

Promoting Alternative Dispute Resolution in the Massachusetts Land Court:
Current Perceptions and Use

By

Alexandra Elizabeth Kahveci

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Boston University
Boston, Massachusetts (2010)

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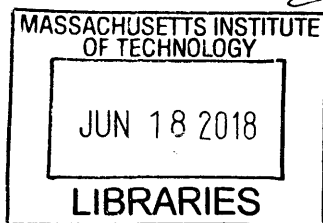
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Author _____ **Signature redacted**
Department of Urban Studies and Planning
May 22, 2018

Certified by _____ **Signature redacted**
Professor Lawrence Susskind
Department of Urban Studies and Planning
Thesis Supervisor

Accepted by _____ **Signature redacted**
Professor of the Practice, Cesar McDowell
Chair, MCP Committee
Department of Urban Studies and Planning



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Abstract

The Massachusetts Land Court is overburdened. More than 15,000 new cases are filed each year, with the even more cases carried over from previous years. Each emotionally taxing case can cost litigants between \$50,000- \$150,000 to try, with no guarantee of winning. One promising option that would relieve the overload, reduce the cost to litigants, and give them control over the outcome is Alternative Dispute Resolution (ADR). This is an approach to resolving disputes that allows parties to find mutually beneficial agreements with the help of a neutral mediator. The Land Court already has an ADR program – and has since 1999. But the program is underutilized and it is not clear why that is the case.

Despite unanimous support for ADR among mediators, Land Court judges, and attorneys, less than 1% of cases that go through the Court are mediated. I find that the Massachusetts Land Court ADR program is perceived as “second-class justice” - less desirable than a trial. A lack of understanding about ADR and its value, a perception that the costs of mediation not worth the service, and emotional factors emerged as the key barriers to wider use of mediation in Land Court cases. I make recommendations for each of the involved parties. For the courts, I recommend reinstating an in-court ADR program (rather than sending cases to external mediators) and giving judges and clerks more responsibility for addressing litigants’ misperceptions of ADR. For legislators, I recommend increasing ADR-specific funding for the Land Court. For attorneys, I suggest ensuring that all of their clients fully understand how ADR can improve their prospects, and bringing their clients with them to case management conferences or a similar court-tracked meeting. And lastly, for mediators, I recommend providing in-court screening of cases for the possibility of mediation and establishing long-term professional relationships with judges.

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Chapter 1: Introduction

Land disputes can go on for years. Even when the parties seek a judicial remedy, some disputes last decades. A famed case over a building permit in Beverly, Massachusetts, has remained in Massachusetts Land Court for 25 years with no sign of resolution. A family purchased a vacant lot intending to build a home on it. The next-door neighbor, upset over losing the property in an auction, was determined not to allow the family to build, and filed an easement suit in the Land Court. 25 years and countless suits and appeals later, the suit has devolved into a “case of emotion, pride, and principle” (Boston Globe, 2016). Land disputes can cover a myriad of issues, ranging from disagreements over property lines, differing interpretations of deed restrictions and rights of way, to efforts to appeal a range of regulatory restrictions. Although the Massachusetts Land Court only covers real property issues, it still amasses a large caseload. Over the last two decades, more than 300,000 new cases have been filed. The total number of new cases increases between 5%-7% every five-year period. In FY07, the Land Court’s jurisdiction was expanded to include permit sessions and permission to partition cases, which, in conjunction with the foreclosure crisis, led to a 231% caseload increase. The caseload remained high – over 25,000 new cases each year – until FY11. Since then, the Court has received an average of 15,500 new cases each year.

The Trial Courts (and therefore the Land Court) have taken measures to address this growing burden. Originally implemented in 1988 and revised in 2004, scheduling rules impose time limits for each part of a trial. The Trial Courts also implemented an alternative dispute resolution (ADR) program in 1999. The Court’s

ADR program gives litigants an option to engage a mediator or arbitrator to resolve their case without going through a trial. The Land Court partnered with five fee-based mediation providers and, for the past 5 years, has referred an average of 46 cases a year to these professional mediators (Massachusetts Land Court).¹ The focus of this thesis is how the Land Court has used ADR thus far and how it could make better use of this option.

ADR offers an alternative to a full-blown trial, offering the parties (and their lawyers) an opportunity to talk through their differences with the help of a neutral mediator to see if they can resolve the complaint voluntarily. Mediation costs litigants roughly 5% of what it costs to go through a full trial, and takes an average of 3-6 months from start to finish compared to the average 31 months a traditional trial takes (Massachusetts Superior Court 2008). In FY17, 15,226 new cases were filed in the Land Court. That is in addition to the 31,885 cases rolled over from previous years that were not resolved (MA Land Court "Caseload Statistics FY17"). 27,411 of total (pending plus new) 47,111 cases were cleared. Only 71 of the 47,111 cases, however, were referred to mediation. Only 48 of those were actually mediated (Massachusetts Land Court). With such dramatic saving of time at stake, one might expect more litigants to choose the mediation option. My question is, "What are the factors that discourage litigants before the Land Court to take advantage of the mediation option?"

Alternative Dispute Resolution in land disputes has been studied before (Baker 2016; Nolon 2012; Lampe & Kaplan 1999; Susskind et al. 1999; Forester

¹ Mediation Works Inc, Massachusetts Dispute Resolution Services, Community Dispute Settlement Center, the Real Estate Bar Association Dispute Resolution Inc., and The Mediation Group

1987). Almost all of these studies looked at how and why mediation worked, but only after the fact. I am interested in determining why ADR - interchangeably referred to as consensus building or mediation in this thesis - is not initiated more often in the Massachusetts Land Court, and how its wider use might be promoted ². To be clear: I do not believe that ADR is intrinsically or always better than a trial. Rather, I argue that ADR is a vitally important option for litigants within the Courts – one that is underutilized. Thus, my focus is on the obstacles to settlement of various kinds of land disputes within the Massachusetts Land Court.

The Massachusetts Land Court, which is part of the Massachusetts Trial Court system, is a bench court (meaning there is no jury) with a chief justice and six justices. It is one of the oldest land courts in the United States, and an early adopter of ADR (Buscher Jr., 1998; McManus and Silverstein 2011). ADR's first use in the Trial Courts was in the Superior Courts. In the 1990s, Governor Michael Dukakis created the Massachusetts Office of Dispute Resolution and later partnered with the Superior Courts to offer ADR (Adams 2004). ADR's use was expanded throughout the Trial Court departments during the 1990s. Adopted in 1998 by the Supreme Judicial Court, the *Uniform Rules on Resolution*, Supreme Judicial Court Rule 1:18 formally incorporated ADR into the Massachusetts Court System, including the Trial Courts (Massachusetts Supreme Judicial Courts 1998). The Land Court was one of the most enthusiastic supporters of ADR (Massachusetts Office of Dispute Resolution 2000).

² There is a growing push by mediators to drop the "A" from ADR and instead refer to it as "Dispute Resolution." However, because the Courts refer to it as "ADR," I will use that language for this paper.

There are six types of land court cases in Massachusetts: Registration/Confirmation³, Land Registration/Subsequent⁴, Tax Lien Foreclosures⁵, Miscellaneous⁶, Permit⁷, and Servicemember⁸ (MassCourts 2015; Department of Revenue 2005; MGL Chapter 185). Every case, with the exception of Servicemember cases, is given a single judge for the life of the case. Servicemember cases are typically perfunctory cases: foreclosure cases filed by mortgage holders to ensure that the mortgagee was not on active military duty during the foreclosure. These make up overwhelming majority of cases, comprising approximately 75% of the caseload over the last four years (Massachusetts Land Court Caseload Statistics; Massachusetts Real Estate Blog 2013). Since they are mostly formalities and rarely go to trial, they are not considered viable cases for mediation. This leaves an average of 3,600 cases a year (Massachusetts Land Court Caseload Statistics). The other five types of cases might plausibly be mediated. These typically involve neighbors, family members, businesses, towns and cities, zoning boards, and banks (Massachusetts Land Court Published Decisions 2018). Cases before the Court rarely involve the same private parties, although zoning boards, towns and cities, and banks are likely to return in cases involving different plaintiffs.

³ Confirmation of registration includes both registering a parcel with the State and withdrawing a parcel from the registry

⁴ Land registration after confirmation includes changes to the registration

⁵ Tax lien foreclosure cases try to exempt owners or relatives from foreclosure in cases of deaths, age, extenuating financial circumstances etc.

⁶ Miscellaneous cases are cases that do not fit into the other five categories. This sometimes includes suits against financial institutions, petition to partition cases, easements, adverse possession, etc.

⁷ Exclusively for developments with more than 25 units or 25,000 gross floor area, permits cases may approve or reverse previous approvals for non-conforming building permits.

⁸ In accordance with the Servicemember's Civil Relief Act of 1940, banks may not foreclose on service members who are on active duty. These cases are formalities for the lenders to confirm the property owners on whom they are trying to foreclose are not service members.

Attorneys filing cases before the Land Court are required to provide their clients with information about their mediation options, including the advantages and disadvantages of ADR⁹ (MA Superior Courts). Supreme Judicial Court Rule 1:18 (Uniform Rules on Dispute Resolution) Rule 5 mandates:

Information [about court-connected dispute resolution services] should state that selection of court-connected dispute resolution services can occur at the early intervention event or sooner, and that no court may compel parties to mediate any aspect of an abuse prevention proceeding under G.L. c. 209A, §3. Insofar as possible, information should be available in the primary language of the parties. Attorneys shall: provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantages and disadvantages of the various methods of dispute resolution; and certify their compliance with this requirement on the civil cover sheet or its equivalent.”

Attorneys bear most of the responsibility to inform their clients about their ADR options, especially since clients rarely attend initial proceedings (Shapiro; Vhay; Massachusetts Supreme Judicial Court 1998).

As discussed above, mediation costs a fraction of what a full trial costs, and often takes only a few months, as compared to the several years that litigation takes. Thus, when it is used, mediation can be a productive alternative to litigation. Yet, it is not often used in the Land Court. My goal is to understand how the judges, attorneys, and mediators involved view mediation, why they believe mediation is or is not used more often to resolve Land Court cases, and what changes might be made to encourage more widespread use of mediation. I also think it would be useful for these groups to hear how the other parties think about mediation and to hear how they might work together to promote it (since they do not seem to talk to each other about these topics much). Finally, it is important for legislators in

Massachusetts to understand the benefits of mediation in case more widespread use of mediation requires new legislation to overcome some of the existing barriers.

To understand how mediation is currently being used in the Massachusetts Land Court, I used semi-structured interviews to speak with mediators associated with the five court-approved mediation groups, current and former land court justices, and several real estate attorneys who appear before the Court on a regular basis. I also reviewed data provided by the Land Court and the Massachusetts Trial Courts regarding mediated cases and cases by subject. In all, I talked with 6 of the 7 current Land Court judges, 1 retired land court judge who is now a mediator, 5 mediators from court-approved mediation programs, and 3 attorneys who have experience before the Court. These interviews took on average about 40 minutes.

Chapter 2: Mediation and the Massachusetts Land Court

Consensus building

Consensus building is a term that encompasses facilitation, mediation, and still other forms of ADR. I will rely on the description of the Consensus Building Approach, or CBA, presented in *Breaking Robert's Rules* (Susskind and Cruikshank 2004). This follows the thinking and research of the MIT-Harvard Public Disputes Program (dusp.mit.edu/publicdisputes). Susskind and Cruikshank describe a five-step consensus building process: (1) convening, (2) clarifying responsibilities, (3) deliberating, (4) deciding, and (5) implementing agreements. They are thinking in terms of a wide range of public disputes, not just those that would otherwise come before the Land Court or any other court. Their discussion of consensus building considers public policy disputes, facility siting and design disputes, and regulatory disputes. As far as land disputes in the Massachusetts Land Court are concerned, I am particularly interested in the initial convening step. That is, ways of encouraging the parties involved to meet face-to-face, with whatever technical support they need, to talk through their differences and ways of resolving them, without having to go through the trial process. If all the parties involved cannot get the right stakeholders "to the table" to work through an agreed-upon agenda of issues, following an agreed upon set of ground rules, consensus building will not be possible.

In many land disputes, public agencies or elected officials could play the role of convener (Susskind and Cruikshank 2004). That is, they could select a skilled "neutral" to undertake a Stakeholder Assessment. This involves having confidential

conversations with the obvious stakeholders and preparing a written summary (without attribution) of the points of agreement and disagreement. This makes clear who should then be invited by the convener to participate in a discussion of informal problem-solving options. Sometimes the person who prepares the Assessment serves as the mediator if the consensus building effort goes forward and all the parties agree. In other situations, the parties interview and then select a mediator of their own choosing once the convener has invited all the relevant stakeholders (identified by the Stakeholder Assessment) to participate. Even with an appropriate mediator, all the important disputants must agree to participate. Following confidential interviews with all the parties, a mediator can determine whether there is a chance an agreement can be reached. It is also possible for the parties to agree to mediation, go through the process, and still reach only a partial agreement or no agreement. Not every land dispute lends itself to consensus building.

The types of land disputes that come before the Massachusetts Land Court, outlined in the introduction, are only a fraction of all the types of land disputes. Babette Werhmann, in her 2008 essay, "Land Conflicts, a Practical Guide to Dealing with Land Disputes," outlines 35 types and over 50 subtypes of conflicts broken down into four categories: (1) conflicts occurring on all types of properties, (2) special conflicts over private property, (3) special conflicts over common and collective property, and (4) special conflicts over state property (Werhmann 2008). She also discusses a myriad of resolution entities, only one of which is a special land

court¹⁰ (Werhmann 2008). Thus, the Massachusetts Land Court deals with only a limited set of land use disputes most of which must be adjudicated within the narrow scope of existing law (regardless of what ever creative resolutions might be possible in a more informal setting).

Strengths and weakness of ADR

ADR has many strengths beyond the time and money that can be saved that make it a valuable tool both inside and outside the courts. Several studies show that it improves shared understanding of the issues by all the parties, and helps identify and resolve underlying disagreements, even when it does not generate a final settlement. And, parties that use ADR feel more satisfied with the outcome (Susskind et al. 1999). This leads to higher compliance levels and allows disadvantaged parties to participate on an equal footing in generating the terms of agreement (Susskind et al. 1999; Shestowsky 2017; Booher & Innes 2002). Overall, mediation has the distinct advantage of generating creative solutions and mutually-beneficial outcomes rarely afforded through traditional court processes that can only take up the issues prescribed by law and must abide by prevailing precedents (Brazil 2002).

Conversely, there is no guarantee that ADR will produce a settlement and avoid trial. When there is no settlement, some consider it an unnecessary waste of time and money since the legal process must then begin (Susskind et al. 1999). ADR also requires full participation by all parties in order to be successful. Without full

¹⁰ Other bodies include the judiciary, administration, political institutions, party system, customary institutions, religious institutions, civil society, and private sector mediators.

participation, ADR can be seen as biased against a missing party. Care must be taken to ensure that the actual mediation process does not begin to mimic court dynamics: lawyers, discovery, expert witnesses, and manipulation of public perceptions (Carver & Vondra 1994). These get in the way of informal problem-solving. Questions arise, especially with the inclusion of lawyers unfamiliar with the mediation process, about how much “truth” to divulge and whether it is ethical to aim for a win-win outcome (Burns 2001). Mediation, unlike litigation, does not have to produce a winner and a loser. Lawyers with mediation experience know this, and understand that there is no requirement for passionate advocacy on behalf of their client that precludes the “other side” meeting its interests as well.

ADR in the United States Courts

ADR use is growing in district courts nationwide. A 2011 Federal Judicial Center study found that 63 of the 93 federal district courts across the US have an explicit mediation option available (46 of these allow for federal courts to mandate mediation) and all district courts have some form of ADR program (Federal Judicial Center 2011). The Federal *Alternative Dispute Resolution Act of 1998* found that ADR “has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency of achieving settlement, ...had the potential to reduce the large backlog of cases now pending,... and court-annexed mediation can be equally effective in resolving disputes in the Federal trial courts.” It declared that every district shall adopt the

use of ADR into civil cases (28 U.S.C. § 651 (1998)). Not every state adopts ADR in the same way, but Massachusetts is on par with the average state.

A Brief History of Mediation in Massachusetts Courts

ADR is not a new concept in the Massachusetts Courts. As early 1786, formal arbitration laws were integrated into the judicial system (*An Act for Rendering Processes of Law Less Expensive*) and mediation was informally used (in fact, the famous Shay's Rebellion of 1786-1787 was settled through mediation) (Conklin 2013; Davidson 2004)¹¹. In the 1970s, district courts, including Cambridge, Woburn, and Lowell, created mediation programs in both their civil and criminal divisions. The Courts allowed plaintiffs and defendants to come to an acceptable restitution agreement and provided the defendant job placement assistance and job opportunities in order to fulfill the agreement. Paul Alphen, a current real estate attorney and former mediator who worked in all three programs, describes the Courts' reasoning:

"The theory was that if [the aforementioned program were successful], the victim would feel better about the judicial system and that they had been treated fairly and that the defendant would have felt the same way. The program in Cambridge court was a big success and I think...the outcome was that people at the end of the day by and large felt better about the judicial system and the defendants were able to get some job assistance rather than just being kicked out of the courts saying 'you were bad'" (Alphen).

In 1985, Lawrence Susskind, MIT professor and public policy mediator, with Governor Michael Dukakis, wrote a grant to fund the Massachusetts Mediation

¹¹ For a fascinating history of ADR in the early US, see Carli Conklin's 2013 essay, "Lost Options for Mutual Gain? The Layperson, the Lawyer, and Dispute Resolution in Early America"

Service (later renamed the Massachusetts Office of Dispute Resolution “MODR”). This Office provided dispute resolution services for complex policy issues to all three branches of government. In 1987, the Superior Courts invited the MODR to design a civil dispute program. This began a decade-long partnership between the MODR and the Suffolk Superior Court mediation program, Norfolk Superior Court mediation program and the Suffolk Case Evaluation program to provide mediation, training, and dispute resolution system design. MODR screened over 3,000 cases between the three programs in FY1998-2000 (Adams 2004; Massachusetts Office of Dispute Resolution 1999). The MODR had an operating budget of \$382,719 in FY97 (Massachusetts State Budget 1997). The Office provided extensive pre-mediation assistance, a referral system, and a highly qualified mediator panel (Adams 2004). A 1997 evaluation of these mediation programs found 70-80% of parties were completely or mostly satisfied with the outcome of the mediation, even when the mediation did not end in settlement, and 92-100% were satisfied with the fairness of the process (Maiman 1997).

In 1999, in compliance with the 1998 Federal policy, the Supreme Judicial Court instituted the *Uniform Rules on Dispute Resolution, Supreme Court Rule 1:18* that introduced ADR to all Trial Courts, including the Land Court (Massachusetts Supreme Court 1999). MODR’s program became one of three active mediation programs in the Land Court, screening 18 cases and mediating 5 between February 1999 and June 2000 (Massachusetts Office of Dispute Resolution 2000). It included rules for a competitive process for mediation referrals (Rule 4) and qualification

standards for neutrals (Rule 8) (Massachusetts Supreme Court 1999). However, this success was short-lived.

Some private mediators became resentful of the court's system, alleging it hurt their practices. In Jeannie Adams' history of the rise of ADR in the Superior Courts she reports: "[Some lawyer/mediators] did not feel the need for training, which was required by Rule 8. [They] felt that being a lawyer was a sufficient credential for becoming a mediator" (Adams 2004). Providers began lobbying the legislature to cut in-court ADR and MODR funding. At the end of 1999, the new Chief Justice Suzanne Delvecchio ended the arrangement with the MODR, and in 2002, the current system was put into place. The MODR did not last within the Massachusetts' Executive Office for much longer after that, and in 2005 was transferred to the University of Massachusetts – Boston's Massachusetts Office of Public Collaboration (Adams 2004; Brill-Cass; Massachusetts Office of Dispute Resolution 2005; Massachusetts Office of Public Collaboration). In the early 2000s, there were ADR State grants available to support mediation for indigent or low-income parties. However, these grants were cut from the State budget in 2007 (Packer).

Mediation in Massachusetts Trial Courts

Supreme Court Rule 1:18 requires that mediation programs be court-approved and that each court should have its own autonomous mediation program. The Court defines ADR broadly as any of seven processes: arbitration¹²,

¹² Neutrals hired outside of the court give binding or non-binding decisions after hearing arguments and reviewing evidence.

conciliation¹³, case evaluation¹⁴, dispute intervention¹⁵, mediation¹⁶, mini trial¹⁷, and summary jury trial¹⁸ (Supreme Court Rules). The Trial Court Standing Committee on Dispute Resolution advises the courts on their implementations of court-connected mediation and ensures the courts' approved mediator lists qualify. Each Trial Court has a designated ADR administrator and appoints someone to be an ADR coordinator to assist the public.

There are 51 court-approved mediation programs across the seven Trial Courts. Of the 51, 39 are free or non-fee-based. These operate in the Boston Municipal, District, and Juvenile Courts. Programs are also approved for the Land, Superior, and Probate and Family Courts, but may charge for mediation services. The parties in any mediation must evenly split the cost (N.B., I discuss these costs in the next section). The other 12 programs are fee-based programs that operate primarily in the Land, Superior, and Probate and Family Courts. The Boston Municipal Court has 5 free mediation programs. The District Court has 24 free programs staffed by volunteer mediators. The Housing Court has free, in-house,

¹³ Neutrals hired outside of the court assist parties by clarifying issues and assessing the merits of both sides of the claim and, if the case is not settled, help both parties explore next steps for trial.

¹⁴ Parties or attorneys present their sides of the case to a neutral who gives a non-binding opinion of the settlement value and a prediction of the likely outcome were the case to go to trial.

¹⁵ Only used in the Probate and Family Court and Housing Court, a neutral identifies the areas of dispute between the parties and assists with finding solutions.

¹⁶ A voluntary, confidential process in which a neutral is hired or accepted by both parties to assist them in identifying and discussing issues of mutual concern, exploring solutions, and developing a mutually acceptable settlement.

¹⁷ A two-step process to facilitate settlement in which (1) the parties' attorneys present a summary of the evidence and arguments to a neutral in the presence of individuals with decision-making authority for each party, and (2) the individuals with decision-making authority meet with or without the neutral to discuss settlement of the case.

¹⁸ A non-binding process by the court in which (1) the parties' attorneys present a summary of the evidence and arguments to a six-person jury chosen from the court's jury pool, (2) the jury deliberates and returns a non-binding decision on the issues in dispute, (3) the attorneys may discuss with the jurors reasons for the verdict, and (4) a presiding neutral may be available to conduct a mediation with the parties.

mandated mediation. Each case must go through a mediation session before the parties see a judge. The mediators, known as housing specialists in the Housing Court, serve more as go-betweens connecting the judge and the litigants, conducting home checks and discussing possible solutions to specific housing issues. The Juvenile Court has 15 free mediation programs. The Superior Court has in-house ADR screenings and 15 fee-based programs. The Probate and Family Court offer in-house dispute intervention services conducted by probation officers and 27 fee-based programs.

The Massachusetts Land Court has partnerships with five court-approved ADR programs as well as an active case management conference program to promote mediation during the trial process. A case management conference is an initial discussion between the plaintiff and defendant's attorneys and the judge. It is the first opportunity for the judge to hear positions, obstacles to settlement, and set a schedule. The court-approved program founded in 1999 is not specifically for land disputes, but rather is available for every type of trial court case (MA Supreme Judicial Court). The Massachusetts Guide to Court-Connected Alternative Dispute Resolution Services notes that early alternative dispute resolution can "substantially reduce the cost, time, and complexity of litigation, while promoting greater satisfaction on the part of both litigants and attorneys" (Massachusetts Trial Courts 2016).

The Massachusetts Land Court

The Massachusetts Land Court is a bench-trial court that consists of seven court justices, one of whom is the chief justice. The judges are supported by a host of clerks, administrators, and court personnel who help with the research and logistics for each case. When a case is assigned a judge, it remains under that person's jurisdiction for the life of the case. Judges do not have specialties within the court and are, therefore, assigned all types of land cases. Cases are electronically, randomly assigned to a judge. Parties are not allowed to request a specific judge.

After the cases are filed, cases are put on tracks, or schedules, to try to set time limits. Land Court Standing Order 1-04, adopted in 2004, assigns cases into four tracks with suggested time allotments: "T" or "Tax" (14 months), "F" or "Fast" (16 months), "A" or "Average" (31 months), and "X" or "Accelerated" (special circumstances). The judges I interviewed consistently said they try to speed up cases, often ignoring the tracks and giving shorter service schedules (i.e., the standing order for tracks F and A give 90 days; some judges only give 30-45 days). There do not seem to be any consequences for a case extending beyond the suggested time period. At the beginning of every case, the judge, attorneys, and occasionally, the litigants, meet for a case management conference (CMC). This is the point at which judges hear the plaintiff's and defendant's positions, discuss settlement and obstacles to settlement, and set up a preliminary schedule. "My goal in the conference is to set a schedule and corresponding expectations for how the case will proceed before me, should the parties not want to explore ADR; and to advocate for ADR if that's a possibility," explains Judge Michael Vhay. "My CMCs

always achieve my goals unless fewer than all of the parties (or fewer than all of those who should be parties) show up. In that case, I can't accomplish the goals until the next CMC." CMCs help judges and attorneys understand how long a trial is likely to take.

The Land Court seems to be trying to deal with its backlog. Of the six types of land court cases in Massachusetts the "Miscellaneous" cases should be further explained. This category can be broken down further into cases such as easement¹⁹, deed restrictions²⁰, zoning appeals²¹, permission to partition²², boundary line disputes²³, adverse possession²⁴, and so on. Massachusetts Supreme Judicial Courts estimates the average lawsuit takes three years to reach trial or settlement. Less than half of all Land Court cases filed in a given year are resolved in the same year. In some years, MA Land Court did not dispose of even a third of the cases filed with the Court. In FY07, the caseload reached a peak of 94,225 cases, with 27,881 new cases and 66,344 pending cases from the previous year. This is due in part to a lack of staff and resources, but also because the jurisdiction of the Land Court was expanded in 2007. The Superior Court transferred Permit Sessions cases to the land court because of these cases involved real property. Most importantly, this peak is explained by the uptick of servicemember cases in relation to the foreclosure crisis

¹⁹ Challenges of a non-owner's right to access another's private or public real property.

²⁰ Requests to change or remove restrictions on real property deeds

²¹ Challenges to the validity of a zoning board's decision for permits or building approvals

²² Requests for two or more parties who co-own property to split the property or proceeds from the property

²³ Challenges of real property boundaries between abutters

²⁴ Challenges of real property possession

(Scheier 2008). Seven land court justices are available to hear cases, with the same number of clerks and title examiners (MA Land Courts; MA Supreme Judicial Courts) to assist.

Land disputes fall into three categories: private vs. private, public vs. public, public vs. private. Amundsen in his paper “Evaluating the Use of Mediation in Land Use Decision-Making” points out that there is a typical list of stakeholders likely to appear in a land dispute (i.e. developers, abutters, citizen groups, and government agencies), although, there can be significant diversity within each of these categories. Amundsen explains that there is often not “one” public agency or representative, but many who might need to be involved in a specific dispute resolution effort (Amundsen III 1998). This is particularly important when reflecting on Daniel Moss’s assertion that our traditional two-party system (i.e. plaintiffs and defendants) requires multiple parties to bring suit individually, “resulting in a long, poorly coordinated process” (Moss 1997). That is, a plaintiff could decide to bring a case against a City’s Zoning board, Planning board, Architectural Commission, etc.. Separate suits would be required for each party. Since land disputes often (but not always) reflect disagreements among property holders, I will rely on the Massachusetts General Laws definitions of “public” and “private” property. “Public property” will refer to any tax-exempted property rights owned by a government agency (i.e. municipal government, quasi-government authority). “Private” will refer to any non-tax-exempt property rights belonging to an individual, group or business (MGL Chapter 59). The Land Court has a relatively balanced caseload of private vs. private and private vs. public cases. It does have

some public vs. public cases (0.5% of Land Court cases on average between 2008-2017 were public vs. public), but these are not as common. Between 2008-2017, of all reported decisions, there were 1-5 public vs. public cases a year. Approximately 49% of cases between 2008 and 2017 were public vs. private (mostly zoning and appeals boards vs. private parties) and 50% private vs. private (Massachusetts Land Court Published Opinions).

Costs within the Land Court

Filing cases is relatively inexpensive in the Land Court. It costs between \$250 and \$400 to file a case with a raft of optional small fees beyond this, such as copies of the transcript, which total roughly \$500 (Massachusetts Land Court) The one major exception to this is a Permission to Partition case. A permission to partition case involves two (or more) parties that jointly own a building or property and no longer wish to co-own it. According to the MA Land Court schedule of administrative fees for those cases, it costs \$775 + 1/10 of 1% of the assessed valuation of the property to file such a case, plus 3/8 of 1% of the assessed valuation to record any judgment up to \$2,800. In addition, the parties must split the cost of a commissioner (usually an attorney) who charges a standard hourly fee. The commissioner can act as a pseudo-mediator, assessing the case facts and land value, discussing options with the parties, brokering possible sales and helping decide how much each party should be awarded.

Attorney's fees, however, make the Land Court expensive. Conservative estimates for a single land court case run between \$50,000-\$150,000 per party

when attorneys are factored in (MA Land Courts; Shapiro). These costs are based not only on interviews with real estate attorneys active in the Land Court, but also from a December 2017 judgment (*Sudbury vs. Bartlett*) filed on December 8, 2016. The defendant asked to be awarded attorney's fees. Judge Howard Speicher found the "hourly rate of \$325 charged by the [defendant's] counsel...to be fair and reasonable and consistent with rates charged by attorneys practicing in smaller offices outside of Boston. [He found] the hourly rate of \$565 charged by [the plaintiff's counsel] to be well in excess of the rates typically charged." He further found the 170 hours spent by defendant's attorney and the 63 hours spent by the plaintiff's attorney for one year of court-involved work to be "reasonable." Judge Speicher awarded the defendant \$54,716.93 and the plaintiff \$20,507.50 both at an hourly rate of \$325. The defendant in *Wojtkun vs 258 Andover St. LLC* was awarded \$141,027 in attorney's fees using the same method of calculation (Massachusetts Land Court Published Opinions 2018).

Attorneys are often hired long before a case is brought to court and in many instances, parties hire a lawyer who specializes in litigation, in addition to their regular real estate counsel. Some litigants represent themselves, avoiding legal costs, but given the specialized nature of the Land Court, this is not advised. In many cases, the parties themselves do not even appear in court, especially in the preliminary case management conference, although judges advise clients to accompany their attorneys. Clients rarely attend these conferences with their attorneys since the standard notice does not require them to be present. Judges I interviewed noted that it would be advantageous for the clients to attend, especially

if their attorneys had not been open about the litigation process, the possibility of ADR, or the merits of their case. They did not see any disadvantages to the clients attending. Attorneys, though, see it as a housekeeping matter, with a focus on scheduling and summarizing the facts of the case (which presumably the client knows).

For mediation, there are five court-approved mediation organizations in Massachusetts land courts. Their fees range from \$175 per hour to \$330 per hour depending on the number of parties and the litigants' income. Some mediators offer steeply discounted rates for lower income citizens. The Community Dispute Settlement Center, the only Land-Court-approved non-profit mediation group, offers a sliding scale: \$40 per session (a session is typically 2-3 hours) for parties who earn less than \$25,000 up to \$375 per session for parties who earn over \$100,000 (<http://communitydispute.org/mediation/fees>). The Real Estate Bar Association Dispute Resolution Inc. charges \$250 per party per hour plus a \$450 administration fee, but noted that they are willing to give a discount to indigent clients (Wittenborg). Attorneys are present at most mediations, which means that litigants must pay both the mediators and their attorneys. However, mediation takes an average of a day to complete and a total time, including screenings, scheduling, and post-mediation court approval, of three to six months. Thus, the average mediation of a typical case before the Land Court costs between \$3,000-\$5,000 total (\$1,500-\$2,500 per party) including legal fees (Wittenborg; Shapiro).

Mediation in the Land Court

Land Court judges are not allowed to mandate mediation. They are, however, allowed to mandate free mediation screenings. A mediation screening requires the parties and their attorneys to meet with a mediator and discuss whether they would like to enter into mediation. The purpose of such screenings is to educate the clients about mediation and discuss whether the mediator, attorneys, and clients see an opportunity to resolve their land disputes. The courts can recommend a specific mediator in certain cases, but tries to remain impartial regarding this choice. The screenings usually last about an hour and involve both the parties and attorneys. The attorneys describe the case, and the screener describes the mediation process and its benefits. Joel Reck, mediator for the Real Estate Bar Association Dispute Resolution Inc., Mediation Works Inc., and The Mediation Group, describes the screening process as “very informal,” allowing parties to ask questions and make comments throughout (Reck).

Nearly two years ago, in 2016, the Land Court added a new screening process option. Instead of going to a professional mediator for screening, a retired appellate judge, Judge David Mills, comes to the Land Court to screen clients or, if one of the clients is indigent, offers to mediate (Trial Court Report FY2017; Scheier; Vhay; Speicher; Foster; Cutler; Piper). Judge Mills screened and/or mediated 28 cases in 2016 at no cost to the court or litigants (i.e., it is unclear if there is overlap between these 28 cases and the 48 cases mediated by court-connected ADR professionals). The private mediators from the court-approved programs with whom I spoke had no qualms about the addition of this new screening option. Speaking directly about

Judge Mills' involvement, Joshua Hoch explained, "I think any approved dispute resolution program/process that helps parties discuss and resolve disputes prior to trial is a positive step. Such a process may reduce cases being referred to approved mediation providers, but if it works for some parties, and they elect to participate, I am in favor of it" (Hoch). At the end of the mediation, any agreements become legally binding and can be enforced by the Land Court by the presiding judge.

Research Questions

It is evident that the Massachusetts Land Court has invested, to some extent, in mediation. Yet, the Land Court still does not utilize mediation very often. Given the high costs of trial, the long average time it takes to complete a trial, and the large case backlog, ADR would seem like a good way to offset these burdens. More importantly, ADR has the potential to afford litigants greater opportunity to control the outcome of the dispute in which they are involved. And, it ought to increase public faith in the fairness of the Court system. The purpose of this study is to understand how mediation is used in the Massachusetts Land Court and why it is not used more often. If mediation really leads to mutually advantageous outcomes, is cheaper and quicker, why is it not more widely used? What discourages attorneys and justices to use ADR? What are the obstacles? What do the participants in typical land disputes in Massachusetts perceive to be disadvantages and advantages of mediation for resolving their land disputes? Are there certain types of cases in which the parties are more amenable to mediation? How might the use of mediation be promoted more effectively?

Chapter 3: Gathering and Analyzing the Relevant Data

Methodology

To determine the Massachusetts' Land Court's use of mediation and ways it could be improved, I interviewed 15 people over four months (Appendix A). The judges and mediators came from the official court rosters. Two of the attorneys were referred by land court judges and one by a real estate attorney. These attorneys were recommended because of their direct involvement in land court actions. I contacted all five approved mediation groups and was able to interview the directors of four.

Each semi-structured interview took 30 minutes to an hour to complete. Interviewees were asked between six to ten open-ended questions about the land court, mediation, and their experiences with both (Appendix B, C, and D). I provided my questions beforehand when requested. Most interviews were recorded with permission using the "Voice Recording" iPhone application and were conversational. My questions focused on opinions and perceptions about ADR, based on their positions and expertise. I wanted to understand what their thoughts on ADR were, their experiences with it professionally, and how they thought it could be improved.

In addition to interviews, I used the caseload data made available by the Courts. The Land Court does not have a lot of data on the mediations it has referred, and had only two complete (FY2016 and FY2017) data sets of mediation outcomes for cases that were originally filed in the Land Court. The Massachusetts Fiscal Year runs from July 1st to June 30th. The data available includes total cases mediated,

cases screened, cases settled, cases partially settled, cases not settled, and cases pending results. It also includes which mediation provider mediated the cases.

I also used the Massachusetts Trial Court data on the total number of cases in the Land Court. The Trial Court annually releases Land Court case data that includes a simple breakdown by the six case types of backlogged cases, new cases filed, and cases disposed. It also releases a revised 5-year caseload analysis each fiscal year. These reports do not provide any granularity, and the Court system does not release bulk or detailed trial data. I used these aggregated data to understand the case backlog, case filings, and how caseload has changed over the past 15 years.

Select detailed Land Court case opinions are available from 2008 to 2018. The database averages roughly 100 cases per year. The data include parties, full case details, history, and decisions. I used these cases to make generalizations about party types and case types.

Research Bias

My potential research bias may include the assumption that mediation is a useful tool to address Land Court trials. Furthermore, the attorneys recommended by the Land Court judges and real estate attorney were recommended for their knowledge or encouragement of mediation. While all have experience practicing in the Land Court, these attorneys had favorable views towards mediation. I did not seek out attorneys who actively dissuade their clients from using mediation.

Limitations

Limited Land Court data prevents deep analysis of the types of cases and parties that may be good candidates for mediation. This paper relies heavily on the opinions and perceptions of the interviewees.

Chapter 4: Findings and Discussion

Current Mediation Use in the Land Court

The detailed breakdown of FY2016 and FY2017 provides the best picture of the use of mediation by the Massachusetts Land Court. Of the 71 cases sent to screening in FY2016, 48 (68%) agreed to mediate. In FY2017, 66% went to mediation after screening. This demonstrates that, of the cases the judges believed could mediate, the majority of cases that went to the screening were convinced enough of the merits of mediation to hire a mediator.

There is not enough data to speak conclusively about the effectiveness of mediation in the Land Court. However, in FY2016, 48% of mediated cases settled (20 cases) or partially settled (3 cases) (Table 1). FY2017 shows a 40% settlement or partial settlement rate, but there are still 13 cases pending results (Table 2).

Table 1. Breakdown of Mediations Referred by the Land Court FY2016

<i>2016</i>	<i>MDRS</i>	<i>CDSC</i>	<i>MWI</i>	<i>TMG</i>	<i>REBA</i>
Screened	5	3	1	15	47
Mediated	5	3	0	7	33
Settled	3	1	0	3	13
Partially settled	0	0	0	1	2
Did not settle	2	2	0	2	14
Pending	0	0	0	1	4

Source: Massachusetts Land Court, 2018

Table 2. Breakdown of Mediations Referred by the Land Court FY2017

<i>2017</i>	<i>MDRS</i>	<i>CDSC</i>	<i>MWI</i>	<i>TMG</i>	<i>REBA</i>
Screened	3	6	0	7	48
Mediated	2	1	0	7	32
Settled	1	0	0	5	6
Partially settled	0	0	0	0	5
Did not settle	2	0	0	1	9
Pending	0	1	0	1	12

Source: Massachusetts Land Court, 2018

How to define a “successful” mediation is an important question. Many practitioners would say that “success” means a settlement was reached. However, a mediation should not be considered a “failure” if a settlement is not reached. There may have been no plausible Zone of Possible Agreement given each side’s estimate of its Best Alternative to a Negotiated Agreement (Fisher & Ury 1981). Although an agreement reached is certainly a concrete measure of success, agreement is not in and of itself an adequate measure of success. The real question is whether the interests of the parties were met as well as they could have been. Bringing parties together to discuss a case, understand each other’s interests more fully, and narrow the scope of what needs to be negotiated in court are valuable outcomes whether or not agreements are reached.

The Land Court may mandate screenings, but litigants have the choice not to mediate. The Court only had two full years (FY2016 and FY2017) of data showing the results of the screenings (Table 3). Some attorneys advise their clients to skip the screening and go straight to mediation. “We generally advise our clients that it is better simply to go to mediation than to a screening because of the time and attorneys’ fees associated with a screening,” explains Nicholas Shapiro, real estate attorney at Phillips & Angley. “It is better simply to use those resources for a true mediation session than for an informational session about what mediation is” (Shapiro). In the previous three years the Court listed only the number of cases sent to screening, listed by mediation program. Despite purported impartiality by the Courts toward the five mediation groups, the majority of cases were screened and

mediated by REBA Dispute Resolution Inc²⁵ (“REBA DR”) – the Real Estate Bar Association mediation group. Between FY2014 and FY2017, REBA screened 66-77% [N=25-44] of land court cases mandated for screening. Among the other mediation groups, The Mediation Group²⁶ (TMG) screened as few as 7% [N=4] of cases in FY2015 and as many as 21% [N=15] in FY2016. Mediation Works Inc²⁷ (MWI) screened a high of 22% [N=8] in 2014 and a low of 0% in 2017. Community Dispute Settlement Center²⁸ screened 2% [N=1] of cases in FY2015. That increased to 9% in FY2017. Lastly, Massachusetts Dispute Resolution Services²⁹ screened 0% in FY2014 which increased to 5% [N=3] in FY2017 (disputeresolution.net; themediationgroup.org; MWI.org; communitydispute.org; mrds.com; Land Court Mediation Data).

Table 3. Mediations Referred by the Land Court to Court-Approved Mediators FY2014-FY2017

	<i>MDRS</i>	<i>CDSC</i>	<i>MWI</i>	<i>TMG</i>	<i>REBA</i>
2014	0	1	8	3	25
2015	2	1	7	4	46
2016	5	3	1	15	47
2017	3	6	0	7	48
<i>Total</i>	<i>10</i>	<i>11</i>	<i>16</i>	<i>29</i>	<i>166</i>

Source: *Massachusetts Land Court, 2018*

²⁵ Founded in 1995, REBA concentrates almost exclusively on real estate and business disputes. It has a panel of 22 neutrals, nearly half of who are retired judges.

²⁶ Founded in 1985, TMG has a panel of 14 mediators available for all types of disputes.

²⁷ Since 1994, MWI has offered mediation services for all types disputes. It has over 300 mediators across the country.

²⁸ Established in 1979, CDSC is a not-for-profit mediation center. It has an extensive panel of volunteer mediators, with varying specialties.

²⁹ Founded in 1991, MDRS was one of the first ADR providers in Massachusetts. It does not specialize in any one type of case and has a panel of 37 neutrals located throughout Massachusetts.

There are several reasons why lawyers and judges suspect REBA DR may be over-represented among the mediation group referrals. First, REBA DR specializes in real estate issues. Judges, lawyers, and mediators all suggested that the Land Court requires specific real estate knowledge and this program's mediators may be more likely to understand the legal issues at stake. Second, many of the mediators REBA hires are former land court judges and real estate attorneys. Not only do they understand real estate law, they understand the nuances of the operation of the Massachusetts Land Court. All have been trained as mediators. Lastly, an overwhelming number of cases are being referred to REBA directly by the Land Court, undermining the reason for having an array of mediating groups on stand-by.

There is no reason why referring a real estate issue to a mediation group that specializes in real estate is wrong. One attorney likened it to seeking out a dermatologist rather than a general physician; both have extensive medical training, but one has a particular kind of expertise. However, if the court is supposed to be unbiased in offering clients a choice among their court-connected mediators, then REBA seems to be getting a disproportionate share of referrals. Rule 6 of the *Uniform Rules on Dispute Resolution* states that, while the Courts may refer clients who cannot decide on a mediator to a specific program, "The court shall make a reasonable effort to distribute such specific referrals fairly among programs on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, and fee levels" (Massachusetts Supreme Court).

It is altogether possible that litigants (or more likely, their attorneys) are choosing REBA based on their reputation in the legal community. However, referrals

to mandated screenings come from Court. The other court-approved mediation programs acknowledge the unbalance: “The notion that REBA has more nuanced knowledge (than MWI mediators) to better mediate land cases is unsupported and not accurate,” argues Josh Hoch, Director of Mediation at Mediation Works Inc. “All MWI Land Court mediators have extensive experience in issues related to the Land Court. I am not sure why REBA continues to receive an unfair distribution of cases. MWI would like to see cases shared more evenly.” In fact, several Land-Court-approved mediation panels have the exact same mediators – real estate attorneys and retired Land Court judges - as REBA’s panels, but do not receive the same number of referrals (REBA “Our Neutrals”; TMG “Mediation”; MWI “Mediators”; Hoch).

It seems that the Land Court made an effort to address this bias. With the advent of the appellate judge as an unbiased screener, it stands to reason that cases would be more evenly distributed. However, this pilot program that began in FY2016 and continued in FY2017, had a worse distribution than the previous three years. This is not a gratuitous shot at the pilot program; the program “represents a good development,” says Brian Jerome, who called the program “worthwhile” and Judge Mills’ work “excellent” (Jerome), I simply want to point out that the Court should be aware of the distribution of the cases it refers to mediation.

Attitudes Towards Mediation

All of the 15 people I interviewed ardently advocate for mediation. Mediators, of course, advocate for their profession. All of the mediators I spoke with entered into the profession because they believe in the merits of mediation and want to help further its cause. Several interviewees experienced the value of mediation in previous careers (when they were not themselves mediators), which led them to become mediators. That is to say, they are advocating for a general approach or system they deem useful. "Having been a practicing attorney for my first 11 years after law school, it became clear to me that there's a better way to resolve cases than through the traditional litigation process," said Brian Jerome, President of Massachusetts Dispute Resolution Services. "I see it every day happen at mediation where people don't have a mechanism to speak to each other after something goes wrong and the litigation process doesn't afford that settlement moment as much as mediation does." Joel Reck, who practiced real estate for 40 years, echoed Attorney Jerome's sentiments: "I was really intrigued by the first mediation I did. [Mediation] was much more intellectually interesting and demanding than I thought, and still is. I find it endlessly fascinating and challenging" (Reck). Within the courts, the judges agreed.

All of the judges said that they actively encourage mediation during their case management conferences. Not only because of the Court rule, but because they personally believe in the usefulness and necessity of ADR. There are many cases, several judges noted, that should definitely not be decided unilaterally (i.e. with a winner and a loser) and lend themselves to a negotiated agreement that meets the

most important interests on both sides. They explained that mediation allows for creativity and compromise. Beyond creativity, several judges pointed to the fact that in disputes between families or neighbors, litigants will still have to interact with one another after the case is decided. They see mediation as a way to work out a voluntary agreement, while maintaining or improving relationships. Judge Michael Vhay explains:

“If you live next door to somebody, and go to court today, you still see them every time they take out the trash. If somebody can make the pitch saying, ‘Hey, you’re better off resolving things,’ great, because if you just let the fight continue in court, the fight will end some day because somebody’s going to win. But the two of you are going to live next to each other until one of you moves away or dies. Which actually may be why some people have better luck at mediation; Some neighbors do realize that they have to work through issues.”

Attorneys, too, discussed both the ability to be creative and the importance that should be attached to maintaining family and neighbor relationships. They discussed the importance of client-attorney relationships as well. “My clients are generally repeat clients, and I’m going to see them project after project after project,” explains real estate attorney Paul Alphen. “I want them to have a good experience and I want them to build their project. Then I want them to come to see me for another project.” He says he does everything he can not to go to court, and often, that means pursuing mediation. In fact, he and - according to Peter Wittenborg, Executive Director of REBA - many attorneys have started including mandatory mediation clauses in their contracts, including purchase and sales agreements (http://www.disputesolution.net/images/Form21C_ADR.pdf). Alphen puts a paragraph in almost all of his contracts that requires at least three hours for mediation as the first step in a dispute resolution effort: “It doesn’t change the fact

that under certain circumstances, you may have to file in court in order to protect your rights, but it at least says ‘okay, you’ve agreed to go to mediation before you spend money in court’” (Alphen).

A Case for Mediation

As discussed in the literature, mediation holds many benefits for both or all parties involved (Susskind et al. 1999; Shestowsky 2017; Booher and Innes 2002). Cases in the Land Court are no exception. The three most frequently cited reasons mediators, judges, and attorneys believe litigants tend to select mediation are: time, money, and risk. Mediation by the Land-Court-approved providers is significantly less expensive than a full trial. Even though litigants usually still have to pay their attorneys to attend the mediation, the total costs are much less. Through trial, some cases end up costing more to litigate than the value of the property in question. Mediation costs a fraction of what litigants pay for their attorneys’ and litigators’ time.

Mediation is the perfect example of the old adage that time is money. The time saved by choosing mediation is as significant as the legal fee costs saved. The time trial takes can be detrimental to the litigants as well. Property litigation can prevent sales from going forward or permits from being granted (Campisi 1995). It sometimes means that much-needed housing is put on hold. It also requires litigants to take time out of their schedules to appear in court multiple times over several years (Krill 2017). Further, since the “A” track cases are 31 months, there is

significant potential for mediation to help clear the Land Court's heavy caseload if it were used more often.

There is, in addition, a significant risk in pursuing litigation: there is no way for a litigant to be sure they will win their case. In trial, one party wins and one loses. However, in mediation, there are often mutual gains to be had. Judge Howard Speicher explains: "Generally I try to say something like if you guys settle the case, you'll both be a little bit unhappy because you'll have to compromise. If I settle the case, one of you is going to be pretty happy but the other one is going to be really miserable and if you don't want to take a chance on the one being really miserable, you'll take a chance on being just a little unhappy" (Speicher). Judge Michael Vhay, a Land Court Justice, also points to privacy concerns as a reason for mediation: "I think [people] want to get out of the public spotlight, the public court system. I can think of a couple cases I've had where parties decided that they didn't really want to have their lives laid out on the public record and so decided to mediate for that reason" (Vhay). Mediated agreements - even through court-annexed mediation programs - are not public record.

A Case Against Mediation

The way an ADR program is set up and presented is one of the most important precursors of its success (Carver & Vondra 1994). The current ADR program in the Massachusetts Land Court can be interpreted as inferior to a trial; Judge Wayne Brazil in his 1999 essay on the delivery of ADR services by the courts calls this "second-class justice." The less ADR is formally incorporated into the Court

system, the less likely litigants are to perceive fairness and binding justice have been served. Imagine a boundary line dispute, for example. The parties have been arguing for a long time and finally arrive in Land Court. The plaintiff believes the defendant's shed and fence are actually on his property. This is a straightforward case: the shed and fence are either on his property or they are not, a yes or no case. If the plaintiff is expecting a judge with a gavel and a formal trial in a courtroom (maybe exacerbated by courts on TV and in movies), being shunted to an office somewhere else where he has to pay a mediator to tell him to compromise – and therefore lose the land he thinks he deserves – is a hard sell. The further removed an ADR program is from the Courts (and Courthouse), the less it is perceived by litigants as equal to trial.

Convincing people to meet with an external mediator, schedule times that work for all parties, attorneys, and the mediator, and then meet for a day to discuss the case can be a deterrent. Judges have found that mediation loses its appeal the further away from the case management conference they get. This is one of the reasons why judges are allowed to mandate free screenings. As shown in the data above, there is a good chance people will mediate once they have participated in an initial screening. However, the travel and scheduling time for a court-connected mediator is a factor.

The cost of court-connected mediation is also a deterrent. After people pay their filing fee, they view the judge as “free” and the mediator as an extra cost on top of the legal and court fees they will have to pay. It can be difficult to convince parties that they should pay \$3,000-\$5,000 when there is a possibility that they could pay

nothing or win a settlement. Of course, in the grand picture of \$50,000-\$150,000 for a trial, that amount may seem insignificant. Yet judges report that these costs appear to be sufficient to prevent parties from considering mediation. If people perceive judges as a better authority and free, choosing mediation over a judge can seem like value lost.

There is also the element of emotion. Choosing to go to mediation is as much an emotional decision as an economic choice. In fact, all of my interviewees pointed to emotion as one of the reasons why people choose not to go to mediation. Sometimes emotions wrapped up in the disputes cannot be put aside. The parties are often as eager to conquer the other side as they are to win the lawsuit. Even when emotions run high, though, they are not impossible to overcome and settlement can be reached. Often, the parties will take their lead from their attorneys. And, it is not always clear that lawyers would rather settle than litigate.

One of my interviewees discussed a mediation in which the parties started the process physically standing against opposite walls. Their lawyers did not expect a settlement. The mediator, though, was able to ascertain what the root problem was between the parties – needing to feel respected by the other – and the case was settled by the end of the day. Although anecdotal, the story is an important reminder that even emotionally tense cases can be settled, and how mediation can address underlying issues that may not come out in trial.

Lastly is the principle of going to court. Many people want their “day in court” and believe that having a judge hear what they have to say will help them win their case. Some believe that mediation means acquiescing to the other party, and

would rather go to court, regardless of whether they win or lose. In these cases, parties may even be willing to spend more money to litigate the case than they could possibly win at trial. These types of cases cannot be mediated because both parties must be willing to sit down and talk. However, as mediator and attorney Israela Brill-Cass points out, “mediation *is* their day in court.” Mediation offers a better opportunity for people to be heard and their positions on the matter at hand to bear weight in the decision. Even in court before a judge, an attorney usually speaks for the parties.

Types of Land Court Cases

There is general consensus among mediators, judges, and attorneys that cases involving public entities such as zoning boards or town governments are more difficult to mediate than disputes between private parties (Vhay; Cutler; Piper; Alphen; Reck) Municipalities and their various departments are bound by open meeting laws. These require meetings when two or more public officials are present to be open to the public. The Massachusetts Open Meeting Law Guide specifies that a body may enter into a private Executive Session to meet with a private mediator, provided that “(i) any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and (ii) no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session” (Massachusetts Office of the Attorney General 2017). This makes private mediation, which operates through confidential negotiations,

difficult to complete. Like cases that are emotionally tense, cases involving municipal officials are not impossible to mediate. The process is just different from a mediation with two private parties. Often when municipalities are involved, the board in question will designate one or two members who have a general sense of these issues to attend the mediation and see how the board and public might agree. These board members make recommendations to the other parties – such as a developer – who then reapplies with the recommended changes incorporated into their proposal. The revised proposal goes back through the public review process. These negotiations can be tricky, since the public sometimes views them as “back room deals.” However, there are opportunities for mediation involving public entities that can produce good results.

There are, though, a host of Land Court cases that undoubtedly lend themselves to mediation. There are two ways to discuss these: by case track and by type. Cases on “F” fast tracks, according to David Matz’s extensive research on the best case types to mediate, are ready to mediate 10-12 months from the initial filing (Adams 2004). Case types that interviewees believe are more easily mediated include permission to partition, easement, boundary line, and adverse possession disputes. These cases represent more than 1,300 cases annually. These cases, noted Judge Speicher, are open to creative solutions. He told a story of a homeowner whose backyard and patio would be shadowed and view completely blocked by a new six-story building. The homeowner’s objective was to have the building blocked; the developer’s objective was to build. Had the case gone to trial, the homeowner would have likely lost. An inconvenience does not have significant

grounds to stop an entire building. However, in the private discussion, the developer acknowledged that his new building would diminish light and air to the homeowner. He proposed, at his own expense, renovating the back wall of the home, installing large French doors to the patio and enlarging all of the windows. The homeowner agreed that this was a reasonable exchange and the building was approved. This is a great example of mutual gains that led to a better outcome for both parties (Speicher). Permission to Partition cases, for example, involve parcels which belong to multiple parties - whether through inheritance by multiple people, by marriage, or something similar - and need to be subdivided. If the litigants go through a trial and engage with a commissioner (an attorney charging an hourly fee), the end result often involves selling the property and dividing the proceeds. If the case is mediated, however, settlement possibilities might include building condos and selling just one to buy out one of the owners. Parties may realize they want to engage a broker directly and skip all of the case deliberation and property assessment by a commissioner. The other case types listed offer similar flexibility. If these types of cases go to trial, the judge is required to adjudicate within the narrow scope of the law. One party may end up winning and the other losing everything, but the judgment may not be as good a solution for either party as they could have found through mediation.

Chapter 5: Recommendations

Not every case can be mediated and not every mediation will end with a settlement agreement. However, mediation is a valuable and often successful tool to improve the quality of court proceedings and should be used more often. While most of my findings revolve around litigants' perceptions of ADR, I offer the following recommendations to the Land Court, Legislature, attorneys and mediators to increase mediation's use within the Court because they are the groups that have the power to change these perceptions. These recommendations come from both the research discussed above and ideas collected directly from judges, attorneys, and mediators.

Changes by the Land Court

It should be a priority of the Land Court to address public perception that mediation results in second-class justice. It can do this in several ways: implementing short educational programs for judges, clerks, litigants, and attorneys; instituting universal 3rd party screenings so the parties are not suspicious that a mediator is simply trying to get more business, and reinstating the in-court ADR services that once existed to fully integrate mediation into the Court system.

At the most basic level, there should be published resources for attorneys and litigants that describe the benefits of mediation and acknowledge it as a fully comparable (and maybe even advantageous) option to trial. This can include printed and online material (approved by all 5 mediation groups to avoid bias) given directly to clients and making ADR prominent on the Court's website. The Court's

website currently has no reference to ADR as an option (mass.gov/orgs/land-court). Having court-sponsored resources may improve litigants' confidence in ADR. Further, the judges should consider some training on the best way to present ADR to attorneys and clients; instead of explaining it as a compromise, ADR should be considered a benefit to all parties involved. Judges should express their confidence in ADR as an equal option to trial. This is a simple language change that may promote increased use of mediation.

Another way to improve public confidence is to expand the pilot screening program to screen all cases within the court. Having an in-court screening system for all cases would reinforce the legitimacy of court-approved mediation. Court-approved programs have a financial interest in mediating cases. This can raise doubts in the minds of some litigants who worry about the veracity of mediator's claims, whether warranted or not. It is not necessary for these screeners to be current or former judges; it is possible for there to be trained administrators (similar to special masters) that may be attorneys or commissioners to screen. However, having judges in this role may help litigant's perceptions. Having a 3rd-party screener can increase litigants' confidence that their case should go through the ADR process. I should note that not everyone with whom I met advocated in-court screening. "Impromptu mediation screenings at case management conferences sometimes lack an orderly consideration of alternative dispute resolution and potential settlement constructs, relying, instead, perhaps, on the power of being ambushed and extemporaneous settlement negotiations," explains Nicholas Shapiro. "I do not believe that this type of modality is particularly effective"

(Shapiro). This raises a good point. Careful consideration should be given to this concern, and screenings should be carefully organized and information-focused.

Ultimately, the Court should reinstate the in-court ADR provider program. One judge referred to this as their “dream.” Having an in-court program would address the timing, cost, and legitimacy issues of mediation. The success of the original program, the case backlog of the courts, and the benefits ADR provides litigants should override private mediators’ market argument. “I think that any time you can settle a dispute without the need of burdening the already overworked judicial system and save people some money along the way, I think that’s a spectacular idea,” argues attorney Paul Alphen (Alphen). In fact, the Court should maintain close relationships with the five court-approved mediation programs. Brazil notes in his 2002 essay that litigants may perceive that close relationships between mediators and judges could hurt their cases, undermining the value of the mediator’s objectivity. But it is unlikely that judges are going to say anything to mediators about the merits of the particular cases they refer. To alleviate this perception, the Land Court should maintain its current list. If the parties believe the in-court mediators were impacted by their relationships with the judges, the Court should have trusted private mediators to offer as an alternative. Ultimately, Brazil (a former judge and highly experienced mediator) vouches for in-court mediation as a “core function” of the Courts because it “sends a message to the public that the court identifies itself with the program and endorses its value and quality” (Brazil 2002). Reinstating the program may require changes by the Legislature.

Changes by the Legislature

The Massachusetts Legislature should restore ADR-specific funding to the Land Court. A budget line including funding for expanding the existing pilot program, recreating a taxpayer-funded in-court mediation program, and small grants for low-income litigants to pursue mediation outside of the courts are several possibilities. The budget the Massachusetts Office for Dispute Resolution operated on was relatively small – less than \$500,000 a year. Granted, that was twenty years ago, but the Land Court budget has only increased \$1M in two decades (Massachusetts Budget and Policy Center).

Some may argue that taxpayers should not bear the burden of dispute resolution for private parties. Since there are already filing fees required for each case, there may be ways to offset some of the court's costs with small increases to the fees. Ultimately, the fees would return to them. It may also not be necessary for the Legislature to reinstate the budget line for ADR, but instead reallocate funding currently used for litigation. In fact, it may be unnecessary for the Legislature to be involved at all. The Courts should consider rededicating some of their funding towards in-court mediation. 35% of the Trial Court's \$669,277,376 FY19 budget is administrative staff. While the Court's budget is already tight, repurposing some staff time should be worthwhile. If the Courts can identify it as equal to trial, the time, efficiency, and the long-term satisfaction of mediation (thus reducing the number of cases returning to Court) should offset the caseload burden and ultimately save money.

Changes by the Attorneys

Like judges and clerks, attorneys should pay attention to the language they use and explain mediation as a win-win situation. Examples like those outlined in this essay may help clients picture what a mutually-beneficial agreement looks like. There is an argument for bringing clients to case management conferences or having a court-tracked settlement meeting. A 2017 empirical study of litigants' awareness of court-approved ADR services interviewed 413 litigants from three state district courts and found that less than one-third of the litigants could accurately identify whether their court offered ADR services. Litigants with attorneys were not significantly more likely to answer correctly (Shestowsky 2017). Having litigants in case management conferences could slow them and may not provide the best place for a discussion of mediation. However, it may be useful to have a court-tracked event where the parties and attorneys sit down and discuss settlement options.

Changes by the Mediators

Mediators should focus on educating the public, judges, and attorneys on ADR's merits. One option could be to partner with local law schools and the courts simply to provide education to litigants. One of my interviewees suggested that law students pass out information about mediation inside the Court to litigants. This would increase awareness at little to no cost to the Court and increase awareness of mediation for law students.

Mediators can also build professional relationships with Land Court judges and clerks to ensure that ADR is being appropriately supported. This could take the form of trainings for judges and clerks or training materials sent to the Land Court written specifically for judges. Increasing ADR use and addressing litigant perceptions must be a team effort by all parties involved.

Chapter 6: Conclusion

ADR in the Massachusetts Land Court is a valuable tool that can play a role in improving efficiency and generating long-lasting, creative solutions for complex cases. Instead of being considered a tool for compromise, ADR should be considered a tool for creative problem-solving. There are many practical reasons why ADR is a viable option for Land Court cases but there are also psychological and emotional benefits to litigants. It is important to recognize that ADR agreements are not settlements; they are solutions that are better for both parties. Identifying areas for improvement is just the first step in making ADR a more robust option.

I find that despite broad approval of mediation by judges, attorneys, and mediators, there are still many obstacles to litigants choosing mediation over trial. These include the perception that mediation is not equal to trial, the costs are not worth the service, the outcome is not guaranteed and may waste time, and emotional factors that prohibit litigants from being willing to mediate. The Courts outsourcing approach to mediation does not give litigants the confidence necessary to make ADR a viable option for resolution. Moreover, the Court refers few cases to mediation in the first place, even though over 50% of cases (excluding servicemember cases) are types that my interviewees believed were the most amenable to ADR. There is a disconnect between the purported support and the actual use of ADR.

My findings suggest that the Land Court should focus on improving litigant confidence in the ADR program as a viable option to resolve cases. This can be achieved through the Land Court, legislature, attorneys, and mediators working

together to improve litigants' perceptions of ADR. The Land Court can increase resource availability, expand in-court, 3rd-party screening, and eventually reinstate the in-court mediation program. The Legislature can increase ADR-specific funding for the Land Court or reallocate existing funding specifically for ADR. Attorneys can ensure that their clients understand the benefits of mediation and include them in court-mandated discussion sessions. Mediators can support and encourage ADR education for all litigants, attorneys, and judges.

Areas for further research include how other courts have increased the rate of mediation use; perceptions of ADR among litigants and litigators; and experimenting with mediation in cases before the Massachusetts Land Court cases when public entities are involved.

Implementing wider use of ADR and addressing the perception of second-class justice among litigants will require intentional support from all actors (mediators, judges, attorneys, and the legislature) working together towards this common goal, but I believe it will be worth it. Increasing the use of ADR in the Massachusetts Land Court would benefit everyone involved in the system and lead to more satisfactory outcomes for parties. As the famous Robert Frost poem says, "Good fences make good neighbors." And ADR makes good fences.

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Appendix A. Interviewees

1. Brian Jerome, Founder and President of Massachusetts Dispute Resolution Services
2. Gail Packer, Executive Director of Community Dispute Settlement Center
3. Joel Reck, Esq. Mediator for MWI, REBA, TMG; Retired Real Estate Attorney, Adjunct Professor at Boston College Law School
4. Peter Wittenborg, Esq. Executive Director, Real Estate Bar Association for Massachusetts, Inc.
5. Joshua Hoch, Mediator and Director of Mediation Services, Mediation Works Inc.
6. Chief Justice Judith Cutler, MA Land Court
7. Justice Michael Vhay, MA Land Court
8. Justice Karen Scheier, MA Land Court
9. Justice Robert Foster, MA Land Court
10. Justice Howard Speicher, MA Land Court
11. Justice Gordon Piper, MA Land Court
12. Nicholas Shapiro, Esq., Phillips & Angley
13. Israela Brill-Cass, Esq., Mediator, Attorney, Adjunct Professor at Emerson College
14. Paul Alphen, Esq., Alphen and Santos, PC
15. Anonymous Retired Land Court Judge and Current Mediator

Appendix B. Interview Questions: Land Court Judges

1. Do you think ADR is a useful tool to resolve land disputes? Why or why not?
2. Do you recommend screening and/or ADR to litigants? Why or why not?
 - a. If yes, how many cases a year do you recommend to screening and/or ADR?
3. Are there certain types of cases you are more likely to recommend ADR?
4. Are there types of cases you wouldn't recommend ADR?
5. Roughly what percentage of cases do you believe are resolved through screening/ADR a year?
6. Why do you think people choose ADR?
7. Why do you think people choose trial?
8. Based on my conversations with mediators, the MA Land Court is the most successful user of ADR. Why do you think that is?
9. What do you think prevents ADR from being more widely accepted in other courts?
10. Are there changes in the courts, law, etc. that would encourage ADR's use more?
11. Can you briefly walk me through the case management conference? What happens? What is the goal of the conference? How effective do you think the conferences are to reaching this goal? How often do clients accompany their attorneys? What are the pros and cons to clients attending?
12. In my interviews with the judges, several mentioned tracks to put the cases on appropriate time limits. The average case, according to court data, takes 3 years from start to finish. What's an appropriate time limit? Why? Why do cases take years to resolve?
13. The land court carries a significant caseload with a backlog roughly equal to the number of new cases filed each year. What contributes to the case backlog? Is this a staffing issue? A resource issue? Scheduling? Do you believe the Land Court is overburdened or is the caseload appropriate?
14. Are there questions I should have asked?

Appendix C. Interview Questions: Mediators

1. How many land court cases do you mediate a year?
2. Are there specific types of land court cases you see more often?
3. Roughly what percent of cases do you think are resolved through mediation?
4. On average, how much does each case cost to mediate?
5. What types of cases would you recommend to mediate? Are there any you wouldn't recommend?
6. Have people expressed hesitation or excitement about mediation? What did they say?
7. What do you think would make people choose mediation more often?
8. Are there changes in the courts, law, or otherwise that would encourage its use more?
9. Are there questions I should have asked you?
10. There are five court-approved mediation groups from which litigants may choose. According to data from the Land Court, REBA receives 66-78% of mediation referrals. What do you think about this? Are there reasons why you think this is true? Some people have suggested REBA has more nuanced knowledge to better mediate land cases. How do you respond to that?
11. Tell me about your experience with screenings and walk me briefly through the process of a screening. How do you do it? How long does it take? Are both lawyers present during a screening? Roughly 65% of those who go through the screening process within the land court mediate. Why do you think this is?
12. The Land Court recently implemented a pilot program where retired appellate court judge, David Mills, screens cases and occasionally mediates if one party is indigent. What do you think about this program? Have you noticed any impact on your program because of it? What do you think about a retired judge doing the screenings?

Appendix D. Interview Questions: Attorneys

1. Do you regularly practice in the land court?
2. Have you been involved in land court mediations?
3. What's been your experience as an attorney with mediation?
4. What's your role in a mediation?
5. Do you encourage or discourage mediation?
6. Why do you think clients choose or don't choose mediation?
7. Some interviewees have suggested that attorneys would discourage mediation because it would decrease your pay. How do you respond to that?
8. What changes could be made in the courts, law, or otherwise that would encourage mediation more?
9. There are 5 land-court-approved mediation groups, yet REBA receives 66%-78% of all screening referrals from the court. Some have suggested REBA has more nuanced understanding of land disputes than the other groups. Is there a perception in the legal community (or with you if you don't want to generalize) that REBA is more qualified to negotiate land disputes than the other groups? Why do you think that is? Do you think the other mediation groups do not have the necessary land dispute experience?
10. In the land court, there are case management conferences but these conferences are often only between the judge and attorneys. Are there pros and cons to having the clients in the conferences?