Land Use Consultations Advancing Therapeutic Jurisprudence: Ripe for Clinical Trials

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LAND USE CONSULTATIONS ADVANCING THERAPEUTIC JURISPRUDENCE: RIPE FOR CLINICAL TRIALS

Michael N. Widener*

Zoning matters produce high volumes of “disputants” aligning with two camps, leaving a third group that is apathetic and disengaged in the short term, even though its interests are affected following the development or use implementation (becoming stakeholders in the ultimate results). Zoning is a legislative (hence political) process replete with behind-the-scenes negotiations and deal-making between leaders and developers. Leaders of local governments are charged with securing competing goals: to protect property owners against the potential erosion of their wealth and health caused by ongoing development, and to promote the entire town’s economic efficiency and growth in the name of competitiveness. (Sometimes this is expressed as balancing local aesthetics with local finances.) This balance is delicate and difficult to achieve. As a result, land use hearing outcomes can be tortured and their explanations incredible or irrational on the surface, expressing “naked preferences,” in which a raw exercise of political power substitutes for general justification or broader public value.

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*©2016, All Rights Reserved by the author, Adjunct Professor, Arizona Summit Law School, Zoning Adjustment Hearing Officer, City of Phoenix, and Of Counsel, Bonnett, Fairbourn, Friedman & Balint, P.C. The author began his law practice representing the development community in land use and entitlement matters; since 2010, he has heard and decided hundreds of zoning adjustment (variance and use permit) applications. Prof. Betsy Hollingsworth’s experience in clinician’s roles at three law schools made her insights invaluable. This essay is for Martha C. Tolcher: Peacemaker, empathizer and beloved sister. A brief lexicon follows the text.

1 In truth, there’s still more complication. The community planning function includes a town’s preparation of a master or “general” plan, the town’s visionary statement for future development. In many jurisdictions, the master plan periodically must be vetted by citizens’ committees; then the town’s planning commission; and finally its chief legislative body. That’s a circus that can consume years of meetings and features broad spectra of stakeholders with shifting agendas as a master plan develops. See Michael N. Widener, Moderating Citizen ‘Visioning’ in Town Comprehensive Planning: Deliberative Dialog Processes, 59 WAYNE L. REV. 29, 34-8 (2013); see also City of Phoenix Planning & Development Department, UPDATEPDD 4 (Feb. 2016) (inviting public participation in the next General Plan iteration; copy in possession of law journal).

2 See Erin Ryan, Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts, 7 HARV. NEGOT. L. REV. 337, 339, 348-52 (2002). Zoning adjustment, by contrast, is a multi-step process in most instances of contested requests for relief; but these are quasi-judicial proceedings sometimes stripping out lobbying’s impacts from the process. See Michael N. Widener, Curbside Service: Community Land Use Catalysts to Neighboring Flowering during Transit Installations, 45 URB. L. 407, 437-9 (2013). Zoning adjustment processes likely are the “low hanging fruit” sources for land use neutral service, as they are less legally complicated cases with the fewest average number of disputants, but see text at note 59, infra.

3 Ryan, supra note 2, at 337.
In therapeutic jurisprudence, the practitioner’s inquiry is whether the social force known amorphously as “the law” produces therapeutic or non-therapeutic consequences.\(^4\) Professor Daicoff explains that this analytical approach plumbs the effects of laws and legal rules, processes and participants on individuals’ well-being, relationships and behavioral functions.\(^5\) Many land use decisions, stemming from a legal procedure (one or more public hearings on a general plan or specific entitlement matter) that confuse or raise feelings of marginalization, are viewed by some stakeholders as products of administrative deceit or public corruption,\(^6\) and these processes and rules-playing strategies are non-therapeutic. Among bases for an unhealthful response is a feeling that the “deck is stacked against” the unsuccessful party,\(^7\) who often is not well informed or financed, feels manipulated by the successful party’s agents’ public statements or assurances, and feels unrepresented in the process by elected and appointed officials in her jurisdiction.\(^8\) The resulting state of the public’s health in controversial matters in local entitlement processes is well summarized by Susskind and Field:

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\(^7\) See Larry Bakken, *Public Conflict Management Using ADR Techniques in Local Government Public Disputes, ALTERNATIVE DISPUTE RESOLUTION IN STATE & LOCAL GOVERNMENTS: ANALYSIS AND CASE STUDIES* 246 (OTTO J. HETZEL & STEVEN GONZALEZ, EDs.) (2015); LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH 28 (1996) (“At too many public hearings, the public officials describing a proposed law or a private developer sketching a new development are calm and composed.”) The calmness exhibited indicates the decision has been made by the authorities prior to the public hearing).

\(^8\) See Camacho, *supra* note 6, at 6 (land use decisions are frequently made in closed-door negotiations between developers and local officials that exclude many affected parties, further disenfranchising those with the least influence and fewest resources); Bakken, *supra* note 7, at 242 (noting opponents often have little experience in land use processes and substance, and retain no representation of their positions).
We all need to be concerned about a society in which the public’s concerns, fears and anger are not adequately addressed. When corporate and government agencies must spend crucial time and resources on rehashing and defending each decision they make, a frustrated and angry public contributes to the erosion of confidence in our basic institutions and undermines our competitiveness in the international marketplace.\(^9\)

This paper proposes educating law students in the processes of therapeutic justice through service as a neutral in land use controversies, in the process improving law student dispute resolution skills and enabling them to increase therapeutic outcomes.

### I. ZONING PROCESSES’ THERAPEUTIC SUCCESSES AND FAILINGS

The legislative act of zoning is subject to judicial review, but the standard of review seldom results in the reversal of legislative conduct. Courts examine due process claims against zoning ordinances, like other legislation affecting property rights, under a loose “reasonableness” standard, in which the purpose of challenged legislation is presumed valid, and a reviewing court evaluates if the means employed are reasonably calculated to achieve the stated purpose.\(^{10}\) In practice, this test accords great deference to legislative judgments, because the link between the means and the purpose of the legislation is satisfied by most any conceivable rational basis, disregarding whether the “explanation” offered was the actual basis of legislative action.\(^{11}\) The court asks only whether a rational relationship exists between the ordinances passed and a conceivable legitimate governmental purpose or objective.\(^{12}\) Moreover, zoning codes are sufficiently ambiguous that a legislative body can either approve or reject a vast majority of entitlement applications with impunity, in either direction on seemingly reasoned grounds, without violating a plausible interpretation of the existing town’s ordinance’s text.\(^{13}\)

Judicial deference renders it difficult to reverse abuses of the town’s zoning power, so communities at times become substantially divided over that power’s exercise. Since (a)

\(^9\) SUSKIND & FIELD, supra note 7, at 2.

\(^{10}\) See STEVEN LEBEN, SOME THOUGHTS ON THE JUDGE’S WRITTEN WORK 16-7 (2014), http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/LebenSomeThoughtsontheJudgesWrittenWork.ashx.


\(^{12}\) See id.

\(^{13}\) See id.
modifying a zoning map to introduce new types of uses benefits only non-residents (i.e., potential future occupants), and (b) adhering to “locals-only democracy” norms, non-residents lack voice in the discussion, a proposed entitlement engages few if any genuinely local supporters.\footnote{See Simon Vallée, Zoning’s self-defense mechanism: when local democracy is local tyranny, URBAN CHOZE (Apr. 29, 2014), http://urbankchoze.blogspot.com/2014/04/zonings-self-defense-mechanism-when.html.} Meanwhile, when local (incumbent) residents seemingly will not benefit directly from the entitlement proposal, these residents form either (i) an opponent’s group (among those to whom the proposed zoning change seems disadvantageous) or (ii) a disinterested group (whose members do not share the opponents’ views or are simply apathetic).\footnote{See id.}

The opponents’ group often becomes strident, or even irrational, about the proposed modification,\footnote{See John R. Nolon, Champions of Change: Reinventing Democracy Through Land Law Reform, 30 HARV. ENVT’L L. REV. 1, 16 (2006) (noting the “instinctive, rather than thoughtful, reaction”).} unless they become better informed, fearing change in the familiar if segregated, homogeneous neighborhoods they occupy. In any case, those loudest voices in a debate invariably oppose the initiative, as proponents usually are not current residents who are “invested” in the surrounding property.\footnote{See Vallée, supra note 14.} Even if opponents are a small minority of all neighborhood dwellers, since its real majority more often than not is disinterested, a few opponents may stymie an initiative, exercising “veto power.”\footnote{See id.} This inclination has exceptions, such as when neighbors are poor and lack influence but face politically influential developers who want a zoning change, or where project leaders induce local residents to dial down their opposition in exchange for the developer’s creating or improving public parks, plazas or other amenities.\footnote{See id.}

Next, there is the process itself to contend with. Frequently, what statutes or municipal ordinances require affords little opponent stakeholders’ organization; while neighbors may testify during public comment periods, these moments result in no constructive dialog.\footnote{See id.} Most times, developers cannot or will not change proposals to meet neighbors’ needs, due to the

\begin{flushright}
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15 See id.
17 See Vallée, supra note 14.
18 See id.
19 See id.
\end{flushright}
substantial costs of the municipal or county site-planning exercise.\textsuperscript{21} In ensuing discussions, stakeholders withhold key information from one another, to preserve the “element of surprise” at the hearing or due to anxieties at being taken advantage of.\textsuperscript{22} The public forum thus dissolves into a “stage” upon which actors monologue, instead of engaging in useful dialogue for decision-makers to absorb and process.\textsuperscript{23} Public testimony degenerates into political positioning, preparation for legal challenges or merely grist for ongoing grievances between the developer and neighbors.\textsuperscript{24} Once a conflict proceeds to court, litigants advance in many instances without attempts at negotiation of mutually satisfactory solutions beforehand.\textsuperscript{25}

In the worst excesses of incivility, the stakeholders sort into vociferous, emotionally-charged factions, clamoring for a voice in the hearing process and raising issues unrelated to the immediate land use issue (voicing other objections to the applicant developer, developers in general, or the town notice and hearing process), while communicating stridently to their leaderships whose ox will be fattened – or gored – by granting or denying a rezoning or zoning adjustment request.\textsuperscript{26} When the matter becomes especially emotionally charged, these factions become increasingly antagonistic, inclined to see the process as binary, leading to “zero sum outcomes.”\textsuperscript{27} In the illustrations of positional attitudes below (extracted from the author’s personal experiences in presenting and adjudicating zoning matters), the two active disputant camps are designated “opponents” and “proponents” for convenience’s sake. Of course, these

\begin{itemize}
  \item \textsuperscript{21} See id.
  \item \textsuperscript{22} See id.; John Forester, \textit{Moving from Facilitating Dialog and Moderating Debate to Mediating Negotiations}, 72 J. AM. PLAN. ASSOC. 447, 448 (2006).
  \item \textsuperscript{23} See Nolon, supra note 20, at 8; JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 406 (1961).
  \item \textsuperscript{24} See NOLON, supra note 20, at 8.
  \item \textsuperscript{25} See id., citing PATRICK FIELD, KATE HARVEY & MATT STRASSBERG, INTEGRATING MEDIATION INTO LAND USE DECISION MAKING (Mar. 2009), https://www.lincolninst.edu/pubs/dl/1590_807_Integrating_Mediation_in_Land_Use_Decision_Making_Final_Lincoln.pdf (Vermont land use court assesses before formal adjudication whether mediation would serve a useful purpose).
  \item \textsuperscript{26} See id. at 12 (communities “often become embroiled in battles that tear at the civic fabric, pit neighbor against neighbor, demonize the applicant, and wear down local officials”).
  \item \textsuperscript{27} See SUSSKIND & FIELD, supra note 7, at 38; Forester, supra note 22, at 449; Michael N. Widener, \textit{The Five Tool Mediator: Game Theory, Baseball Practices, and Southpaw Scouting}, 12 PEPP. DISP. RESOL. L. J. 97, 104-8, 114-6 (2012). An illustration of an “all or nothing” binary approach is underway in Mission Valley, Montana, where the issue is whether to eliminate altogether a 10-year old development density map without considering map alternatives or revisions, see Alex Sakanassen, Wiping off the map, MISSOULA INDEP. (Feb. 18, 2016), http://missoulanews.bigskypress.com/missoula/wiping-off-the-map/Content?oid=2688488.
\end{itemize}
attitudes often arise at the inception of an application for zoning change or another entitlement process and carry forward throughout that process.

II. ZONING STAKEHOLDER DISPARATE ATTITUDES IN CONFLICT

Following is a synopsis of “position statements,” undergirded by negative attitudes and suspicion, as articulated by opposing camps in rezoning or zoning adjustment application cycles.

A. Stage One: Pre-hearing:

*Proponents’ World-View of opponents’ camp:*

Why can’t you [opponents] grasp the simple realities that (a) vacant property is supposed to be developed, and (b) the town’s tax base grows from developing property?

Why do you believe that an entire project is pre-planned (in final form) from the inception of a development concept?

Why do you assume your property holdings will lose value as a direct result of the development? Is it not conceivable that your property values will increase as a result of the development?

*Opponents’ World-View of proponents’ camp:*

How could you think of putting this project in my neighborhood? (neighbors’ prior or better entitlement)

How could you move forward with any project in my neighborhood without receiving my input and reacting to it first?

Why do you think you can diminish my property value while you get rich? (Zero-sum reaction)

B. Stage Two: In-Hearing Process:

*Proponents’ World-View of opponents’ camp:*

We gave the precise notice to the neighbors that the ordinance says we must give of the project’s applications for approval.
This is the optimal project in its surroundings’ context; why can’t you understand it, and be reasonable?

Since nothing we would offer you will make you happy, we may as well take our chances under the [city’s entitlement processes] without compromising with the objectors.

*Opponents’ World-View of proponents’ camp:*

Why don’t you give us advance notice of the time and place of public hearings? Do you hope to exclude us from the conversations?

Why won’t you (a) meet with us in person, (b) listen thoughtfully to our critique and inputs and incorporate them into your project, and (c) modify your project to suit the neighborhood’s needs/tastes/preferences?

Why can’t you explain to us your project so that it makes sense to us and assuages our concerns?

Why must your project diminish our property values? (Zero-sum conviction)

**C. Stage Three: Post Hearing and Appeals:**

*Proponents’ World-View:*

You have cost us substantial amounts and lost time for development because of your protests, so our only recourse is to build our project and put all this behind us (assuming proponents won).

You have cost us substantial amounts because of your protests, and our only recourse is to file suit to contest the city’s decision – an even further expense and time-waster (assuming proponents lost).

Our project is diminished in quality and value because of the compromises in scope and other accommodations you have forced us to make; now our [lost opportunities mount] [profit margin is reduced] [investor base has shrunk].

*Opponents’ World-View:*
We have to put up with noise and dust during construction and then look at your lousy project while you take your profit and leave our area for good/until your next lousy project is developed nearby.

Our voices weren’t heard/we have no voice in these proceedings; my elected officials didn’t represent me as they should (alienation).\(^{28}\)

The zoning process is rigged in favor of developer interests (loss of trust) OR the zoning process is an arbitrary system neither guided or much influenced by the affected public’s interest (disillusionment).

Who’s going to reimburse us for losses in our property value?

Our only recourse now is to file suit to contest the city’s decision - an even further expense and time-waster with no certain likelihood of a good outcome.

The angry stakeholder’s (jaundiced by non-therapeutic reactions) perspective must be heard by those seeking peacemaking through legal processes. Calming passions, and facilitating the give and take of negotiating in legal processes, spares no corner of the legal community.\(^{29}\) The challenge for a lawyer injecting therapeutic jurisprudence into land use mediation is to engage citizens and developer representatives, however haltingly, in a “democratic outlet for . . . deep passions,” into one “forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight.”\(^{30}\) Students are well-served learning negotiations dynamics and empathy among their practice-ready skills’ acquisition, in the manner suggested below.

\(^{28}\) This sentiment is widespread, see Matt Leighninger, *Three Minutes at the Microphone*, in MAKING PUBLIC PARTICIPATION LEGAL 3-5 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406660 (depress “download this paper”). This compilation of the Working Group on Legal Frameworks for Public Participation was published by the National Civic League, National Coalition for Dialogue and Deliberation, International Association for Public Participation, the American Bar Association and various other contributors. The report finds that the dominant model of public engagement in the United States is a “public comment period” allowing each speaker approximately three minutes at the microphone to make a statement, allowing for limited interaction with elected officials. As an alternative to this “default” and ineffective model for engaging people in governance, the report recommends dialogue and deliberation in small groups, and proposes a model city ordinance and state law to require more interactivity engaging citizens in public meetings, and advocates such provisions’ insertion of ordinances governing land use and transportation planning. *See id.* at 18.


III. PROPOSAL FOR A LAND USE MEDIATION CLINIC

Land use is a noteworthy “street law” subject based upon the numbers of potential stakeholders engaged in a general plan or zoning entitlement process and the magnitude of passions generated, especially when values collide.\(^{31}\) Depending upon the scope of the project, a handful or a hundred citizens can become engaged, at varying levels of interest and, at times, acting at cross-purposes. The most vocal and passionate citizens, if also thoughtful and organized, are worthy opponents of the most well-conceived development plan. Too often, however, zoning cases become soap-operatic, featuring dramatic presentations at public hearings that ignore or altogether replace merits within the opposing perspective(s).\(^{32}\) Sometimes opponents are merely grandstanding or have agendas besides expressing opposition (such as future office-seeking). Law students with some basic knowledge of land use law and of mediation approaches to land use controversies can serve a valuable role in educating lay public stakeholders before a zoning public hearing process. But they also can facilitate a pre-hearing session to attempt to soothe ill feelings and reach understandings on the optimal outcome of an entitlement process. Since this approach is far more affordable to citizens than hiring counsel or another land-planning expert to oppose the developer’s legal staff at serial formal hearings, there is incentive for citizen opponents of an entitlement proposal to engage in mediation. A second advantage of citizen engagement is their opportunity to share and organize their collective thoughts and through making acquaintances, perhaps to organize opposition tactics and logistics.

Likewise, a developer gains advantage in submitting to a mediation session with other stakeholders. Viewed most cynically, one developer opportunity is to learn meritorious arguments against the development proposal, or citizen counter-proposals for mitigating negative impacts of the development proposal, prior to the public hearing date. A second opportunity is that the developer can avow to the land use staff and elected officials that its representatives “sought to accommodate” the surrounding neighbors. On occasion, however, the developer may discover wisdom among its opposition and learn that its own representatives’ silence (or lack of

\(^{31}\) See SUSSKIND & FIELD, supra note 7, at 153.

\(^{32}\) E.g., id. at 175 (featuring vilification of “greedy promotors, incompetent public servants and trouble-making neighbors”).
communications skills) stymied messaging that, properly managed, might have made a project proposal acceptable to opponents.

For law students to be prepared to assist the parties to land use controversy mediation, basic preparation has two ingredients. Initially, a student should have completed the basic property course of study in the first year and an additional term in a land-use law course. Land use courses are taught periodically in a large number of law schools nationally.33 Second, the students must have studied both two party mediation and elements of mediation in the group-dynamics process. One such technique involves the “mutual gains approach.”34 The mutual gains approach to tamping down stakeholders’ rhetorical level35 and ameliorating land use disputes is not a single process or strategy. It draws from negotiation, consensus building, collaborative problem-solving, alternative dispute resolution, public participation and public administration. The result is inclusive, collaborative processes designed to explore stakeholders’ full range of interests and criteria, compare various alternatives to land use outcomes, and determine which alternatives meet the most interests of participants.

Among other dimensions of a mutual gains approach:

• It is based on considering all stakeholders’ respective interests (as opposed to positions) as well as the necessary technical development information, such as a proposed project’s impact upon open space, economic development and transportation;
• It involves stakeholders, along with appointed and elected decision makers, such as planning staff members and officials, and members of zoning boards or city councils;
• It generates information for understanding better the stakeholders’ interests and determining if some of those interests are shared;
• It requires application of the mediators’ public engagement skills along with mediation skills; and

33 See Patricia E. Salkin & John R. Nolon, Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices, 60 J. LEGAL ED. 519, 531 (2011). Salkin and Nolon note that few schools offer a land use law clinical experience, however, see id. at 543.
34 See generally NOLON, supra note 20. Of course, mutual gains is not the sole neutral’s solution to successful land use controversy mediation; but a tested, rational, template approach enables the student to learn front-to-back mediation facilitation and to discover which elements of facilitation require her most continued study and application to enable her to become an effective out-of-court dispute resolver.
35 See SUSSKIND & FIELD, supra note 7, at 153, 178; Part II, supra (illustrations of distortions and “ideologies.”)
• It engages the public and the developer in dialogues beyond merely expressing information and views while skirting solutions-building.36

The law student’s role in the clinic evolves during three stages. The first stage is preparation, while the second is engagement and the third is reflection. In the first stage, the student mediators would meet with the town’s planning staff better to understand the technical aspects of an application. The students must learn facts about these topics: What is the specific project request? How does the request compare to the existing use of the land? Under the current zoning, what is the most intensive use of the land available, and how does that contrast with the proposed use? Under the proposed zoning or zoning adjustment, what is the most intensive use of the land, how does that contrast with the intensity of the proposed use? What are the new or augmented negative potential impacts of the use proposed (if approved); and how likely are each of those impacts actually to occur affecting open space, transportation, jobs creation and quality of life generally in the surrounding area? Such preparation enables students to feel confident in engaging with stakeholders who will not dismiss the students’ efforts due to their utter lack of knowledge or experience. The students also prepare by familiarizing themselves with the sets of “world-views” described above in the realm of each camp. Realizing that she had “heard that before” buffers the student mediator against the shock of hearing something especially strident or un-civil from a consultation’s participant.

In the second stage, the students engage with the stakeholders in consultations.37 Tasks involved here include: Filling gaps in stakeholders’ knowledge with accurate technical information; inventorying concerns of the opponents (and counter-concerns of the proponent developer about the cost of mitigating opponent concerns); directing citizen research on the bona fides of these interests (that is, plumbing their genuine existence and the costs attending their consequences); inventorying the sorts of mitigation approaches the developer might implement to ameliorate the opponents’ concerns; urging all stakeholders to press forward toward a tolerable resolution on each issue involved in the zoning matter until options are chosen meeting shared interests or identifying where stakeholders must agree to disagree; and, finally,

36 NOLON, supra note 20, at 11; see SUSSKIND & FIELD, supra note 7, at 37-42; Lawrence Susskind, Resolving disputes the kinder, gentler way, 61 PLAN. 16, 16 (May, 1995).
37 Deliberations themselves feature three phases, according to NOLON, supra note 20, at 17-8.
documenting agreements reached with the consent of the participants, allowing concessions on both sides are incorporated into the public record of the forthcoming hearing. Indeed, developer promises may even be incorporated in a community benefits agreement\(^{38}\) between the neighbor stakeholders and the development enterprise, which the clinic may aid in drafting.

The third stage is post-mediation student reflection, taking into account these queries:

A. How (if at all) can therapeutic jurisprudence affect an entitlement hearing atmosphere to reduce the intensity of stakeholder hostility and negative rhetoric, and to render outcomes of zoning processes more “palatable,” thereby sustaining, if not improving, the behavioral health of the neighborhood’s residents and the developer’s principals alike?

B. What additional sorts of counseling agencies or bodies would most effectively accomplish your answer to A.? Would a semi-private specialist court or arbitral panel hearing zoning applications be a viable option?

C. What sorts of processes and protocols are most successfully employed in a mediator’s quest to educate and to ameliorate tensions and pent-up, lingering hostilities among stakeholders, and to address shared interests in ways that may produce stable, wise and fair outcomes? As part of this inquiry, which processes best created value by creating theretofore uncontrived solutions meeting shared interests, effectively “expanding the pie” to the benefit of all stakeholders?\(^{39}\)

D. After counseling the stakeholders in the entitlement matter, do you believe you had any community impact, and if so, how would you describe that impact? If your answer is “no, there was no discernable impact,” how would you turn your response in an affirmative direction?

**IV. WHAT THE LAW SCHOOL’S ADVOCATES MUST CONTRIBUTE**

For a land use mediation clinic to succeed, all parties engaged with the law school must contribute. No matter their role in the school, every employee must mention to their neighbors and other university employees the availability of neighbor-developer mediation through the clinic. Here are the other roles the professional staff must play in advancing the clinic.

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\(^{38}\) See, e.g., Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?* 77 U. CHI. L. REV. 5, 6-7 (2009).

A. The clinician: The clinician does what she does best – teaching by demonstration. Among elements demonstrated are working in teams, problem-solving, listening, drafting of agreements and ordinances, informing clients and persuasion in collaborative settings. Perhaps the single most important lesson the clinician can teach student mediators is the virtue of paying attention. Academics and practitioners alike have informed the academy that the art of active listening is a vital lawyering skill in short supply, in negotiations and otherwise. Second, we understand that listening not only leads to heightened empathy but is critical to understanding sentiments and thoughts underlying statements being communicated. And finally, the discipline of paying complete attention to anything extraneous, a virtue diminishing across the bandwidth of society, must be mastered. Professor Edmundson brilliantly summarizes its benefits:

Happiness is losing yourself in something that you love and that will also, in all probability, come to benefit others. Happiness is working in an honorable vocation. Happiness is helping others, or protecting others, or enhancing the stock of humane knowledge. Happiness is absorption. . . . To be absorbed is to intensify one’s connection with what is real with the hope of reshaping it for the better, if ever so slightly.

40 See Salkin & Nolon, supra note 33, at 543 note 91.
42 See Evelyne Schwaber, Empathy: A Mode of Analytic Listening, EMPATHY II 144 (Joseph D. Lichtenberg, Melvin Bornstein & Donald Silver, eds. 2014).
44 See Edmundson, supra note 43. Happiness is indubitably therapeutic.
Next, as partnering with planning staff\textsuperscript{45} in the various jurisdictions the clinic serves is beneficial, the clinician has additional educating to do by melding efforts of the planning staff member(s) and the students. One aspect of that is trust-building between them.\textsuperscript{46} Either constituency may think the other has an agenda; and the clinician must assure them that they can rely on each other for correct information flow, honest assessments of facts and their best judgments. The clinician also will encourage the town’s planning staff member to think creatively, a trait not native to all persons trained and paid to rely on codes and related official interpretations and the “conventional wisdom” surrounding planning principles.\textsuperscript{47} The key is to convey that communities have more than “zero-sum” outcomes to consider – that they have multiple choices how to resolve controversial decisions.\textsuperscript{48}

The clinician also must assure the students that the leadership required in facilitation methods like a mutual gains approach is not about always knowing what to do.\textsuperscript{49} Facilitation is more geared toward sharing information, listening attentively to others and learning from information gained.\textsuperscript{50} These skills are not native or rapidly acquired but can be learned – by students accustomed to attempting learning. They should become absorbed but calmed by the idea that they need not acquire substantial technical expertise in land use.

B. Doctrinal faculty: The doctrinal faculty needs to be a resource to students, particularly in the areas of land use and real property law but also in ADR theory (I include here the principles of therapeutic jurisprudence), ethical conduct and practice.\textsuperscript{51} If these faculty members

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\textsuperscript{45} See Susskind, supra note 33, at 16. Of course, planners (including Susskind, long ago) themselves can become mediators, at least informally, see Joshua Abrams, The Zoning Dispute Whisperer, 77(9) PLAN. (Nov. 2011), http://www.daytonmediationcenter.org/pdf/Mediation_Article.pdf; John Forester, Planning in the Face of Conflict: Negotiation and mediation strategies in local land use regulation, 53 J. AM. PLAN. ASSOC. 303 (1987), https://www.researchgate.net/profile/John_Forester/publication/247188660_Planning_In_the_Face_of_Conflict_Negotiation_and_Mediation_Strategies_in_Local_Land_Use_Regulation/links/55359c5b0cf218056e929c56.pdf. As they have some interest in the outcome, however (i.e., retaining their jobs – the government they work for is an interested party, see id. at 303, 309), it is more sensible for them to serve in a co-conciliator’s role, see Adams, supra.

\textsuperscript{46} See Widener, supra note 27, at 120.

\textsuperscript{47} See Susskind, supra note 33, at 16 (noting reliance on conventional behaviors can lead to erosion of public confidence in planning).

\textsuperscript{48} NOLON, supra note 20, at x, xiii.

\textsuperscript{49} See Susskind & Field, supra note 7, at 230.

\textsuperscript{50} See id.

\textsuperscript{51} See, e.g., Charles B. Craver, The Use of Mediation to Resolve Community Disputes, 48 J.L. & POL’Y 231 (2015) (providing typology of mediator styles useful in community disputes, see id. at 234-9, and outlining a typical
have contacts in the development community where they live, it behooves them to speak enthusiastically about this available resource at their school. Also, they maintain contacts among the town’s attorneys they taught during school; and the word of the clinic’s availability can be spread among this constituency, potential consumers of the clinic product.

C. Librarians: These professionals will be called on to source town zoning codes, model codes and their respective written interpretations, along with collateral course materials on mediation and therapeutic jurisprudence. Crucial ingredients of successful mediation are fact-gathering and (where possible) agreeing on the significance of facts. Consequently, aggregating facts on a zoning matter from reliable sources is a valued role of the librarian that will explode in scope, as big data saturates the public domain, such as populates dynamic maps undergoing constant change.53

D. The Dean’s office: The administration’s members are crucial players in getting planning and zoning administrators, and their bosses, to refer cases to the clinic. They should inform each mayor, board of supervisors chair and the chairs of regional planning and zoning boards about the clinic’s availability and its potential to streamline their zoning processes. This last item is the “hook”; the clinic’s value proposition to the town is its capacity to save everyone time.54 By “time,” I include reducing time consumed in legislators being lobbied by stakeholders (and sometimes planning staff) and listening to in-hearing testimony, and time saved in pre-

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52 Among other available resources are instructional videos posted on YouTube, see, e.g., LAWRENCE SUSSKIND, GLOBAL ISSUES IN SUSTAINABLE DEVELOPMENT, NEGOTIATING SUSTAINABILITY (LESSON 7), YouTube (Feb. 17, 2016); LAWRENCE SUSSKIND, DEALING WITH ANGRY PEOPLE (Harvard Law School Program in Negotiation), YouTube (Feb. 8, 2011). (Susskind, an urban planning professor and an early [mid 1970s] proponent of mutual gains approaches to negotiation, launched a business [the Consensus Building Institute] promoting this group conflict-resolution method.) Podcasts and other media resources dealing with many aspects of mediation and land use conflict resolution are available; but this paper is not a bibliography, so the author shall not tread upon the law librarian’s territory.


54 See Abrams, supra note 45.
hearing narrowing of issues\textsuperscript{55} to those few critical “calls” that require policy – making experience and judgment by local legislators. When the clinic is ready to display its capability, the Dean’s office must invite local authorities to visit the clinic to speak to the clinician about its processes, creating the opportunity for the school to make the pitch. The “pitch” promotes local authorities requiring disputants’ participation in one or more consultative sessions before any contested matter comes to a contentious but unproductive public hearing.\textsuperscript{56} In other words, a town would make consultations in one or more forms in a contested application mandatory by regulation.

One may expect skeptical reactions from some town politicians, along with the inquiry why a law school clinic engages in a collaborative peacemaking process. Two underlying concerns may surface: Ceding of control over the zoning process (something local officials at times are reluctant to do\textsuperscript{57}) and concern over the quality of the conflict resolution’s guidance. The first concern is deftly resolved by the clinic’s according a town’s leadership substantial credit for reaching solutions, identifying contributions of appointed planning staff members participating in joint problem solving on the local government’s behalf. The second concern is addressed by the clinic’s reporting favorable results and diminished public anger with local land use processes generally. Now, what lies in the path of such achievements?

V. LAND USE DISPUTE RESOLUTION CLINIC HURDLES

Students maintaining everyday citizens’ dignity and animating social justice and civil discourse through a clinic vehicle, by itself, won’t justify its establishment and maintenance. Sturdy challenges to launch that must be addressed are described below. An initial hurdle is

\textsuperscript{55} See id. Prof. Carol Rose believes that development proposals generating concrete disputes are those that local officials approach with greatest energy, see Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, supra note 6, at 874-5.

\textsuperscript{56} NOLON, supra note 20, at 10-11, notes that local officials have encouraged mediation prior to adjudication. Indeed, in large scale or long-term development promising substantial changes to an enclave, it makes sense for stakeholders to sort out major roadblocks and concerns before the developer’s application is filed initially, to explore whether a superior development plan and a coalition of affected parties achieving compromise is attainable through the development of community trust and developer transparency, see id. at 12-3. But mediation may occur at any stage in the development review process (before or after the hearing is commenced), without violating legal constraints, so long as the process is structured properly and is completed before the public hearing is closed. See Edith M. Netter, Esq., Mediation: A New Way to Resolve Land Use Conflicts, 3 PLAN. COMMISSIONERS J. 1 (Mar.- Apr. 1992), http://aalto.arch.ksu.edu/jwkplan/cases/netter.htm.

\textsuperscript{57} See Bakken, supra note 7, at 246.
achieving supply-demand equilibrium, a dilemma addressed responding to three intertwined inquiries. First, can a clinic secure a “stream” of land use controversies with suitable complexity levels and proper sequencing for student/staff neutrals? Next, can the clinic prepare its students rapidly but ably enough (before they graduate) to perform “solo” mediation or joint problem-solving work? Finally, how does the clinic match an incoming controversy’s complexity to the level of its available neutral’s expertise?

In many jurisdictions, student-manageable land use disputes (featuring immediate but less-widespread project impacts) exceed in numbers major projects having complex controversies rooted in discordant values or ideologies.\textsuperscript{58} (Contemplate the difference between “private nuisances” involving a development that abuts relatively few grieving neighbors with more “public” nuisances with geographically and demographically far-reaching implications arising from, for instance, a proposed master-planned, mixed use community.)\textsuperscript{59} Examples of less complex cases include intended expansions of non-conforming uses, smaller infill developments of modest proportions, conditional use permits, minor-scale variance requests and single location liquor license applications.\textsuperscript{60} Performing a neutral’s role in these simpler cases affords a “capstone experience” to a second or third year law student who has completed classes in land use law, negotiations and mediation.\textsuperscript{61} The more complex cases afford opportunities for

\textsuperscript{58} Abrams, \textit{supra} note 45.


\textsuperscript{60} Admittedly, any of these facially “less contentious” matters can blow up on a mediator if opponents consist in whole or part (for example) of strident historic preservationists, persons seeking to maintain a neighborhood’s “community character” (thus, illustratively, disposed to dispute any change because it interferes with, for instance, their “equestrian way of life”) or of members of super-neighborhood associations encompassing square miles of land for resisting any new proposal not blessed in advance. If local regulation a portion of the lower airspace to be occupied by drones, the potential number of controversies is, so to speak, astronomical. See, e.g., Troy A. Rule, \textit{Drone Zoning}, 95 N.C. L. REV. (forthcoming, 2016) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2743945; Michael N. Widener, \textit{Local Regulating of Drones in Lower Airspace}, 22.2 BOST. U. J. L. SCI. & TECH. (forthcoming, May, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2732845. Professor Stephen R. Miller observed that one clinic challenge is to identify land use controversies that, from inception to conclusion, are “manageable” within the period of a semester, see e-mail from Stephen R. Miller, Univ. Idaho to the author (Mar. 3, 2016, 8:15 PM) (on file with author); but no legal obstacles prevent a student concluding her clinic semester from ongoing service as a neutral with the stakeholders’ mutual consent. Such a student’s final reflection awaits the task’s completion, which is not the ideal clinician-feedback environment but ultimately may prove more satisfying to the student.

\textsuperscript{61} See Salkin & Nolon, \textit{supra} note 33, at 548. These authors point also to the significance of learning use of new technologies in the planning field such as GPS systems, see id. at 526. In Seattle, a hearing examiner process involving independent appointed officials affords an appellant the opportunity to mediate her dispute by stipulating with the Hearing Examiner and the other party at a discretionary prehearing conference, see SUZIE A. TANNER, \textsc{Public Guide to Appeals and Hearings Before the Hearing Examiner} 5-6 (rev. Apr. 23, 2014),
clinician or student mentor demonstrations to the clinic’s students or for recent law graduates (or law school fellows) sharpening collaborative problem-solving skills.

Growing the base of prospective neutrals among the student population is a space for creative recruitment. In the short term, neutral sources include advanced students in joint-degreed law and urban planning or environmental studies programs and new lawyers employed in school-sponsored legal incubators and fellowship programs. A pro bono commitment to serve as a neutral in a certain volume of cases can be part of these new lawyers’ firm or fellowship contracts. Bringing these participants up to speed in short order implicates crash courses through a series of audio and video materials provided online or mentoring via one of the American Inns of Court chapters, both achievable low-cost approaches.

For longer-term momentum in building up the neutral stable, clinicians may lobby their academic deans to bundle ADR, negotiation skills, Therapeutic Jurisprudence, environmental/natural resources and land use law courses into a Public Controversy Resolution “track” or “certificate program” (PCR) at the school, with the student neutral’s handling a land use dispute being her capstone course final assignment. One endeavor engaging students in this track is to promote their enrolling in a short seminar (approximately five weeks long) during the second semester of the student’s first year of law school, fulfilling a single credit. This seminar ideally touches on elements of all courses offered in the full PCR program, taught broadly by


63 See Davida Finger, The Pro Bono Requirement in Incubator Programs: A Reflection on Structuring Pro Bono Work for Program Attorneys, 1 J. EXPERIENTIAL LEARNING 229, 231 (2015) (23 of 39 incubator or residency programs listed in an ABA directory for same required program attorneys to do pro bono work).

64 According to its website, one AIC goal is: “To be a primary resource for mentoring and education focused on professionalism, which includes ethics, civility, and excellence,” with related objectives including to have more Inns of Court with mentoring programs and to assist new lawyers in finding a mentor. See AMERICAN INNS OF COURT, OUR VISION, MISSION AND STRATEGIC GOALS, http://home.innsofcourt.org/AIC/About_Us/Our_Vision_and_Mission/AIC/AIC_About_Us/Vision_Mission_and_Goals.aspx?key=27d5bcde-8492-45da-aebd-0514af4154ce. Indeed, the AIC has a Model Mentoring Program, see http://home.innsofcourt.org/AIC/AIC_For_Leaders/AIC_Achieving_Excellence/AE_Mentoring/Inns_of_Court_Model_Mentoring_Program.aspx.
clinicians and expert guest speakers, inducing student registration in full-term courses after completion of their first year curriculum.

Financing clinic operations: Though not invariably required, clinics are most favored by law school administrators when they self-pay or have substantial funding sources. Where will financing come from for such a clinic? The optimistic view that a private benefactor’s donations or foundation grants will underwrite a clinic is often unrealized. In a major university setting, however, a law clinic may partner with an urban planning or public administration school unit elsewhere on campus, an alliance sharing resources including clinic operations budgets, especially under a dual-degree program.

Ultimately, newer clinics of this type will need to charge fees for conflict-resolution services. What’s the value proposition spurring adversaries to pay for services from a law school clinic? Initially, mediation, joint fact-finding or problem-solving facilitation will occur if cities, towns and counties mandate one or more of these activities in all contested land use entitlement applications. Even when the Planning Director, Zoning Administrator or another administrator of the zoning apparatus is charged with “in-house” conflict resolution, these efforts may not bear fruit. The staff member mediates in an environment frequently affording little preparation time; thus, she neither has had an opportunity to verify asserted facts and positions or to consider the consequences of what is presented. Additionally, if opponents of a project perceive the administrator’s bias favoring the development community, or if the conflict resolution caseload

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65 Among possible benefactors are zoning and environmental law firms and organizations promoting civil discourse in public life, a core ambition of this type of clinic. One organization committed to the advancement of civil discourse is the Sandra Day O’Connor Institute in Phoenix, envisioning that “policy decisions affecting our future are made through a process of civil discussion, critical analysis of facts and informed participation of all citizens,” see SANDRA DAY O’CONNOR INSTITUTE, OUR VISION, http://www.oconnorhouse.org/about/mission.php. That institute has a Fellowship program for select graduate students, see id. The Stegner Center’s Environmental Dispute Resolution Program at the S.J. Quinney College of Law is funded by a multi-year grant from Alternative Visions Fund, part of the Chicago Community Trust, see http://www.law.utah.edu/projects/edr/.

66 See, e.g., a dual-degree program sponsored jointly at the University of North Carolina, Chapel Hill, by the School of Law and the Department of City and Regional Planning, under which students may pursue the J.D. and M.C.R.P. degrees together and, with concurrent enrollment, may obtain the two degrees in four years, see LAW & PLANNING, https://planning.unc.edu/academics/masters/dualdegrees/lawplanning.


68 See Forester, supra note 45, at 303.

69 Cf. id. at 307 (citing planning director’s perspectives that developers and their attorneys are earlier to meet with as they are familiar, speak a common language with the planner and share technical know-how whereas neighbors are
becomes overwhelming, the zoning bureaucracy should prefer loaning an employee periodically to the school’s clinic as an advisor or a co-neutral over conflict resolution becoming multiple city employees’ primary stock in trade. 70 This time commitment raises budgetary issues while enhancing personal discomfort, especially in the inexperienced or passive planner’s situation.

Second, alternatives to mediation are more costly, often by a wide margin. Consider a developer’s choices. First, they can pay attorneys or lobbyists by the hour, sometimes many hundreds of dollars per hour (or the equivalent under a fixed fee arrangement). Hours are expended in lobbying initially planning commissioners and second, council members in a rezoning – or members of boards of adjustment, where variance or special exception cases are involved.71 In any such instance, staff members of the zoning bureaucracy must be met with repeatedly to provide facts and other inputs such as assurances of future development performance. These meetings and preparation for them raise the developer’s project “soft costs” substantially, compared to costs of group problem-solving exercises that resolve outstanding controversies or at least narrow the issues in their number and complexity. (The costs of litigation that may ensue if a lawsuit is the outcome of a hearing body’s decision also sting.) The sensible developer acknowledges that occasional unproductive attempts at dispute resolution are cost-effective if some fraction of these exercises narrow the scope and magnitude of objections, leading to outcomes reducing friction in future neighborhood or community relations.

Third, hidden value lies in less mediator experience. Private mediation of land use disputes by well-seasoned mediators may be less therapeutic than a professionally-led consultation produces. Besides higher costs of private mediation (borne by someone), when the mediator is more experienced, consultative proceedings likely will be less spontaneous because they are less messy. An articulate neutral-in-training remains less rehearsed (unsaturated with

inconsistent in their points of view and lack understanding of the process). Forester, supra note 22, notes that residents also doubt the good intentions of planners at times, see id. at 447.

70 Further, zoning bureaucrats prefer avoiding becoming material witnesses in later litigation over an allegedly broken zoning bargain. See, e.g., Lake County Trust Co. v. Advisory Plan Commission, 904 N.E. 2d 1274, 1275-9 (Ind. 2009).

71 In complex cases, rezoning and zoning adjustment and modifications to the town’s master (or general) plan are implicated, as are rights-of-way abandonments, historic preservation approvals, subdivision changes, sign code approvals, design review and so on – and each process in controversy may involve the town’s legislative body (final appeals) and/or a board’s or commission’s members, as well as staff members, to be persuaded. This explains why zoning-practice partners earn enough to help in underwriting salaries of land use clinics’ fellows, see note 63, supra.
the jargon and style of the professional’s resolution-process preferences), exhibiting rougher edges. These very traits can be disarming, causing stakeholders to relax earlier in the flow of the neutral’s contributions, causing disputants to divulge instead of withhold viewpoints, leading to earlier identifying shared interests of the opponents. Developer representatives, perhaps identifying less with a student neutral than with a specialist, may express less impatience with the mediation or other process and may minimize attempts to “score points” as is their custom with a professional neutral.\textsuperscript{72}

Market prices for clinic services must vary according to complexity of a land use contest engagement, its geographic location and the number of disputants and “sides” imbedded in the controversy. A clinician’s or a clinic volunteer affiliate’s conduct of the consultation likely will result in increased expense. A fixed per-diem fee, so long as the consultation’s duration is not utterly unknowable, lends predictability and, therefore, comfort to the paying parties. The clinic should impress a minimum charge for opening the proceeding (since the neutral presumably forewent other opportunities). In simpler cases such as zoning adjustment cases having few stakeholders, half-day and full-day fixed charges, carefully priced, should capture sufficient streams of revenue to sustain the clinic, if the influx of disputes is continuous. Periodic comparison shopping with the market prices of mediators of varying experience levels is in order.\textsuperscript{73}

The neutral’s costs should rest primarily on the development side of the land use dispute for this reason. If most developers interacted early in the application process with proximate neighbors, using finesse (according dignity to the neighborhood representatives by conceding some imperfections in the project and making affordable modifications), often the major bases to

\textsuperscript{72} But the student’s inexperience could embolden an obstreperous negotiator with a non-therapeutic outlook on life or negotiating, a fact teachable by the clinician to students, along with addressing advocate behavioral problems, cf. Widener, supra note 27, at 116-19. Experienced developers have negotiated with public bodies over numbers of projects in many realms, including development agreements, planned unit developments, floating zones and even zoning adjustment applications, see Stewart E. Sterk, Structural Obstacles to Settlement of Land Use Disputes, 91 BOST. U. L. REV. 227, 251 (2011). One means to limit “exploiting inexperience” is co-mediation, an opportunity for the less experienced mediator to gain experience and confidence in a more protective environment shared with her seasoned fellow mediator, see DAVID SPENCER & MICHAEL BROGAN, MEDIATION LAW AND PRACTICE 75-7 (2006). Another professionals’- dominance blunting approach implements a “circle process,” see Larry Chartrand, The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives, 33 ALBERTA L. REV. 874, 876 (1995).

\textsuperscript{73} Caution is indicated. Shoppers should intuit those bases for price differences, applying the analog of receiving treatment from an intern versus an attending physician.
oppose a project evaporate before the initial hearing on the application. In those instances, a town planning or zoning employee will intermediate those opponents’ remaining points, achieving a mutually satisfactory conclusion. Hostility of affected residents too often results from the developer’s inattention to or disrespect for neighbor positions. When that occurs, the developer ought to view the financial burden of consultation by the clinic properly as liquidated damages assessed for poor advance planning or, worse still, intentional “cloaking” of the development plan from prospective opponents. Still, opponents must have “skin in the game.”

Neighbor posturing for outright denial of a project, interminable delays in hearings or unreasonable developer concessions, and wasting of the neutral’s time otherwise, will be minimized when a share of the price tag is associated with such tactics. Collecting the developer’s share of the consultation fee concurrently with the town’s initial acceptance of the development application is reasonable, with the neighbor’s share remitted prior to the consultation date.

Identifying qualified clinicians is hampered by an historic imbalance in the American law school curriculum.74 Land use law engages students who often do not intend a litigator’s career aside from appellate practice or eminent domain representations. Recently, accrediting bodies have made clear that a curriculum’s litigation focus needs greater balance with non-litigation skills acquisition.75 Today a sizable roster of persons having land use controversy resolution backgrounds with deep neutral’s consultation experience is not in evidence, especially within the multiparty-dynamics resolution arena. Newly-minted clinicians may seek training from proprietary providers like the Consensus Building Institute or the Straus Dispute Resolution Institute, from independent experienced practitioners, or from faculties of those urban planning


75 See ABA STANDARD 302(a) (4) (2004) (requiring that “students receive substantial instruction in other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”) Interpretation 302-2 states that: “Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation,” . . . are among instruction in professional skills fulfilling Standard 302 (a) (4).
and law schools immersed in land-related clinical mediation programs such as those found at Pace University and the University of Utah.76

VI. CONCLUSION

Law school clinics focus on a town’s underserved populations of those with modest means, enduring neglect and abuse or other deprivation. While neighbors impacted by zoning matters own or rent residential property they cannot usually afford legal representation to press protracted administrative oppositions to proposed or approved (but as yet unbuilt) development. Quite frequently, these persons’ voices in the land use entitlement process are minimal – yet they have relatively more to lose. Among other results, they may be displaced in gentrification of a neighborhood or redevelopment of their enclave through an improvement or redevelopment district, or have a highly-incompatible new use or mixture of uses adjoining their homes. Possible negative impacts from a new or renovated project include increased local traffic, loss of curbside parking or sacrifice of familiar open space or other walkable areas due to unwelcome improvements. Even if a consultation’s outcomes are uneventful, some citizens will feel the neutral offered them the chance freely to communicate grievances in a group setting where some were attentive to their issues. An occasional joint problem-solving session may result in an apology,77 itself a highly therapeutic message.78 The argument that a public controversy resolution clinic does not aid or succor unserved citizens accordingly is short-sighted.

76 Readers should note that while dispute resolution approaches are emphasized in these schools, their programs do not, as of mid-2016, engage students as neutrals, see THE STEGNER CENTER’S ENVIRONMENTAL DISPUTE RESOLUTION PROGRAM AT THE S.J. QUINNEY COLLEGE OF LAW, http://www.law.utah.edu/projects/edrp/ (“EDRP is available to “do the work” of environmental dispute resolution for select projects. Services available include conflict assessment, process design, and mediation/facilitation. As appropriate, clinical students have the opportunity to assist the professional neutral in these cases.”) The Land Use Law Center at Pace University provides a four-day dispute resolution program for town leaders emphasizing mediation, facilitation and community decision-making skills, but apparently does not engage Pace’s students in that course nor in mediations of actual controversies. See PACE LAW SCHOOL, LAND USE LAW CENTER, STUDENT INVOLVEMENT, http://law.pace.edu/student-involvement-0. This summary is not offered as critique - rather to acknowledge that this proposal for law students to act as land use controversy neutrals envisions uncharted territory.
77 See Susskind, supra note 33, at 16.
78 See, e.g., Daicoff, supra note 3, at 159 (noting that the therapeutic benefits of apology and forgiveness are valuable considerations for those operating as creative problem-solvers seeking a more comprehensively satisfactory outcome to the problem-solving exercise); Michael B. Rainey, Kit Chan & Judith Begin, Characterized by Conciliation: Here’s how business can use apology to diffuse litigation, 26 ALTERNATIVES TO HIGH COST LITIG. 131, 134 (July/Aug. 2008). With sufficient mutual intention to behave both humbly and practically, several neighbors’ or developer grievances could dissolve at this mediation stage.
A second advantage will be the student participants’ growth as citizens, who increasingly understand plights of those somehow dispossessed by project development, through loss of property value, a change in their former living environments or simply disruption in their daily habits of engaging in the street life of their enclaves. A citizen’s perspective, tempered by the neutral’s vantage point, enhances the student’s desire to pursue social justice and property rights in the student’s town, not strictly as a lawyer but also as a communicator, peacemaker and purveyor of therapeutic jurisprudence to adjacent neighbors and the community beyond. On the coin’s verso, someone training in the law merely explaining entitlements’ processes and roles of the actors engaged in them may profoundly affect persons feeling that no one connected to that process knows their points of view or, in any event, heeds their expression. In Professor Wexler’s words, “what legal actors do has an impact on the psychological well-being or emotional life of persons affected by the law.” Therefore, an experiment in deliberative dialog, civil discourse and therapeutic conflict bargaining, readying law students as future neutrals in community land use controversies, is ripe for law school curriculum integration.

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79 Cf. Madelyn Nelson, Students on the law: Active Citizenship Goes beyond Memorization (college student who understood her citizenship as the manner of her relating to her community, under the community-based conception of citizenship) http://www.lifeofthelaw.org/2013/09/students-on-the-law-active-citizenship-goes-beyond-memorization/.

80 Views of the “just society” abound, but an inspiring version is Michael Sandel’s: “To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.” MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 261 (2009). Sandel observes that instead of avoiding the moral convictions of our fellow citizens, “we should attend to them more directly – sometimes by challenging and contesting them, sometimes by listening to and learning from them.” Id. at 268.

81 I include here property rights possessed by developers, one stakeholder not invariably on the “wrong” side of consultations about optimal land use policies. Some argue that application-by-zoning application party bargaining has substantial negative consequences, see, e.g., Roderick M. Hills, Jr. & David Schleicher, Planning an Affordable City, 101 IOWA L. REV. 91, 95, 118-24 (2015) (in a by-the-parcel bargaining system, outside developers must hire well-connected zoning “fixers” who lubricate the zoning approval process, but such costly activities add to the price of new housing and delay its construction while deterring outsiders from proposing new housing construction at all). If neutrals calm the waters in advance of escalating hostilities, perhaps they substitute as the “fixers.”

82 See Wexler, supra note 4, at 126.
LEXICON

Consultation: A meeting moderated by a neutral in which stakeholders’ positions are negotiated or formally discussed until reaching either an impasse or a resolution. These talks feature civil discourse; and they include, variously, joint fact-finding, problem solving, mediation and other forms of bargaining and discovery of shared interests, if any.

Land use: The variety of elements of organization of, and processes for maintaining, a town’s physical layout and uses; they include general (or master) plans, rights-of-way dedications and abandonments, historic preservation, building design and sustainability, site planning and zoning (including rezoning cases and zoning adjustment matters) and subdivision plats and amendments.

Neutral: A person organizing and moderating a consultation, playing no advocacy role other than urging the participants to use civil discourse and, where possible, to reach an understanding and perhaps tangible outcomes. The neutral may be a student, a fellow (post-graduate), a clinic volunteer in law practice or a clinician.

Town: A political unit for land use purposes with a deliberative body. “Town,” as used in the paper, includes cities, villages, boroughs, burgs, wards, counties, parishes, and all manner of special districts such as school districts, regional transportation authorities, utilities’ districts, water and sewer districts, community facilities’ districts and special assessment and taxing districts to the extent these are local (i.e., not state agency) bodies reaching a land use decision.

Zoning code: The specific codified recipe for a tract’s use and operation, which typically include a narrative ordinance and a map, along with written zoning code interpretations.

83 This definition may seem contrived, depending on method; Charles Craver observes in his paper, supra note 51, that the transformative mediator “intervenes,” identifying for parties their points of bargaining leverage, see id. at 240.