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Zoning and Land Use Planning

John R. Nolon and Jessica Bacher*

The Role of Lawyers in Resolving Environmental Interest Disputes

Contexts for Resolving Environmental Interest Conflicts and Disputes

This article explores the role of lawyers and the tools they can use in the resolution of environmental interest disputes. We draw on the decades-long work of ADR professionals in this area as well as the professional experience of attorneys and the skills they have honed in the context of ''rights based'' and ''rights to process'' disputes.[1] By ''environmental interest disputes'' we include both emerging conflicts and current disputes among multiple parties over the use and abuse of land, air, water, surface, and subsurface resources whose resolution is unlikely to occur in traditional adjudicatory tribunals such as courts and administrative agencies.

We define ''rights based'' disputes as those traditionally resolved by litigation through courts where causes of action stem from—and the court's decision is heavily influenced by—established constitutional, statutory, regulatory, or common law rights. ''Rights to process'' disputes are adjudicated by administrative agencies with discretionary authority to interpret legal standards as they approve, condition, or deny applications for approval to proceed with a land use project or plan. In both instances, lawyers collect, analyze, categorize, marshal, and present facts to persuade the court or agency to decide the matter in their clients' favor. In the former, they use discovery, depositions, and the rules of evidence to build their case. In the latter, they

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amass and present evidence both to persuade decision-makers and to ensure that the substantial evidence rule is satisfied. Lawyers predict outcomes based on established rights and legal standards and the precedents set by relevant tribunals. In both settings, the operations of the adjudicatory venue are familiar to practitioners, and the judicial decision or administrative determination is the mechanism for settlement.

What do lawyers do, however, when legal rules have not kept pace with the times, when the outcome of litigation or administrative decision-making is too uncertain for their clients' comfort, or when there is no available tribunal whose jurisdiction is appropriate for the dispute's resolution? Our legal system is being challenged for solutions and approaches to the resolution of grave conflicts regarding the environment and the use of land and natural resources. With environmental interest disputes, settlement discussions require adjustments in public policy and the settlement of manifest disputes takes place in novel venues. In these new settings the parties follow procedures typically used by mediators and facilitators, and seek to discover and address the ''interests'' of the parties, rather than arrive at a rights-based conclusion. In the 21st Century, environmental conflicts and disputes abound.

Consider the implications of the recent Intergovernmental Panel on Climate Change reports.[2] They reveal the startling consequences of climate change, including unprecedented damage from fires, flooding, and other natural disasters, sea level rise, water shortages, and the continued spiking of greenhouse gas emissions. Given the nationwide and global character of climate change, the conflicts involved are multi-jurisdictional in nature, involve multiple stakeholders, raise novel legal issues where rights are indeterminate, and arise outside the reach of established adjudicatory forums. Is our environmental legal system up to the challenge?

Imagine the land use implications that stem from the United States Census Bureau's projection that the U.S. population will increase by 100 million by 2043, only 37 years after reaching its last milestone.[3] This new population and the need to replace aging homes

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and buildings will cause the private sector to build 70 million new homes and 100 billion square feet of nonresidential space.[4] Where is this new building to go; how much fossil fuel will its construction and operation consume; and how many vehicle miles will its occupants travel in traversing the human settlements our land use laws allow? How do we provide these travelers, occupants, and developers with the energy they need and where will the renewable and non-renewable power sources be sited? Is our land use legal system up to the challenge?

In these cases, lawyers can suggest alternatives to their clients, including the creation of new ''institutions'' and ''mechanisms'' for conflict management, or by suggesting that their clients and other stakeholders create new ''venues'' for dispute resolution where they negotiate settlement. In these venues, lawyers can help the parties establish their own ''procedures:'' ground rules and timetables for coming to an agreement. They can also use novel mechanisms for convincing the stakeholders to participate and settle.

Examples of new institutions include the creation of intermunicipal or public/private councils or partnerships, consensus committees to rework a development proposal, community advisory groups, and even a voluntary carbon exchange. Venues that can be created include the full range of facilitated or mediated settlement environments where a neutral party helps convene the disputants, build trust among them, bring them to consensus on the negotiation procedures, and lead them to agreement. Mechanisms that can be used as incentives to get the parties to participate or to satisfy their interests include Development Agreements between a governmental permitting agency and the permit applicant, Community Benefits Agreements executed by multiple stakeholders, Environmental Impact Assessments that calculate the impact of proposed developments on climate change, the formation of Community Advisory Groups and their participation in Superfund cleanup discussions, and the use of Technical Assistance Grants to fund community groups so they can secure needed and reliable facts regarding such cleanups.

The inspiration for the creation and use of such techniques can come from any of

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the stakeholders or any of their advisors. This article suggests that attorneys for disputants and stakeholders can build new practice areas where they are known for their abilities to function in this new arena of environmental interest conflict management and dispute resolution. Lawyers can help lead the way or, at least, be productive participants where client interests are adrift in a changed world. Drawing on the work of mediators, facilitators, and other neutrals as well as involved leaders and professionals, this article discusses how lawyers can serve client interests when established rights and proceedings are inadequate by suggesting the use of new dispute resolution institutions, venues, processes, and mechanisms.

Lawyers can establish professional practices as neutrals, for sure, but as representatives of disputants they can also establish respected practices through which they serve their self-interested clients as wise counsel. In this relatively new practice area in the environmental and land use field, they can be known as a trusted broker of new resolution processes, for their skills as productive participants in alternative dispute resolution proceedings, for their great capacity to find, marshal, and analyze relevant facts, and as creative problem solvers in matters requiring non-traditional approaches to the practice of law.

Institutions and Mechanisms for Conflict Resolution

An early example of environmental interest dispute stakeholders creating an ongoing institution for managing conflict involves a process that took place in Washington State in 1974. In order to settle a dispute over the proposed location of a flood control dam on the Snoqualmie River, two mediators facilitated a discussion among opposing parties. Environmental advocates opposed the project because of their concern over the survival of the river's ecosystem; farmers were concerned about proposed reductions in water for irrigation; and citizens worried about the potential for uncontrolled suburban sprawl. Although the dam was never constructed, the parties implemented many of the land use recommendations that were agreed upon and formed a basin-wide coordinating coun-

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cil that continued operating for ten years.[5]

Another example is seen in the case of *Santa Margarita Area Residents Together v. San Luis Obispo County*,[6] where all principal stakeholders affected by a proposal to develop the Santa Margarita Ranch participated in a mediation process prior to the submission of a land use application for approval. The mediation arrived at consensus regarding the number and location of housing units, the preservation of agricultural land, and open space conservation easements. This became the basis for the negotiation of a Development Agreement between the developer and the county—a mechanism sanctioned by law in California and available for use in other states with similar statutes or under the implied land use powers of local governments. The court upheld the agreement as valid, finding that it did not compromise the county's authority to exercise its discretion in approving the developer's application under existing zoning rules.

Local land use requirements are embedded in zoning and site development standards applied to development proposals by planning boards as they review applications for approval. They also are contained in rezoning resolutions adopted by local legislatures, which typically specify the permitted use or uses of the land and a variety of area and bulk standards that must be met. Recently, lawyers for developers, municipalities, and stakeholder groups have supplemented planning board approvals and legislative rezonings with Community Benefits Agreements (CBA) that reach far beyond the scope of traditional zoning. In San Diego, for example, an unusual group of stakeholders—over two dozen community groups—negotiated in 2005 the city's first CBA with the developer of Ballpark Village, a mixed use development encompassing over three million square feet of retail, office, and residential space. The agreement requires the developer to follow LEED green building standards and use construction practices that protect the environment, incorporate structural elements such as non-reflective windows to protect birds in flight, as well as to provide on and off-site affordable housing and make cash contributions to a local job training program.[7]

Under federal environmental law, disenfranchised commu-

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nity stakeholders are empowered to participate effectively regarding the remediation of Superfund sites in their neighborhood. They are allowed to participate in the resolution of disputes between the Environmental Protection Agency (EPA) and the responsible parties for hazardous sites in two ways. The EPA allows the affected public to participate in cleanup discussions by forming Community Advisory Groups that are encouraged to be involved as early as possible in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) matters.[8] In addition, the EPA provides Technical Assistance Grants under CERCLA to qualified community groups. Having and understanding the relevant facts is critical to effective participation and workable agreements in dispute resolution. Technical Assistance Grants are made to community stakeholder groups to pay for technical assistance needed to gather and interpret information regarding the nature and extent of the hazard and its remediation.[9]

Under New York State law, state and local agencies must review and mitigate the environmental impact of actions they take to fund, conduct, or approve plans, programs, and projects.[10] The law and regulations broadly define the environment and how governmental actions can adversely impact it, but nowhere is climate change mentioned. Similarly, environmental impact assessment regulations do not require the quantification and mitigation of a project's greenhouse gas emissions. Despite the absence of express references to the matter, both local land use agencies and the New York Department of Environmental Conservation (DEC) have established new mechanisms for ensuring that land use projects both evaluate and then mitigate their impacts on climate change. The DEC has implied authority to require environmental reviews to consider GHG emissions. In the long form (Environmental Assessment Form) EAF, the applicant is asked whether the project will increase energy use, affect air quality, and/or affect the community's fuel or energy supply. All of these inquiries open the door to considering GHGs in the environmental review process.[11]

In 2007, the DEC Commissioner designated the DEC as the lead agency for the environ-

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mental review of a project commonly referred to as Kingwood in Sullivan County. The project proposed 1,000 detached single family homes and 1.3 million square feet of commercial development on a 1,845 acre site. DEC was designated lead agency due to the disproportionate acceleration of GHGs generated by the project as a result of the inherently long commutes for the future residents, equally long driving distance for potential customers, and the car dependant layout of the plan. In another project referred to as the Belleayre Mountain Sky Area project, ''DEC has required what appears to be the most detailed analysis of GHGs yet mandated for a project of this nature in New York [by] setting out a laundry list of issues that must be addressed in the supplemental DEIS for this project.''[12] The project consists of two resort complexes with 370 hotel rooms and 250 units in townhouse and multi-unit buildings

A dramatic example of the invention of a new institution for conflict resolution is the Chicago Climate Exchange (CCX), created in 2003.[13] Greenhouse gas emitters may become CCX members and voluntarily agree to legally bind themselves to meet annual GHG emission reduction targets. This allows members to sell or bank credits if they reduce emissions below established targets and allows others who exceed limits to purchase offsetting credits. This mechanism was created by a foundation funded academic institution. CCX was established and operates in the absence of rights and tribunals for the resolution of the innumerable stakeholder interests affected by climate change. As CCX develops, farmers and municipalities (among others) that adopt practices that sequester, destroy, or displace greenhouse gasses may qualify for emission offsets if the practices can be verified to meet CCX standards.

In *Medeiros v. Hawaii County Planning Commission*,[14] the state court enthusiastically endorsed mediation of land use disputes with these words: ''[S]ince it allows the interested parties the opportunity to meet with the developers on a one-to-one basis and to attempt to resolve their differences, mediation may, as a practical matter, provide the residents and property owners with greater impact on the decision than a contested case.''

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The concurring opinion by Justice Bryson in *Fasano v. Board of County Commissioners of Washington County*,[15] Supreme Court of Oregon, is also instructive: ''The basic facts in this case exemplify the prohibitive cost and extended uncertainty to a homeowner when a government body decides to change or modify a zoning ordinance or comprehensive plan . . . No average homeowner or small business enterprise can afford a judicial process such as described above nor can a judicial system cope with or endure such a process in achieving justice. The number of such controversies is ascending.''

Venues and Procedures for Dispute Resolution

The practitioners and scholars of Alternative Dispute Resolution have a long and textured history of engagement. They have raised and debated many issues about terminology, proper venues, correct practices, bringing disputants to agreement, and, even, what is a successful agreement. This history and these debates reveal extensive variation in practice and endorse continued experimentation. This is not surprising since the contexts in which they practice are immensely diverse and because of the fast pace of change in land use and environmental conflicts. Drawing on this history, counsel for the disputants can be creative in establishing a venue and procedures for the resolution of an environmental interest dispute.

By ''venue'' we mean the place and circumstances chosen to hold the negotiations. These range from a town hall to a bank conference room and from a grange building to the YMCA—mostly neutral places with no association to any of the parties to the dispute. The parties will be convened in the venue, which must be a place that raises no suspicions and, if possible, has positive connotations, such as space in a cultural or educational institution or the home or business of a respected local leader not directly involved in the dispute. These venues stand in stark contrast to the formally appointed court of law or the planning board meeting room.

Once the venue is established, there are several procedures commonly followed in neutral-assisted negotiations. The stakeholders must be determined, some pre-assessment of their issues done, a method of bringing them into the negotiations identified, the parties

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convened at a properly-called first meeting, the role of the neutral and the agenda clarified, a process for the negotiation agreed upon along with ground rules for proceeding, a timetable for resolution established, and a variety of matters decided, such as whether the meetings are open to the public, whether the negotiations are confidential, and whether the participants are restricted in their contacts with the press. There is much more, and it is explored in an impressive body of literature that describes the successes and failures of mediated settlement proceedings.

One of the principal objectives of this type of settlement is to build trust among the disputants so that they can be candid about what it is that they really want to achieve and work productively to accomplish those objectives. This takes time and is achieved at the first few meetings of the stakeholders by getting to know one another through discussions about the procedures, the critical issues in need of resolution, and the facts related to them. Gradually, stakeholders move from discussing their positions (''we don't want development on that site'' or ''I have a right to build 50 single family homes there'') to revealing what they truly want to achieve (''we don't want to lose our rural character and a critical viewshed on that land'' or ''I could cluster fewer units on a portion of the site, and meet my financial objectives, if I received a speedy approval.''). Once interests are revealed, the neutral can lead parties through a discussion of options or alternatives to the initial development proposal.

The Critical Importance of Facts

The neutral typically helps the stakeholders frame a problem statement, such as ''How can the site be developed to realize the developer's financial objectives, while preserving the viewshed and the area's rural character?'' It is here that it is possible to appreciate the critical job of collecting, analyzing, marshalling, and evaluating essential facts. What are the developers costs and revenues? What is an acceptable return? What is the effect of a delayed decision-making process on the bottom line and marketability of the project? How long would it take to get the project approved over substantial community opposition and how much faster could it

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be approved if consensus on the project is achieved? Is there a market for clustered homes with surrounding, protected open space? What are the critical viewing spots that define the viewshed in need of protection? What are the characteristics that define the rural nature of the community? Can the land be developed by placing buildings away from the relevant viewshed or designing them and their exterior treatments to minimize view interruption? Is it possible to enhance the rural characteristics of the area through the architectural design or arrangement of buildings or by preserving several deteriorated farm buildings in the neighborhood?

The questions abound, and for each question there are facts to be gathered, agreed upon, and used to bring the parties to an agreement. The positive financial impact of a quick project approval, an untapped market for clustered housing on a rural landscape, the existence of three classic barns nearby that the developer can preserve, and a better understanding of what land needs to be protected to preserve the view from a critical spot may lead to the design of a better project, one that accommodates the interests of all stakeholders.

Dealing with facts is the attorney's principal stock in trade. Attorneys have spent years in the study and practice of amassing, organizing, and understanding the context and circumstances of disputes. Given the importance of facts and how they lead to and shape settlements, lawyers play a central and productive role in mediated settlements.

Lawyering in Mediated Negotiations

When the economic and environmental stakes are high, many of the stakeholders in mediated settlement discussions will be represented by counsel. From the moment they step into the new venue, lawyers enter terrain that is different from courts and board chambers in many critical ways. Quite often they resist efforts to create new venues, procedures, and mechanisms for resolving disputes over development proposals. Their resistance is understandable. Land use, real estate, and environmental attorneys conduct much of their practice preparing for, participating in, or negotiating in the shadow of adjudications: litigation or formal permit proceedings. Those venues are familiar places and the

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procedures used are well scripted, while the craft and substance of mediated disputes are unfamiliar to most.

The traditional task of lawyers for the contestants in right to process disputes is to ensure that facts favorable to their client's position are placed on the record and to argue persuasively from those facts to convince the board to favor their client's position. Faced with these competing tensions, the lawyer for the land use board reflexively focuses on ensuring that all of the legally required steps are taken, time periods respected, and substantive due process standards followed.

The lawyer's clients, too, are familiar with the traditional tribunals and processes. Without being advised of the benefits of mediated proceedings, stakeholders may want a fierce advocate, armed with facts favorable to their positions, battling to win. Regarding controversial projects, however, the traditional land use decision-making process is stacked against the applicant and the community's best interests. The preliminary review process is lengthy and those affected by the proposal's impacts have no right to participate in the process until they receive public notice of the public hearing and then they have only the right to be heard, sometimes for only a few moments. This builds resentment and heightens opposition, not only to the project, but also because of the ineffective process. Because the process does not build trust, dedicate time to explore the interests—rather than just the positions—of the stakeholders, and to involve parties in productive, mutual gain oriented conversations, the community is often deprived of a better decision and better land uses.

For practical if not ethical reasons, lawyers should inform their clients about the possible adverse consequences of the traditional decision-making process and that there are alternative processes available, such as forming a concept committee or retaining a mediator to help. Section 1.4(b) of the American Bar Association's Model Rules of Professional Conduct states that ''A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'' Section 1.2(a) states ''A lawyer shall abide by a client's decisions concerning the objectives of representation

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. . . and shall consult with the client as to the means by which they are to be pursued.'' Where there appear to be advantages to using mediation and the client's interest may be better served by such a process, the objectives of the client are clearly implicated by the choice of process. At a minimum, attorneys should become familiar with alternative means of handling land use proposals and provide clear and unbiased information to their clients about how mediations can be structured and the pros and cons of agreeing to them.[16]

Once the lawyer's client is convinced to participate in a mediated settlement, the considerations attorneys confront and the skills they need change dramatically. Instead of considering who has standing to sue, they now must think about which groups are affected by the matter. Who are stakeholders? Who has an interest in the matter? Who has resources that could help? If they are not involved, who can derail an agreement reached through the process? Do these stakeholders have recognized leaders? Do they need help in participating in the process effectively?

In the process of identifying stakeholders, attorneys now have to assess whether these stakeholders will come to a meeting convened to discuss the dispute and, if not, how can they be enticed to participate. Is the venue proper? Is the right person convening the first meeting? Who selects the neutral party to assist? Is that person a mediator or facilitator? How is the neutral to be paid? Have we identified all the necessary stakeholders? Can we assess at this early stage what some of the issues are and whether the stakeholders are willing to discuss them in a mediated environment, rather than clinging to their power or rights-based options?

Once the parties are convened, how does the process start? How can trust among the parties be built? Can the parties agree on ground rules for discussing the issues? Effective ground rules in this setting are entirely different from those used in courts and administrative agencies. In those formal proceedings, the parties either don't talk in one another's presence, or they address the decision maker in the manner and time defined by the judicial or administrative rules. In mediated venues, the parties learn to conduct productive, face-to-face discussions following pro-

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cesses that they themselves agree to. Once trust has been created among them, they can get past their initial positions and explain what they truly want to accomplish. Their interests will define the issues to be addressed and those issues will define what facts need to be gathered, analyzed, and evaluated. Working from the facts, the parties can consider a range of alternatives to the initial position that gave rise to the dispute. What other approaches can be taken? What alternatives or options are there? How can adverse impacts be mitigated? How can the costs of mitigation be covered?

Attorneys who specialize in business transactions routinely engage in these types of negotiations. Their job is to craft a deal that will work for each party involved; one that certainly won't lead to litigation; and one that builds positive business relationships that will facilitate additional deals in the future. For these attorneys, rules of law are background principles that are used to shape agreements to comply with positive rules while meeting the business interests of parties who must agree for the deal to proceed. Here, too, facts are critical to creating effective transactions. Attorneys in these settings must discover, understand, and shape deals based on the business circumstances of their clients. They spend an important part of their professional lives learning the facts about their client's business and the businesses of those with whom their clients deal. In the process, they build records and conduct themselves so their clients are protected if litigation becomes necessary, but their essential task is to help create a deal that will work for all the parties.

The practice of law is replete with examples of attorneys guiding their clients and those with whom they work as they create deals that benefit all the parties and, particularly, in mastering, presenting, and reasoning from relevant facts towards mutual gain results.

Shaping the Influence of Public Policy: A Case Study

We conclude our analysis with two case studies in which the authors are involved. We examine an ongoing debate in the New York legislature over a bill that would create a new mechanism for the resolution of land use conflicts and a dis-

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pute resolution pilot project of ours that demonstrates the potential effectiveness of this new mechanism. In the process we touch on mediation statutes in other states, the relevant New York case law, how government can serve as a powerful catalyst for dispute resolution, and how planners, lawyers, and mediators can advocate for changes in public policy that create new options for the resolution of environmental interest disputes.

The New York Legislature is considering a bill that would allow the use of mediation to supplement, not supplant, the decision-making of local land use boards. This is an example of planners, lawyers, and state legislators attempting to provide a systemic solution, one that would encourage participants involved in administrative proceedings (rights to process cases) to create supplemental proceedings for land use dispute resolution.

A land use mediation bill has passed the New York Senate four times since 2001, including S. 3232 on May 9, 2008. This legislation would add section 99-v to the General Municipal Law and would apply to all towns, villages, and cities outside New York City. The Senate bill authorizes the use of mediation to supplement, not replace, land use review procedures the results of which would not bind or limit the discretion of local boards that adopt zoning, approve subdivision and site plan application, and issue special use permits, but not variances.

The Introducer's Memorandum in Support of S. 3232 notes that the bill builds on the success of the New York State Community Dispute Resolution Centers Program within the Office of Court Administration and a successful land use mediation pilot project conducted in the Hudson River Valley.[17] It is aimed at the soaring legal fees associated with complex land use litigation and the congested court dockets. The Memorandum references with favor legislation adopted in other states permitting mediation to resolve land use matters.

The local land use approval process for projects of any size often costs the applicant significant sums of money, involves only indirect contacts among interested parties, and provides little opportunity to develop creative solutions that accommodate the interests of affected parties. For most significant

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development proposals, the right to process proceeding is lengthy, inflexible, and frustrating. The outcomes are unpredictable and relationships among those involved are more often damaged than strengthened. Nonetheless, during the journey of a development proposal or rezoning petition through the local approval process, critical interests of many stakeholders in the matter are expressed, heard, considered, and disposed of by a decision rendered by a voluntary board of local citizens. The legal procedures for these decisions are designed to ensure due process, not to result in the best possible resolution for the parties and the community.

Although thought of as objective adjudications by administrative bodies, land use decisions, in fact, are extended and awkward negotiations that resolve, if not satisfy, each participant's interests. When land use decisions are seen in this light, efforts to make them a more productive, satisfying, and efficient negotiation seem worth exploring. Legislation, like S. 3232 that encourages and guides the use of more productive deliberations is critical, particularly with regard to high stakes development proposals.

Mediated processes can not only avoid costly future litigation, but can make the administrative decision-making process much more efficient and beneficial. Under S. 3232, local land use boards will still be required to make independent, fact-based decisions, but they will be assisted by an agreement of the principal contestants, one based on clear facts contained in the agreement. Such agreements are welcomed by most boards because they reduce the tensions of the contestants and lead to decisions that better accommodate their interests and those of the broader community.

Recent efforts to use the methods of mediation to improve results in the local land use review and approval process are promising. Mediation has been used in recent years as a method of building consensus regarding rezonings and project approvals. It has been encouraged by legislation in other states and sanctioned by New York courts.

Studies and Pilot Projects

The Consensus Building Institute and the Lincoln Institute of Land Policy undertook a study in 1999 of mediated land

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use disputes. The study, based on interviews with participants in 100 cases in which a professional neutral assisted in the resolution of a land use dispute, indicated that 85% of participants had a positive view of assisted negotiation.[18] Additionally, of respondents who participated in cases that were settled, 92% believed that their own interests were well served by the settlement and 86% believed that all parties' interests were served by the agreement reached. These conclusions are affirmed by New York Farm Bureau reports of favorable results under the authorized agricultural mediation program, the use of mediation by the Adirondack Park Agency in recent land use controversies, and by the positive results of resolving neighborhood disputes over land use by the Community Dispute Resolution Centers Program of the New York court system.

When a prior version of S. 3232 was introduced in 2001, many legislators in both the Senate and Assembly asked whether mediation would work and whether it was practical at the local level. In response, the Land Use Law Center conducted an experiment involving five land use disputes in municipalities located in the Hudson River Valley region.[19] These experiments tested the willingness of parties to participate in the mediation of controversial land use proposals and its effectiveness. The Center successfully encouraged the applicants for planning board approval in five municipalities to create and participate in a process that paralleled the planning board's deliberations and involved all the relevant stakeholders. Participants were invited to form a ''concept committee'' to determine whether, with the assistance of a trained neutral, they could reshape the developer's approval to better meet the interests of the community, while still satisfying the developer's business objectives.

In the opinion of the stakeholders, the concept committee experiment succeeded. In interviews following their participation, they reported that, even where full agreement was not reached, they thought the process and the results were improved. They told us that they were disappointed that consensus-building is not employed more often in land use decision-making. The participants stated that the traditional land use decision-making pro-

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cess can seem complex and confusing and, particularly with controversial projects, seldom yields results that truly meet the interests of any party. Concept committees, like all mediated processes, are more understandable and often more productive because the parties themselves are involved in creating the ground rules for the decision. The parties create and agree to the process and its timetable, and work cooperatively to identify solutions that meet the interests represented.

While mediation can be used in many situations, our concept committee experiment revealed a number of factors that increase the possibility of reaching agreement:

- The municipal decision-making body has endorsed the process;
- All the interested parties are willing and able to negotiate in good faith;
- The parties are willing to try to achieve a consensus agreement;
- The process is as inclusive as possible;
- A deadline for action exists; and
- Funding is shared among the participants.

We found that the parties willing to participate in the experiment did so for several reasons. They thought that a mediated process would enhance the quality of their communication about the project; speed the process of identifying issues and gathering information; identify more options and resources to resolve issues; involve parties with a stake in the outcome at an earlier time; resolve issues more quickly; expedite the decision-making process; create good will among diverse parties; establish a better atmosphere for future community decision-making; and be more likely to produce better decisions.

Legislation in Other States

Land use mediation of various types is authorized by statute in about two dozen states. Some of these statutes authorize mediation for very specific issues such as regional impact development projects, border disputes between local governments, or decisions on land use applications. The point at which mediation is encouraged or required varies under these laws from early in the development approval process until after an administrative determination is made, or even after litigation has been initiated. At least twelve states offer some type of mediation or dispute resolution service to assist par-

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ties who opt to mediate in the land use decision-making context.[20]

Seven states have statutes that recognize and define a mediation procedure for land use disputes between a private individual and a government body.[21] These procedures are voluntary and arise in the context of land use permit applications. The greatest distinction among statutes authorizing mediation of land use applications is the point at which mediation is allowed. In Maine and Florida, mediation is authorized after a final decision on the application is rendered, and in California, Connecticut, and Oregon mediation is not expressly authorized until after a court action has been filed. Three states, Idaho and Pennsylvania, and Hawaii,[22] provide for mediation once an application for a land use proposal is submitted for approval; that is, before a final decision is rendered on the application. Under these proceedings, involved and affected parties have the opportunity to influence modifications to a plan before it is approved or adopted by the governing authority.

Court Decisions in New York

The Court of Appeals sanctioned informal, voluntarily, multi-party negotiations by a local planning board in *Matter of Merson v. McNally*.[23] The issue in *Merson* was whether a project that, as originally proposed, involved several potentially large environmental impacts could be mitigated through project changes negotiated in the early environmental review process mandated by the State Environmental Quality Review Act (SEQRA). The agency involved was the planning board in the Town of Philipstown. The owner of a mining site submitted a full Environmental Assessment Form to the planning board as required by SEQRA along with a special permit application to conduct mining operations. In an unusual move, the board conducted a series of open meetings with the project sponsor, other involved agencies, and the public. As a direct result of the input received at these meetings, the applicant revised the project to avoid any significant negative impacts. The planning board then issued a negative declaration, finding

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that the project, as now configured, would not adversely affect the environment.

The Court of Appeals found that the planning board had conducted an ''open and deliberative process'' characterized by significant ''give and take.'' It described the planning board's actions as ''an open process that also involves other interested agencies and the public'' rather than ''a bilateral negotiation between a developer and lead agency.'' The Court found that the changes made in the proposal were not the result of conditions imposed by the planning board but were, instead, ''adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies . . . . These adjustments, it, ''could be viewed as part of the 'give and take' of the application process.'' In short, the planning board had mediated an effective multi-party negotiating process that met due process requirements.

Subsequent New York cases have followed the lead of the Court of Appeals in its *Merson* decision. In *Matter of Village of Tarrytown v. Planning Board of Village of Sleepy Hollow,*[24] the court noted: ''[W]here a developer works with the lead agency and other reviewing agencies in public and, as a result of that open consultation, incorporates changes in the project which mitigate the potential environmental impacts, a negative declaration may be appropriate—provided that such declaration is not the product of closed-door negotiations or of the developer's compliance with conditions unilaterally imposed by the lead agency.''

In *Matter of Waste Management of New York v. Doherty,*[25] the court quoted *Merson*: ''[M]odifications made to a project during the review process should not necessarily be characterized as impermissible 'conditions' . . . The mere circumstance that modifications may have been made to a proposal is an insufficient basis to nullify a negative declaration otherwise properly issued.'' The Court of Appeals' language on this point in *Merson* is clear: ''Thus, the modifications here were not conditions unilaterally imposed by the lead agency, but essentially were adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies, with only minor

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variations requested by the lead agency during the review process. Of distinguishing dispositive import here is that the modifications were examined openly and with input from all parties involved. This process comports with the overriding purposes of SEQRA.''[26]

Deciding Whether to Encourage Mediation as Public Policy

Against this backdrop, S. 3232 can be better evaluated. Through this legislation, the New York legislature would encourage contestants and municipal boards to explore the use of a new decision-making technique. Such efforts give needed new techniques legitimacy. After the legislature adopted a modest mandatory training bill, agencies offering training reported a doubling of attendance of planning and zoning board members at their sessions. Training was possible before the training law was adopted, but the law boosted positive efforts. This is how needed change happens. The planning community's attention was galvanized on training, involved agencies responded, local board members sought good training forums, and a success is underway.

S. 3232 could have a similar galvanizing affect on the planning community and provide much needed encouragement to the legal community. Given the built-in resistance among lawyers for contestants and boards, among the contestants and board themselves, and the unfamiliarity of the mediated process, state legislation takes on a catalytic role. It affirms a process that has been proved to work that can produce better results for the parties and the community where employed in the proper context and where properly managed. Mediation can be done under existing state law, but few board members, planners, and lawyers know where those legal provisions are and that mediation is available as a useful supplement to the land use process.

By describing mediation as an option that supplements the traditional process the bill respects local officials and participants in the process to determine when it should be used. Experimentation in land use regulation has been furthered by decades of consistent state legislative policy that has placed broad and flexible authority in the hands of localities and trusted them to use it wisely. S. 3232 will launch a

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much needed state-wide experiment that will develop a variety of successful decision-making processes that can be evaluated and adapted by other land use boards to their unique circumstances.

Conclusion: Challenges and Opportunities for Lawyers

This article has explored how lawyers can shape public policy to better manage environmental conflicts and how they can structure settlement discussions to better resolve environmental disputes. S. 3232 is an example of how public law can set the stage for the adoption of productive dispute resolution venues, procedures, and mechanisms. Our work fostering and guiding concept committees demonstrates how private parties can work together to supplement rights to process proceedings with consensus based negotiations structured by the parties themselves. The central insight offered is that the lawyer's carefully honed fact gathering skills and the historic role of lawyers in shaping deals and settlements that work should encourage more attorneys to build practices attuned to the needs of a changed world.

While law schools and much of law practice still emphasize the lawyer's role as a zealous representative of clients in rights based and rights to process forums, lawyers can play a critical role in creating new venues, procedures, and mechanisms for the resolution of interest-based disputes. They are capable of anticipating and helping resolve the dramatically ascending number and confounding range of environmental and land use challenges that will define their future practice.

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[1]See Resolving Environmental Disputes: A Decade of Experience, G. Bingham, The Conservation Foundation ((1986). This early work regarding the practice of mediators describes dozens of site-specific disputes and policy-level conflicts in which mediation was used. Even at this early stage, the author reports there is ''striking diversity'' in the practices and participants where mediators were involved in environmental dispute resolution.. See also Lawrence Susskind, et al, Mediating Land Use Disputes: Pros and Cons, Lincoln Institute of Land Policy (2000).

[2]Intergovernmental Panel on Climate Change, IPCC Fourth Assessment Report: Climate Change 2007: Working Group III Report ''Mitigating Climate Change'' (2007), available at http://www.ipcc.ch/ipccreports/assessments-reports.htmar4-wg3.htm.

[3]U.S. Census Bureau, Population Division, Interim State Population

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Projections, 2005, Table A1: Interim Projections of the Total Population for the United States: April 1, 2000 to July 1, 2030 (2005), available at http://www.census.gov/population/projections/SummaryTabA1.pdf.

[4]Reid Ewing, et al., Growing Cooler: The Evidence on Urban Development and Climate Change (Urban Land Institute 2007) and from the recent assessment reports of the Intergovernmental Panel on Climate Change, available at http://www.ipcc.ch.

[5]See supra n. 1, at pp. 14-15.

[6]Santa Margarita Area Residents Together v. San Luis Obispo County, 84 Cal. App. 4th 221, 100 Cal. Rptr. 2d 740 (2d Dist. 2000).

[7]The Partnership for Working Families: Ballpark Village CBA—San Diego 2005, http://www.community-benefits.org/article.php?id=575.

[8]See Guidance for Community Advisory Groups at Superfund Sites, OSWER Directive 9230.0-28 (1995, summarized at http://www.epa.gov/superfund/community/cag/resource/quickeng.htm.

[9]CERCLA § 117(e)(1); 42 U.S.C.A. § 9617(e)(1).

[10]Environmental Conservation Law (ECL), Art. 8, commonly referred to as the State Environmental Quality Review Act (SEQRA); Title 6 NYCRR Part 617.

[11]Silverberg and Zalantis, The Ultimate Challenge to SEQRA, Debating whether greenhouse gases are an appropriate area of environmental inquiry, NYLJ (Sep. 15, 2008).

[12]Silverberg and Zalantis, The Ultimate Challenge to SEQRA, Debating whether greenhouse gases are an appropriate area of environmental inquiry, NYLJ (Sep. 15, 2008).

[13]Chicago Climate Exchange (2003), at http://www.chicagoclimateex.com.print.jsf.

[14]Medeiros v. Hawaii County Planning Com'n, 8 Haw. App. 183, 797 P.2d 59, 21 Envtl. L. Rep. 20463 (1990).

[15]Fasano v. Board of County Com'rs of Washington County, 264 Or. 574, 507 P.2d 23 (1973) (disapproved of by, Neuberger v. City of Portland, 288 Or. 585, 607 P.2d 722 (1980)) and (rejected by, Quinn v. Town of Dodgeville, 120 Wis. 2d 304, 354 N.W.2d 747 (Ct. App. 1984)) and (rejected by, Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987)).

[16]The language of the Model Rules does not clearly require lawyers to allow clients to decide whether and how to pursue ADR. Professor Robert F. Cochran, Jr., has noted that the new Model Rules ''are ambiguous on this issue.'' The Comment to Model Rule 2.1 states: ''[W]hen a matter is likely to involve litigation it may be necessary . . . to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.'' State rules adopted by Arkansas, Colorado, Georgia, Hawaii, and Ohio encourage discussing ADR with clients; rules in Massachusetts, Michigan, Pennsylvania, and Virginia require lawyers to inform clients of ADR options. See Robert F. Cochran, Jr., Educating Clients on ADR Alternatives, Los Angeles Lawyer, October, 2002, and Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Committee Proposal and Other Professional Responsibility Standards, 28 Fordham Urb. L. J. 895 (2001).

[17]This program was conducted by the Land Use Law Center with which the authors are affiliated.

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[18]See L. Susskind, et al, Mediating Land Use Disputes: Pros and Cons, Lincoln Institute of Land Policy (2000).

[19]See Ch. VII, Case Studies in Mediating Land Use Disputes, Land Use Mediation, Starting Ground Series, Land Use Law Center (2003).

[20]CO, DE, GA, ME, MN, NJ, NY, OR, PA, UT, VT, and WA.

[21]CA, CT, FL, ID, ME, OR, and PA. Utah and Virginia have dispute resolution procedures but are not included in the count because Utah's statute is purely for takings claims, and Virginia's statute was only adopted in 2002 legislation and so far there are no codified statutes that utilize such process.

[22]Hawaii's statute is unique. It is listed as a regional planning statute because it applies specifically to applications for geothermal development, and not to development proposals in general. Hawaii's statute differs from the other regional planning statutes in that it allows a private person to participate in the mediation as a party. The Hawaii statute authorizes a mediation proceeding on a particular issue raised at a public hearing in the context of a geothermal development proposal.

[23]Merson v. McNally, 90 N.Y.2d 742, 665 N.Y.S.2d 605, 688 N.E.2d 479 (1997).

[24]Village of Tarrytown v. Planning Board of Village of Sleepy Hollow, 292 A.D.2d 617, 741 N.Y.S.2d 44 (2d Dep't 2002).

[25]Waste Management of New York, LLC v. Doherty, 267 A.D.2d 464, 700 N.Y.S.2d 494 (2d Dep't 1999).

[26]Waste Management of New York, LLC v. Doherty, 267 A.D.2d 464, 700 N.Y.S.2d 494 (2d Dep't 1999); see also Hoffman v. Town Bd. of Town of Queensbury, 255 A.D.2d 752, 680 N.Y.S.2d 735 (3d Dep't 1998).

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