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ARTICLE
The Lawyer as Process Advocate: Encouraging Collaborative Approaches to Controversial Development Decisions

SEAN F. NOLON*

INTRODUCTION

On most nights, in most communities, a public hearing on an application for senior housing would bring out an angry mob of neighbors. However, on this night, neighbor after neighbor approaches the microphone to encourage the local government to approve the application submitted by the developer. The developer's lawyer turns to him and says, "What's going on here? I've never seen anything like this in my life." What was different about this proposal that changed the dynamic from hostile to productive? Can it be repeated? Why did this come as such a surprise to the attorney? Can this process be abused, allowing parties to be taken advantage of? Answers to these questions and others will be explored with the help of four case studies highlighting the use of collaboration to manage development conflicts requiring land use approvals from the local government. Based on lessons from these examples, the author presents a framework to help lawyers who want to play a larger role in promoting and facilitating similar collaborations.

Much like Eris's golden apple of discord,[1] a significant development proposal can incite hostility in an otherwise peaceful community dashing any hope for achieving greater community benefit. Significant development proposals can be seen as

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1. THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 211 (Crown Publishers 1979) (1913).

unwanted threats causing irreversible change or great opportunities to provide critical resources to ailing communities.[2] Typically, these development decisions involve significant controversy and produce unsatisfying results. They can result in destroyed environmental resources, wasted money, divided community and loss of opportunities for mutual gain. Why do these proposals become such battlegrounds—polarizing neighbors, frustrating developers, paralyzing local officials, and producing unsatisfying results?

Specifically, this article deals with situations where development is likely to occur, the development will have a large impact on the community, the governmental decision makers have discretion over what can be approved, and opposition is likely. Typically, in these types of situations community benefit is not maximized because the decision is limited to compromises that only satisfy the lowest common denominator and do little to create value. Conventional wisdom holds that little can be done to make the governmental decision-making process more productive. However, the practice and theory of dispute resolution, collaboration and conflict management suggests otherwise.[3]

The effects of process are often not given appropriate consideration when planning for a significant land use development. The applicant often views the facts and the law that supports his position as the most important factor in determining the outcome of a decision; leaving process as secondary. For example, proponents will point to studies that show positive tax benefits of a project as justification for approval while opponents present evidence that the infrastructure cannot

2. Elsa Brenner, *Yonkers Mayor Wants Action on Rebuilding*, N.Y. TIMES, Feb. 10, 2008.

3. *See*, *e.g.*, Edith Netter, *Using Mediation to Resolve Land Use Disputes*, *in* ZONING AND PLANNING LAW HANDBOOK 179 (Kenneth H. Young ed., 1992); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING ROBERT'S RULES: THE NEW WAY TO RUN MEETINGS, BUILD CONSENSUS, AND GET RESULTS (2006); BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS (1989); JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT (2000).

support the proposal as justification for denial.[4] The parties engage in an adversarial process and expect that verifiable data, applicable law, and the force of their convictions will produce the desired result.[5] While *facts* are indeed important, the *process* used to present and deliberate the facts is also important. A good process can improve the substantive options by uncovering new information and discovering new connections. For example, even if a development could benefit all parties involved, a process that stokes hostility and promotes mistrust will eliminate any opportunities to capture that benefit. The process by which the developer crafts the proposal and the community engages in response will either create or eliminate options for satisfactory outcomes. Many parties fail to recognize that they have the ability to *choose a process* and that *choice of process* will determine the outcome as much as, if not more than, the substantive characteristics of the proposal.

Process plays a central role in influencing what substantive possibilities the parties will consider. Highly competitive processes only consider a narrow set of outcomes. In more cooperative processes, where parties are able to explore alternatives, a broader range of outcomes can be considered. Since controversial development decisions, like the ones in Part II, resist narrow solutions, limiting oneself to a strict competitive approach is inappropriate. Satisfying the range of issues in these complicated matters requires broad thinking and, therefore, the integration of collaborative approaches. The use of concept committees in the four case studies offers one example of how to integrate these approaches.

To help parties take advantage of these opportunities lawyers must play a more central and active role in advocating for good process. Lawyers are embedded in all aspects of local decisions—they formally represent applicants, opponents, and decision makers, they informally advise through casual conversations and opinion, they are members of the community, maybe the applicant themselves, and frequently are members of

4. *See* RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE (1987).

5. Barbara McAdoo & Larry Bakken, *Local Government Use of Mediation for Resolution of Public Disputes*, 22 URB. LAW. 179, 183 (1990).

the local government. When process decisions are being made by the applicant, opponents or the local government lawyers are actively involved. Too often, however, these lawyers miss the opportunity to counsel clients on appropriate process. Lawyers mistakenly limit their participation to counseling on substantive legal advice or procedural advice limited to what the law requires instead of what it allows.

This article is organized to help lawyers provide procedural advice so that their clients can participate effectively and efficiently in a collaborative process without compromising legal entitlements. Using the four cases and exploring relevant scholarship, the author provides an accessible framework for attorneys who are involved in conflicts over land development. Part I examines why the required process is adversarial and what consequences that has for significant development decisions. Part II presents the four case studies that illustrate how collaborative approaches were used effectively in several significant development decisions. Each example describes how a group of interested citizens participated as part of a concept committee to provide pre-application input into a development proposal. Part III provides a framework of six lessons to help lawyers be more effective process advocates.

I. LIMITATIONS OF THE REQUIRED PROCESS

A. Local Government and Land Use

In the United States, the primary authority to approve the development of land has been delegated to local governments.[6] This includes towns, townships, villages and cities at the sub-

6. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 47 (2d ed. 2007) (pointing out that this is not a blanket delegation and there is a tremendous range of delegations among the fifty states); Craig Anthony Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441 (2007) (noting that the land use regulatory system is located primarily at the local level of governance in the United States, despite the rise of federal and state statutes and regulations that govern certain aspects of land use); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 341 (2002) (discussing how local governments vigorously wield the police power to protect various public interests in land use).

county level. According to the Census Bureau there are over 35,000 local governments.[7] When making land use decisions, local governments must do so pursuant to specific authorizations and detailed procedures.[8] State enabling laws create the structure for this system that allows local governments to control the development of land.[9] While each state has a different system, the overall structure has many similarities.[10] This section looks at how decisions are made in this system, why certain procedures are followed, when procedures work well, and why they fail when trying to address significant development proposals like those in Part II.

The land use system has both substantive and procedural requirements. Substantive requirements specify where

7. U.S. Census Bureau, The U.S. Census of Governments, *available at* http://ftp2.census.gov/govs/cog/2007/techdocgovorg.pdf.

8. BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 6 (2d ed. 2009).

> [A]ny activity the municipal government undertakes: (1) must be expressly authorized by the state legislature—it must be authorized in express words in a state statute, or (2) it must be reasonably necessary to the achievement of an activity that is expressly authorized—it must be incidental to an express authorization; or (3) it must be essential to the declared objects and purposes of the municipality.

Id.

9. *Id.* at 8 (noting "[t]here is no inherent municipal power to zone. Neither does such a power spring from the creation of a municipal corporation or local government. Absent home rule powers, some specific state enabling act or statutory authority is required. Such authority in fact exists today in every state."); *see also* John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, *in* LAND USE LAW FOR SUSTAINABLE DEVELOPMENT 581 (noting that "states retain[ ] the power to define and limit property rights . . . From that reservoir of authority, states have delegated land use control principally to local governments.").

10. BABCOCK, *supra* note 4, at 157.

> It is reasonable to expect, from municipality to municipality, differences in substantive goals and objectives, and it is not essential to procedural due process that there be uniformity in procedure among the hundreds of municipalities in each state. But substantial uniformity of local procedure will be an inevitable consequence of an insistence by the state that each community that elects to regulate land use maintain a procedural system that contributes to fairness and openness in local administration.

Id.

development can occur and how it can be built. Specifying a development envelope, allowing density bonuses, and defining to what extent scenic resources can limit development potential are all examples of substantive requirements; federal, state and local provisions all serve as sources for this authority. For example, a local law or decision must not violate the "takings" clause of the federal constitution by taking land without just compensation.[11] Federal telecommunications law prohibits local boards from regulating cell towers based on health effects.[12] State enabling laws prescribe what local governments can regulate and what they cannot.[13] With this authority, local governments can enact laws to create zones that segregate uses into districts and describe how development will take place on the land.[14] From these substantive requirements landowners have a general idea of what is allowed on their land and how it can be built.

B. THE REQUIRED PROCESS

Procedural requirements dictate what process a local government must follow in order to take substantive action.[15] These procedural requirements apply to such legislative actions as adopting a zoning ordinance and to administrative action such as a subdivision application, as well as judicial actions like variances and interpretations.[16] Examples include: time frames for providing notice of the proposal; who should be notified; duration of public hearings; filing requirements at the local, regional and state level; time frames for decision making; record

11. The 5th Amendment of the U.S. Constitution, which prohibits deprivation of property without due process of law is made applicable to the states and local governments through the 14th Amendment. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION (1999).

12. *See* Laurie Dichiara, *Wireless Communication Facilities: Siting For Sore Eyes*, 6 BUFF. ENVTL. L.J. 1, 2 (1998).

13. BURKE, *supra* note 8, at 161 (observing that "[i]n enacting any amendment, municipal legislatures must follow the procedures set out in their own enabling statutes.").

14. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

15. BURKE, *supra* note 8, at 161 (citing Riggs v. Twp. of Long Beach, 538 A.2d 808, 812-13 (N.J. 1988)); *see also* DANIEL R. MANDELKER, LAND USE LAW §§ 2.41 to .43, § 6.67 (5th ed. 2003).

16. MANDELKER, *supra* note 15, §§ 6.67 to .76.

keeping; time frames for appealing a decision; the standard of review on appeal; what constitutes a conflict of interest; as well as technical specifications for the underlying application.[17] If a decision fails to follow one of these requirements and is appealed, it can be overturned on procedural grounds even if it is, in substance, the correct decision.[18]

Again, local governments must look to federal, state and local law to make sure they follow the proper decision-making structure. For example, local administrative decisions must provide for due process protections.[19] State law requires a local government to hold a public hearing within a required number of days after accepting an application[20] and must document its action in accordance with sunshine laws.[21] A local government can enact rules to define when an application is deemed complete.[22]

The required process at the local level is a mosaic of requirements from federal and state constitutions, statutes and regulations, local and regional laws, as well as locally adopted board procedures.[23] Unlike federal agencies, which must comply with the Administrative Procedures Act,[24] each local government has a different set of procedures. The process varies from state to state, county to county and municipality to municipality.[25] With

17. *Id.* § 6.70.

18. *In re* City of Schenectady v. Flacke, 475 N.Y.S.2d 506 (N.Y. App. Div. 1984); *In re* Envtl. Defense Fund v. Flacke, 465 N.Y.S.2d 759 (N.Y. App. Div. 1983) (holding "[w]e must determine whether the entities involved have complied with the procedural requirements. . ." (citing *In re* Cohalan v. Carey, 452 N.Y.S.2d 639 (N.Y. App. Div. 1982)).

19. MANDELKER, *supra* note 15, § 1.01.

20. *See, e.g.*, N.Y. TOWN LAW § 276(5)(d) (McKinney 2009).

21. *See, e.g.*, The Freedom of Information Law, N.Y. PUB. OFF.Law §§ 84-90 (McKinney 2009); The Open Meetings Law, N.Y. PUB. OFF. Law §§ 100-111 (McKinney 2009).

22. KAREN SCHNELLER-MACDONALD ET AL., TOWN OF MILAN PLANNING BD., HABITAT ASSESSMENT GUIDELINES (2005), *available at* http://www.ecosny.org/conferences/Sustaining%20conf%20Feb%202%202007%20presentations/milanhabitatassessmentguidelinesfinal-12-06-05.pdf.

23. Arnold, *supra* note 6, at 449, 487, 490-91.

24. Administrative Procedure Act 5 U.S.C. §§ 553-554 (2006) (creating a framework for decision making and review of agency actions).

25. MANDELKER, *supra* note 15, § 1.16.

over 35,000 local government entities in the United States[26] the variety is impressive. For the purposes of this article, however, there are sufficient similarities among all these local governments to draw parallels and construct a working model.

While the required process is different in each jurisdiction, it generally follows four basic stages: (1) an application is accepted by the board; (2) the board deliberates; (3) the board solicits public comment; and (4) the board makes a decision.[27] Beyond these four stages, the process in each community varies depending on the type of action[28] and the jurisdiction.[29] Governmental decision-makers are typically aware of the local requirements but frequently rely on advice from attorneys and clerks on how procedure applies in specific situations. In most situations, when asked about *appropriate* process, the advising attorneys explain what procedures *must* be followed. Lawyers rarely provide information about what other processes can be used and the advantages and disadvantages of other processes. Few lawyers are aware that the required process can be supplemented and that it may be beneficial to do so.

Being a subdivision of state governments in a federal system, the required process at the local level is informed by the governmental structures at the other levels. The three functions of government—executive (administrative), legislative and judicial—present at the federal and state level are also found at the local level.[30] While these functions are neatly housed in branches of federal and state governments, the structure at the local level is not so tidy. For example, the local chief elected official (mayor, first selectman, supervisor, etc.) may perform some executive functions and may perform some legislative

26. *See* U.S. Census Bureau, *supra* note 7. The U.S. Census of 2007 counts 36,011 sub-county general-purpose governmental entities. If we include counties, which often have some form of land use control, the number is obviously higher.

27. This structure loosely follows trial like proceedings. *See* BURKE, *supra* note 8, at 157; *cf.* BABCOCK, *supra* note 4, at 154 (finding that "local administrative practices vary from some resemblance to rules for judicial hearings to the most colloquial proceedings").

28. MANDELKER, *supra* note 15, § 6.70.

29. *Id.* § 1.16.

30. JUERGENSMEYER & ROBERTS, *supra* note 6, § 5.9.

functions.[31] She may sit as a member of the local legislature and vote on legislation[32] and she may or may not have veto authority.[33] Similarly, the legislative body, in addition to having legislative responsibilities, may have executive powers to appoint and oversee the staff that administers the local laws.[34] While some communities have judicial boards to interpret zoning laws and hear variances,[35] others rely on the state judicial system to perform this function.[36] Despite this dizzying variety, for the purposes of this article, it is important to remember that at the local level, executive, legislative, and judicial functions exist, but are carried out by different entities depending on the type of proposal.[37]

Significant development proposals may require approvals that engage all three of these governmental functions from inception to implementation. A developer may request a change to the law that would require a legislative action such as a rezoning or an amendment to the comprehensive plan. If granted, the developer will then need to go through an administrative process to get approval for the proposal before

31. OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 223 (2d ed. 2001).

> The tripartite division of the federal and state governments into independent branches is not reflected in the set-up of a great many cities. The mayor of a city is, for instance, generally not an exclusively executive officer and does not enjoy immunity from the subpoena powers of the legislative branch. There is much overlapping of administrative, legislative, and even judicial functions among municipal organs—and ideally, much cooperation.

Id.

32. *Id*.

33. *Id*. at 58 (stating that in a weak-mayor format, the mayor has little, if any veto power, while in a strong-mayor format, the mayor has veto power over most legislation).

34. *See id.*

35. JUERGENSMEYER & ROBERTS, *supra* note 6, § 5.32.

36. *Id*.

37. In some communities, a planning board serves as the principal administrative board, hearing most subdivision and site plan applications. There may, however, be certain decisions over which the local legislature retains administrative authority to grant site plans and subdivision in areas of critical importance. *See, e.g.*, Jayne E. Daly, *What's Really Needed to Effectuate Resource Protection in Communities*, 20 PACE ENVTL. L. REV. 189, 193 (2002) (explaining how the Town of Dover in New York reserved site plan approval for all parcels in the "Mixed Use Institutional Conversion Overlay" zone).

beginning to develop. After the administrative approval, the project may need a variance from the quasi-judicial entity. After all these approvals, construction can begin and will likely be monitored by an enforcement officer to ensure compliance with permit conditions. Depending on the proposal and the community, these separate functions may or may not be performed by the same entity.

Regardless of the function the government is performing, the required process organizes interactions and communications to be directed at the governmental body. This separates the applicant from the community and discourages communication across the divide. In the required process, the landowner submits the application and the community can only participate at designated opportunities. Participation required by law is limited to providing comments, in person or in writing, in response to the submitted application at a public hearing. Once sufficient information is collected, the government then rules based on evidence and relevant law.[38] Because this process is deliberately designed to be like a trial, the parties see each other as adversaries competing in front of the governmental body. In routine land development matters, this adversarial dynamic does not interfere with good decision-making; in significant land development matters, it presents a considerable obstacle.

C. When the Required Process Works Well

For routine decisions—where the government has limited discretion, understands how to apply the governing regulations, implicates few parties, and presents a limited number of issues to be resolved—the required process works well. In these situations, a landowner submits the application, it is reviewed, there is an opportunity to be heard, and the government makes a decision in a timely manner. When a party's interests are consistent with the rights codified in the existing law the required process will likely produce a satisfying outcome. In these situations, the required process is efficient, effective, and predictable. A majority of the development decisions fall into this

38. MANDELKER, *supra* note 15, § 6.70.

category.[39] As a result, most of a government's decisions are handled in a timely manner through the required process.

D. Limitations of the Required Process

The required process, while efficient, is also adversarial. The government is the ultimate decision-maker and the parties participate in a trial-like environment to present their arguments. Parties may work out a compromise, but it is likely to be limited in scope and must be approved by the government. What typically happens is that parties become consumed with winning the battle instead of working constructively to identify an appropriate solution.[40] Their interactions can become fueled by misinformation and fear, causing them to spend significant resources attempting to advance their position by spinning facts, undermining the other parties, and fighting over procedure. For the applicant, the process can force her to engage in competitive behaviors that encourage deception, manipulation, and, in some cases, corruption.[41] For neighbors, they may work to prevent inquiry into appropriate solutions, while attacking the applicant and intimidating the government with threats of political retribution.[42] For the government, it becomes more about surviving and making a defensible decision than achieving a pareto-optimal solution.[43]

Unfortunately, parties typically assume that required processes cannot be supplemented because they equate "required" with "exclusive." While the required process does specify what a board must do in order to make a decision, the required process imposes a *minimum*, not a *maximum*. The government *must* hold a public hearing, the applicant *must* notify adjacent property owners, and the government *must* make a decision within a given

39. Phil Kenkel, *Cooperative Management Series: Effective Decision Making in the Board Room*, OKLA. COOP. EXTENSION SERV. (n.d.), http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-1784/AGEC979 web.pdf

40. SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS 16 (2d ed. 2001).

41. SUSSKIND & CRUIKSHANK, BREAKING THE IMPASSE, *supra* note 4, at 3-13.

42. *Id.*

43. *Id.*

time frame. These mandates do not bar the government from suggesting or requiring additional procedures in appropriate circumstances.[44] Some governments have enacted pre-application procedures,[45] others have extended the notice provisions to include more than the minimum number of participants,[46] while still others have held extensive informational sessions that go far beyond what is required at a public hearing.[47] Governments have ample authority to supplement the required process when an adversarial process will limit the creativity needed to advance and protect their constituents' needs.[48] If lawyers are aware that the required process is a floor and not a ceiling, that the required process is adversarial, and that adversarial processes stifle creativity, they will be more likely to suggest and participate in supplemental procedures.

II. SUPPLEMENTING THE ADVERSARIAL PROCESS TO FOSTER COLLABORATION

The following development case studies illustrate how parties can take advantage of opportunities presented by collaborative approaches.[49] Using these examples, we can see how the

44. *In re* Merson v. McNally, 688 N.E.2d 479 (N.Y. 1997) (sanctioning informal, voluntary, multi-party negotiations during local environmental review process); State Environmental Quality Review Act, N.Y. COMP. CODES. R. & REGS. tit. 6, §§ 617.3, 617.2(b)(1) (2009) (waiving applicable time periods for environmental reviews); N.Y. TOWN LAW § 276(8) (McKinney 2009) (allowing subdivision time frames to be extended by mutual consent of owner and planning board).

45. *See* SCHNELLER-MACDONALD ET AL., *supra* note 22.

46. Town of Gardiner, N.Y., TOWN CODE ch. 160 (2005) (extending the area of notification regarding applications and public hearings).

47. Consensus Building Institute, Streamlining Community Planning in Falmouth, Maine, http://cbuilding.org/publication/case/streamlining-community-planning-falmouth-maine (last visited Dec. 15, 2009) (describing how this community used a volunteer stakeholder advisory committee to improve the land use system).

48. *See supra* note 44 and accompanying text.

49. A subcommittee of The Westchester County Executive's Task Force on Environment and Development that has first-hand experience with this new approach worked with Pace University's Land Use Law Center to document these cases. SEAN F. NOLON & EMILY M. BECK, COLLABORATIVE DEVELOPMENTS: A REPORT ON DEVELOPMENT APPROVALS ACHIEVED THROUGH COLLABORATION (Sept. 10, 2003) (on file with author).

required approval processes can be supplemented to be creative and less adversarial while still protecting clients' interests. These cases involved significant development decisions and used a range of collaborative processes to produce proposals that united and satisfied more than they divided and infuriated. In all of these cases, an application to develop a specific parcel had been submitted or was likely to be submitted to the local government, key parties decided that using predominately collaborative techniques presented significant advantages over predominantly adversarial techniques, and use of those techniques resulted in an approval that enjoyed widespread support. The process was still difficult, challenging and, at times, frustrating, but the overall experience was productive and the outcomes more satisfying than not.

Each case is organized to provide a description of the proposal, details about the subject parcel, the process used, and summaries of the parties' experience. In some of these examples, applicants and government officials, involved residents early in the process, sometimes even before triggering the required process. Information for the case studies was obtained from interviews of the participants, during which they were encouraged to offer their critical assessment. Segments of these interviews are included to provide their perspective. Accordingly, no project is portrayed as perfect. Despite some critical comments, the developers, local officials, and residents listed many incentives to employing collaborative processes.

A. From Senior Housing to Clustered Single Family

The developer acquired a seven-acre parcel with an eighty-six-bed nursing home that had recently been closed. Their original plan was to turn it into affordable apartment housing for senior citizens. Based on meetings with officials and neighbors, the developer felt there was sufficient support to proceed with applications for zoning approval and to the state for affordable-housing tax credits. The developers learned that the zoning code would also permit a subdivision into approximately twenty lots for single-family residences, but considered the senior housing plan more suited for the property. Notwithstanding developer's preference, however, the property was developed as clustered

single-family homes—the result of conversation with neighbors who stood to be most affected by the project.

The developer created a process to engage the twenty-four adjacent neighbors and provide them with a choice of what could be built. Another fifteen were included after they registered a complaint that they had been left out. Over the course of two to three months, approximately six meetings were held. There were no ground rules or formal agendas; and the developer decided who would participate in the meetings, as well as their timing and content. Officials were in favor of the process, and indicated that the municipality would support the residents' decision. Residents were also encouraged to visit recent projects of the developer in nearby communities. At the final meeting, the residents were presented with alternative site plans for senior housing, a clustered development of eighteen single-family homes with a conservation easement on the perimeter, and a conventional twenty-two, lot subdivision. The developer indicated his preference for senior housing, but made it clear that the decision was the residents' as long as they would continue to support the project throughout the planning process. After questions, a vote was taken where all but one family chose the clustered single-family housing development.

A leading official was himself in favor of affordable housing for senior citizens, pointing out the advantages over single family homes: a larger tax base, preservation of more open space, no burden on the schools, a minimal increase in traffic, and less need for emergency services. In his view, the final plan benefits a handful of homeowners to the detriment of the community. But while he wishes the developer had made more of an effort to sway residents in favor of affordable housing, the official is enthusiastic about what he described as an "excellent, democratic" process.

The developer felt that if they had insisted on proceeding with senior housing on the site, the project would not have been built. They also note that they were not required to prepare an environmental impact statement for single family homes and accordingly saved a great deal of time and money. Asked whether a mediator would have improved the process, they said "no"—that in fact a mediator might have created a barrier between them and the residents, who were "open and delighted to be asked to participate" in the decision-making process. The

developer noted that the success of the consensual approach depends on the menu of choices that can be offered the community and what is feasible for the developer.

A homeowner who attended many of the meetings said that although several residents initially reacted to the developer with suspicion, he won over many with his candor—admitting, for example, that he would need to construct at least seventeen homes in order to recoup his investment. This person did not believe a mediator would have appreciably improved the process; she felt that the developer handled the residents well and was effective in getting those who supported the project to help win zoning approval through their participation in official meetings.

One couple that was interviewed was among the two or three households that preferred housing for senior citizens on the site. They said that many other residents also supported this plan at first, but changed their minds in favor of single-family homes when a well-respected fellow neighbor pointed out that property values would increase if single-family residences were built on the property. Notwithstanding the couple's disagreement with the final result, they praised the developer for his flexible attitude. In fact, they add, meetings became social gatherings that neighbors looked forward to, and everyone was able to know each other a little better.

The neighbor who steered people toward the plan for single-family homes lives nearby the site of the old nursing home. Her memory is that only two people initially supported affordable senior housing; most were opposed to the concept of a large apartment building and some, apparently, to the "affordable" aspect. Once they learned of the option of clustering homes on a portion of the property and creating the "magnificent buffer zone" around them, the neighbors were firmly behind the single residences plan. This person is enthusiastic about her experience with the consensus building process, and considers the developer to have done an excellent job of communicating with the residents and of preserving the land.

B. Rezoning from Single Family to Townhouses

The 254-acre parcel was zoned for single-family subdivision but the developer was not sure it was the best use for the property. The developer asked the municipality to establish a

concept committee to explore alternative plans for the property. As a result of the process, the zoning was changed to allow a golf course, eighty-five townhomes, two single-family homes and sixty-three acres of open space. According to the Consensus Memorandum issued by the concept committee, the golf course was to be "environmentally friendly". The committee's support of the project was expressly premised on the development of safeguards against compromising quality of the downstream reservoirs and ongoing monitoring and testing.

The developer and the municipality selected the participants for the committee after soliciting volunteers. As established, the committee consisted of several local officials and neighbors, including a member of a local group that promotes environmental awareness and smart growth. While the committee had the municipality's endorsement, meetings were not mandatory, nor were they to be considered in any way a substitute for the official decision-making process. At one meeting, the golf partner of the developer answered questions from the committee, including queries as to impacts on water, traffic, open space access, and preservation of wildlife corridors. The developer brought in a professional mediator for another session. The committee met six times over the course of seven weeks. The developer wrote summaries of each meeting and circulated them to the committee members with the agenda for the next meeting. His firm paid for the site and building plans presented to the committee. There was no opposition to the meetings and no one dropped out.

Certain representatives from the town who attended the concept committee meetings indicated that they had some misgivings about the process. One official remarked that by drafting minutes of the meetings, the developer retained control of the process and did not go far enough to get the committee's approval of the minutes. Another commented that the developer inflated the number of homes that were likely to be approved and felt that he manipulated the committee into agreeing to a larger development than it otherwise would have chosen. One member felt that the committee participants should have been examined for conflicts of interest before being asked to join. A town official who participated throughout the approval process and who favors collaborative approaches says the developer lost much hard won

credibility by waiting until the eleventh hour to disclose his decision to switch the golf course from public to private.

Each of the neighbors would have preferred to see a smaller development on the parcel; one stated that there was "no solid feeling" that the end result was acceptable to all. And while no one felt that the project or the committee process itself was forced upon them, they all believe that a neutral facilitator would have made for a fairer, more satisfactory process. Notwithstanding their criticism, all considered the use of a concept committee beneficial, and all appreciated the opportunity to choose among alternative projects for the site.

The developer said he formed a concept committee because he wanted consensus from the outset, which he believed would result in a better project. Both he and his associate expressed enthusiasm for the project, asserting that it was "wonderfully well planned, addressed owners' and environmentalists' needs, and pretty much everyone was happy." The alternative, in their view, was a contentious approval process that would have taken years to complete with no guarantee of approval. The developer sees involving the community as the way to address residents' fears fueled by incorrect and misleading information and notes that a concept committee provides an additional forum to the required process for residents to speak about their concerns. The concept committee's involvement and approval made the required process run more smoothly.

Despite the developer's use of the concept committee for this project, he drew the community's ire by switching from a public course to a private course after the committee had reached agreement. The issue of residents' use of the course was later resolved by allowing residents twenty-five rounds of golf six days per week and by providing access for two school golf teams. The developer learned an important lesson: the committee's work continues after an agreement is reached. Openness must be maintained throughout the process—no matter how complicated or uncertain the issues are. The developer sees no disadvantage to seeking community participation, but cautions that the process will work only if committee members participate voluntarily. At the least, he says, using a collaborative approach will make for a shorter, more reasonable approval process.

A local conservation group had some concerns about the process and the result. According to one interviewee, the environment is the one element often entirely left out of the process in land development. This project was a prime example of a case in which the scientific perspective was neglected. For example, no representative of this group was included in the concept committee; issues of biodiversity or wildlife were only brought out in the required process—at a point too far along to examine and resolve them properly. And since the developer had already been involved with the concept committee, he was not open to considering important additional modifications after information was revealed in the required process. While acknowledging the attraction of resolving land use problems in a non-adversarial manner, this person believes the fundamental problem with collaboration is that environmental considerations are brought up too late in the process for them to receive adequate attention. Accordingly, the interviewee warns against using these committees as a cure-all to land development controversies.

An official who was also involved in conservation and who was invited to view the site credits the developer with having an open mind. According to the interviewee, he did make some modifications to the golf course in order to avoid sensitive resources, but remains extremely concerned with the adequacy of a fifty-foot buffer on a critical watercourse and the number of exceptions within the buffer. According to the interviewee, the developer demonstrated a "real unwillingness" to consider design changes. The interviewee was uncomfortable with the fact that the developer had the power to revert to his alternative proposal for ninety or more single-family homes, which had also undergone an environmental review. Maintaining the concept committee through the required process, this person believes, may well have ensured a more thorough and satisfactory resolution of the water quality issues.

One resident who lives near the site found the concept committee helpful in giving the townspeople an opportunity to evaluate the alternative development proposals and focus on the one or two that were most appropriate. Finding out what people object to and are concerned about at the outset rather than in public meetings, this person feels, is the main advantage to such

committees. This individual found the developer fair and balanced and did not feel that a facilitator would necessarily have improved the process. Another resident on the concept committee would have preferred preservation to the development of the site and remains concerned about water quality. Nevertheless, this person valued the use of a collaborative approach, noting that it allowed residents to know what was being planned, made them feel they were heard, and calmed some of their fears. A neighbor agrees, and adds the opinion that the approving board should promote the intelligent use of concept committees; since that body is most often the starting point for a proposed project, it is in the best position to recommend their use.

C. Rezoning for Senior Housing

This project demonstrates how a collaborative approach used in tandem with the required process can result in a proposal welcomed by a large segment of the community. Before this developer became involved, the fifty-one acre parcel was zoned for commercial use. The developer initiated a process to rezone the parcel to allow for senior housing clustered on part of the property with significant open space.

Faced with the hurdle of rezoning, the developer organized a consensus committee to identify interests and build support. Local officials were informed of the meetings and endorsed the process. There were at least ten informal meetings of thirty-forty residents usually with the same nucleus of five to seven of the most interested citizens. The developer served as the process manager by preparing the agenda and organizing presentations by architects, engineers, and other experts. By the time approval was obtained, over one hundred meetings had been held.

One official who attended dozens of meetings believed the collaborative effort worked so well because both the municipality and the developer were highly motivated. The town gained desired housing with minimal disruption and received additional benefits of green space for the public, and also received much needed sewer connections. In the end, the property was rezoned with little opposition. By going to the community, the developer ended up with strong support during the required process and no unpleasant surprises. He does not believe a facilitator would have improved the process based on his experience that a

purported neutral usually has a relationship with someone. At least with the developer as process manager, he notes, the residents are aware of the bias. His suggestions for others undertaking is a collaborative approach: talk to the residents early on and take them seriously, "you may discover the project isn't palatable or needs to be curtailed."

A longtime resident whose home will become part of the new sewer district took an active role in meetings with the developer. The vast majority of residents supported the project, this person says, because it meant a residential development without burdening the school system. The open and recreational space was an additional benefit; the interviewee believes the forty acres were offered to the community by the developer because they consist largely of undevelopable wetlands and steep slopes. Support was not unanimous, the interviewee admits. At least one homeowner objected to the building height, and there have been accusations that those benefiting from the sewer deal are "selling out." Another opponent doesn't like what the developer is building in another community and so will object to any project proposed by the developer. One resident feels that the developer has been consistent throughout the process and willing to work with the community. "People always think developers lie and cheat, but they're just businessmen, trying to make money."

D. Senior Condominiums

This project represents a successful mix of affordable housing for seniors that meets a current need, inter-municipal cooperation, and creative land preservation. The developer originally proposed to build 112 senior apartments and forty attached single-family houses. The number of units was decreased and the overall plan revised after a series of meetings with local residents. The revised plan has more contiguous open space that is protected by a conservation easement and served by a trail system, public access to a pond area, and ten percent of the affordable senior housing to local residents.

The developer began the project by holding several meetings with local officials. Encouraged that he would be able to forge a consensus in support of his proposal, the developer acquired the site and then initiated several rounds of meetings with neighbors, both in groups and one-on-one. Meetings were informal and

without ground rules, but provided an open forum for people to voice their opinions and concerns. Residents' reactions ultimately led to revision of the site plan to reduce building height and length for the senior facility by adding a third structure, moving single family homes away from neighboring properties, and creating more contiguous open space. Parking was relocated to adjacent property through negotiations with the property's owner, unnecessary emergency access eliminated, and a conservation easement placed on a portion of the site.

One official who attended all of the meetings as an observer notes the favorable impression the developer made with many of the participants. The meetings were well attended and were conducted where anyone who wished to speak could. The principal issues brought up concerned the size of buffers and the emergency access road. This individual says that the developer was able to mitigate nearly every problem. The interviewee considers him a "good businessman [who] took people's concerns seriously" and believes his approach saved a good deal of time and money, noting that he had a much easier time in obtaining the board's approval because he worked with the members throughout the process. He would like to see the collaborative techniques used more often. For another official of the town, however, this project does not provide a particularly good example of consensus building. One official is not aware that the municipality was brought into the process at all. He feels that they had no say in where the entrance to the development would be located and no real options in the matter.

A local environmental group was concerned about potential problems with storm water runoff, impacts on wetlands and wetland buffers, and compromising a portion of a reservoir. Some residents had come to the group with similar concerns. The environmental group found it easy to work with the developer. The developer repositioned homes to avoid encroaching on wetland buffers, reduced the length of driveways to decrease the amount of impervious surfaces, used porous pavement for driveways near buffers, added a water quality treatment basin, and made it pedestrian friendly. Remarking on the development process generally, she said there needs to be a "wholesale change in the way planning is done."

Another resident involved in conservation is a self-described "strict environmentalist" who expressed opposition to the project and who, early on in the process, made a sarcastic comment to the developer about the destruction of trees. His participation in the process was mainly through one-on-one meetings with the developer. At their initial meeting, the developer made promises concerning open space and water supply issues. The resident admits to some skepticism but the developer kept his promises: "He reached out to [me] as if [I were] a stakeholder even when I had no control over the situation." The developer brought in hydrologists to allay his fears over the aquifer and water shortage problems, limited the number of trees cut, and created a walking trail. Overall, this individual says, the process was "wonderful;"" he also felt that the "give and take" was possible because the developer was so willing to listen and try to remedy certain concerns. This resident does not believe a facilitator was needed in this case, but appreciates that one would be advantageous if there are other people "as stubborn in their views" as this person was about what should be done.

III. LAWYER AS ADVOCATE FOR COLLABORATIVE PROCESSES

The concept committees used in the cases above show how the required process can be supplemented with collaborative techniques. While lawyers play a central role in the selection of process, few are trained to design, manage and participate in collaborative processes. If lawyers are not familiar with these processes they will be hesitant to participate or recommend them. For example, what would have resulted in the cases above had attorneys counseled against participating in the concept committees? The following framework is designed to help lawyers provide valuable advice on collaborative processes and more broadly satisfy client needs.

Most lawyers advise their clients to follow the required process and are skeptical, if not hostile, of processes that go beyond what is legally required. When looking at how lawyers are trained, on one level, this makes sense. Law schools teach students to provide advice on what is legal. They are trained to tell clients what they must do. The required process is law; clients must follow the law. However, on another level, this

hostility does not square with the oath lawyers take to faithfully discharge their duties and adhere to rules of professional conduct.[50] Collaborative processes, while not required, offer lawyers a mechanism to meet client needs and achieve better outcomes.

Lawyers may also hesitate to recommend collaborative processes fearing a diminished role as a substantive legal advisor. For many lawyers, this is an important point to make: advocating a supplementary process does not relegate the attorney to the sidelines. Parties need competent legal advice to understand the range of outcomes and not exaggerate alternatives or omit relevant information. Before agreeing to collaborate, and certainly before reaching an agreement, a party must know what they are likely to get in the required process. For example, a developer needs to be aware of what she is entitled to as-of-right and what is discretionary. Neighbors need to know the same thing. Government officials need to know what authority they have to approve or deny a particular application and what information is needed to support a decision.

An objective legal assessment is necessary to serve as a comparison to what is being negotiated in the collaborative process. This may be one of the harder things for attorneys to do when faced with a significant development because rights are not always clearly defined—especially in situations where the government can make discretionary approvals and take legislative actions. However, when done thoroughly and thoughtfully, a range of options comes into relief that can sufficiently inform the evaluation of any agreement reached. When done poorly, clients will have an inflated sense of entitlement that serves as a barrier to reaching agreement. For those attorneys seeking to expand their effectiveness as process advocates, they need not give up their role as substantive advocates. In fact, following the advice in the next section, can improve their overall effectiveness.

The following subsections are organized to deal with issues as they might arise in the course of representing a client in a significant land development. First, a lawyer must know when

50. Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, *in* DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 927 (Carrie J. Menkel-Meadow et al. eds., 2005).

collaboration is appropriate and when the required process will work to meet a client's needs. Second, lawyers can help clients see the positive aspects of conflict. Third, an awareness that different processes produce different results helps parties to recognize the consequences of process choices. Fourth, collaboration is not a nebulous term; it has discrete and definite components. Fifth, any agreement reached must be presented to the decision-making agency and is subject to the rigors of the required process. Sixth, the subsequent required process must be monitored to ensure the final decision adequately incorporates the collaborative agreement.

A. The Required Process Works Well, Most of the Time

Supplementing the required process with collaborative approaches—such as a concept committee—is not appropriate for all development decisions. In fact, it is probably not appropriate for the majority of development decisions. This is because the required process works well most of the time. It handles most land use decisions efficiently and effectively providing a predictable set of procedures and legal rules for applicants to follow when seeking governmental approval.

Specifically, the required process works well for development decisions where the correct legal solution is obvious. These are typically as-of-right decisions or ministerial decisions where the government does not have much discretion, the issues are few and uncomplicated, controversy is limited, the information needed is obvious, and there is little debate about the validity of the information.[51] Examples might include an application for a single-family home, a minor addition and extension, a minor subdivision and site plan, a sign, and a variance. In these situations, following the required process will not limit the outcomes available to the client because their needs can be met through application of the law. If the government denies an application, that decision can be appealed and, if found to be incorrect, overturned. The need for a collaborative process in these situations is minimized.

51. *See* McAdoo & Bakken, *supra* note 5, at 183.

However, where the government has considerable decision-making discretion, a challenge or appeal is likely, and the proposed development threatens considerable harm, the required process does not work well.[52] Significant developments, like the ones featured in Part II, have these characteristics. When clients are faced with multi-party, multi-issue situations where parties can benefit from sharing information, adhering to the required process is not likely to generate satisfying outcomes. Helping clients understand the effect of different processes is an important role.[53]

B. Conflict Presents Opportunities

Many people take a negative view of conflict.[54] Many work hard to avoid it and then, once embroiled, chart the quickest course out of it.[55] Significant development conflicts are no different. Neighbors, developers, and politicians will go to great lengths to minimize conflicts and contain their effects. Once embroiled in a controversy, parties rarely see past their differences and their interactions take on a combative and competitive tone.[56] They view each other as the archetypal foe: developers as rapacious, greedy and deceitful, officials as incompetent, corrupt and unresponsive and opponents as parochial, hypocritical and untrustworthy.[57] The overwhelming sense is that there is no common ground and the only option is to prepare for battle and hope for a quick victory by defeating the other side.[58]

52. *See* Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions,* 24 STAN. ENVTL. L.J. 269, 274 (2005); John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform,* 30 HARV. ENVTL. L. REV. 1, 4 (2006).

53. *See* Breger, *supra* note 50 (discussing how some states' code of conduct mandates that attorneys discuss the appropriate dispute resolution options with a client).

54. CARPENTER & KENNEDY, *supra* note 40, at 19.

55. *Id*.

56. *Id*. at 17; MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 7 (1973).

57. *See* DOUGLAS PORTER, BREAKING THE DEVELOPMENT LOG JAM: NEW STRATEGIES FOR BUILDING COMMUNITY SUPPORT (2006).

58. CARPENTER & KENNEDY, *supra* note 40, at 4-17.

While pervasive, this negative perception presents an incomplete vision of conflict. Mary Parker Follet, a labor management expert from the 1920s, observed that, "all polishing occurs through friction"[59] and according to Albert Einstein, "[i]n the middle of difficulty lies opportunity."[60] While the perception of significant land developments is principally negative, these decisions usually present many rich opportunities to mine mutual gains. Finding a way to realize these benefits while still guarding against the dangers is an exciting role for lawyers who recognize the value of process advocacy.

In the *Rezoning for Senior Housing* case above, the property was zoned for commercial use but the community needed senior housing, open space, and sewer connections.[61] Many of the houses around the parcel had failing septic systems that were polluting the local drinking water supply. By adding the sewer system, the developer saved the community money and time. In return, the developer got a discretionary rezoning, predictability in the decision-making process, and buy-in from the municipality and the residents. If the developer had pursued an as-of-right development under the commercial zoning, he would have had a much harder time winning approval, if at all.[62] By exploiting different priorities, the developer provided high value benefits to the community at a low cost to him. For example, the developer did not care about what would be built; but rather, what he wanted was a return on his investment. Whether it was a mall or senior housing did not matter to him; however, it mattered to the community. On the other hand, the community wanted some benefits out of the project but it did not care how long it took to make a decision, but for the developer, time was money. A long delay in the approval process due to citizen opposition and legal appeals would be very costly. By searching for and finding these trades the parties were able to manage the conflict to minimize dangers and maximize opportunities.

59. MARY PARKER FOLLETT, DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 31 (Henry C. Metcalf & L. Urwick eds., Harper & Brothers Publishers 1940) (1926).

60. QuoteWorld.org, http://www.quoteworld.org/quotes/4122 (last visited Dec. 15, 2009).

61. *See supra* Part II.C.

62. NOLON & BECK, *supra* note 49.

For value to be created in land use conflicts, lawyers should help parties identify opportunities while protecting them against the dangers. Lawyers involved in significant developments have the opportunity to shape their client's view of the situation. If they feed into a client's negative view of conflict and promise a quick resolution in an attempt to minimize danger, they will miss opportunities to discover and explore differences that can lead to creative outcomes. In *Beyond Winning*, the authors remind us that "[d]ifferences are often more useful than similarities in helping parties reach a deal [as] . . . [d]ifferences set the stage for possible gains from a trade and it is through trades that value is most commonly created."[63]

C. Different Processes Produce Different Results

At stake in this choice of process is the type of outcomes that are possible. The required process conducted as an adversarial adjudication will produce narrow outcomes.[64] When parties engage in adversarial processes, they become highly competitive.[65] Their interactions become less about solving the problem and more about undermining the other party.[66] This shift away from problem solving is what reduces creativity. There are many reasons why competitive, adversarial processes discourage creativity.[67] The limited scope of the required process inhibits the imagination of the parties.[68] The trial-like climate forces attorneys and parties to think in oppositional and polarized

63. ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 14 (2000).

64. Lon L. Fuller, *The Forms and Limits of Adjudication*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Kenneth I. Wilson ed., rev. ed. 2001) (making the point that adjudicative decisions demand a level of rationality that is not expected of negotiated agreements).

65. DOUGLAS YARN, DICTIONARY OF CONFLICT RESOLUTION 10 (1999).

66. CARPENTER & KENNEDY, *supra* note 40, at 17; *see also* DEUTSCH, *supra* note 56, at 7.

67. *See* DEUTSCH, *supra* note 56; *see also* KENNETH E. BOULDING, CONFLICT AND DEFENSE: A GENERAL THEORY (1962); LOUIS KRIESBERG, THE SOCIOLOGY OF SOCIAL CONFLICT (1973).

68. DEUTSCH, *supra* note 56, at 30 (noting that "[a] competitive process stimulates the view that the solution of a conflict can only be one that is imposed by one side on the other.").

frames instead of taking an expansive view of the situation.[69] It leads parties to guard information and preferences closely for fear of giving up some advantage.[70] It encourages the manipulation of information to enhance one's position and to erode or discredit the other party's.[71] Overall these tactics promote fear and mistrust among the parties[72] that then drives parties to more competitive interactions.[73] Once relations turn hostile, the likelihood of seizing opportunities is greatly reduced and the range of possible outcomes is further narrowed.[74]

Lawyers play an important role in setting parties' expectations about how to interact with each other in the development approval process. While it is impossible to generalize about all lawyers, it is fair to say that the legal profession encourages a competitive and oppositional approach to conflict.[75] Lawyers typically assume that "(1) the disputants are

69. *Id*. at 29 (noting that "[a] competitive process tends to increase sensitivity to differences and threats while minimizing the awareness of similarities. It stimulates the sense of complete oppositeness."); *see also* Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 30 (2002) (observing that "[r]egrettably, systems of conflict resolution can also serve as barriers to community building. The procedural nuances of litigation and arbitration can be manipulated to stifle meaningful discourse among the disputants.").

70. *See* ROGER FISHER & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., Penguin Books 1991) (1981); ROGER AXELROD, THE EVOLUTION OF COOPERATION (1984).

71. DEUTSCH, *supra* note 56, at 29.

> A competitive process is characterized by either lack of communication or misleading communication. It also gives rise to espionage or other techniques of obtaining information about the other that the other is unwilling to communicate. In addition to obtaining such information, each part is interested in providing discouraging or misleading information to the other.

Id.

72. *Id.* (indicating that "[i]t seems likely that competition produces a stronger bias toward misperceiving the other's neutrality or conciliatory actions as malevolently motivated").

73. *Id.* at 217; *see also* Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325 (1996).

74. DAVID A. LAX & JAMES K, SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 34-35 (1986); *see* AXELROD, *supra* note 70.

75. *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997).

adversaries—i.e., if one wins, the other must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law."[76] This adversarial approach may be useful in situations where parties are negotiating to distribute a fixed resource, there is overlap in the bargaining range, and where future relationships are not important.[77] In these situations, an adversarial approach efficiently distributes the resource among the parties.[78]

In significant developments, however, parties are not dealing with a fixed resource that can only be divided up into finite pieces. While the land being debated is a fixed resource, what can be done on the land and how deliberations proceed offers many opportunities. A predominantly adversarial approach will undermine the relationships needed to uncover any opportunities that might be present. Since significant developments frequently require discretionary approvals, governments can create value or expand the pie by granting new rights. For example, in the *Rezoning from Single Family to Townhouses* case study, the government rezoned the parcel to change the allowed use from single family to attached housing and a golf course. A fixed resource perspective, relying on a competitive process and undermining relationships, would have inhibited the exploration of opportunities.

76. These assumptions appear on what has been called "the lawyer's standard philosophical map." Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-44 (1982); *see also* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 12 n. 54 (2002) (recognizing that the map is overdrawn and does not represent the mindset of most transactional lawyers, but that it does describe "the way most lawyers think, most of the time" citing Riskin, *Mediation and Lawyers, supra* at 46).

77. For example, when negotiating to buy a house the seller wants the highest price possible and the buyer wants the lowest. What they are negotiating over is a fixed resource—the seller only has one house and the buyer only has so much money. The higher the price, the less money the buyer has left over.

78. FISHER & URY, *supra* note 70, at 151-53 (pointing out that there are few situations that are truly zero sum/fix pie; for example, maybe the seller needs to sell quickly, or the buyer is having a hard time getting a mortgage—there are creative solutions that could help the parties allocate resources and meet interests).

Collaborative approaches can more effectively help clients meet the full range of needs[79] and explore possibilities for mutual gain.[80] The community may need senior housing, childcare facilities, infrastructure repairs, playing fields, or open space. These are important interests that are often not protected or advanced by the existing land use regulations. Having cooperation as an essential element allows the parties to move beyond the win-lose dynamic and explore interests beyond just what is legal.

A collaborative process can also help overcome significant psychological barriers to creating value and reaching agreement.[81] Through the competitive dynamic of an adversarial process parties look unfavorably on solutions proposed by the other side simply because they are proposed by the other side.[82] In processes like the required process, that set parties against each other, this reactive devaluation prevents parties from looking at the situation creatively.[83] Instead of seeing the value

79. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT L. REV. 97, 109 (2001) (including psychological, economic, social, political, and moral needs).

80. These solutions can be referred to as "win-win," however, this framing inappropriately elevates expectations so parties think they will get everything they want instead of satisfying their interests.

81. CONSENSUS BUILDING INSTITUTE, COGNITIVE BARRIERS IN THE LAND USE PLANNING PROCESS 4 (2007), http://cbuilding.org/resource/cognitive-barriers-land-use-planning-process (click to download pdf).

82. Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 247 (1993); Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* BARRIERS TO CONFLICT RESOLUTION 54 (Kenneth Arrow et al. eds., 1995); DEUTSCH, *supra* note 56, at 30 (indicating that "[a] competitive process leads to a suspicious, hostile attitude, and it increases the readiness to exploit the other's needs and respond negatively to the other's requests.").

83. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 38 (Kenneth Arrow et al. eds., 1995).

> [Reactive devaluation increases] the likelihood that compromise proposals or concessions designed to demonstrate goodwill and prompt reciprocation will fail in their objectives. All too often, they will be dismissed as trivial and token, or received with coolness and expressions of distrust that serve to thwart the goal of negotiated agreement and to weaken rather than strengthen the hand of those who urge conciliation.

Id. See also CARPENTER & KENNEDY, *supra* note 40, at 21-22 ("[W]hen parties choose to enter the legal system, it becomes more difficult for them to exchange information and adjust their positions. As a result, satisfactory solutions may be

of the proposal, the parties are blinded by biases and stereotypes.[84] Attorneys can reduce the effect of this devaluation by guiding clients to a process where creative ideas are not presented in the adversarial context.[85] Concept committees are just one example of a process that reduces the effects of reactive devaluation.

In significant development decisions, where multiple parties are involved and multiple issues are being discussed, lawyers should help parties move from an exclusively adversarial approach to a process with collaborative elements. Adversarial approaches start with solutions and emphasize competition among the parties over how to distribute the available resources.[86] Collaborative approaches start with gathering information and emphasize communication that explores possible solutions.[87] An effective collaborative process also recognizes and plans for the distribution of resources after value is created.[88] This means that there will be some competitive interactions in a collaborative process, but those moments are managed so as to not interfere with the creation of value.[89] The attorney who does not counsel a client to explore collaborative options loses the opportunity to create value and will have less to distribute.

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overlooked, and resources that could otherwise be developed to finding creative solutions are poured into carrying on a fight.").

84. CARPENTER & KENNEDY, *supra* note 40, at 21-22.

85. MNOOKIN, PEPPET & TULUMELLO, *supra* note 63, at 95-96 (stating that lawyers should use problem-solving methods in both disputes and deals to create value that would otherwise be unavailable to the client); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 272 (3d ed. 2003) (discussing how "[p]arties often adhere to positions because they see no other way to develop new ones. Introducing a logical or acceptable problem-solving process can often allow a disputant to abandon a position in favor of another option.").

86. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 756-57 (1984) (discussing how "in the adversarial approach to negotiation] resources are limited and must be divided. Information about one's real preferences must be jealously guarded.").

87. *See infra* Part III.D.

88. MNOOKIN, PEPPET & TULUMELLO, *supra* note 63, at 40 ("No matter how good you are at brainstorming and no matter how carefully you search out value-creation trades, at some point the pie has to be sliced.").

89. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 9 (1988).

D. Collaboration Has Required Elements

What does "collaboration" mean to the average lawyer? For some, it may suggest a cooperative process where all the parties set aside their differences and reach an agreement that maximizes the common good. Other lawyers may see a group of people giving away value that they are entitled to, being taken advantage of, and subverting the safeguards in the required process.[90] Whichever image a lawyer subscribes to, the reality is that few have an accurate understanding of what collaboration is.

The popular view that collaborative processes are nebulous and loosely organized, squarely conflicts with what is practiced by professionals[91] and promoted by scholars.[92] Over the last forty years, a range of collaborative techniques has successfully been applied to public policy disputes dealing with environmental and land use matters.[93] Through this scholarship and body of practice, a firm concept of collaboration has emerged that is well organized, detailed, and specific.

In the public policy context much has been written on collaboration.[94] Much of this work starts with the understanding

90. GRAY, *supra* note 3, at 250-51.

91. Including a variety of professional associations ranging from the International Association of Public Participation, National Coalition for Dialog and Deliberation, to the Association for Conflict Resolution and American Bar Association's Dispute Resolution Section.

92. *See* CARPENTER & KENNEDY, *supra* note 40; GRAY, *supra* note 3; Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); FISHER & URY, *supra* note 70; HOWARD RAIFFA, JOHN RICHARDSON & DAVID METCALFE, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 311-27 (2002); Carrie Menkel-Meadows, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981); John P. McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49 (1981); Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

93. *See* GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986); WONDOLLECK & YAFFEE, *supra* note 3; LAWRENCE SUSSKIND, SARAH MCKEARNAN & JENNIFER THOMAS-LARMER, CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (1999); GRAY, *supra* note 3; CARPENTER & KENNEDY, *supra* note 40; John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, NEGOT. J., July 1989, at 251; MANAGING LAND-USE CONFLICTS: CASE STUDIES IN SPECIAL AREA MANAGEMENT (David J. Brower & Daniel S. Carol eds., 1987).

94. *See supra* note 92.

that collaboration is defined as being both assertive and cooperative.[95] Kenneth Thomas and Ralph Kilmann assert that:

> Collaborating involves an attempt to work with others to find some solution that fully satisfies their concerns. It means digging into an issue to pinpoint the underlying needs and wants of the two individuals. Collaborating between two persons might take the form of exploring a disagreement to learn from each other's insights or trying to find a creative solution to an interpersonal problem.[96]

Barbara Gray, in *Collaborating*, applies this notion to public policy situations and provides the following commentary:

Five features [of collaboration] are critical to the process: (1) the stakeholders are interdependent, (2) solutions emerge by dealing constructively with differences, (3) joint ownership of decisions is involved, (4) stakeholders assume collective responsibility for the future direction of the domain and (5) collaboration is an emergent property.[97]

To help organize this advice into an accessible framework for lawyers in significant development decisions, a collaborative process must be inclusive, transparent and responsive. Without these elements, a process labeled "collaborative" will not deliver on its potential. While other frameworks are available to describe the elements of a collaborative process in the public policy context,[98] *inclusive*, *transparent* and *responsive* presents an

95. *See* Ralph Kilmann, http://www.kilmann.com/conflict.html (last visited Dec. 15, 2009).

96. *Id.*

97. GRAY, *supra* note 3, at 11.

98. For a detailed and comprehensive overview of consensus building see SUSSKIND, MCKEARNAN & THOMAS-LARMER, *supra* note 93; *see also* CARPENTER & KENNEDY, *supra* note 40; JIM ARTHUR, CHRIS CARLSON & LEE MOORE, A PRACTICAL GUIDE TO CONSENSUS (1999); Ass'n for Conflict Resolution, Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement Seeking Processes, http://www.acrnet.org/acrlibrary/more.php?id=13_0_1_0_M (last visited Dec. 19, 2009); STEVEN DANIELS & GREGG WALKER, WORKING THROUGH ENVIRONMENTAL CONFLICT: THE COLLABORATIVE LEARNING APPROACH (2001); GRAY, *supra* note 3. For a thorough description of meditative processes that require collaboration, *see* MOORE, *supra* note 85; WONDOLLECK, & YAFFEE, *supra* note 3; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING (Thomas Dietz & Paul C. Stern eds., 2008); SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 3.

accessible model for lawyers involved in development decisions. Attorneys using these three elements can quickly assess whether a particular process is on track or needs to be adjusted to better meet client needs.

* * *

A Note on the Process Manager

One way to ensure that these three elements are present is to designate a process manager who has the requisite skill and access to adequate resources. In most public policy situations, this function is often ignored. Ideally, the process manager should be a neutral party—one without a stake in the outcome. At the local level, however, where suspicion runs high and resources are limited, most groups decide not to hire a neutral.[99] If a group decides to collaborate without hiring a neutral process manager they must designate one or more parties to serve as the process manager. Ideally, the designated party will have some experience in group dynamics and collaboration.[100] The party should work with the other parties to break out of the adversarial dynamic, avoid typical traps that waste time and money, so the party can all create value and claim as much as possible.

The concept committee cases in Part II illustrate how an interested party can assume the role of process manager. In some of those cases, the participants felt that the process manager should have been a neutral.[101] In others, parties were content with a stakeholder managing the process.[102] Regardless of the perception, the use of an interested party as a process

99. This is assuming that they are even aware of what a neutral could do to assist and improve outcomes.

100. In *Breaking Robert's Rules*, the parties have the benefit of a community member, Connie, who has had some experience with facilitation and group processes. SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 3, at 44. Susskind lays out an excellent and comprehensive structure for a collaborative process, called the Consensus Building Approach that relies heavily on the guidance and encouragement from Connie. *Id.* This is an ideal situation—someone from the community who has the experience and background to guide the process and also has the free time to serve the group. *Id.*

101. *See supra* Part II.D.

102. *See supra* Part II.A, II.C and II.D.

manager presents a potential for abuse that must be guarded against. Since collaboration is, at its core, an ad hoc process, the ever-present temptation to tip the scales in one's favor can corrupt the intentions of an "interested" process manager. While experience is useful and a neutral is preferred, the fact remains that despite decades of support for these ideas,[103] use of neutral mediators at a local level is the exception rather than the rule. Lawyers and parties educated and practiced in principles of collaborative process can help protect against abuses and advocate for good process in the absence of a skilled neutral.

While there is a persistent debate about the neutrality of the process manager,[104] there is little debate about the importance of having a process manager. In all the case studies in Part II, the parties valued the role of the process manager and recognized the utility to have someone play that role. For attorneys advising clients in local land use matters, advocating for a process manager—ideally as neutral as possible—is a necessity. If hiring a neutral is not feasible and an interested party manages the process, then attorney and client must guard vigilantly against abuses of process.

* * *

1. Inclusive

To be inclusive, a process must include the right people at the right time and also include the right ideas. A principal frustration with the required process is that the public is not required to participate until the public hearing, which is often at the end of the process.[105] By this point, much of the work has been done by the applicant and the municipality to shape and

103. *See* LAWRENCE SUSSKIND, MIEKE VAN DER WANSEM & ARMAND CICCARELLI, MEDIATING LAND USE DISPUTES: PROS AND CONS (2000); THE WILLIAM & FLORA HEWLETT FOUND., ENVIRONMENTAL CONFLICT RESOLUTION: STRATEGIES FOR ENVIRONMENTAL GRANTMAKERS (Rosemary O'Leary, Terry Amsler & Malka Kopell eds., 2005).

104. Forester & Stitzel, *supra* note 93 (looking at the role of activist mediators in public sector conflicts).

105. *See* SUSSKIND & CRUIKSHANK, BREAKING THE IMPASSE, *supra* note 4.

condition the proposal.[106] As a result, public involvement is often characterized by hostile participation and rarely produces much value.[107] While this hostility is directed at the substance of the application, much of the frustration is also with the process itself.[108] In some communities months may pass before the public is officially asked to comment on an application.[109] A collaborative process can minimize this frustration by including the right people early and including the right issues.

In addition to finding and selecting the appropriate participants, an inclusive process will emphasize building relationships among the parties.[110] In order to reach an agreement, parties must communicate with each other. In order to communicate, parties must have a relationship.[111] Many process managers have helped parties break through protracted stalemates by creating opportunities for new relationships to form.[112] In the successful Northern Ireland peace negotiations, the mediator created space for the parties to see each other in a

106. MIKE E. MILES ET AL., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS 7 (4th ed. 2007) (presenting a model with "construction" as stage six, "obtaining government approval" is close to the end, at stage four).

107. HERBERT INHABER, SLAYING THE NIMBY DRAGON 90 (1988).

> [R]esidents of Heard County took up arms to keep hazardous waste out of their community . . . a public hearing where a gun-toting crowd crammed into the local high school auditorium to parry and jeer at . . . officials of the state . . . steel drums marked with skull and crossbones hurled from passing trucks; a rally and cross-burning by the Ku Klux Klan; a family grocery store selling "Dump the Dump" T-shirts; and most of all the violence—firebombing, arson, bullet-riddled pickup trucks.

Id.; *see also* Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnerships with Experts and Agents*, 27 PACE ENVT. L. REV. 151, 207 (2009).

108. PORTER, *supra* note 57, at 3 (discussing how "[c]ommunity residents are given their only opportunity to speak about the issues at the scheduled public hearings, which can amount to a lame exercise in participatory democracy, the requisite public involvement that many citizens have come to view as a charade.").

109. *See* Nolon, *Historical Overview of the American Land Use System, supra* note 9, at 602.

110. CARPENTER & KENNEDY, *supra* note 40, at 57-58; E. FRANKLIN DUKES, MARINA A. PISCOLISH & JOHN B. STEPHENS, REACHING FOR HIGHER GROUND IN CONFLICT RESOLUTION: TOOLS FOR POWERFUL GROUPS AND COMMUNITIES (2000).

111. *Id.*

112. MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS: CONCEPTS AND CASES (Roy J. Lewicki, Barbara Gray & Michael Elliot eds., 2003).

different light by talking about their families and other interests like opera.[113] From those relationships, the parties were able to communicate in a more reliable and productive way to establish trust, and were eventually able to reach an agreement ending years of bloody conflict. Local land use disputes, with parties from the same community, who have overlapping interests and activities, present rich opportunities to similarly build relationships and create value. In all of the case studies in Part II, interviews revealed that the process improved relationships among the participants.

The commitment to be inclusive must start early.[114] A process is not inclusive if it begins with the developer or municipality presenting a well-polished proposal that was created after months of internal preparation. To be inclusive, parties must be involved long before an application is submitted or even ready to be submitted.[115] Starting early allows for the greatest flexibility in reaching an agreement.[116] Early in the process parties have not committed to and invested in particular solutions; their positions have not hardened thus creating a greater range of opportunities to meet parties' interests.[117] There are however, significant barriers to starting the process early. Parties often have inflated views of likely outcomes.[118] A developer may view her application as likely to be approved while opponents may earnestly hold the opposite view. In addition, a local official may look at the situation as it evolves and feel confident that he can manage any conflict that might result in a

113. GEORGE MITCHELL, MAKING PEACE (1999).

114. "Early" usually means before an application has been submitted so that resources are not committed to a particular proposal that can limit flexibility later on. Some scholars refer to this as "upstream." *See* THE WILLIAM & FLORA HEWLETT FOUND., *supra* note 103; THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION (Rosemary O'Leary & Lisa B. Bingham eds., 2003); Lisa B. Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 1 HASTINGS ANN. L. REV. (forthcoming 2009).

115. Sean Nolon, *Moving Collaboration Upstream,* ACRESOLUTION, Summer 2007, at 26.

116. *Id*.

117. McAdoo & Bakken, *supra* note 6; Edith Netter, *Using Mediation to Resolve Land Use Disputes*, 15 ZONING & PLAN. L. REP. 25 (1992); Edith Netter, *Using Mediation to Supplement Zoning Hearings*, LAND USE L. & ZONING DIG. (1992).

118. CONSENSUS BUILDING INSTITUTE, *supra* note 81.

manner that will satisfy all who are involved. Research and findings in neuroscience, cognitive psychology and related fields have given us a greater understanding of these barriers.[119] In many cases, this overconfidence is reinforced by comments from attorneys who, in assessing likely outcomes, tend to emphasize the positive and omit the negative aspects of a case.

A less significant, but still important obstacle is the need for information gathering. Under the structure of the required process, a developer will create a proposal based on his assessment of the relevant laws and the constraints of the property.[120] A tremendous amount of money will be spent to pay for lawyers, planners, engineers, and scientists to help create that proposal.[121] Under the structure of a collaborative process, the developer can show the parties a basic, inexpensive development plan allowed under the existing law and then ask them if that is what they want to see. If not, the developer can dedicate the funds he would have spent on a full proposal, to engage in joint fact finding and gather information about development opportunities and environmental constraints.[122] This is similar to what the developer did in the *Rezoning from Single Family to Townhouses* case study.[123]

Finally, the process must be framed broadly. While including the right people is the hallmark of any collaborative process, the

119. While it is impracticable to generalize across the great variety of development disputes, this research gives us a small window into the motivations of some parties: the endowment effect, the status quo bias, overconfidence, self serving bias. *See* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Test of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990); Russell B. Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998) (discussing status quo bias); George Lowenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993) (discussing self-serving bias).

120. *See* MILES ET. AL, *supra* note 106, at 481-83.

121. *Id*.

122. PETER ADLER ET AL., MANAGING SCIENTIFIC AND TECHNICAL INFORMATION IN ENVIRONMENTAL CASES: PRINCIPLES AND PRACTICES FOR MEDIATORS AND FACILITATORS (2000), http://www.resolv.org/publications/reports/Environmental_Cases.pdf; Norman Shultz, *Joint Fact Finding*, BEYOND INTRACTABILITY.ORG, July 2003, http://www.beyondintractability.org/essay/joint_fact-finding/.

123. *See supra* Part II.B.

approach must also be inclusive of ideas.[124] By framing the initiative broadly, a process can include the full range of topics that are important to the parties. Critics of collaboration argue that a broad scope makes reaching agreement harder.[125] The more issues there are on the table—the more out of control the process will become, the more expensive it will be and the less focused the negotiation will be.[126] This criticism ignores the reality that most significant development proposals going through the required process have to address an oppressive number of issues in their formal review regardless of whether they are significant issues.[127] As a result, the issues are only dealt with in a perfunctory manner, to meet the procedural requirements, but not to address the issues.[128] A collaborative process identifies the truly relevant issues that actually need to be addressed and creates a productive structure to mitigate their impact. As a result, the collaborative process can create more opportunity for creative problem solving.

2. Transparent

A transparent process allows people to peer in and see what *is* happening, what *has* happened, and what *will be* happening. Transparency requires information to be published widely and

124. CARPENTER & KENNEDY, *supra* note 40, at 54-55 (making the point that the problems identified initially are often not the real problems at issue requiring openness to new information).

125. *See* E. FRANKLIN DUKES & KAREN FIREHOCK, UNIV. OF VA.'S INST. FOR ENVTL. NEGOTIATION, COLLABORATION: A GUIDE FOR ENVIRONMENTAL ADVOCATES 69 (Michael Leahy & Mike Anderson, eds., 2001); Douglas S. Kenney, *Are Community-Based Watershed Groups Really Effective?*, 3 CHRON. CMTY. 33 (1999); DOUGLAS S. KENNEY**,** NATURAL RES. LAW CTR., UNIV. OF COLO. SCH. OF LAW, ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS IN NATURAL RESOURCE MANAGEMENT (2000)**,** http://www.cde.state.co.us/artemis/ucb6/UCB6582C762000INTERNET.pdf; George Cameron Coggins, *Of Californicators, Quislings, and Crazies: Some Perils of Devolved Collaboration*, 2 CHRON. CMTY. 27 (1988); Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, HIGH COUNTRY NEWS, May 13, 1996.

126. *Id*.

127. Struever Fidelco Cappelli, A Bold New Future for Yonkers, http://www.sfcyonkers.com/feis/index.htm (last visited Dec. 19, 2009).

128. Michael Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENVTL. L.J. 18, 22-23 (2003).

through many channels, so that as many people as possible know about it. Transparency addresses another major frustration with the required process—that it does not adequately inform interested citizens what is happening in the decision-making process.

The minimum notice requirements are mandatory statutory obligations.[129] For example, in New York, the public hearing for a site plan application must be held within sixty-two days of receiving the application.[130] Depending on the jurisdiction, notice might be a certified letter to adjacent property owners, it might be to all property owners within 500 feet, or it might require posting of the notice on the subject property.[131] Once the application is accepted, the board will need to notice all public hearings and workshops and include the matter on the agendas.[132] While notice provisions may meet basic due process rights, they do little to satisfy interested parties who would like to be involved. In many situations, notice is so vague that recipients may wonder what a board will be discussing. Typically, there is little information on the agenda to indicate the sequence of events at a meeting. Items may be placed on the agenda in the order in which they were requested rather than in terms of priority.[133] Many people may be in attendance who will have to wait through ministerial matters until late in the evening for the matter with which they are concerned to be heard.[134] This breeds frustration and anger, and gives the impression that the board is not interested in input from the community.

Collaborative processes aspire to a level of satisfaction beyond what is required by due process.[135] Because collaborative processes are used to satisfy requirements beyond due process,

129. *See, e.g.*, N.Y. TOWN LAW § 276(8) (McKinney 2009).

130. *See, e.g.*, N.Y. TOWN LAW § 274-a (8) (McKinney 2009).

131. *See, e.g.*, CODE OF THE CITY OF YONKERS, N.Y., ch. 43, art. IX, §§ 43-99.

132. *See, e.g.*, The Open Meetings Law, N.Y. PUB. OFF. LAW, art. 7, § 104 (McKinney 2009).

133. Interview with Dr. Michael Klemens, Rye, N.Y. (Sept. 2000). There are certainly exceptions to this practice. Boards will adjust their agenda to move priority items earlier in the evening if a large contingent of citizens is in attendance. Of course, there are plenty of boards that schedule controversial matters for later in the night, as well.

134. *Id.*

135. For a description of what due process requires, *see* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

they should be constructed as if they are on display, available for viewing by both the casual observers and involved parties. Again, the ultimate goal in transparency is to allow anyone who is interested (participant or not) to be able to look into the process and see what has happened, what is happening, and where the process is going.[136] Posting meeting notes, agendas, and schedules on websites can accomplish this effectively; however, depending on the community and the situation, a more engaged method of outreach may be necessary.[137]

The concept of transparency may make some attorneys uncomfortable because of a perceived strategic disadvantage for some clients. Providing the wrong information at the wrong time may prejudice the outcome. Being transparent, however, does not mean that all the information is discoverable; that would be both impractical and unwise. Transparency refers to information about the process—when meetings will be held, what will be discussed, who will be there—as well as information shared in the process. While this might be obvious to some, there is a danger that parties misunderstand what happens in a collaborative process. While a collaborative process has elements of cooperation, it also has assertive elements.[138] Assertiveness compels parties to be truthful and honest about the power they posses, the rights they have and what interests they want to see met.[139] Being assertive also requires a party to be strategic about what information they give out and when. Therefore, being transparent refers to what is happening in meetings and at the "table," but does not extend to the information parties decide not to share.

3. Responsive

Meeting this third element is the most challenging. The essence of responsiveness is that the parties are ultimately in control of the process and the outcome. Practically, being

136. David Strauss, *Designing a Consensus Building Process Using a Graphic Road Map*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 137 (Larry Susskind et al. eds., 1999) (providing an excellent example of process mapping).

137. *Id*.

138. *See* Ralph Kilmann, *supra* note 95.

139. *Id*.

responsive means that the process adjusts to new information and anticipates the next steps. Meeting this element requires constant attention from a skilled and patient process manager.

One of the flaws of the required process is that it is inflexible.[140] It requires a large amount of information to be collected and organized during the very early stages.[141] In significant development decisions, preparing an application can be very expensive.[142] Applicants spend hundreds of thousands of dollars gathering information, hiring experts, reviewing the applicable law, and drafting maps for the application prior to submission.[143] Making this investment places significant inertia behind the application, making a developer reluctant to consider alterations. An early collaborative process, such as a concept committee, helps applicants consider valuable alternatives before large amounts of money are spent and parties commit to their positions.

Lawyers favor the required process because they perceive it as predictable. Specifically enforceable time frames give this impression; however, when dealing with significant decisions, the promise of predictability is an illusion. Collaboration, on the other hand, is perceived as unpredictable because the governing guidelines are not codified or standardized ahead of time. Many lawyers may be hesitant to trade the perceived predictability of the required process for what looks like an ad hoc approach. The responsive nature of collaboration feeds this fear. How can a process be predictable if it changes in response to new information? How do we know what to expect?

While the required process may be predictable with as-of-right and ministerial decisions, the approval process for significant development decisions can be predictably unpredictable. Boards can delay their decision-making process if matters become too complicated or controversial. Laws can be

140. *See* Ellison v. City of Fort Lauderdale, 183 So. 2d 193 (Fla. 1966); City of Searcy v. Roberson, 273 S.W.2d 26 (Ark. 1954); *but see In re* Merson v. McNally, 688 N.E.2d 479 (N.Y. 1997).

141. *See* MILES ET AL., *supra* note 106.

142. *Id*.

143. *Id*.

changed or subject to different interpretations.[144] Appeals can add delay and inject doubt.[145] Board members can be removed or step down and new ones can be appointed or elected.[146] In short, when significant developments are subjected to the required process, predictability is not guaranteed.[147] Recognizing the fact that these situations are inherently complicated and ill suited for the required process, a properly designed collaborative process may actually present a more predictable option.

Most process managers will address predictability as the first order of business.[148] They engage parties to establish procedures that will address a variety of circumstances. How will we incorporate new information? What responsibility do parties have? How will we conduct our deliberations? How do we integrate new parties into the process? The best way to manage the uncertainty surrounding these questions and others is to create ground rules.[149] There are many good examples of useful ground rules and what is appropriate depends on the situation.[150] By establishing and following these ground rules, the participants will construct a process of their own making. The predictability

144. Laws on vested rights, while varying from state to state, explain when an applicant's rights to a particular approval become immutable or "vested." In some states, an approval is not vested until the applicant has made significant investment and considerable construction. *See* MANDELKER, *supra* note 15, § 6.12.

145. All local decisions can be appealed administratively or through the state court system. These appeals are costly and time consuming for all involved. By filing an appeal, an opponent can stall a project for years. *See* MANDELKER, *supra* note 15, §§ 8.12-.23.

146. Depending on the state and the type of board, members may be appointed or elected.

147. *See* BABCOCK, *supra* note 4.

148. CARPENTER & KENNEDY, *supra* note 40, at 118.

149. *Id*.

150. Interview with Mary Davis Hamlin, White Plains, New York, (Oct. 1999). Most ground rules call for respectful behavior to encourage productive deliberation. In some situations, ground rules such as "disagree without being disagreeable" will suffice. In other situations, where the environment is more hostile, more directive ground rules are required. For example, in a negotiation between animal rights advocates and trappers, one of the ground rules was "leave your guns at the door."

achieved through this approach can be more durable and satisfying than what is offered by the required process.[151]

One of the most important ground rules is how decisions are made.[152] Being an ad hoc process, the participants must agree on how they are to agree. Since the required process uses majority and supermajority voting, that is what most parties will be accustom to. Consensus and unanimity are more common in collaborative processes.[153] Accordingly, parties usually employ some form of consensus as the grounds for reaching a decision.[154] The creation and use of these ground rules makes the process more predictable and satisfying than the rigid required process.

By advocating for an inclusive, transparent and responsive process, attorneys will be more likely to satisfy clients and themselves. A process manager will have many strategies and techniques to meet these elements.[155] Attorneys recommending that clients participate in a collaborative process should review a proposed design before committing. If the three elements are not present, the client and attorney should contact the process manager to discuss deficiencies and design remedies. Since process design in this arena is generally flexible, attorneys can expect to influence the design. By contacting the process manager and raising concerns about perceived procedural deficiencies, the manager will have an opportunity to be responsive and either explain the design or make adjustments to build a better process.

E. A Consensus Agreement Does Not Substitute for the Board's Decision

Many attorneys counsel clients against participating in a collaborative process arguing that it improperly delegates the

151. SUSSKIND, VAN DER WANSEM & CICCARELLI, *supra* note 103, at 17 (reporting on a survey of 100 land use mediations where 84% of participants were satisfied with the process).

152. MOORE, *supra* note 85, at 430-31.

153. CARPENTER & KENNEDY, *supra* note 40, at 29.

154. *Id.*

155. SUSSKIND, MCKEARNAN & LARMER-THOMAS, *supra* note 93; GRAY, *supra* note 3; CARPENTER & KENNEDY, *supra* note 40; THEODORE W. KHEEL, THE KEYS TO CONFLICT RESOLUTION: PROVEN METHODS OF SETTLING DISPUTES VOLUNTARILY (1999).

municipality's authority to make decisions.[156] The argument mischaracterizes the purpose of a collaborative process and misses a crucial step. It assumes that the collaborative process is a *substitute* for the official decision-making process. If this were the case, discouraging advice would be fitting. However, in the consensus committees described above and according to best practices, the agreements reached are not substitutes for the required process.[157] Instead, the agreement reached in the committee becomes part of the application submitted to the government and is then subject to a full review by the decision-making body.[158] As part of this review, the government still has its statutory authority to approve the application, impose conditions or deny. Lawyers should be aware that, when following proper procedure, the consensus committee's agreement *supplements*, not *substitutes*, the required process.

Another misperception is that participation in the process ends when the agreement is reached. Attorneys may counsel clients to avoid a consensus process because they fear it will limit their ability to participate during the required process. This advice ignores the fact that an agreement of the committee does not amount to an official decision. After the committee reaches agreement, the landowner uses the agreement to craft an application.[159] Once it is submitted, the committee members can participate in the required process as members of the public, through public hearings, commenting on the deliberations. Participation in one process does not bar participation in the other. In the second case study, the developer made a major change to the application by switching the golf course from public to private after the agreement had been reached.[160] The committee members were furious with the change and made their opinions known to the government. In response, the developer

156. *See* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997).

157. SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 3, at 143-45.

158. *Id.*

159. Lawrence Susskind, Patrick Field & Alexis Gensberg, *Building Consensus: Dealing with Controversial Land Use Issues & Disputes*, 48 PLAN. COMM'R. J. 16, 19 (2002).

160. *See supra* Part II.B, para. 6.

explained the reason for the change and made accommodations to address their concerns.[161]

F. Agreements Must Be Monitored

If an agreement is reached through a collaborative process, it must be converted into a proposal, submitted to the government and then, if approved, the project must be built. Attorneys can help their clients by monitoring the required process and informing clients of important developments and relevant time frames. Many parties assume that agreements reached in negotiation will not change and be approved, unaltered, by the government. This is not always true in practice. As a proposal passes through the required decision-making process new information comes to light and alterations to the proposal may be required.[162] So long as the parties involved consider them minor and agree with the rationale, these alterations may be appropriate. In addition, non-lawyers may not be aware of what impact one decision in the required process will have on another. Lawyers can add value by monitoring any changes in the proposal and communicating the significance of those changes to the members of the committee.

Assuming that the board approves a proposal that resembles the concept committee's agreement, the next challenge is ensuring the project is built as approved. Again, lawyers are perfectly situated to certify that construction is progressing consistent with the committee's intent. If construction deviates from the permitted approval, the attorney can quickly inform the participants and the error can be cured in a timely manner.[163] By having attorneys monitor the implementation, parties can confidently return to their lives without fear that their hard work will be ignored.

CONCLUSION

The author does not argue that collaborative approaches such as concept committees should *replace* the required decision-

161. *Id.*
162. MILES ET AL., *supra* note 106, at 487-503.
163. SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 3, at 187.

making process and that they are appropriate in all situations. Rather, the author argues for a *supplemental* collaborative process to be used in significant development decisions where the government has considerable discretion when reviewing an application, when some form of development is likely to occur, and when any governmental decision is likely to be challenged. The four cases in Part II offer evidence of how this can be done and Part III presents a framework to guide lawyers. By supplementing the required process to deal with significant developments, lawyers can help communities improve their chances of attracting and approving the most appropriate projects while building civic capacity at a time when we desperately needed it. While these processes may require more time and thought early on, the benefits achieved in the long term make the effort worthwhile.

A review of these case studies reveals common elements that contributed to the success of the process. First, someone was responsible for managing the process. Second, the process was inclusive, transparent and responsive. Third, information sharing and flexibility were encouraged. Fourth, the collaboration began early in the process. Fifth, the process was supported and favored by the key parties including the decision-making boards. The parties stated that a collaborative approach is more likely to produce a better project, help the parties share reliable and relevant information, use time more efficiently, conserve resources by pooling the efforts of many, reduce the need for multiple experts, and build relationships. Based on their accounts and the results, we can see that interested process managers can help add collaborative elements to otherwise adversarial situations. Well-informed lawyers can play an influential role advocating for sound collaborative approaches and making up for the lack of a neutral process manager.

Attorneys who do not understand that these are supplemental processes will continue to discourage their use and miss opportunities to help their clients. This is not to say that the required process should always be supplemented—as there are advantages to the required process.[164] Those advantages, however, should be weighed against the disadvantages so clients

164. *See supra* Part III.A.

can make an informed decision regarding process. When clients are confronted with situations that are not appropriate for a strict adversarial environment, they need sound process advice from their counsel. Without such advice, client's needs go unmet and opportunities will be lost.

Seizing the opportunities presented by significant development decisions is of critical importance locally to our communities and collectively to our nation. Lawyers must actively promote and advance a new relationship with significant development decisions that not only protects against perils but also recognizes and takes advantage of inherent opportunities. Hopefully, this new relationship will set us on a course where more satisfying outcomes become the rule rather than the exception.