid a costly legal process, but mediation only works when the parties really want to reach a settlement. There has to be some empathy for the other views at table.

Mediation is not good at handling disputes when one party is intractable, and when their objection to a project is based on principle rather than facts.

A few developers and local officials made specific reference to Dale Martin’s high profile, and to the OPF’s power to force ministry staff to compromise:

We wanted closure. The OPF was a bully pulpit. Martin had great character, he knows that you have to bang heads to get solutions.

We wanted to get the MNR staffperson’s boss to the table. Martin’s high profile definitely helped; he was feared by civil servants, and he could get Ministry bosses to table.

In his own interview, Dale Martin did not even think “mediation” was the right term for what the OPF did. He freely admitted that his clients were really the developers, and he stated that he was willing to do whatever was necessary to get their projects moving. Rather than a “classic third-party neutral,” he saw himself as an “advocate for development.” Martin said that he often made provincial agencies aware that the Premier would know if and when they were “messing up.” These comments point to a noteworthy bias in the OPF towards developers.

In light of this bias, it is no surprise that ministry officials felt a bit uneasy about going to the OPF with their case. They usually had no choice in the matter; they were summoned to the bargaining table once a developer brought a case to Dale Martin’s Office. Ministry officials knew they might have to compromise on their rigid positions, and they didn’t like it:

We had no choice. Martin was a "command performance." The philosophy behind the OPF was great, but their methods were
heavy-handed. There was a lot of talk in MNR about Dale Martin, his connections, and his tactics.

We had no choice in the matter. The OPF was very political, their mission was to facilitate a quick review of development proposals.

We didn't have much choice. Martin had the ear of the Premier and the Cabinet Ministers. We didn't like it, but we focused on how to negotiate the best deal possible. MOE's mandate usually was compromised by the OPF, and we usually felt a bit taken when the meetings were over.

The OPF was a facilitator of development proposals, they were biased, and they tried to get projects approved at any price.

Some ministry staff thought going to the OPF was unnecessary. They felt perfectly able to resolve conflicts without them:

Frankly, we thought the issues had already been resolved, but I guess the parties needed to hear it from the OPF. The OPF often gave credibility to agreements that were already reached.

We didn't want the OPF involved, we were already making headway with the owners and local politicians. We have had success with a private mediator, but the OPF does not fit in the “mediation” category. Basically, the OPF created political interference for developers who wanted to get around environmental protection.

A few Ministry people did acknowledge some good points of the OPF. They pointed out that the OPF did screen out developers who merely wanted to circumvent the system from those with important projects for the province, and that the “buy-in” for more flexible solutions could only happen at the OPF.

The OPF discerned the “posers” who wanted to get around regulations from the “builders” with projects that represented real economic opportunities for the province.

We needed “higher-ups” to sign off on the project, it definitely wasn't going to happen at staff level. I had a good opinion of OPF, they were fairly scrupulous about protecting provincial interests, and they found untraditional solutions.
Regional officials gave balanced views on mediation and the OPF. They pointed out that mediation brought the opportunity for success or failure, and that some conflicts were not good candidates.

I was neutral, and I didn't have much choice in the matter. I prefer mediation to fighting in court. It's useful when someone has taken a strong position and doesn't want to lose face.

I had already been involved with 3 mediations through the OPF, with 2 successes. They have a pretty good record of resolving cases.

I went along with it at the suggestion of the developer. Mediation works in some cases but not others.

One activist, however, felt that the impact of a development on the environment was inappropriate for mediation, because any compromise would result in permanent damage:

I wasn't against the concept of mediation, but in this case I didn't want to compromise too much. Filling in wetlands is too permanent for compromise.

Compared to their initial impressions, more participants had a favorable view of the actual mediation. 82% of the participants had a favorable opinion of the OPF's mediation effort. At least one development consultant, ministry staffperson, and local official gave an unfavorable review. Several unfavorable comments are worthy of mention. In one case, a Ministry staffperson said the OPF applied political pressure on his boss, forcing him to accept an inadequate technical report and allow the development to move forward. In another case, a Ministry representative referred to pressure by OPF staff and the use of profane language. These were the only observations of this nature. Only one developer gave an unfavorable rating, saying there was not enough empowerment in the OPF, the process took much too long, and he would rather go to the OMB. His
particular case happened to be one of the longest mediations the OPF ever had to conduct.

For most developers and local officials, the favorable comments touched on the OPF’s ability to bring the right people to the table, nudge the parties to take new perspectives on the relevant issues, suggest innovative or untraditional solutions, and bring at least partial closure to the matter. Some participants commented that the OPF “tried hard” and acted in a “professional and timely” manner. A number of parties were grateful to avoid an OMB hearing. Some participants pointed out that the settlements reached at the OPF were based on agreements already reached, but as one planner put it: “They were there at the end when it counts.” One agency member said that although she was forced to deviate from ministry policy, she was still able to protect the public interest and the environment.

I will analyze the OPF’s practice by the type of environmental issue that was at stake. I will discuss the principle obstacles to resolution, and the methods used by the OPF to overcome these obstacles. In general, the parties were more sure of what the obstacles were than of what the OPF did to resolve them. This was due to the OPF’s relatively closed process. The OPF would iron out details over the phone or in separate meetings with individual stakeholders. After the initial meeting, there was limited contact among the parties, with OPF staff practicing shuttle diplomacy in person or by telephone.

Agricultural land:

The problem in this case concerned inflexible agency regulations. As mentioned earlier, a barn located on a neighbor’s property was technically considered an agricultural facility, even though it had not been used for a number of years. Therefore, a buffer zone was mandated by MAFRA regulations, and all
the land within this zone had to be designated as “agricultural land” in the
Official Plan. This buffer zone extended into the developer’s property, and the
developer agreed not to put any structures on his land that fell within the buffer.
However, MAFRA wanted an official zoning redesignation of the developer’s land as agricultural. The developer, concerned with the impact this ruling would have on his property’s marketability to investors, proposed some wording to the Official Plan Amendment (OPA) that would prevent development on that section of land but avoid an official zoning redesignation. Since MAFRA could not allow this at the staff level, the obstacle in this case was to get the buy-in of higher-ups in the agency. OPF was able to get a high-level MAFRA person to the table who could authorize such a decision.

Soil and Groundwater Contamination:

These cases revolved around technical issues and the assignment of responsibility for treatment systems. The exact contaminants present, the extent of contamination, the need for additional studies, and the predicted effect on future residents were important topics of discussion. Sometimes the OPF needed to bring in technical people to inform the stakeholders. The OPF often succeeded in narrowing the agency’s concerns and encouraging developers to comply with additional reporting requirements. When developers were very reluctant to submit additional reports, the OPF worked to get their commitment in return for promises from the Ministry to abide by a strict timeline for review and comment. In one case involving an elaborate treatment system, the MOE wanted the local municipality to assume responsibility in case the system failed. The OPF suggested phasing in the project on the uncontaminated portion of the land to calm the MOE’s fears and downplay the responsibility issue.
Once again, inflexible regulations and an unclear mandate presented problems; MOE people were unsure about what they could agree to, and often needed buy-in from higher-ups in the agency. When the MOE sent subordinate staffers to the initial meeting, the OPF replaced them with people having more authority to make decisions. In some cases, personalities were the problem; the challenge was to find ways of dissolving inertia while allowing people to retain their dignity. According to one local official, Dale Martin “bullied people in a polite way” to get them to shift on their positions. In one case, the OPF threatened the developer with a letter of contamination (which would be permanently attached to the property’s title) in order to get him to respect the MOE’s concerns.

*Impacts from Nearby Industry:*

In these cases, MOE’s real concern was that they would have to field complaints from new residents in the proposed developments. One development was planned adjacent to an existing feed mill, which would generate noise, dust, and odor. The other project was located near a municipal sewage plant, with potentially unpleasant odor impacts during the summer months. In the first case, MOE wanted to download responsibility to the city to field complaints, and the city refused. Obstacles mentioned by participants were the MOE staffperson’s personality, and the lack of any willingness at the agency to find a solution. The OPF could not do much to relieve this conflict, but the policy regime changed over time. After the city became the approval authority, MOE dropped their opposition. In the other case, the developer pointed out that residential subdivisions already existed even closer to the sewage plant than the proposed project. The OPF suggested a study to set forth a baseline level of exposure to the sewage plant; in other words, the developer had to prove that the effect on
the new residents would be no worse than that on the existing residents. The developer was reluctant to pay for this study; he preferred to share the cost with the region and the MOE. The OPF convinced him that the study was in his self-interest, and that he should pay for it.

Natural Areas:

These cases concerned how best to protect lands with ecological value. The habitats in need of protection were: deer wintering grounds on the shore of an island, unique forest under private ownership, a river valley threatened by a widening urban boundary, wetlands impacted by a large development, and a wildlife corridor in the midst of a subdivision. The MNR was the active party in two of the cases, while citizens groups were the primary opponents in the other three.

One major problem the OPF faced was technical disagreement over the real needs of various species to be protected. Both the citizens and the MNR tended to take very strong positions at the start of mediation. The biologists tended to dominate the debate; one developer commented that “at first MNR staff were trapped by their own biologist’s radical position.” In the wetlands case, there was considerable disagreement about the proper setback for certain bird species. The local planner in this case said the biggest obstacles were the egos of the three biologists who worked for MNR, the developer, and the citizens. The OPF managed to reduce tensions and reconcile positions. One biologist said that the OPF “allowed us to talk and prevented lawyers from attending our meetings.” As with other technical disputes, the OPF also managed to get people from MNR to the table who could compromise and sign off on the development in question.

In two of the natural area cases, the parties considered a land purchase for the purposes of preservation. This led to disagreements over how much land to
protect and who should purchase it. The MNR and citizens typically wanted to conserve more land than local municipalities did. Value differences came to the forefront, as citizens and developers argued over ecological versus economic considerations. To put an end to this irreconcilable value dispute, the OPF took a very strong position in these two cases. In one of the cases, the OPF unilaterally decided that a purchase was necessary, and assigned the responsibility to a regional conservation authority funded by the province. This was one of OPF's most controversial strategies to resolve a conflict. Provincial ministries reportedly felt this set a dangerous precedent and accused the Premier of bailing out his friend, who owned the land in question. In the other case, the OPF downplayed the ecological significance of the land and told an adamant citizens group that the province had no more money for such purchases.

Another debate that came up in one case was over the merits of private versus public stewardship. The MNR, trying to protect a wildlife corridor in the middle of a planned subdivision, had little faith that the new residents would maintain the habitat once it fell into their hands. The OPF pointed out that there was already a law on the books that authorized private stewardship of natural resources. This new information allowed the parties to come to a compromise, where the land would remain private but the town would have access for monitoring and maintenance of the natural area.

The presence of citizens groups in some of these cases made them especially hard to resolve, and illustrated the difficulty of mediating value disputes. One local official pointed out that citizens groups are far less motivated to settle than the MNR, and that they do not have the same type of economic losses experienced by developers and localities. In all three cases involving citizens groups, the citizens took the case to the OMB as well. The OPF did not represent a final effort towards compromise, it was merely another way to use the
process to stall a project, with the hope that the weight of the province might come down on their side. In the river valley case, the local planner thought Martin’s strength was that he had credibility with the citizens, and he said that the citizens got more concessions from the developer at the OPF than they would have at the OMB. But in the wetlands case, where Martin refused the land purchase, the local planner involved said the citizens felt disenfranchised and coopted. The citizens representative in this case thought there were not enough green people at the table. The OPF took different strategies of dealing with the citizens depending on the case; sometimes their demands were respected, other times they were discounted.

**Septic Servicing:**

The most common problem in these cases concerned the adequacy of technical information provided to the MOE by the developer. The MOE would initially refuse to approve an OPA if the developer could not prove septic capacity existed for the future residents. In one case, the developer wanted to add a large number of units to an existing retirement community. His estimate of future effluent flows was based on a low occupancy rate typical of elderly communities. However, the MOE got wind that a new automobile factory was under construction nearby, and they thought the homes might be attractive to young families moving to the area (resulting in a higher occupancy rate and larger septic flows). The OPF suggested that the developer hire a consultant to validate existing occupancy rates and flows. As it turned out, this technical dispute could not be resolved without assigning responsibility for increased flows in case the developer was wrong. In the end, the settlement hinged upon whether the municipality would construct a new sewage plant, and assign capacity to the new development if it was needed.
In a case involving a large tourism project, the MOE was concerned about the thousands of gallons of sewage that would overrun small streams and ponds that were dry part of the year. The developer had not yet proposed what kind of treatment system he would install. Since the OPA was the issue at stake, the OPF brought up the "principle of development." In other words, the MOE could only block the project at this point if they were sure there was no way the site could be serviced. Since they could not make that determination, a "conditional" OPA could be granted, but the developer would have to meet various criteria when he applied for a subdivision approval.

In another case, existing private wells in the town were already contaminated, and the MOE was concerned about the effects of the new development on the already fragile aquifer, as well as the viability of water supply for the town. Perhaps because this land was designated as a "provincial interest area" for its natural heritage, the MOE was able to negotiate a large degree of responsibility on the part of the town and region. The issues on the table were how much new development to permit, how to remediate existing wells, and how to ensure an adequate water supply. The MOE wanted the town and region to remediate all existing substandard septic systems, build a new water system, and enforce hook-up by all residents. The town and region wanted to maximize development and minimize costs. But the OPF made them realize that the health of the community was at stake, and in order to boost tax revenues they would have to provide a system for clean drinking water.

In septic servicing cases, as with others, there were initial problems with lack of information among the parties, the inability of agency staff to make compromises, and personnel changes at MOE. One developer mentioned that layoffs and a provincial employees strike interrupted the process. In some cases, developers insisted that the MOE's application of policy was personal and
unreasonable, that the agency staff could only present the “standard party line,”
that there was no mechanism to waive or alter provincial policy, and that
restrictions were placed on their properties in a “cookie-cutter” way. Agency
staff mentioned that developers had little understanding of provincial policies,
and little respect for water resources in their communities. Local planners
mentioned that agency staff did not understand how various planning tools
could protect water resources, and that some agency staff did not have enough
authority to be at the table. As with other cases, the OPF worked to inform the
parties and summon agency people who could override guidelines if they deemed
technical work to be sufficient. In some cases, they helped to validate the MOE’s
position, while in others they deflected the MOE’s concerns off of the OPA and
onto later stages of the approval process.

All 15 cases reached at least partial settlement. I will discuss the
settlements, once again organized by the environmental issues at stake. In
general, the settlements relied on the following features:

- phasing developments,
- assigning responsibility in case of unforeseen events,
- deflecting concerns off of the OPA and onto subdivision agreements,
- restricting future uses,
- using setbacks and buffering to protect habitat, and
- requiring additional reporting and monitoring.
Agricultural Land:

In this case, the parties agreed that there would be no official redesignation of the land in question as “agricultural.” Instead, the parties agreed to slight wording changes in the OPA that would prevent any built structures on that section of the property.

Contamination:

In a groundwater contamination case, the parties agreed to phase in the development on the uncontaminated portion of the property. Approval was granted for Phase 1 but not for Phase 2, leaving open the possibility for future negotiations. In one soil contamination case, the developer’s engineer had to provide more information on soil that had been removed from the property. This report was reviewed by the MOE, and the subdivision was eventually cleared. In another soil contamination case, the developer agreed to do further testing and eventually received approval. In the case that concerned an existing industrial building, the owner and MOE agreed to “angled testing” that would forestall demolition of the building, and he received approval for residential development outside of the building area.

Impacts:

In one case, the city took over approval authority from the MOE due to planning policy changes. In another, the developer agreed to pay for the study to determine a baseline effect of the existing sewage plant on nearby residents, and the parties agreed to parameters for the study.
Natural Areas:

In the land purchase case, the parties agreed on which parcels had the most ecological value, and the province allotted $10 million to buy out the biggest landowners. The regional conservation authority was given 2 years to buy out the smaller landowners.

In the wetlands and deer habitat cases, the parties agreed on buffer zones and required setbacks. There were a list of conditions attached to the subdivision agreements, concerning “best practices” for construction and maintenance of vegetative communities. In the wetlands case, the developer agreed to give up 3 lots to allow for more effective marsh protection.

In the wildlife corridor case, a conservation easement was granted to the local municipality for monitoring and maintenance of the habitat. The land in question would remain in private hands, but with limited private use.

Septic Servicing:

In the retirement community case, the developer agreed to phase his project based on demonstrated capacity. The town finally decided to build a sewage plant, and to allot capacity to the future units if needed.

In a case that involved a planned mixed-use development, the developer agreed to keep some land unpaved and unbuilt in order to attenuate septic flows. He also agreed to various restrictions on commercial uses and septic flows that would be written into the subdivision agreement.

In the tourism project, the MOE agreed that the site was theoretically serviceable, and the agency agreed to meet with the town and region to set conditions for the subdivision agreement. In this meeting, the parties agreed on which environmental documents would be required and when the developer
would have to submit them. The developer would still have to seek various approvals down the line, but the OPA was approved.

In the water supply case, the town and region agreed to finance a new water supply system. The town passed a bylaw requiring residents to hook up to the new system, and the region provided financial incentives for the residents to do so. A number of contaminated private wells were capped, and the town and region embarked on a remediation program. The development in question was approved, but with a minimum lot size to attenuate septics.

It was difficult for most interviewees (and hence the interviewer) to judge how innovative these settlements really were. Roughly half the respondents thought some aspect of their settlements was creative, while the other half did not. Some innovative features mentioned by participants were:

- the use of partial approvals and phasing,
- the ability of “good planning” to override regulations,
- the use of angled testing under the industrial building,
- the installation of a bird watching station,
- the use of natural barriers in the marsh, and
- the use of community-based planning.

The wildlife corridor settlement represented the first example of a conservation easement in Ontario. The division of responsibility between a town and developer to provide septic capacity, and the groundwater remediation strategy adopted by a region and town, were both considered unusual.

Participants were asked to consider if agreement could have been possible without the help of a neutral party. 34% thought the mediator was “crucial” in
reaching settlement. 60% thought he was at least somewhat important. Only 6% thought he was “not important.” Those who said “crucial” or “important” thought there was little chance of an agreement otherwise; the OPF was needed to bring provincial officials to the table and to resolve a seemingly irreconcilable impasse. One developer said the provincial officials had to be forced into the process by Dale Martin. Another said that timing was key; a settlement might have emerged without the OPF, but much, much later. The mediator was considered important to foster credibility with citizens groups, and to act as a catalyst for parties to meet face-to-face. Respondents who said “somewhat important” or “not important” thought their settlements were rather ordinary and could have been agreed upon without the OPF. Given more time, some development consultants thought they could have worked out problems with ministries. Some participants pointed out that the OPF only validated prior agreements.

Dale Martin’s high profile made him a more effective mediator, in the opinion of many developers and ministry officials. An “outside” mediator would not have been as effective, according to one participant. Several ministry people insisted that the agency would never have agreed to some settlements without Martin’s domineering presence and political connections. Since the OPF had no real authority of its own, Martin had to know the issues well enough to challenge the credibility of certain positions, and he needed a high level of confidence from the political party in power.7

In Martin’s own view, his role was to “call on the agencies to be accountable, force them to deal with reality, and get them to come to solutions.” He also said the OPF staff “problem-solved the system” by identifying the “key reasons for problems in the development process.” Martin would then try to

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7 See Martin’s interview.
convince the ministries to “address these problems.” These comments may lead the reader to wonder how much settlements differed from traditional agency policy. Roughly half the respondents thought their settlements represented some change in ministry policy. Developers, local and regional planners, and ministry officials were all divided on this issue.

Some developers said their settlements went beyond typical ministry procedure. In the deer habitat case, the developer thought he was allowed to build more lots than usual, and that the MNR showed it was open to new ways to protect habitat. In the retirement community case, the developer perceived some new acceptance at MOE of private septic servicing (despite the settlement’s reliance on the municipal sewage plant). In a soil contamination case, the developer said that downloading responsibility to the city addressed long-standing MOE concerns. In the wildlife corridor case, the developer perceived some “flexing of development standards.”

Local planners echoed some of the developers’ observations. One septic capacity settlement was a “somewhat different way of applying existing policy.” The water supply case “placed a greater responsibility on the town to implement solutions, and was part of larger changes going on in the province.” In the groundwater contamination case, the local planner thought allowing a phased development on a “contaminated” property was a new precedent. In the wetlands case, the local planner said MNR had to readdress the protection of marshes and justify each setback requirement. A regional planner thought his settlement only seemed radical to ministry field staff who “follow regulations to the letter.”

Ministry officials pointed out that partial approvals and phasing were techniques the ministries had used many times before. One mentioned that ministry “guidelines” were arrogant and difficult to enforce, and they tended to
raise concerns in many cases. However, both the land acquisition and the “conditional” OPA for the tourism project were considered very radical, and were never repeated (at least not to their knowledge).

Overall, 84% of respondents thought mediation was an effective tool to resolve land use disputes. Positive comments on this issue referred to the skills of the OPF as well as the general benefits of mediation. A number of participants thought the OPF could “counter government paralysis” due to their “insider” status in the provincial government. One person commented that the OPF was useful for interpreting provincial law. Many thought mediation was cost-effective, helped to narrow conflicts, allowed parties to gain a better appreciation of other interests, permitted everyone to pursue their mandates even if all goals were not met, and led to win-win situations. A number of parties were so displeased with the OMB that any alternative seemed worthwhile. One insisted that getting rid of lawyers leads to innovative solutions.

Some parties were concerned that mediation did not have enough authority and might force them to duplicate their efforts. Some relevant comments follow:

It can be effective, but it should not duplicate the judicial or administrative process, forcing us to go through the same thing twice.

It’s worth giving mediation a go, but it needs teeth for smaller resolutions. It’s too easy for parties to change their minds.

I prefer a quasi-judicial tribunal; the OPF process is open to abuse.

Dale Martin liked the lack of structure in the OPF. He simply said, “If there’s too much structure, it can easily be coopted.”

A few respondents thought mediation was particularly appropriate for their case. In the land purchase case, the MNR official said mediation was needed
to focus the numerous actors in a case that complex. A developer thought mediation worked especially well for cases bogged down in cleanup issues. The MOE representative in the water supply case said mediation effectively addressed the mix of provincial interests, municipal financial interests, and the public interest in drinking water quality.

Other participants did not feel that mediation was a worthwhile tool for their cases. A few ministry officials were not convinced of the benefit to their agency of mediating cases. One environmental activist pointed out the difficulty of mediating value disputes: “The environment is a black and white issue, either you’re for it or you aren’t.”

Some respondents conditioned their approval of using mediation. One thought contact with the technical staff at the ministry was also very important, while another said the parties at the table must be interested in agreement for mediation to work.

In the author’s view, the OPF was best able to come up with innovative solutions to technical and procedural problems, but value disputes were difficult for them to handle. In all cases, the OPF was very useful in getting provincial bureaucrats to the table. These ministry officials were often convinced to make alterations in the application of regulations and guidelines that might not have occurred without the OPF’s involvement.

Section 3: Fairness

I analyzed the fairness of the settlements by looking at how well interests at the table were met. I also asked participants to consider other interests, like that of the public, future residents, or the environment, that may not have had a place at the table.
An overwhelming 97% of respondents felt that the settlements met their own interests. This finding was most striking for ministry officials, many of whom had serious initial reservations about taking cases to the OPF. In the end, although ministry officials may have felt coerced into the process, they felt that they got something out of it. The environment was usually protected by the solutions they agreed to. Out of all the respondents, only one, an agency staffperson, disagreed. This was the same official who claimed his boss buckled under political pressure and accepted an inadequate technical report.

The participants who agreed that their own interests were met did not always do so unconditionally. A few development consultants complained about the restrictions placed on their properties. Some ministry officials had qualms about new precedents and the inevitable impacts of development on natural areas. In settlements that went against traditional agency policy, ministry officials often acknowledged that adequate safety catches were put in place to protect the environment. In general, the parties thought the settlements were reasonable compromises, even if they did not get everything they wanted.

93% of the parties agreed that, on the whole, the other interests at the table were also met by the settlement. Some participants mentioned that everyone felt satisfied or even happy at the end of the mediation. A number of participants who agreed (as well as the only two who disagreed) referred to the failure of the citizens groups to get what they wanted. But one local planner mentioned that even the citizens representative in the wetlands case thanked all the parties in a concluding ceremony. Some ministry officials pointed out that while developers may have perceived their interests as being met, future events might well change their perspective. Since some of the settlements pushed environmental concerns off into the future, developers might well encounter the same problems at a later stage in the approval process. In contamination cases,
developers would still be subject to liability if their predictions proved to be overly optimistic. If additional studies showed a project was infeasible, new investors, who financed projects as a result of OPA approval, might lose their money. But in general, the parties felt the settlements represented the best possible compromise, and that all demands were respected if not entirely granted.

87% of participants thought the process and outcome at the OPF were fair. To answer this question, participants were encouraged to consider interests that may not have been present at the bargaining table. A minority of respondents thought the OPF process and settlements were unfair. One citizens activist thought the interests of the environment were not adequately represented either at the table or in the settlement. The developer in the deer habitat case thought that restrictions placed on the new property owners were unfair, because people who chose to live in that region already appreciated the value of habitat protection, and it was unnecessary to attach legal conditions to the land title. An MOE official (the same one who had to accept an inadequate technical report on soil contamination) thought the “settlement” was unfair to future residents, whose lives might be in jeopardy. In general, most of the opposing parties accepted that some form of development was needed, and thought the compromises they reached were win-win.

Dale Martin did not consider it his personal responsibility to block an unfair agreement, and would do so “only if the stakeholders themselves thought an agreement was unfair.” Martin concerned himself primarily with the interests at the table. He did note that some cases had “little or no impact” on the public at large.

Participants were asked to speculate on what might have happened if the case had gone before the OMB instead of the OPF. A few parties thought the
result would have been similar. But many referred to the arbitrary nature of OMB decisions and the high potential for a win-lose solution:

The OMB is a crapshoot, and chances are one party would have won or lost in full.

The OMB often has a big loser.

In many cases, OMB decisions are unfair to one party.

I think a negotiated settlement is better; OMB decisions are arbitrary and subjective, and the outcome often depends on the mood of whoever happens to be the Chairman.

Some respondents noted the inability of the OMB to address mutual gains. In particular, ministry officials pointed out that they built more safeguards into OPF settlements than would have been possible at the OMB:

The OMB would not have placed any restrictions on the woodlot (wildlife corridor case).

At the OPF, the MOE was able to insert more control and safeguards into the agreement; OMB decisions are more the yes/no variety (septic servicing case).

The OMB would have allowed development without requiring the additional work from the region and town (water supply case).

The OMB would have given less to the citizens; the OPF was more fair (natural area case).

Some respondents noted that the adversarial nature of the OMB destroys any chance for compromise and flexibility:

At the OMB, lawyers are protecting their clients interests, so the process is far less flexible. Mediation finds common ground.

At the OMB, all prior agreements are off, parties go for the jugular, and the decision depends on the Chair. Also, there is a lack of local control over the outcome.
In conclusion, most participants thought the settlements they reached at the OPF were fair, and many had serious reservations about the potential for an equitable outcome and mutual gains if their case had gone to the OMB instead.

Section 4: Efficiency

Critics may point out that a fair solution can still take too much time and money to achieve. Therefore, I asked participants to estimate the time and money they expended for the purposes of the mediation, and to try and compare these estimates with what might have been necessary at the OMB. The results were quite striking. 93% of respondents thought mediation at the OPF was cheaper and faster than litigating their case might have been at the OMB. Based on the respondents’ memory, the average length of time the OPF took to handle the 15 cases was 5.5 months. The median length of time was 2 months.

The OPF itself was funded by the provincial government, so the parties did not have to pay the mediator. The participants were asked to estimate their own costs to prepare for and attend OPF meetings. Developers still had to hire consultants and prepare studies. Their costs ranged from $1,000 to $50,000, with most estimates falling between $5,000 and $10,000. The only citizen activist who responded to the question estimated his costs at $200. Local, regional, and ministry officials could not estimate dollar costs, but most categorized their participation at the OPF as “part of our normal workload.” Some ministry officials commented that there was an opportunity cost in serving other clients, since OPF cases were often given “front of the line” service.

Participants were also asked to estimate the costs (in time and money) that might have been required by an OMB hearing. Developers’ estimates of OMB costs ranged between $100,000 and $1,000,000. Their estimates of time,

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8 All estimates are in Canadian dollars.
including the time needed to schedule a hearing, ranged between 6 months and 3 years. Almost all the developers thought the OPF had saved them substantial amounts of time and money. One thought he saved $50,000 and 6 months, while another thought he saved $15,000 just in terms of the carrying costs of his land. Yet another thought the OMB would have been more costly by a factor of 10.

Ministry officials were on the whole quite happy not to go to the OMB. They pointed out that OMB hearings “become our life,” taking them off all other cases. At the MNR, staff need to go through a 3-day training when a case goes to the OMB. One ministry official complained that OMB hearings pit one technical expert against another endlessly. Many referred to the additional legal help, document preparation, and staff time that would be needed.

In conclusion, there seems to be a threshold cost of going to the OMB that usually exceeds what is necessary at the OPF. Although participants gave me a wide range of estimates, the minimum cost of an OMB hearing was somewhere around $100,000 for developers. The OPF seems to have represented significant dollar and time savings to developers in most cases. Ministry officials may not have saved in dollar terms, but for this group the OPF appears to have saved substantial amounts of time and staffing resources.

Section 5: Stability

Another measure of success in mediated settlements is their ability to last over time. Parties can “agree” at the bargaining table, then realize that they have very different ideas about how the agreement will be implemented. Agreements may be challenged at a later date by unsatisfied parties, and some parties may not follow through on their commitments in the absence of continual monitoring and enforcement. I asked participants to tell me how stable settlements were over time, and to describe the components of settlements that were crucial in achieving
this stability. Overall, 93% of respondents considered the mediated settlements to be stable over time. Stability stemmed from documentation, flexibility, and specificity. The inclusion of implementation and monitoring agreements into the settlements was extremely effective. In some cases, satisfaction and improved relationships among the parties made implementation more likely.

Mediated settlements were often well documented, able to adapt to changing technology, and specific to particular areas. In the agricultural land case, the official zoning documents that came out of the agreement solidified the agreements reached. In a septic servicing case, the settlement had the flexibility to accommodate future improvements in septic technology. In the wetlands case, the settlement was very specific to the development scheme at hand, and served to promote the use of community-based planning for other local projects.

In a few cases, the settlement was not stable. In the case that involved suspected soil contamination around an existing industrial building, “angled testing” and a visual inspection of the floor did not prove sufficient, and the MOE wanted more testing under the building. One participant in this case noted that there was no full commitment by the parties to the initial settlement. Some parties pointed out that while the settlement had proved stable thus far, future monitoring and enforcement would be necessary to ensure stability. Others attributed stability to luck, a change in government, or to independent actions by localities and regions that allowed development to move forward.

A number of respondents compared the stability of an OPF settlement with that of an OMB decision. Roughly half of these participants thought an OMB decision would have been more stable, while the other half thought the OPF settlement was just as stable. One participant put this issue in proper perspective, saying: “An OMB yay or nay would have been more stable, but would not have allowed this win-win situation.” Participants were asked if their settlement had
encountered any legal challenges. Only a few settlements were subsequently challenged at the OMB, and the OMB affirmed the OPF settlement in both cases. None of the settlements were challenged in any other court.

Implementation and monitoring agreements played the greatest role in lending stability to agreements, by adding concrete deadlines and reporting requirements that put “teeth” in resolutions. Dale Martin explained:

The Office was really all about implementation. Nine out of ten agreements usually fall apart -- agreeing is always the easy part, implementing the agreement is the hard part. We tried to build self-regulating agreements, by including safety valves and penalties.

78% of participants remembered that implementation and monitoring agreements had been built into the settlements they reached at the OPF. Examples of these agreements follow, presented by case type:

- In the agricultural land case, the “wording” agreed upon was fully incorporated into the Official Plan and policy for the area.
- In a groundwater contamination case, the MOE committed to work on general pump and treat policy for the province, in order to head off future disputes over responsibility for remediation systems.
- In a soil contamination case, the developer committed to a series of confirmations on actions required by the ministry.
- In a case involving impacts from nearby industry, the municipality agreed to enforce air emissions limits for the industry, and to use land use controls to limit noise and odor from future industrial development in the area.
- In the sewage plant case, the parties agreed on the parameters of the study to measure impacts on existing residents.
- In the deer habitat case, there were a number of zoning and subdivision restrictions, and a record of photographs to ensure that the habitat would not be significantly altered by the development.
- In the river valley case, the citizens were allowed to continually monitor the area.
In the wetlands case, the town was responsible for monitoring the installation of protective devices to preserve the marsh, and for checking the land during site preparation and the construction process.

In the wildlife corridor case, the town was given access for maintenance, and special fencing was erected to limit private use of the corridor.

In the retirement community case, the developer agreed to annual reporting on construction of new units and effluent flows, in order to alert the town if more septic capacity was needed.

In the mixed-use development case, the town passed a bylaw listing the permitted uses for the site, and the developer submitted to annual reporting of effluent flows.

In the water supply case, the town and region were responsible for monitoring groundwater and for getting as many residents as possible onto the new water system.

In general, the parties thought these implementation and monitoring requirements were realistic and easy to follow. However, one developer thought the reporting requirements were onerous, while another thought fencing off the wildlife corridor was impractical and aesthetically displeasing.

Overall, 71% of participants thought that settlements were implemented sufficiently. 26% of respondents were involved in projects that never went forward for various reasons, usually related to a downturn in the real estate market or financing difficulties. A few respondents had a “wait and see” attitude; they felt that some details would still need to be ironed out in the future.

In cases where the project went forward, most respondents thought the parties followed through on their commitments. There were a few exceptions. In a soil contamination case, the MOE did not issue their approval when additional reports were submitted. In another contamination case, the required reports were never provided by the developer.
The quality of relationships between the parties can often be an indicator of stability. Interestingly enough, 61% of respondents noted no significant change in relationships between the parties as a result of the OPF mediation. In many of these cases, the parties communicated on a professional level before, during, and after the OPF was involved; relations were never really bad. Developers and ministry officials often said that relations were professional, and that they “agreed to disagree.” A small number of participants thought relations got worse during the mediation. Some ministry officials felt backed into a corner, or they were upset when private actors showed disrespect for agency guidelines. In one case, relations between provincial and local officials worsened, because the local planner felt the province was interfering with local business.

30% of respondents reported that the OPF mediation did result in some significant relationship improvements. In the wetlands case, the developer gained trust by hiring respected biologists to determine marsh buffers. In the same case, according to the local planner, all the parties went through a slow learning curve followed by hand shaking. In other cases, parties began working together and gained empathy for “opposing” positions. One participant referred to a “real rapport with mutual respect” that emerged between the developer and the MNR.

In conclusion, participants thought mediated settlements were stable. Implementation and monitoring agreements, documentation, flexibility, and specificity were all important components of stability. Satisfaction and improved relationships among parties also helped, but to a lesser degree. Although the evidence is not conclusive, comparisons made by respondents suggest that the OPF was more likely to adopt flexible solutions than the OMB, and that mediation was more likely to result in higher levels of satisfaction among participants than an OMB hearing.
Chapter 4: Conclusions and Recommendations

Based on the experiences of participants in these 15 cases, the OPF settled land use disputes with environmental issues to the satisfaction of most parties involved. While some parties, including Dale Martin himself, would not use the term "mediation" to describe the OPF process, the OPF did present a relatively unstructured forum for reconciling various stakeholding interests, where interested parties could reach a negotiated settlement with the assistance of an outside party. The fact that Dale Martin may not have been perceived as completely "neutral" only points to the difficulty of conducting a truly unbiased mediation; the "classic third-party neutral" may be hard, if not impossible, to find in the real world. Dale Martin's high profile may have compromised his perceived neutrality, but it appears to have helped him resolve development disputes in a timely and effective manner.

Despite any perceptions of bias, the OPF settlements I examined seem to have satisfied the interests of all the relevant stakeholders. A direct comparison of "fairness" between the OMB and the OPF is difficult to make with this sample. However, many participants thought that the OPF process had more potential to realize mutual gains, while OMB decisions tended to have a winner and a loser. Development was usually allowed to move forward in OPF settlements, but a number of environmental interest groups felt they were able to insert safeguards that would not have emerged from OMB hearings.

OPF settlements not only appeared to be fair, but participants also perceived that the process was relatively efficient. Most of the people involved did not think the OPF took too long to resolve disputes; on the contrary, most were pleased with the low amounts of time and money required. The principle reason for this was their knowledge of how long and expensive OMB hearings
can be. Therefore, although the evidence in this sample is not conclusive, it strongly suggests that the OPF can handle land use disputes in a more efficient manner than the OMB, without sacrificing equity. Based on the participants' estimates, OMB hearings seem to present threshold costs to parties that usually exceed what most OPF mediations would require.

OPF settlements were perceived to be stable by participants, and most of the conditional approvals have stood the test of time. The inclusion of implementation and monitoring agreements, specificity of conditions to particular areas, flexibility to accommodate future information or technological change, and full documentation of agreements in plans and policy documents were very important factors that lent stability to settlements. The continued satisfaction of the parties and improved relationships were also deemed to be important by a number of participants.

In general, participants thought OPF settlements were as stable as OMB decisions; there was not a clear consensus that either process led to more stable solutions. However, the reader should note that OMB decisions carry more finality than a U.S. court decision, due to the very limited possibilities for appeal in Ontario. In the United States, court decisions can easily be appealed, and they often are. Thus, if the opportunities for appeal were greater in Ontario, more participants might have viewed OPF settlements as more stable than OMB decisions. This possibility points to the need for research on U.S. cases, to test for different perceptions of stability with respect to U.S. court decisions.

The OPF represents a relatively successful example of institutionalizing mediation in a government body. For the OPF, this value hinged on increased status and the knowledge gained by handling numerous disputes with similar characteristics. As government "insiders," the OPF could summon key decision-makers from other agencies to the table. The OPF could effectively help parties
interpret provincial law and policy, identify precedents which might narrow the choice of strategies or solutions, and even encourage substantial reforms in provincial regulations and guidelines.

As it turned out, OPF settlements contained many harbingers of provincial planning reform. Some local officials noted that changes in the review process and the use of ministry guidelines mirrored the agreements reached in some of these cases. Dale Martin thought the OPF had a “profound effect” on the reform of provincial planning and environmental policies. Under the new Planning Act as amended in March 1995, local and regional agencies have taken much of the approval authority that once lay with provincial agencies. Commenting agencies like the MOE and the MNR will not hold up OPAs, because the MMA will no longer circulate routine development applications to them. There is now a strict time limit on the review and comment period at the local, regional, and provincial level. A set of published policy statements (incorporated in the Planning Act amendments) presents a more precise and public articulation of provincial environmental policy than the informal guidelines of old. The amended Planning Act also makes specific references to the OPF and the benefits of using alternative dispute resolution to reach settlements.9

Although the evidence is far from conclusive, the author feels that the institutionalized role of land use mediation in Ontario was a key reason behind the unusual regulatory flexibility that many of these settlements represented, and that the OPF helped create the knowledge that led to wider planning reforms. The author can hypothesize, if not prove, why this is so. An institutionalized mediation office will in all likelihood handle more land use disputes than a private mediation firm, and it can achieve notable economies of scale when it learns to

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9 Ministry of Municipal Affairs, “Ontario’s New Planning System” and “Comprehensive Set of Policy Statements.” Also see Dale Martin’s interview.
recognize patterns in disputes. Since the office is more likely to run into similar patterns than a private mediation firm, it is more likely to gain knowledge of effective solutions to individual disputes and wider policy problems. When land use disputes are handled by private mediators on a piecemeal basis, these economies of scale and knowledge gains may be less likely to surface. More importantly, it is probable that an institutionalized mediation office will have the status and access to convince decision-makers to adopt innovative solutions to regulatory problems, once solutions to the problems have emerged.

Given that an institutionalized mediation program may add value to land use decision-making, it is worth asking which types of disputes are best suited for such an office. From the evidence of these 15 cases, the OPF was best at handling technical and procedural disputes. In this subset of cases, no party adamantly thought that development was “wrong;” rather, they had different ideas about the technical work that was necessary to protect environmental resources, and about how best to coordinate the technical work and the approval process. Most of the disputes concerning contamination, septic servicing, and impacts revolved around these issues.

The natural area cases forced the OPF to deal with deeper value disputes, which are typically harder to mediate. Here, the results were more mixed. When parties were at odds over the merits of public versus private stewardship, the OPF was able to mediate effective compromises that kept land private but used zoning to accomplish public goals. However, when citizens groups wanted to preserve land in its natural state, the OPF was forced to adjudicate rather than mediate.

The participants themselves made a number of relevant observations on what types of disputes are best suited to mediation. Some participants thought there were limits to how many conflicting interests mediation could handle effectively, and that there must be underlying support for the project in question:
Mediation works when there are one or two areas of opposition, but a general consensus that a project is “good.” With a large bunch of disciplines involved, it’s best to go to the OMB.

It works when the interests can be identified. It’s not appropriate when there are too many conflicting interests, or when the dispute is over personalities rather than policy. In these cases, you should go to the OMB for clarity.

Respondents emphasized the importance of goodwill among the parties for mediation to be effective:

Parties must exercise some goodwill for mediation to work.

When there is common ground, there are willing parties, and the mediator is impartial and qualified.

According to participants, mediation was effective in fleshing out the facts of the case and to establish the validity of unclear interests:

Mediation works when positions are taken in the absence of information, or when positions are not very defensible. NIMBY situations are an example.

Mediation is useful to establish the validity of objections to a project, to separate personal attacks from legitimate objections.

You should mediate when one side has a weak case or little knowledge of the issues, or when there is some doubt as to the facts.

A number of participants warned of the pitfalls of value disputes:

Mediation doesn’t work for value disputes; when groups start fighting on some pure principle, consensus becomes very difficult.

It’s not appropriate when people lodge objections for personal reasons, because mediation will not be able to get at the root of the problem.

It only works when the issues are specific, and quantitative answers can be given.
Some participants thought mediation would only work later in the game when the parties had given up on litigation:

It should be tried when everything else has failed. You should exhaust other avenues first, and when the next step is a protracted legal battle, parties will agree to talk.

The balance of evidence led the author to conclude that deep value disputes over environmental resources may not be good candidates for land use mediation. In order to mediate development disputes, all parties should be willing to accept a project in some form. When parties object to development purely on the basis of values, they are less likely to want a compromise. These cases may be better served by a court, and the OPF itself took a more authoritarian approach when these disputes came up. Similarly, disputes rooted in "personalities" or "unreasonable" positions are difficult to mediate; but in these cases, where positions and facts are often unclear, a mediator can at least try to bring out the key issues of conflict, inform the parties, and sway them towards consensus while allowing them to retain some dignity. Even if these cases do not settle, mediation can still play an important role in narrowing the conflict and generating some potential solutions.

In the author’s view, mediation is best used in land use cases to clarify the implementation of regulations and guidelines. Technical matters are good topics, as long as they serve to relate policy documents to on-site science and planning. Policy documents may set forth goals, but they are inherently vague and their application is often too broad to avoid discretion. As the experience of the OPF demonstrates, mediation can provide a forum where intelligent, experienced parties can work together to implement policy on the basis of new knowledge and diverse local circumstances.
Appendix 1: Interview Questions for Participants

Elaborating on the Case History:

1) I have some basic information about your case, but I would like to hear your interpretation of the issues. Could you give me a brief summary of the important issues from your standpoint? What were your primary concerns or interests?

2) Which parties (or interest groups) were most opposed to your position, and why?

Reasons for Trying Mediation:

Script: I’m going to ask you some questions about the mediation process you went through. When I say “mediation,” I’m using a broad definition of the word, which can include facilitation or non-binding arbitration. The important thing is that a neutral person was employed to help you reach some resolution to your case. Do you feel the process you went through fits in this category?

1) Before you were involved in the mediation, did you attempt to pursue your interests in some other way (litigation or an administrative appeal)? If so, can you tell me more about that?

2) Why do you think that effort failed?

3) Were you in favor of trying mediation? If not, why not? If so, what convinced you to try mediation (time/cost of litigation, time/cost of administrative appeal, intransigence of parties, bureaucratic inertia, other)?

4) Prior to the mediation, did you have a view about the strengths and weaknesses of this process (as compared with alternate ways of pursuing your interests)?

The Mediation:

1) How was the mediation convened? Who selected the parties? Were any new stakeholders identified by the process?

2) What were the steps involved (meetings, telephone calls, other) in the mediation?

3) In your opinion, what were the biggest obstacles to achieving a good settlement during the mediation?

4) What did the mediator do or try to overcome these obstacles? How effective were the techniques that the mediator used?
5) In general, what was your evaluation of the mediation process? Please choose among the following responses: "very favorable," "favorable," "unfavorable," "very unfavorable." Why?

Settlements and Agreements:

1) Please choose among the following responses to describe the outcome of the mediation: "settled," "not settled, no significant progress," "not settled, but significant progress made," or "settled, but further litigation ensued." Please explain your answer.

2) (If Settled) Could you describe the settlement?

3) (If Settled) Do you agree with the statement: "My interests were well met by the settlement." Would you say that you "strongly agree," "agree," "disagree," or "strongly disagree?" Why? If you disagree with the statement, do you feel another process would have better met your interests?

4) (If Settled) Do you agree with the statement: "In general, all the parties' interests were well met by the settlement." Would you say that you "strongly agree," "agree," "disagree," or "strongly disagree?" Why?

5) (If Settled) How fair was the settlement? (very fair, fair, unfair, very unfair) In your opinion, was the settlement fairer than that which probably could have been reached through another process (litigation or administrative appeal)? (yes, no, don't know) Why?

6) (If Not Settled) Even though there was no final settlement, were there any issues clarified, relationships improved, or smaller agreements reached that made the mediation worthwhile in your mind? (If Settled) Do you feel that relationships between the parties improved as a result of the mediation?

7) (Either Settled or Not Settled) In your opinion, how important was the mediator in achieving agreement between the parties? Would you say the role of the mediator was "crucial," "important," "somewhat important," or "not important?" Could the parties have agreed on their own?

Time and Cost:

1) Roughly how long did the (mediation) take?

2) How much was the mediator's bill? How was the cost of the mediator covered?

3) Could you estimate your costs (including any attorney/consulting fees) for participating in the mediation?

4) How would you compare the time and cost of mediation with the time and cost that probably would have been required if you had litigated or appealed
your case? Please choose among the following responses: “mediation cost less and took less time,” “mediation cost less but took more time,” “mediation cost more but took less time,” or “mediation cost more and took more time.”

Implementing the Settlement:
(ask these questions only if a real settlement was reached during the mediation)

1) Was there any agreement regarding how to implement or monitor the settlement by the parties? Were these agreements realistic and easy to follow?

2) Did the parties follow through on their commitments? Please explain.

3) Were there any subsequent legal challenges to the settlement?

4) In your opinion, how well was the settlement implemented? Please choose among the following responses: “very well,” “sufficiently,” “insufficiently,” or “poorly.”

5) Looking back on what happened, how stable was the settlement? In your opinion, was the settlement more stable than that which probably could have been reached through another process (litigation or administrative appeal)? (yes, no, don’t know) Please explain.

Broad Questions:

1) (If Settled) Given that the settlement met basic interests, was this a “creative” settlement? In other words, did it address local circumstances and interests in a way that went beyond existing regulations, policies, or practices?

2) (If Settled) How radical was the settlement from the provincial agency’s point of view? What I mean by that is, did it represent a new way to apply existing agency policy? Or did it result in new agency policy?

3) In general, do you feel mediation is an effective tool for resolving (your category) of land-use dispute? Why?

4) In your opinion, what types of land-use disputes are the best candidates for mediation? Please explain.
Appendix 2: Interview with Dale Martin

1) Prior to becoming “Facilitator” what were your political background and affiliations?
   I was a member of two municipal councils, at the local and regional levels. I was a lefty, a democrat. I was concerned with the environment, and I felt that it needed a greater emphasis in policy-making.

2) In your opinion, why was the OPF created?
   There was a political reason and a practical reason. The NDP government had a reputation of being anti-business. There had been a development boom in Toronto, and there were many fights over developments published in the papers. Partly as a result of these fights, the NDP was perceived as anti-development. Then there was a major economic downturn, and many NDP voters -- unionized construction workers -- were out of work. So the NDP created the OPF to get development moving again, to cut through government red tape, and to give the construction and development industry a voice inside the government.

3) Specifically, how was the OPF created?
   It was announced in the Throne Speech, which is when the government announces what its program will be. The OPF was an economic development policy initiative from within MMA. The specific idea came from the Urban Deputies Group. MMA actually announced my appointment.

4) What was the official mandate for the OPF?
   The mandate was to identify projects caught in red tape. Since amendments to the Planning Act were going on, the OPF was an interim measure to implement short-term fixes to the system. The Ottawa Palladium project was put forward as the first major project that needed facilitating.

5) In your recollection, was there ever any unofficial pressure to have a particular outcome in certain cases?
   My clients were really the developers. We wanted development projects to occur, and we were willing to do whatever it took to get projects going. At first we were exclusively dealing with provincial agencies, but our mandate changed over time, and we began to deal with municipalities and regions. We definitely weren’t your classic third-party neutrals -- we were advocates for development. The term mediation really doesn’t apply -- we were facilitators.

6) How did your office interact with the Premier’s Office. Were you able to rely on their help with provincial agencies in any of these cases?
   In reality, politicians had a hard time making the bureaucracies move. The only thing I could do was to make agencies aware that the Premier would know if and when they were messing up. This was especially effective if the Premier was particularly interested in certain projects -- I made sure the agencies knew about it. It definitely helps to be able to call the Premier or the Deputy Ministers, and have them return your calls.
7) Did you see any patterns in the cases you mediated? Do you think anyone would have detected any patterns in the agreements that you reached?

With MOE and MNR, there was a clear lack of accountability. There was a lack of clear lines of authority, and there was no coherent, consistent policy. Decisions were too arbitrary and individual, and the decisions were isolated; one agency person’s decision could have no connection to what another agency person might say. They went well beyond the mandate that they were given, in a way they abused their positions. There was this kind of culture within the agencies, coupled with a lack of clearly articulated policy. Our role was to call on the agencies to be accountable, force them to deal with “reality,” and get them to come to solutions.

8) What were your reactions to issues of representation and getting the right stakeholders to the table?

I just did whatever was required to make the deal work and stick. In some cases the only participants might have been two developers -- there were some cases with little or no impact on the public. There are statutory requirements for participation, so often projects that we helped get approved had to go back through such a process. But we didn’t attempt to search out every potential stakeholder.

9) How did you react to the problem of fairness? Did you consider it your responsibility to block an unfair agreement?

No, I didn’t consider this my responsibility, only if the stakeholders themselves thought an agreement was unfair. I came at this from a practical, not an ethical or moral, standpoint. We had to maintain a reputation of not stabbing people in the back and coming to reasonable solutions.

10) Did you feel responsible for implementing settlements, and if so, how did you express this?

The Office was really all about implementation. Nine out of ten agreements usually fall apart -- agreeing is always the easy part, implementing the agreement is the hard part. We tried to build self-regulating agreements, by including safety valves and penalties.

11) In an office like the OPF, do you think it makes a difference who the mediator is? What characteristics should a mediator have?

It’s very important who the mediator is. The Office had no authority on its own. The mediator needs a high level of knowledge on the issues, in order to challenge the credibility of certain positions. Parties must realize they can’t come in and bullshit the others. However, you also need a level of confidence from the political party in power. I worked for a while under the second regime (the Progressive Conservatives, or Tories) and I found that I wasn’t getting any interesting, sensitive projects any more. So I left of my own accord. You need to be able to pick up the phone and call the Premier or the Deputy Ministers. It’s a tough business in the private sector -- you need a good network. I’m doing private sector facilitation now, but I’m relying on the network I put together at the OPF.
12) Do you think the OPF was successful, and what criteria would you use to measure such success?

All the affected parties, even the environmental ministry people, thought the Office was a smash hit. We worked to identify the key reasons for problems in the development process, and we got the ministries to create specific guidelines to address these problems. Basically, we were problem-solving the system.

13) I'm interested in the effect of OPF settlements on future regulations or policies -- were there any reforms of provincial planning or environmental policy that you feel started in the OPF?

I think there was a profound effect. We provided developers and municipalities with a way to identify and solve problems, which led to long-term change. There were certain amendments to the Planning Act, such as a time limit on review by approval agencies, and specific references to mediation and alternative dispute resolution as a tool for reaching settlement. There was a more precise articulation of Ministry policy, and more consistency across Ministries.

14) If you had to structure such an office again, how would you do it? Are there any changes you would make?

I wouldn't make any major changes. I think an Office like that should remain fairly unstructured, with freedom to pursue its mandate subject to some checks and balances. If there's too much structure, it can easily be coopted.
Appendix 3: Statistics from Participant Survey

Initial Impressions

In favor of mediation?
yes: yes: 24 71%
no: no: 7 21%
neutral: neutral: 3 9%
total responses: total: 34 100%

Evaluating the Mediation

General Evaluation of OPF Mediation
very favorable: very favorable: 4 12%
favorable: favorable: 23 70%
negative: neutral: 2 6%
unfavorable: unfavorable: 2 6%
very unfavorable: very unfavorable: 2 6%
total responses: total: 33 100%

Is mediation an effective tool?
effective: effective: 27 84%
not effective: not effective: 5 16%
total responses: total: 32 100%

How important was the mediator’s role?
crucial: crucial: 11 34%
important: important: 13 41%
somewhat important: somewhat important: 6 19%
not important: not important: 2 6%
total responses: total: 32 100%
## Fairness

### Settlement met my interests

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### Settlement met other interests

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### How fair was the settlement?

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### Efficiency

#### Comparing time/cost of OPF and OMB

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- Total: 100%
### Stability

**Impl. and Mon. part of the settlement?**

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**Evaluation of Implementation**

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**Did everyone follow through?**

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<tr>
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**How stable was the settlement?**

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**Did relationships improve?**

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### Innovation

**Was the settlement creative?**

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- **creative:** 48%
- **not creative:** 52%
- **total:** 100%

**Was the settlement radical for the agency?**

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<td>24</td>
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- **radical:** 54%
- **not radical:** 46%
- **total:** 100%
Bibliography


Macfarlane, Julie. “Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre.” Queen’s Printer for Ontario, Toronto, November 1995.


