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Recommended Citation

John R. Nolon & Patricia E. Salkin, Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices, 60 J. Legal Educ. 519 (2011), <http://digitalcommons.pace.edu/lawfaculty/651/>.

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Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices

Patricia E. Salkin and John R. Nolon

Introduction

Appropriate preparation of students to practice land use law to serve clients effectively and to meet the changing legal and policy challenges that confront developers, governments, and communities is no longer possible using the traditional approach to legal education. The challenges that land use practitioners face include understanding the increased complexity of sustainable development law, navigating a labyrinthian regulatory system, learning and adjusting to rapidly changing statutory requirements, and responding to demands for innovation. These challenges require more of law school graduates: interdisciplinary knowledge, a careful integration of core doctrinal subject areas, proficiency with an array of practical skills, and awareness of ethics and appropriate professionalism. The opportunity to reinvent the manner in which land use law is taught may be born out of the

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The authors thank Amy Lavine, Esq. of the Government Law Center, Justin Myers, Esq. of Albany Law School, and Professors Keith Hirokawa and Mary Lynch of Albany Law School for their thoughtful review and input, as well as Albany Law School student Daniel Cummings and Pace Law School student Sarah Featherston for their research assistance. We also thank our colleagues who share our passion for the teaching of land use law and who participated in our focus groups and survey, as well as those who read drafts of this article and contributed valuable ideas and suggestions: Professor Tony Arnold at the University of Louisville Brandeis School of Law; Professor Jamie Roskie at the University of Georgia School of Law; and Professor Kinvin Wroth at Vermont Law School. Special thanks also to Professor Peter Byrne at Georgetown School of Law and the students in his environmental research workshop who took the time to review an earlier version of this article and provide feedback during one their seminars in the Fall, 2009 semester.

growing movement for fundamental change in the legal academy,¹ and this subject matter offers the perfect case study to demonstrate the demand for, and the benefits of, a new teaching paradigm.

A. Historical Overview of Land Use Law

Professor Jacob H. Beuscher from the University of Wisconsin School of Law was one of the early land use law professors.² In 1954, he produced the initial casebook on land use law with the assistance of a mimeograph machine. The book was revised in the late 1950s, again in 1964 and 1966, and then, in 1969, it became the first book on the subject of land use in West's American Casebook Series. That book was adapted from its mimeographed origins by Professor Robert R. Wright. Subsequent editions appeared in 1976 (co-authored by Professor Morton Gitelman), 1982, 1990, 1997, and 2003 (when the authors of this article joined in). In the Preface to the first national edition of the casebook in 1969, Professor Wright wrote that what was new at that time was not land use regulation itself, but the heightened emphasis on it as the law responds "to the needs of an increasingly urban, increasingly complex, increasingly frustrating society in which the use of our natural resources affects the lives of all of us. In the final analysis, this is why the subject is so important." These words could not be more apt today.

Many of the parents of today's graduate students were born in the 1950s. If they were alive in 1954, they might have been the first children to watch color TV, which became available commercially that year.³ They would have been the first to enjoy the Interstate Highway system, authorized by the Highway Act of 1954,⁴ or to witness the demolition and redevelopment of inner-city slums under the Urban Renewal Program, authorized by the Housing Act Congress adopted that same year.⁵ If they grew up in Minneapolis, they might have been the last to ride on the city's streetcar system, which ceased operating in 1954.⁶ They were also among the last students to study materials produced on a mimeograph machine.

1. Karen Sloan, *Reality's Knocking*, National Law Journal, Sept. 23, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463&slreturn=1&hbxlogin=1>. See also Edward Rubin, *What's Wrong With Langdell's Method, and What To Do About It*, 60 Vand. L. Rev. 607 (2007) (suggesting a 21st century law school curriculum that includes, among other things, an integration of experiential learning into the doctrinal classroom which can be accomplished with hands-on drafting exercises and other simulations).
2. See Preface to John R. Nolon, Patricia E. Salkin, Morton & Gitelman, *Land Use and Community Development* (7th ed., West 2008).
3. See Richard Powelson, *First Color Television Sets Were Sold 50 Years Ago*, Pittsburgh Post-Gazette, Dec. 31, 2003 ("The first coast-to-coast color TV broadcast was the Jan. 1, 1954, Tournament of Roses Parade on NBC.").
4. Federal-Aid Highway Act of 1954, 68 Stat. 70.
5. Housing Act of 1954, 68 Stat. 590.
6. See Minnesota Streetcar Museum, *Como-Harriet Streetcar Line History*, available at http://www.trolleyride.org/CHSL_Main/history.html.

The population of the United States topped 150 million in 1950.⁷ On October 16, 2006, our 50 states reached the 300 million population mark.⁸ New York was the most populous state in 1950;⁹ today it ranks third, trailing California and Texas.¹⁰ In 1950, only three states had over 10 million residents;¹¹ today there are eight.¹² The fastest growing states between 1950 and 1990 were those on the west coast, plus Florida and Texas.¹³ In 1950, just over half of the population resided in urban areas;¹⁴ today that number is almost 80 percent.¹⁵ The number of people 65 years of age or older has more than doubled in that time.¹⁶ The percentage of single-person and non-family households has grown

7. U.S. Census Bureau, Historical National Population Estimates: July 1, 1900 to July 1, 1999, *available at* <http://www.census.gov/popest/archives/1990s/popclockest.txt>.
8. *See* National Public Radio, Population Tops 300 Million, Oct. 17, 2006, *available at* <http://www.npr.org/templates/story/story.php?storyId=6282117>.
9. U.S. Census Bureau, Statistical Abstract of the United States 1952, at 11, *available at* <http://www2.census.gov/prod2/statcomp/documents/1952-01.pdf>.
10. U.S. Census Bureau, Population Estimates (geographies ranked by estimate), *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCTT1-R&-ds_name=PEP_2008_EST&-_lang=en&-format=US-40S&-_sse=on.
11. U.S. Census Bureau, *supra* note 10 (New York (14,922,000), Pennsylvania (10,540,000) California (10,592,000)).
12. U.S. Census Bureau, *supra* note 10 (California (36,756,666), Texas (24,326,974), New York (19,490,297), Florida (18,328,340), Illinois (12,901,563), Pennsylvania (12,448,279), Ohio (11,485,910), Michigan (10,003,422)).
13. *See* Steve H. Murdock, *An America Challenged: Population Change and the Future of the United States 17-20* (Westview Press 1995) ("The population of the United States is redistributing itself from the Northeast and Midwest to the South and West. In 1900, 62.2 percent of the US population resided in the Northeast and Midwest, but by 1990 only 44.4 percent of the population resided in these two regions. During the 1980s, the concentration of growth in the South and West was evident. Just three states—California, Florida, and Texas—accounted for 54 percent of all the population growth in the United States between 1980 and 1990. Of the ten states with the fastest percentage growth in population, only one, New Hampshire, was not in either the South or West.").
14. The definition of "urban" changed in 1950, with the result that under the former definition, 50 percent of the 1950 population was considered urban, while under the latter definition, 64 percent of the population was urban. U.S. Census Bureau, *supra* note 10, at 28.
15. According to the 2000 Census, the total U.S. urban population was 222,360,539, while the rural population was 59,061,367. U.S. Census Bureau, Data Set: Census 2000 Summary File 1, P2, Urban and Rural, *available at* http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&-ds_name=DEC_2000_SF1_U&-_lang=en&-mt_name=DEC_2000_SF1_U_P002&-format=&-CONTEXT=dt.
16. In 1950, 8.3 percent of the population was over age sixty-five, and 1.1 percent was over age eighty; those numbers jumped to 12.3 percent and 3.2 percent, respectively, by 2000. Dudley L. Poston & Michael Micklin, *Handbook of Population* 148 (Springer 2006). Because the overall population of the United States has doubled since 1950, *supra* notes 8-9, the number of persons in these age groups has more than doubled.

from about 10 percent in 1950 to more than 30 percent in 2000.¹⁷ The minority population in the United States is now larger than the entire population count in 1910, with one out of every three Americans identifying themselves as non-white.¹⁸

Between 1950 and 1960, when Professor Beuscher's students were first learning land use law, "white flight" set in and millions of Americans moved to the suburbs.¹⁹ By the early 1990s, the movement of people from cities to the countryside involved a massive forty-year shift in the location of jobs, houses, retail, and commercial development.²⁰ Much of this new development displaced areas previously dedicated to farming, ranching, or forestry.²¹ The vast movement of people across the landscape was fueled by low cost mortgages, highway construction, and improvements in building technology.²² These influences lowered per acre population densities on average and caused development to sprawl as it grew, using land at much higher percentages of growth than the increase in population itself. Between 1950 and 1990, for example, St. Louis experienced a 355 percent increase in developed land while its population grew by only 35 percent.²³ From 1950 to 1980, the population in the vast Chesapeake Bay watershed area increased by 50 percent, while the land developed to serve that population increased by 180 percent.²⁴ As the population shifted, cities lost their affluent residents and businesses to nearby suburbs and became more and more deteriorated and impoverished: "tight knots of despair from which men turn," to quote the U.S. Supreme Court in *Berman v. Parker*.²⁵

Each of these changes implicates land use law. In just two generations the American landscape has been transformed and land use law has adapted in response. During the lifetimes of today's graduate students, unprecedented

17. U.S. Census Bureau, Table HH-1, Households, by Type: 1940-2003, *available at* <http://www.census.gov/population/socdemo/hh-fam/tabHH-1.xls>.

18. U.S. Census Bureau, Minority Population Tops 100 Million, May 17, 2007, *available at* <http://www.census.gov/newsroom/releases/archives/population/cbo7-70.html>.

19. *See generally* William H. Frey, Central City White Flight: Racial and Nonracial Causes, 44 *Am. Soc. Rev.* 425-48 (1979).

20. Edwin S. Mills, Large Metropolitan Areas: Their Functions and Prospects, National Rural Studies Committee: A Proceeding 94, 97 (E. Castle, ed., May 1992).

21. *See, e.g.*, American Farmland Trust, Farming on the Edge Report, *available at* <http://www.farmland.org/resources/fote/default.asp>.

22. *See generally* Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (Oxford Univ. Press 1985).

23. Ralph E. Heimlich & William D. Anderson, Economic Research Service/U.S. Dept. of Agriculture, Development at the Urban Fringe and Beyond: Impacts of Agriculture on Rural Land 9 (Diane 2001), *available at* <http://www.ers.usda.gov/publications/aer803/aer803c.pdf>.

24. *Id.*

25. 348 U.S. 26 (1954).

challenges to the land and its resources will be confronted. By 2050, the population of the US is projected to grow to 392 million,²⁶ calling on the private sector to build millions of new homes and billions of square feet of commercial and industrial buildings. Where the new members of our growing population will live and work and the nature of the spaces they will occupy will greatly affect our carbon footprint and hence impact on global climate change.

B. The Changing Practice of Land Use Law in the 21st Century

The practice of land use and community development law has grown more complex and the challenges facing the players in the land use development game increasingly require an interdisciplinary approach to meet client demands. Historically, land use control was considered by most states to be a matter of local concern, and states empowered municipalities to enact zoning laws and other local land use regulations to guide planning and development decisions, resulting in a robust body of state-specific case law.²⁷ Today, the practice of land use law involves a significant federal dimension, resulting in part from the enactment of a number of key federal statutes that have varying degrees of preemptive or influencing effect on local actions (e.g., the Fair Housing Act Amendments,²⁸ the Americans with Disabilities Act,²⁹ the Telecommunications Act,³⁰ and the Religious Land Use and Institutionalized Persons Act³¹). Furthermore, prior to the 1970s, there was a minimal body of federal constitutional case law in the field of land use law.³² A boom then erupted with an ever-growing body of federal case law involving multi-faceted aspects

26. US Census Bureau, National Population Projections, *available at* <http://www.census.gov/population/www/pop-profile/natproj.html>.

27. *See generally* Patricia E. Salkin, *American Law of Zoning*, § 3:1 (5th ed., West 2010).

28. 42 U.S.C. §§ 3601, *et. seq.*

29. 42 U.S.C. §§ 12101, *et. seq.*

30. Telecommunications Act of 1996, 110 Stat. 56 (1996).

31. 42 U.S.C. §§ 2000cc, *et. seq.*

32. For example, a landmark case in the area of the constitutionality of zoning was *Euclid v. Ambler*, 272 U.S. 365 (1926); and in the area of regulatory takings, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

of the Fifth and Fourteenth Amendments as applied to land use regulations,³³ as well as the First Amendment as it relates to signs and billboards,³⁴ adult business uses,³⁵ and siting of religious land uses.³⁶

The landscape further shifted as practitioners and academics began to recognize the strong overlap between environmental regulation and land use regulation to achieve sustainability.³⁷ This has challenged practitioners (and teachers of land use law) to understand the interconnectivity of what have traditionally been two distinct practice areas—land use law and environmental law—and it has demanded that practitioners become conversant with state and federal environmental laws and regulations. It has also challenged land use lawyers to creatively advise clients on how to effectively use the array of land use regulatory tools available to achieve a variety of environmental goals. Most recently, people are realizing the strong connection between local land use regulation and greenhouse gas reduction strategies, again highlighting the critical linkages and opportunities in this practice area.³⁸ The siting of

33. This growing body of federal case law involved challenges based on takings, substantive and procedural due process, equal protection, and eminent domain. Cases include *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 428 U.S. 304 (1984); *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Lingle v. Chevron*, 544 U.S. 528 (2005); and *Kelo v. New London*, 545 U.S. 469 (2005).
34. The highway beautification movement led to the enactment of the Highway Beautification Act of 1965, codified at 23 U.S.C. § 131, and sparked litigation over balancing the public interest in removing billboards believed to be eyesores and distractions with the rights of owners/advertisers to communicate with the public. First Amendment sign cases, involving issues such as commercial speech, political speech, and content neutrality, included *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).
35. One aspect of community redevelopment that accelerated in the 1990s was the desire to rid cities and communities of crimes relating to drugs and prostitution through the strict regulation of the location and operation of adult business uses. Cases decided by the Supreme Court relating to local government's power to restrict adult expression included *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1985) and *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).
36. The siting of religious land uses was not a heavily litigated topic until passage of the Religious Freedom Restoration Act in 1993, 42 U.S.C. § 2000bb. The Act was struck down by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a case involving restrictions on a church located in a historic district. Following the case, Congress enacted the more limited Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, which has inspired a torrent of litigation challenging land use regulations as applied to religious properties. *See generally* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Federalism*, 40 Urb. Law. 195 (2008).
37. *See* John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 Harv. Envtl. L. Rev. 365 (2002); *New Ground: The Advent of Local Environmental Law* (Environmental Law Institute 2003).
38. John R. Nolon, *The Land Use Stabilization Wedge Strategy: Shifting Ground To Mitigate Climate Change*, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 1 (2009); Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and*

renewable energy is yet another example of how local control is being tested in this area.³⁹ On the horizon is the next frontier of environmental justice litigation, which will focus on land use decision making that disproportionately impacts low-income and minority communities.⁴⁰ Traditional law school land use law casebooks are just beginning to recognize these trends.⁴¹

A third shift underway in the practice of land use law is the introduction of, and increasing reliance on, technology in the planning and regulatory environments. For example, planners, engineers, and others are relying on geographic information system data to assess various aspects of project impacts, as well as to develop maps and other graphic illustrations to explain and support project proposals and government review.⁴² Technology such

Regulations To Address Climate Change Challenges and Preserve Resources for Future Generations, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 121 (2009); John R. Nolon, Shifting Ground to Address Climate Change: The Land Use Law Solution, 10 Gov't L. & Pol'y J. 23 (2008); Patricia E. Salkin & Jessica A. Bacher, Modernization of New York's Land Use Laws Continues To Meet Growing Challenges of Sustainability, 29 Pace L. Rev. 563 (2009).

39. Patricia E. Salkin & Ashira Pelman Ostrow, Cooperative Federalism and Wind: A New Framework for Achieving Sustainability, 37 Hofstra L. Rev. 1049 (2009).
40. Craig Anthony Arnold, Planning Milagros: Environmental Justice and Land Use Regulation, 76 Denv. U. L. Rev. 1 (1998); Patricia E. Salkin, The Intersection Between Environmental Justice and Land Use Planning, Planning and Envt'l. Law (May 2006); EPA, National Academy for Public Administration, Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning, July 2003, *available at* <http://nepis.epa.gov/Exe/ZyNET.exe/500005ER.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2000+Thru+2005&Docs=&Query=300R03900&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=pubnumber^%22300R03900%22&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=pubnumber&IntQFieldOp=1&ExtQFieldOp=1&XmlQuery=&File=D:\zyfiles\Index%20Data\00thru05\Txt\00000007\500005ER.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h|-&MaximumDocuments=10&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p|f&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x>; Craig Arnold, Fair and Healthy Land Use: Environmental Justice and Planning, Planning Advisory Service Report No. 549/550 (American Planning Association 2007).
41. *E.g.*, John R. Nolon, Patricia E. Salkin & Morton Gitelman, Land Use and Community Development: Cases and Materials (7th ed., West 2007) (covering the traditional techniques of land use control, including zoning and planning, as well as emerging matters including land use mediation, local environmental law, housing and community development, referenda and initiatives, smart growth, and energy.); Charles M. Haar & Michael Allan Wolf, Land Use Planning and the Environment (Environmental Law Institute 2010) (According to the description, "Throughout the casebook, the authors identify and explore intersections between land use planning law and environmental regulation. They also identify the hidden environmental 'agenda' behind exclusionary zoning, the impact of urban sprawl on clean air and critical habitats, and other interconnections.").
42. *See, e.g.*, U.S. Dept. of Transportation, Federal Highway Administration, GIS in Transportation, *available at* <http://www.gis.fhwa.dot.gov/>; Hawaii Statewide GIS Program, *available at* <http://hawaii.gov/dbedt/gis/>; Nikki Cross, Thoughts from a GIS-Planner, The New Planner, Fall 2008, *available at* <http://www.planning.org/thenewplanner/2008/fall/gis.htm>.

as Google Maps⁴³ and other internet-accessible data (such as Census data) are testing the limits of land use practitioners who lack the training required to identify critical issues related to the use of technology, which opens the door to potential malpractice claims.⁴⁴ While planning schools offer hands-on courses in the use of these new technologies, they are not typically part of the curriculum in law school.

Fourth, litigation has grown more costly in the land use field, yet the pressure to litigate is not dissipating, in large part because of the value of land in many parts of the country. Land use lawyers may be more valuable to all clients in the land use game if they demonstrate a mastery of alternative dispute resolution skills in the public policy arena. Negotiation and mediation skills are unique when government is a party because the discussions are more public and the implications of voluntary agreements may involve public ramifications for the government decision makers, who must often answer to constituents. Since not every recent law school graduate has experienced a skills course in negotiation, mediation, or alternative dispute resolution, much less one that covers these skills in the public policy context, many new land use lawyers are not adequately prepared to find alternative solutions to litigation in this field. These skills are essential for land use lawyers to be effective and successful.

The challenges that these changes in land use law practice present are compounded by the fact that many lawyers lack basic skills that law professors may assume they possess. These include writing for varied audiences (e.g., a court, a lay person client, a municipal official, and opposing counsel), the ability to interpret statutes, the ability to draft and analyze local regulations, and the ability to craft persuasive advice for clients. Students interested in land use and sustainable community development law may graduate from law school having never looked at the types of documents they will be required to review and draft, nor having ever reviewed the types of government forms they will be required to complete and review in the community development process (e.g., an application for an area variance or a building permit, or an environmental assessment form). They will have read about them in cases, but it is difficult to conceptualize or visualize complex land use documents when there is no point of reference.

The changing dynamics in the field of land use and sustainable community development law demand that land use law professors rethink the way in which we prepare students to practice law in this area. This paradigm shift converges with the growing momentum of the best practices movement,⁴⁵ which urges law schools to dramatically revise the curricular approach to legal education. A perfect storm is present, and a unique opportunity exists through

43. Google Maps can be accessed at <http://maps.google.com>.

44. Patricia E. Salkin, *New York Zoning Law & Practice*, Chapter 36A (4th ed., West 2010).

45. *See generally* Best Practices for Legal Education Blog, *available at* <http://bestpracticeslegaled.org>.

the application of many “best practices” concepts for land use law faculty to lead the academy in reinventing curriculum and teaching strategies to better prepare students for the practice of law. A brief history of the best practices movement is described in Part II, as well as an assertion as to why land use should be the “poster child” for best practices. Part III reports on an empirical survey of land use law professors conducted by the authors in 2008 that examines, among other things, the opportunities to apply best practices to the subject of land use law. It also offers innovative examples of teaching methods that can be effectively utilized within the confines of the traditional classroom, using the land use law course as a model, as well as an example of how the land use law course can be used as a best practices capstone experience. The article concludes in Part IV with the observation that the shortcomings of traditional casebook approaches to teaching land use within the four walls of the classroom can be easily converted into exciting opportunities that engage student learners, stretch the limits of student creativity, continue to instill and refine a sense of professionalism in law students, and, consistent with the findings and recommendations of the *Best Practices* report and related literature, prepare students to be more effective lawyers when they graduate.

II. The Case for Best Practices

A. Background

For more than one hundred years the Carnegie Foundation for the Advancement of Teaching has been helping educators to improve the effectiveness of their teaching by undertaking studies of teaching techniques and effectiveness.⁴⁶ Going back to the Flexner Report of 1910, reports from the Carnegie Foundation have had an enormous impact on the education of professionals.⁴⁷ The Carnegie Foundation’s latest look at legal education culminated in the publication of *Educating Lawyers* in 2007.⁴⁸

Also in 2007, the Clinical Legal Education Association (CLEA) published its capstone work based on a six year study of legal education, titled *Best Practices for Legal Education* (“*Best Practices*”).⁴⁹ Going beyond *Educating Lawyers*’ carefully articulated theories on legal education, *Best Practices* outlines both reasons

46. The Carnegie Foundation for the Advancement of Teaching, About Carnegie, available at <http://www.carnegiefoundation.org/about/index.asp?key=13>.

47. See generally Molly Cooke, M.D., David M. Irby, William Sullivan & Kenneth M. Ludmerer, American Medical Education 100 Years After the Flexner Report, 355 New Eng. J. Med. 1339 (2006).

48. See William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* 15 (Jossey-Bass 2007) [hereinafter *Educating Lawyers*].

49. Roy Stuckey and Others, *Best Practices for Legal Education: A Vision and A Road Map* (CLEA 2007) [hereinafter *Best Practices*]. CLEA was incorporated in 1992 with a mission of developing and supporting clinical education as a means of preparing law students and lawyers for more effective legal practice, see CLEA Mission Statement, available at <http://cleaweb.org/index2.php#/info/1/>.

to change current legal education norms, as well as specific suggestions for making these improvements. Preceding both *Educating Lawyers* and *Best Practices* was a 1992 report issued by the American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap, titled *Legal Education and Professional Development—An Educational Continuum*, also referred to as the McCrate Report. A key finding of the report was that law schools were not doing an adequate job of instilling in future lawyers the types of professional skills and values necessary to the practice of law.⁵⁰

The Carnegie Foundation reports that law schools are doing some things very well, such as quickly socializing students into the standards of legal thinking.⁵¹ However, the report points out that this rapid socialization comes at a price, and suggests that legal education has been, and remains, generally over-dependent on its signature pedagogy, the Socratic dialogue and case method.⁵² The *Best Practices* project further pointed out that the Socratic dialogue and case method lends itself to humiliation of students,⁵³ and that when students are not called on, they are often so relieved that they stop paying attention.⁵⁴ To overcome these deficiencies, *Best Practices* provides a comprehensive list of suggestions that offers the promise of moving legal education towards achieving the goal of producing more competent, skilled, and ethical lawyers.⁵⁵

Consistent with the global movement towards outcomes-focused education,⁵⁶ a key *Best Practices* principle is that law schools commit to preparing students to practice law “effectively and responsibly in the contexts they are likely to encounter as new lawyers.”⁵⁷ It is suggested that this be accomplished through clearly articulated educational goals⁵⁸ and that the goals of each course be articulated in terms of desired outcomes,⁵⁹ with the aim of developing competency in the ability to resolve legal problems effectively and responsibly.⁶⁰ Desired *Best Practices* outcomes include helping students to

50. ABA, MacCrate Report, July 1992, available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

51. See *Educating Lawyers*, *supra* note 48, at 185.

52. *Id.* at 186.

53. See *Best Practices*, *supra* note 49, at 216.

54. *Id.* at 222.

55. See *Educating Lawyers*, *supra* note 48, at 27. The authors recommend viewing legal education in terms of The Three Apprenticeships: the intellectual apprenticeship, the practical apprenticeship, and the identity apprenticeship.

56. See *Best Practices*, *supra* note 49, at 46 (discussing the transition in legal education to outcome-focused systems in Scotland, Northern Ireland, England and Wales).

57. See *id.* at 39.

58. See *id.* at 40.

59. See *id.* at 55.

60. See *id.* at 59 (The accompanying principle describes this ability as including an ability to

acquire skills such as self reflection and lifelong learning skills, intellectual and analytical skills, and core knowledge and understanding of the law.⁶¹

Many see *Best Practices* as a movement driven by clinicians with little, if any, relevance to the educational methodology used in doctrinal classrooms; however, *Best Practices* is more appropriately described as *inspired* by clinical methodology and values. In part, *Best Practices* was created with the belief that “there is general agreement today that one of the basic obligations of the law school is to prepare its students for the practice of law.”⁶² In accordance with the accreditation standards of the ABA, all ABA-approved schools must “maintain an education program that prepares its students for admission to the bar and *effective and responsible participation in the legal profession*.”⁶³

B. Land Use Law as a Candidate for Best Practices

The goals and recommendations set forth in *Best Practices* dovetail perfectly with the challenges articulated above in re-engineering how land use law is taught to law students. This doctrinal course is also a good candidate for implementing best practices due in part to its relatively short history in legal education.⁶⁴ Following the Supreme Court’s 1926 decision in *Euclid*,⁶⁵ American legal education institutions slowly began to address land use law as a distinct topic.⁶⁶ Today, land use law is specialized enough that nearly all law schools offer land use as an upper-level course⁶⁷ taught by tenured or tenure track faculty. More importantly, a unique aspect of land use law that does not exist in most other courses taught in law school is that it incorporates many traditionally distinct pedagogical silos, requiring both students and practitioners to have a mastery of the substantive subject matter of, at a minimum, property, contracts, constitutional law, administrative law, environmental law, state and local government law, alternative dispute resolution, negotiation, and legislative interpretation. Further, it demands familiarity with documents not typically introduced in Langdellian case-based classes such as actual comprehensive plans, local zoning laws and ordinances, environmental studies, and reports

work with clients to identify objectives and evaluate the merits and risks of options and to provide advice as to solutions; the drafting of needed agreements and documents to complete transactions; and the planning and implementation of strategies for the movement and ultimate conclusion of the matter).

61. *See id.* at 65.

62. *See id.* at 16.

63. *See id.* at 39 (citing ABA Standards 301(a)).

64. Keith H. Hirokawa, Critical Enculturation, Using Problems To Teach Law, 2 Drexel L. Rev. 1, 2 (2009).

65. *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

66. Hirokawa, *supra* note 64, at 2, 16.

67. *Id.* at 18 (discussing pluralistic nature of land use law, which includes aspects of property, government, and constitutional law).

that contain information critical to effective client counseling in the field.⁶⁸ The breadth of the land use field presents an opportunity to draw upon the teaching resources across the law school curriculum to develop more comprehensive and realistic best practices experiences for students in the land use law course, providing an opportunity to integrate theory, doctrine, and practice. This is discussed more fully below.

Finally, land use law offers a certain accessibility that lends itself to some of the more “hands on” best practices. Every law school sits on land that is subject to zoning laws with one or more local planning or zoning boards and a local legislative body overseeing it. Furthermore, most law students live in communities that regulate the type of housing on their streets, whether different uses (e.g., residential, retail, offices) are permitted in their zoning districts, and other aesthetic issues. The realization that neither renters nor homeowners can truly use their property interests in any way they so choose is an immediate attention grabber for students, who often take on the course with great personal interest. This “sense of place”⁶⁹ for law students provides an immediate connection and allows for implementation of many best practices.

III. Survey of Land Use Law Professors

Having been through two major updates to a land use casebook and the publication of a new student study aid,⁷⁰ the authors were curious as to whether our approach to the subject matter was consistent with the approaches of our colleagues at other institutions, and we wanted to ascertain how others were incorporating the growing diversity of subject matter and required skills into their courses. In the winter of 2008, we designed a survey to elicit this information. An initial draft of the survey instrument was shared with a group of land use law professors at the January, 2008 annual meeting of the Association of American Law Schools. After revisions to the instrument were made, the survey was sent to the small pilot group for completion before being sent to the larger population in order to ensure that the questions were clear. The final survey was sent to all full-time law professors who were identified by individual law schools as teaching land use law. A total of 150 surveys were mailed, and fifty-five colleagues completed and returned the survey instrument. The overall response rate was roughly 36 percent. The survey results reveal many interesting trends, including the fact that many land use law professors are already integrating best practices into their courses in a number of innovative ways.

68. Other doctrinal courses, such as criminal law and procedure, are essential for land use enforcement matters, and energy law, the law of climate change, access to government, professionalism and ethics, state and local finance, and state constitutional law are also frequently a part of the land use lawyer's portfolio of legal issues.

69. Tony Hiss, *The Experience of Place* (Knopf 1990).

70. Nolon, Salkin & Gitelman, *Land Use and Community Development: Cases and Materials*, *supra* note 41; John R. Nolon & Patricia E. Salkin, *Land Use in a Nutshell* (5th ed., West 2006).

A. Demographics

Faculty who have been in the field for a long time may be set in their ways in terms of teaching style, while newcomers to the subject matter, who may have entered the academy with more recent practical experience in the field, may be more willing to experiment with newer teaching methods and topics. The 2008 survey revealed that the median length of time respondent law professors have spent teaching Land Use is eighteen years. Most seemed to be either in their early years teaching or way at the other end of the spectrum, with twenty to forty years of experience. With respect to practical experience, twenty-eight out of fifty-four respondents indicated that they are engaged in the practice of land use law. Relatively few (thirteen out of fifty-five, or 24 percent) have served as an expert witness in a land use matter.

Size of the class may also play a role in developing the most appropriate hands-on experiences for students. For example, faculty who teach large doctrinal classes with one hundred or more students may be limited in their ability to have students work on actual projects. The survey results report that the average enrollment for land use law courses is twenty-nine students, with class size varying from seven to fifty students. Certainly the smaller seminar sections offer outstanding opportunities for small group participatory experiences (examples of which will be discussed below).

In terms of the frequency of the land use course on the schedule, 74 percent of law schools responding offer the course once per year. Surprisingly, 13 percent offer the course every semester. Nine percent reported offering the class every other year, and 6 percent offer the course sporadically.

An overwhelming 81 percent of the faculty responding indicated that the course is offered for three academic credits. Some schools offered two credits and some four. Questions are beginning to arise as to whether the land use course can be effectively taught as a three credit course and still capture the various changes to and added dimensions of land use law practice. It has been suggested that the course be organized into a two or three credit introduction to land use law, and a two or three credit course in the constitutional dimensions of land use law. Seventy-four percent of the respondents indicated that their school did not currently offer a course in takings/inverse condemnation, and 52 percent of those respondents thought that it would be a good idea to add this course to the curriculum.

B. Customizing the Legal Landscape of the Course

Since the community surrounding the law school provides faculty with fertile ground for practical teaching moments in land use law, the authors sought to determine how many colleagues supplement national casebooks with state and regional laws and regulations, and how many took advantage of local planning and zoning meetings in the surrounding municipalities. Sixty-two percent (31/49) of those responding to this question use zoning ordinances or land use plans to supplement the casebook. The response

was fairly evenly split regarding either encouraging or requiring students to attend local zoning or planning board meetings (twenty-nine indicated they have the students experience this and twenty-six do not). Respondents do overwhelmingly expose their students to state statutes such as the planning, zoning, and/or subdivision enabling laws, with 85 percent doing so (47/55). Sixty-seven percent do not introduce students to state court cases that are not in the casebook (37/55). Generally, when state cases not found in casebooks are introduced to students, the cases are only from the state where the law school is located.

C. Integration of Technology into the Modern Land Use Law Curriculum

As noted in the Introduction, technological advances in the practice of land use law have made it imperative for students to be exposed to, among other things, geographic information systems (GIS) and web-based tools. Using GIS as an example, land use lawyers must know how to read and interpret data that is produced by the GIS technician. This means that lawyers must be familiar enough with the technology to ask the pertinent questions regarding data integrity, and lawyers must know enough about the GIS field to find and question experts in the use of GIS. Privacy and access to records issues also arise in this area. In addition, as many municipalities have posted laws and ordinances online, students must become familiar not just with the benefits, but also the legal drawbacks of relying on these postings. For example, municipalities eager to have an internet presence readily post laws and regulations, but experience has shown that enthusiasm wanes when it comes time to regularly update the site. Attorneys relying solely on internet ordinances from the official website of the municipality may be committing malpractice.

Our survey reveals that slightly less than half of respondents teach their students how to obtain ordinances online (26/55). Few faculty show students how GIS can be used to understand land use actions (16 percent or 9/50). Forty percent (22/55) use satellite technologies or other pictorial means to study particular sites related to cases taught, with Google Maps mentioned several times. The authors sought to determine whether faculty would consider other technology, such as Computer Assisted Legal Instruction (CALI),⁷¹ to supplement traditional doctrinal teaching. Twenty-four percent of respondents would use a CALI model if one were available, 7 percent said they might use such a resource, and 51 percent said they would not use CALI. Thirty-six percent of faculty respondents indicated that they have a website for their land use course.

71. See The Center for Computer-Assisted Legal Instruction, available at <http://www.cali.org/>.

D. Best Practices Currently Employed in the Land Use Law Classroom

1. Simulations

The simulation model requires teachers to think about the classroom as more than a place where students are exposed to information. Under this model, students are challenged with the application of the lessons in a more practical, lawyering context. As mentors, faculty assign projects typically encountered in the field and identify the tools and expectations relevant to the task. Students are then subjected to professional standards of methodology and competency as they engage in professional duties and complete their identified tasks.

The simulation approach is amenable to a wide variety of land use lessons and skills. A land use course might incorporate lessons for evaluating property title and third party interests that impact a land use application. Further, the course might expose students to property characteristics (e.g., wetlands, lot dimensions) that can be researched in GIS databases that might implicate the types of development restrictions that apply to the property. Students could be asked to prepare for client counseling on an adverse administrative decision, or could prepare an expert witness for testimony at a land use hearing. Or, a land use course could focus on other fundamental lawyering skills, as particularly needed by land use attorneys, such as drafting (e.g., ordinances, contracts, conditions of approval) and oral argument (e.g., before administrative and legislative bodies).

A. DRAFTING

The most basic method to accomplish this skill is to have students complete a drafting assignment. Thirty-eight percent of the survey respondents reported incorporating this skill into their land use course. The types of drafting assignments varied. For example, some faculty require students to draft memos to a fictional senior partner on a hypothetical client problem. Others ask for letters recommending strategies for gaining approval of a hypothetical project, or bench memos based on ongoing local disputes. In fulfillment of the Best Practices directive to law schools to improve the odds of their students passing the bar exam,⁷² these exercises can be easily modified to resemble the Multistate Performance Test (MPT) portion of many state bar exams.⁷³

B. ORAL ADVOCACY

Land use attorneys frequently appear before local boards to advocate on behalf of their clients. Law school advocacy skills courses typically train students to speak to judges, to negotiate with other attorneys, and to communicate with

72. Best Practices, *supra* note 49, at 15.

73. Currently used in over thirty states and territories, the MPT is designed to test a student's ability to perform common lawyerly tasks such as, writing a memorandum to file, a letter to a client, a contract provision, or a settlement proposal. Students are provided with a "file" and a "library" of materials from which they must identify, analyze, and apply relevant facts and rules of law. *See generally*, <http://www.ncbex.org/multistate-tests/mpt/mpt-faqs>.

clients. In the land use context, an additional skill set is required as land use lawyers routinely advocate for their client's interests before local boards and commissions and in very public and political settings. Not only are members of the public (often including project opponents) present for these meetings, but often the media is there to capture and report on what was said during these meetings and hearings. Fortunately, the opportunity to observe these practice settings is readily available to law students.

One survey respondent reported having the students complete an oral argument in class, while two others indicated that they require their students to participate in mock hearings.⁷⁴ The professors who split their students into teams for the mock hearings are also utilizing another best practice: encouraging collaboration.⁷⁵ One survey respondent supplements the text book with information on preparing for hearings and building relationships with stakeholders.⁷⁶ This is exactly the kind of practical information that has been missing from traditional doctrinal courses.

One best practice that land use law professors seem to be applying in their classrooms regularly is the integration of practicing lawyers and judges into the program of instruction.⁷⁷ Of the survey respondents, 51 percent reported utilizing this best practice in their courses.⁷⁸ Often this took the form of inviting attorneys practicing land use law, but also sometimes included experts such as planners or even the local mayor.⁷⁹

Another faculty member reported that his students participate in a simulation of a Metro Board of Zoning Adjustment (BOZA) hearing concerning a conditional use permit for a proposed biofuel plant on property located in a low-income African American neighborhood whose residents are concerned about environmental injustices of land use and environmental decisions.⁸⁰ The simulation is based on a real-world Conditional Use Permit (CUP) application (along with a relevant application file and other documents) that was abandoned in the face of community opposition. Given that the BOZA never reached a decision on the actual CUP application, it gives the students some freedom to develop their own hearing presentations or decisions. One group is designated as BOZA members or Metro government staff. A second group is assigned various roles in the applicant corporation, and to make the case for the CUP permit. A third group is assigned to represent various community-group roles (mostly opponents from the affected neighborhood or from environmental groups, as well as one supporting group—the equivalent

74. Survey Summary at 3.

75. See Best Practices, *supra* note 49, at 119.

76. Survey Summary at 3.

77. See Best Practices, *supra* note 49, at 157.

78. Survey Results at 3.

79. *Id.* at 3.

80. Professor Anthony “Tony” Arnold, University of Louisville Brandeis School of Law. Description of the course is on file with the authors.

of a chamber of commerce). The students prepare their presentations and then a mock hearing is held over a 3–4 hour period, in which the BOZA is expected to deliberate and reach a decision.

All of these methods can be used to support the best practices of employing context-based education and using multiple methods of instruction to reduce reliance on the Socratic dialogue and case method. By doing so, land use law professors can help lead the way in helping legal education to move towards making better lawyers.

2. Albany Law School's Best Practices in Land Use Law

In the land use law course at Albany Law School, students learn skills they will be required to demonstrate in practice through a combination of the use of narrative,⁸¹ problem-based learning, best practices, and the traditional case method. The first assignment students are given is to read the newspaper covering a locality or region of their choice and to bring to class a “story” about a current land use dispute. The sharing of these narratives by students immediately sets the stage for the breadth of legal issues covered during the semester and it demonstrates the relevance of the course by providing an opening to discuss the legal, economic, political, and social dynamics of community development.

Students are next required to obtain a printed copy of a local zoning ordinance. The students specifically must obtain a printed copy because often local government websites may not have the most current versions of the ordinance. The teaching outcomes for this exercise include: making sure students know where to go to obtain a current copy of the local law (e.g., is it the clerk's office, the planning department, or some other local office within the municipality?); having students experience the challenge of obtaining an actual copy of a local law that is not available on the traditional online legal resource databases (e.g., Westlaw or Lexis); letting students experience the bureaucracies of localities where they will be practicing when it comes to land use and development (e.g., was the law readily available, was there a cost to obtain a copy; was a freedom of information request necessary to obtain the law; was the law available with no questions asked?); and determining whether the municipality routinely provides to the public current versions of the law as well as the zoning map that is often a statutorily defined part of the narrative text. Students next work with the zoning ordinances they selected to learn how to read and interpret laws and ordinances. They see that unlike state statutes, local laws and ordinances take different formats and lack a uniform style and substance. Starting with a comparison of how the early model planning and zoning enabling acts were organized,⁸² class time is spent comparing and contrasting provisions in the various local zoning laws, including the definition sections, the number and different kinds of zoning districts, the varied size of

81. See section 5A below.

82. Copies of the Model Acts may be accessed via the MyAPA website, *available at* <http://myapa.planning.org/growingsmart/enablingacts.htm>.

local planning and zoning boards, and when the ordinance was last updated. The ordinances are then used in future classes as a supplemental teaching tool to demonstrate differences in local approaches to other topics covered in the course such as nonconforming uses. When covering that topic, students get a hands-on examination of how the drafting of language makes a difference with respect to periods of abandonment and discontinuance of use.⁸³

Short of simulating planning or zoning board meetings, students are required to complete two assignments while working through the casebook section on the decision making structure in land use planning and regulation. The first is a research exercise in which the students learn about the “players” in the land use game. Each student is asked to sign-up to research and report on one of the following “players” they will meet in cases to be read in class (for example, a planning board member, zoning board member, local legislator, municipal planner, municipal attorney, code enforcement officer, building inspector, or municipal engineer). Students are asked to find out what kind of training or education is required for these jobs, typical job responsibilities, how much compensation is received for the work, how these positions are obtained, and what are the ethical and professional rules and/or codes that apply to these persons. The learning outcomes from this exercise include gaining an understanding of the backgrounds and experience of the types of people who they will be appearing before and negotiating with. In addition, students learn who is responsible for which decisions, and concepts of professionalism, ethics, and civility are introduced early in the course.

Students are then required to attend a planning or zoning board meeting of their choice and submit a written summary of their observations of the meeting. The initial learning objectives for this experience include: ascertaining when and where various boards meet in different municipalities; observing the level of formality or informality of the meeting; considering the number of board members, the number of people in the audience, and observing who appears before the board to make presentations (e.g., the individual applicant(s)) or a representative (e.g., a lawyer, engineer, planning consultant); observing the role of public participation in the process; observing interactions, if any, between board members and municipal staff (e.g., planning department staff and/or the board attorney); and observing whether decisions are made and announced at the meeting on the applications before the board. After the experiences are briefly shared in class, students are asked to recall this experience later in the semester when discussions focus on topics such as variances. For example, students who attended a zoning board meeting will be asked to recall whether the board correctly applied the relevant statutory criteria to their analysis/discussion of variance requests.

To meet the analytical and client counseling goals, students are required to provide a client memo to a zoning board of appeals advising the board on

83. See Patricia E. Salkin, *Abandonment and Discontinuance of Nonconforming Uses*, 2009 Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation (ALI-ABA August 2009).

several simulated applications on an agenda for an upcoming board meeting. Students are provided with a copy of the applicable zoning ordinance, but not the specific applicable sections, again fostering self-sufficiency by requiring students to figure out how the local codes are organized and how the various sections do and do not work together. They must advise the board whether legally they can grant applications for certain kinds of uses and whether a particular nonconforming use has retained its status. Of course, the answers are not clear from the plain text of the ordinance, requiring students to hone not just persuasive writing skills, but creativity in arriving at proposed actions that can withstand legal challenge. All of these types of drafting assignments help to integrate practical lawyering skills into the doctrinal course.

One of the benefits of being in the capital city is the close proximity to the State High Court (Court of Appeals). This also provides a unique teaching/learning experience for students in the land use course. In the Fall, 2009 semester, oral arguments were held in a controversial eminent domain case that had procedural, statutory, constitutional, and public policy issues.⁸⁴ In advance of attending the oral argument, students were assigned to read the briefs, including amicus briefs, as well as the decision below. In further preparation for the argument, one class included three attorneys who were involved with various stages of the litigation on different sides to speak with the students about the community, the actions being challenged, and the applicable law. Students were able to ask questions to get a better understanding of the issues likely to garner the court's attention.

The following week, students attended the oral argument before the court where a number of learning outcomes were accomplished. For example, students were able to observe the functioning of a "hot bench" as well as the skills required of an effective appellate advocate before the court. In addition, this particular case was so emotionally charged that neighborhood residents from the impacted community arrived by bus from Brooklyn to attend the argument. From this observation, students witnessed first-hand the emotional reaction that often results from government condemnations. Furthermore, in modeling professionalism, after numerous members of the public asked students to "give up their seats" so that they could be in the courtroom to watch in-person a discussion about their community, one of the attorneys who appeared in class the week before approached the faculty member and asked as a favor if she would relinquish her seat and urge students to do the same so those who traveled a long distance could sit in the courtroom. The professor complied with the request, demonstrating to students the importance of collegiality, civility, and professionalism when interacting with colleagues in the legal community.

At the conclusion of the oral arguments, students were given a week to draft a five page memo to a judge of their choosing, as if the student were a

84. *Goldstein v. New York State Urban Development Corp.* 879 N.Y.S.2d 524 (2009). See *Matter of Goldstein v. NYS Urban Development Corp.*, available at <http://dddb.net/eminentdomain/papers/stateappeal/20090629courtletter.pdf>.

law clerk recommending a decision in the matter and articulating reasons why. This writing exercise provided students with an opportunity to process what they read and heard, analyze facts, and apply the applicable law to arrive at a roadmap for a recommended decision in advance of the court's release of an opinion in the matter. It also allowed for feedback on writing and analytical skills where students have applied theory and doctrine to arrive at a reasoned decision predicting the outcome of the issues litigated.

With the advent of technology and social networking, students in the land use law course are required to complete two web-based assignments. Early in the semester, students are asked to use the Internet to identify ten websites that contain substantive and credible land use law information. Students must submit the name of the site and provide the web address, identify who maintains the site and when it was last updated, and then provide a brief description of the information available at that site. The student work product is collected and synthesized into one document and then posted on the course website so that the class may consider using appropriate sites as they conduct research for other course assignments. The goals of this assignment are to introduce students to the plethora of land use law resources on the Internet and to teach them how to be more discriminating consumers of web-based legal information. A second assignment directs students to a land use law blog that covers subject matters covered in the course.⁸⁵ One assignment requires the students to select a blog posting of their choice, typically a summary of a current case or a summary of recent legislation, and draft a thoughtful comment to be posted to the blog. The goals of this assignment are to build skills in the use of legal information available on the web in the course subject area, and to teach students proper etiquette and professionalism in providing postings or comments on a blog or website where the public may have access to their identity. In addition, students are required to think about a recent decision or new law in the context of the material learned in class to provide a meaningful comment that either questions or agrees with the underlying theory or doctrine.

3. Land Use Studies at Pace University School of Law

The land use law curriculum at Pace University School of Law comprises a basic land use course, an advanced land use seminar, a capstone course that integrates land use, environmental, and real estate law, guided research projects, an intensive externship, pro bono experiences, and work as land use honors interns.

A. THE BASIC COURSE

The foundation of this concentration is a doctrinal three-credit course in land use law that uses a national land use casebook, supplemented by the relevant enabling legislation of New York State and the land use plans and regulations of the Town of Wawayanda, a New York community that is under

85. Law of the Land, *available at* <http://www.lawoftheland.wordpress.com>.

extreme development pressure. The town has revised its comprehensive plan and zoning twice in the past several years in response to growth pressures and the political tensions that they cause.

During the first third of the course, students learn basic land use doctrine, supplemented by practical applications. They examine cases and practices from many states, and then find and examine relevant New York State enabling statutes and the corresponding provisions of the Wawayanda code. Through this process, class members learn the legal structure of state and local governments, how they adopt and enforce local laws, and how to analyze both state and local legislation. Practicing attorneys and local officials from Wawayanda supplement class discussions. Hypothetical clients, including applicants for project approval, the town, and concerned citizens, create the basis for simulated law firm meetings on a variety of representational issues.

By exploring the differences among the functions and procedures of legislative, administrative, and quasi-judicial bodies at the municipal level, students learn that land use lawyers practice before policy-setting and adjudicative tribunals. As part of the basic land use course, students are required to select a nearby community and attend a public hearing before a local zoning board of appeals, planning commission, or legislative body. Students are instructed to track carefully the presentations and practices of attorneys and other professionals and their interactions with volunteer board members and the affected property owners and neighbors. They write an analytical paper on the experience and are called on in class to discuss what they learned. By careful selection of material that arises from these papers for class discussion, it is possible to cover many of the matters encountered by practitioners and reflect on how well they represent their clients.

This foundation prepares students for the remaining two-thirds of the course, where they study a number of more complex matters, including judicial review and remedies, regulatory takings, urban redevelopment, local environmental law, sustainable development, and the mediation of land use disputes. The application of traditional land use regulations gives rise to a host of constitutional questions, including equal protection, due process, regulatory takings, and First Amendment protections. The casebook and class discussion identify contexts in which these constitutional issues arise and analyze how they came into existence before they were challenged. While students learn relevant doctrine, they look intensely at how the community could have prevented the claim from arising, or nipped it early, by using nontraditional processes, settlement approaches, and mediation moments that present themselves within the policy setting and adjudicatory process.

When a U.S. Supreme Court case is argued during the term of the class, a group of students is selected to attend the oral arguments and report back on their observations. This was done initially with *Dolan v. City of Tigard*, where the students interviewed Mrs. Dolan and learned that her husband brought the suit primarily because he was arbitrarily required by local regulators to transfer title to a bike path and flood plain to the city, instead of being

requested to donate them. The students reported that Mr. Dolan, who died of a heart attack during the course of the litigation, thought of himself as a good citizen and was offended by the way he was treated, rather than concerned with the regulatory requirement itself. This story suggests obvious reforms in the local land use process that students immediately grasp. The most recent argument attended involved *Walton Co. v. Stop the Beach Renourishment, Inc.*, where the students were surprised to hear very little questioning by the justices related to the underlying littoral property rights under Florida common law that were affected—arguably taken—by the challenged state Beach and Shore Preservation Act and the decision of the Florida Supreme Court for its interpretation of common law property rights. This led to discussions regarding how counsel could have shaped the oral argument to sharpen the focus of the justices on what was fundamentally at issue in the case.

The *Tigard* case leads naturally to a more extensive discussion of how the local project review and approval process can be reengineered to include productive mediations among the applicant and affected stakeholders, and how mediators—or the parties’ counsel themselves—can lead parties to better solutions than those hammered out through traditional adversarial adjudications before local land use boards. The course casebook has a unique set of cases and statutes that involve such processes at various stages of the project review process, from pre-application to post-approval or denial. How lawyers can become mediators or, more often, successful participants in mediation forums on behalf of their clients is explored.

The advent of local environmental law as an offspring of local land use and police power authority is studied with interest by Pace land use law students, many of whom are attracted to the school because of the depth of the environmental law curriculum. They are surprised to learn that much can be done to preserve wetlands, watersheds, species and their habitats, water quality, and other natural resources through local land use law and police power regulations. The casebook includes twenty cases from various states that trace the evolution of local environmental protection, from narrowly-focused drinking water standards to broad-based critical environmental area protection regimes. This tendency of the law to evolve to meet the changing needs of society is explored in this context as well as with affordable housing, urban revitalization, smart growth, sustainable development, and climate change. This analysis begins with the sudden advent and rapid spread of zoning itself in the early decades of the 20th century. Students reflect on how change in society happens and how the law can be an instrument for needed change. Some exposure to theories of diffusion of innovations and complexity helps them understand the interdisciplinary dimensions of the law and its practical application.

Student curiosity and concern about climate change leads naturally to classroom discussions about its management and mitigation. They want to learn whether and how human settlement patterns, the location and construction of buildings, travel patterns and modalities, and the protection

of the sequestering environment can be shaped and affected through state and local land use law reform. Gradually they also learn to appreciate that the principles and practices of sustainable development provide an antidote to climate change, while achieving additional environmental and economic objectives that appeal to a wide range of political and social interests.

B. ADVANCED STUDIES

The experience of students in the basic course encourages many of them to enroll in an Advanced Land Use Seminar, work as land use honors students, participate in a land use law externship, accept guided research assignments, carry out pro bono activities, and take a capstone course called the Lawyer's Role in Green Building and Development.

In the two-credit Advanced Land Use Seminar, students analyze state and local laws that foster transit oriented development, sustainable neighborhoods, green buildings, the use of renewable energy facilities, and the preservation or enhancement of the natural resources that sequester carbon dioxide. They also research efforts of state and local governments to develop effective strategies to adapt coastal development to sea level rise and to build more resilient communities that can withstand the ravages of storm surges, flooding, hurricanes, and other catastrophes.

Students who wish to develop their own papers and model ordinances are invited to participate in either a land use externship with the school's Land Use Law Center by working on one of its projects, or to conduct a guided research project related to these projects. The more exemplary statutes and local laws found and created by the students are placed on the Gaining Ground database maintained by the Land Use Law Center.⁸⁶ Students participating in advanced land use studies often satisfy the pro bono requirements of their Professional Responsibility course by volunteering at the Land Use Law Center. Students work on a variety of research projects designed to advance the center's mission to encourage sustainable development. With funding secured by the center, land use honor students are selected and paid to conduct research and help with innovative projects at all levels of government and with the private sector.

The Lawyer's Role in Green Building and Development is a three credit classroom course that examines the actual and extensive transactional and regulatory documents that led to the creation of a large transit oriented, downtown development that helped spark the revitalization of an older city with a moribund central business district and obsolete industrial waterfront. The project was planned and approved a decade ago when sea level rise, energy efficiency, and green development concerns and practices were in their infancy. The project, which is a transit-oriented success story built at the water's edge, is reexamined by the students to determine how it could have been better designed and regulated to withstand sea level rise, to be more energy efficient, and to incorporate a host of green building practices, including wind turbines,

86. The database can be accessed at <http://www.landuse.law.pace.edu>.

green roofs, solar panels, combined heat and power, low impact site design, and geothermal heating and cooling.

This curriculum allows students to graduate with a more complete understanding of the American federal system and the current and prospective roles of each level of government *vis-à-vis* the private sector. They explore how the power, resources, and influences of each level of government can be integrated into a more functional approach to critical resource and development issues. The emerging practices of today's attorneys as counsel, strategist, negotiator, mediator, and litigator are explored in a variety of practical and memorable contexts. The lessons of the land use curriculum help guide student career choices and, hopefully, their contributions to society as advocates for their clients and for a legal system capable of meeting the exigencies of the future.

4. Service Learning and the Teaching of Land Use Law

Our colleague, Professor Tony Arnold, teaches an interdisciplinary law and urban planning course focused on service learning projects and simulations in which students work in interdisciplinary teams to solve real-world land use problems. The course is composed of both law students and graduate students in urban planning, for whom it is a required course for the Master of Urban Planning degree.⁸⁷ Students work on two major projects throughout the semester. One is a service learning project on a large, complex land use issue for a nonprofit organization, government agency, policy institute, or multi-participant planning group (e.g., multi-stakeholder watershed planning or local government task force). Students work in interdisciplinary teams to identify the relevant issues and present integrated planning and legal options in a thorough, detailed report. The organizations, agencies, institutes, and/or groups are referred to as "project recipients," not "clients," because they are notified that the report does not constitute legal advice or representation and encourages them to consult legal counsel (which they have anyway) about any information, analyses, or ideas in the reports.⁸⁸

87. See <http://www.law.louisville.edu/academics/course-catalogue>, also email on file with the authors. (According to Prof. Arnold, the course also includes graduate students in business administration, public administration, or political science from time to time, and he hopes in the future to include graduate biology, engineering, and public health students.).

88. Professor Arnold describes some of the most valuable service learning projects over the past few years: One class wrote three separate reports (each by a different team of students) for the local Habitat for Humanity chapter on its: a) subdivision and replatting option; b) local zoning and regulatory requirements and options; and c) federal and state environmental regulatory requirements and options for housing development on a number of very small lots originally platted for lake-resort cabins but never developed. These reports helped the local Habitat chapter to evaluate its options in light of its affordable-ownership housing development goals. In another year, a team developed a comprehensive report on land use control options to protect the Darby Creek watershed, a HUC-14 watershed in an area transitioning from rural to suburban. The report was used by a multi-participant watershed planning group, and was posted on the Kentucky Waterways Alliance website. Another team evaluated various land use planning, policy, regulatory, and legal tools that could be used to mitigate land-use contributions to climate change; that report was used by the Louisville Metro Climate Change Task Force (and Green City Partnership) in developing

One important educational aspect of the service learning projects is that students must work together in interdisciplinary teams, not only transcending disciplinary and professional framing biases, but also developing their own skills of teamwork, accountability for work product, leadership identification, and coordinated production of a team product in a timely and professional manner. Learning to work in teams is one of the most difficult, but most valuable, aspects of the course for students. Another important educational aspect of the service learning projects is that students must grapple with complex and multi-dimensional real-world land use issues that do not come neatly pre-packaged in hypotheticals. They learn how to apply their readings, classroom discussions, and research to actual problems. Additionally, students must integrate a wide variety of perspectives, tools, analytical methods, and consideration of various forces (including political, socio-cultural, economic, and psychological) as they develop skills to solve or address complex land use problems. They learn that problem-solving is possible, but it is not simple or facile. It is not surprising that the reports include not only legal sources but also photographs, charts and tables, student-generated design elements, and student-generated maps and GIS analyses.

Few schools actually offer a traditional clinical education experience for land use law. The Land Use Law Clinic at the University of Georgia School of Law presents one model.⁸⁹ The program is designed to provide a teaching opportunity where students learn tools and strategies to protect natural resources and promote development patterns that are more economical, aesthetically pleasing, and otherwise responsive to human needs.⁹⁰ Students work in the clinic office an average of 20 to 40 hours per week during a summer semester on legal aspects of comprehensive growth management projects for state agencies, local governments, and non-profits. They also respond to more time-sensitive research requests that come in to the clinic throughout the course of the semester.⁹¹

5. Other Ideas to Promote Best Practices Through the Land Use Curriculum

A. STORY TELLING

Perhaps separate from, but converging with the movement towards best practices, the role of narrative in the law has been garnering increasing

the land use section of the Louisville Metro Climate Action Plan.

89. See <http://www.law.uga.edu/landuseclinic/index.html>.

90. See <http://www.law.uga.edu/landuseclinic/index.html>; as well as description from Professor Jamie Roskie, managing attorney for the clinic, on file with the authors.

91. Description from Professor Jamie Roskie on file with the authors. In addition, course seminar work covers the following topics: introduction to problem-solving, professionalism, writing, listening, complex problem-solving using environmental justice and community organizing as a framework, ordinance drafting, informing and persuading-collaborative lawyering skills, and community planning and environmental design.

attention across the academy.⁹² For example, the second annual Applied Legal Storytelling Conference was held this year for purposes of creating a sustained dialogue about the use of storytelling elements in the practice and pedagogy of law,⁹³ as was a program specifically focused on the use of narrative in the business law curriculum.⁹⁴

Up until a few years ago, there were no trade or mainstream books on the market that told a comprehensive land use story. Recently, three books in particular have been published that lend themselves nicely to the storytelling approach, with two of the books demonstrating best practices through the storylines and providing opportunities for law faculty to approach the subject matter in a less traditional format. The first book, *Murder and the Comprehensive Plan* by Shel Damsky, is a murder mystery written by a retired land use attorney.⁹⁵ The story revolves around a controversial proposed development project in a small community, a modern story of real estate development that occurs daily in communities across the country. The dialogue between the characters provides realistic detail about the legal, political, and social aspects of private property rights and community development, capturing the tension between the out-of-town wealthy investors-developer and the naïve community residents who are unaware of the money, politics, power, and authority surrounding land development. Through the narrative, topics including the comprehensive plan, eminent domain, subdivision and site plan review, moratoria, special use permits, variances, and the composition, powers and duties of planning and zoning boards and elected officials are explained in the context of what actually happens in practice. The storytelling offers a creative way to engage student discussion about a host of procedural, substantive, and theoretical issues.

A second book, *Bordering on Madness: An American Land Use Tale* by Professor Andy Popper,⁹⁶ provides through realistic fiction an accounting of a town-gown relationship. Set in a community surrounded by green space and confronted with the need for expansion of the bordering university, this story highlights the challenges that developers face when they envision how a parcel of undeveloped land would best suit their needs, and how this vision

92. The narrative method, or storytelling, has been used in legal scholarship and teaching in various ways over the last two decades, but it is now achieving more widespread interest not just from the clinical legal circles where much of the early attention was focused. See generally Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, From Clinic to Classroom*, 7 J. Ass'n Legal Writing Directors 37 (2009).

93. See Lewis & Clark Law School, Applied Legal Storytelling Conference 2009, available at http://www.lclark.edu/law/programs/legal_analysis_and_writing/applied_legal_storytelling_conference/ (podcast available at <http://lawlib.lclark.edu/podcast/?p=1900>).

94. See Michigan State University College of Law, Business Law and Narrative Symposium: Agenda for Sept. 10-11, available at <http://www.law.msu.edu/narrative/agenda.html>.

95. Shel Damsky, *Murder and the Comprehensive Plan* (Write Words, Inc. 2007).

96. Andrew F. Popper, *Bordering on Madness: An American Land Use Tale* (2d ed., Carolina Academic Press 2008).

is rarely shared by neighbors who desire to preserve the status quo. One underlying lesson for law students is that in land use law and zoning, expect the unexpected. The narrative effectively demonstrates how human nature motivates some to protect land values, landscapes, and viewsheds from any change, and the extent to which people will go to do so. The book concludes with one of the characters stating, “The truth is, when it comes to land, there may not be common ground.” This, along with many themes and events in the book, provides wonderful teaching opportunities to integrate the statutory and caselaw materials presented in the class with the practical import of these laws for developers, communities, and individuals.⁹⁷

A third resource, *Cape Wind* by Wendy Williams, is a journalist’s account of the effort to site off-shore wind turbines off of Cape Cod. It demonstrates not only the interjurisdictional dynamics of land use planning and decisionmaking, but it also offers an up close exposé of the political quagmires that land use attorneys must be cognizant of in order to best advise their clients. This is another effective narrative that weaves together discussions of renewable energy policies and the political and social dynamics of hosting such a use in a given neighborhood or community.

B. PROBLEM-BASED LEARNING

In the only other published analysis of teaching practices in the context of land use law, Professor Keith Hirokawa suggests that a course in land use law is especially well-suited for problem solving in the classroom. The problem method, or problem-based learning, is “a curriculum choice to place students in an active role as problem solvers.”⁹⁸ Hirokawa offers three types of problem-solving exercises for a land use law course. First, he asks students to determine whether the land use laws permit a solo practitioner to have an office at his or her residence.⁹⁹ Second, he creates a zoning ordinance for the classroom and requires students to determine how to navigate the restrictions and improve the “value” of their assigned seats.¹⁰⁰ He argues that by personalizing the problems in a manner that is suitable to land use law, students in this course can “become self-reflective lawyers” by facing legal problems as both counselor and client.¹⁰¹ Hirokawa concludes that “what is notable about teaching law through problems is not merely that it prioritizes professional competency

97. Professor Popper developed a companion reader that is a combination of a traditional casebook with more narrative readings and questions. See Andrew F. Popper, Patricia E. Salkin & David Avitabile, *A Companion to Bordering on Madness: An American Land Use Tale, Cases, Scholarship, and Case Studies* (2d ed., Carolina Academic Press 2008).

98. Hirokawa, *supra* note 64, at 2.

99. *Id.* at 21–23.

100. *Id.* at 23–25.

101. *Id.* at 21.

(which may be trivially true about all teaching methods), but also that it can improve on our ideals about professionalism in the process.”¹⁰²

In a third type of problem solving exercise, Hirokawa assigns groups of students to represent specific clients in resolving local land use controversies.¹⁰³ The nature and extent of the third problem is determined by the circumstances of a local, recent land use dispute, and research and advocacy in the case is confined to the actual record. Oral argument and briefing for the problem is then judged by local professionals in the field (including ALJs, planning commissions, and city councils). In addition to satisfying many of the best practices demands, Hirokawa argues that the third problem energizes the classroom and “engages the students in enthusiastic and sophisticated learning.”¹⁰⁴

C. OTHER METHODOLOGIES

At the August, 2009 Southeastern Association of Law Schools conference, a panel was organized to focus on innovative teaching and research strategies for land use and development law.¹⁰⁵ Professor Chad Emerson at Faulkner Law School explained the hands-on experiences in his land use and development seminar.¹⁰⁶ For example, three classes during the semester are conducted off campus in the county and involve a tour of different types of development, so that one class focuses on a governmental land planning issue, another class on a historic preservation development project, and a third class on a residential development. In lieu of a traditional research paper, students are given the option of maintaining a journal tracking and reflecting on legal issues facing the local board of adjustment, the planning commission, and the legislative body throughout the semester. The assignment requires students to attend at least one meeting of each of these boards and then submit a short paper regarding a novel or interesting legal issue facing the board.¹⁰⁷ He also discussed how in his land planning and development law course, he divides his students into four- and five person development firms, and after selecting a real piece of property in the county, they simulate the entire development process from land acquisition to permitting. For their grade, students prepare a final group presentation and development portfolio for the project.

¹⁰². *Id.* at 4.

¹⁰³. *Id.* at 26–28.

¹⁰⁴. *Id.* at 28.

¹⁰⁵. See Southeastern Association of Law Schools, 62nd Annual Meeting Program August 2–8, 2009, available at <http://sealslawschools.org/wp-content/uploads/2010/02/2009-program.pdf>, at 33.

¹⁰⁶. See Land Use Prof Blog, http://lawprofessors.typepad.com/land_use/teaching.

¹⁰⁷. See Prof. Chad Emerson, Land Planning Law Preliminary Syllabus, available at https://www.faulkner.edu/admin/websites/ccemerson/documents/LandUseandDevelopmentLawSyllabus_000.doc.

Professor Gregory Stein of the University of Tennessee College of Law described his Land Acquisition and Development Seminar, a course related to the basic land use law and land finance law courses. In his classroom, students are divided into teams of two or three twice during the semester, with each team representing a party in a real estate development. Each student is responsible for drafting two of the major deal documents and then negotiating against opposing counsel in class. Professor Shelley Saxer of Pepperdine Law School described how students in her land use course are asked to select a city of their choice to follow and report on as the course progresses. She encourages them to pick a city where they may want to begin their professional career. Students must attend a city council meeting or watch it online (where available).

D. LAND USE ACROSS THE CURRICULUM—A PERFECT CAPSTONE

A number of law schools have reinvented their curriculum in response to the best practices movement. For example, recently Washington and Lee University School of Law has replaced its third year curriculum with simulations to provide students with a fictitious client and a case file and an assignment to work through the matter as if for an actual client of a law firm.¹⁰⁸ Albany Law School has launched the Center for Excellence in Law Teaching¹⁰⁹ to promote a dialogue and to make available resources. Professor Mary Lynch, center director, has created a blog on best practices for legal education.¹¹⁰ Southwestern Law School has announced four new capstone courses for the 2009–2010 academic year described as often interdisciplinary courses that cover multiple subjects and are designed to “provide the opportunity for advanced study, with special emphasis on teaching the Carnegie Foundation Report principles of theory to practice and professionalism.”¹¹¹ The University of Minnesota School of Law has likewise announced plans to introduce capstone courses in the next academic year,¹¹² and Temple Law School is re-evaluating their upper level curriculum and considering partnering judges and practitioners with professors to blend high-level theory with current insights from the field.¹¹³

108. Karen Sloan, *Reality’s Knocking*, National Law Journal, Sept. 9, 2009, *available at* <http://bestpracticeslegaled.albanylawblogs.org/2009/09/07/national-law-journal-reports-on-carnegie-and-bp-reforms-at-duke-ucla-dayton-and-others-cgie/>.

109. *See* Albany Law School, Center for Excellence in Law Teaching, *available at* http://www.albanylaw.edu/sub.php?navigation_id=1709.

110. *See* Best Practices in Legal Education, *available at* <http://bestpracticeslegaled.albanylawblogs.org/>.

111. *See* Southwestern Law School, Southwestern to Offer Four New Capstone Courses in 2009–2010, *available at* http://www.swlaw.edu/news/overview/newsr.7gUDwsbVE_ (Capstone courses are currently approved for California Civil Litigation, Complex Criminal Litigation, Entertainment Law, and Employment Law).

112. University of Minnesota School of Law, About The Law School, *available at* <http://www.law.umn.edu/about/index.html> (The dean’s message posted to the School website announces, in part, “New multidisciplinary capstone courses with extensive simulation opportunities”).

113. Joanne A. Epps, *A Tipping Point for Law Schools?*, The National Law Journal, July 20,

Land is the perfect candidate for a capstone experience for a number of reasons. First, the subject matter that might be involved in a challenging land use matter provides an opportunity to recollect and apply material learned in most traditional first year courses—property, contracts, criminal, constitutional, and administrative law—as well as to draw upon the skills taught in the first year lawyering class, and other courses such as environmental law, negotiations, and mediation. A simulation might involve a fictitious client who is a real estate developer and needs to identify a piece of developable property, purchase the property, engage in negotiations with the community/neighbors and the municipality and financial backers, and navigate through the local land use and environmental review processes. Such an exercise could include contract drafting and review, applications for zoning review and building permits, and environmental review. Students would be required to work with local land use plans, law and regulations, and environmental review documents (and they would hopefully be exposed to the technology available through geographic information systems to assist with various development, design, and environmental issues).

Conclusion

It is clear that the traditional casebook method is not sufficient to fully prepare law students for the inter-disciplinary and multi-faceted practice of land use and community development law. A small number of law professors have reached this conclusion before the recent focus on, and pressure to, re-examine the manner in which we teach and prepare law students for practice. However, more faculty should follow the lead of those who are modeling a new curricular and pedagogical approach to land use law. The good news is that many innovative ideas are being identified, tested, and shared among land use law professors. The changes in teaching will undoubtedly lead to greater student engagement, more direct hands-on or simulated experiences that model actual tasks land use lawyers will have to perform, and greater acquisition of various skill sets required to effectively represent clients. Just as the New York Court of Appeals admonished that we should not pay “slavish servitude” to a comprehensive plan,¹¹⁴ law professors should not hold on to the more comfortable methods of teaching that have been honed for decades. Instead, we should embrace the opportunity to redesign courses, and the land use law course in particular, to provide a spectrum of exciting, relevant, and practical learning experiences that include an integration of doctrine, skills, and professionalism—much like what future lawyers will need to survive outside of the “ivory tower.”

2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432335929&slretur n=1&hbxlogin=1>.

114. Udell v. Haas, 21 N.Y. 2d 463 (1968).