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# Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions

## Installment Two

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# Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions

## Installment Two

Alejandro Esteban Camacho*

I. INTRODUCTION ..... 270
II. A COLLABORATIVE GOVERNANCE MODEL FOR LAND USE REGULATION ..... 273
A. Adapting Regulatory Innovation to Land Use ..... 273
B. Characteristics of the Collaborative Land Use Regulation Model ..... 277
1. Broad and Meaningful Participation ..... 279
2. A Sustained Problem Solving Orientation ..... 284
3. An Active, Mediative Land Use Planning Profession . 292
4. Adaptable Comprehensive Plans and Agreements..... 295
5. Creative Accountability: Encouraging Involvement in Implementation and Enforcement ..... 300
C. Judicial Review of Local Government Land Use Agreements ..... 303

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III. THE CHALLENGES OF IMPLEMENTING A COLLABORATIVE APPROACH TO LAND USE REGULATION ..... 306
A. The Challenges of Collaborative Governance ..... 307
1. Assessing the Costs and Benefits of Collaborative Governance ..... 307
2. Fostering Participation and Problem Solving ..... 314
3. "Requiring" Collaborative Processes ..... 316
4. When to Require Consensus Agreement ..... 317
5. Achieving Consensus in Development and Annexation Agreements ..... 320
B. The Prospects for Collaborative Governance in Local Agreements ..... 322
1. The Practicability of Collaborative Local Governance ..... 322
2. Cultivating Local Government Legitimacy ..... 324
3. Capture: the Need for Collaborative Governance ..... 328
IV. CONCLUSION ..... 329

## I. INTRODUCTION

The shift in land use regulation from a primarily command and control approach to an extemporized, negotiated mode has steadily gained momentum, despite initial criticism from many courts and commentators. As explained in the first Installment of this Article, which appeared in the January 2005 issue of the *Stanford Environmental Law Journal*, proponents of this trend have pointed to the weaknesses of the command and control zoning approach—including the inefficiency and excessive rigidity of traditional zoning rules and the questionable expertise of planners—as support for a change to bilateral negotiation. This negotiated approach, whether explicitly endorsed by state judiciaries or not, is now the de facto dominant land use regime in contemporary American land use law.[1] The transition to

1. *See, e.g.*, Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849 (1983) [hereinafter Rose I]; Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 347-48 (2002); Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decision-making*, 65 N.D. L. REV. 161, 166-67 (1989); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 26-27 (2000).

negotiated approaches has rid land use regulation of a number of the problems that pervaded traditional command and control mechanisms.

Yet, as demonstrated in the first Installment, a host of different problems have since undermined the legitimacy of these new negotiated land use approaches. While modern bilateral negotiation attempts to address some of the intrinsic inefficiencies of the traditional command and control approach, its ostensible efficiency benefits are at best unproven. To the extent these benefits exist, they are significantly offset by the costs of institutionalizing favoritism. In addition, bilateral negotiation approaches promote adversarial and self-interested behavior while ignoring the long-term community engagement that is essential to the legitimacy of local decisionmaking processes. Bilateral approaches also continue to rely on the faulty assumption that professional planners can represent the interests of an entire community with little input from those affected by a particular decision. While negotiation-based regimes do reject the unworkably rigid, detailed plans at the core of traditional planning, these new regimes have largely failed to produce planning alternatives that take into consideration long-term and cumulative impacts. Rather, negotiated regimes have simply and steadily loosened substantive restrictions on development negotiations, producing an essentially ad hoc system of agreement-by-agreement regulation. Finally, although development and annexation agreement regimes have introduced explicitly contractual mechanisms into land use regulation, they too often fail to require the basic contractual guarantees to ensure accountability during implementation.

In short, by ignoring the multilateral nature of land use disputes and by failing to tap the potential of negotiated models to achieve—rather than frustrate—long-term planning, the prevailing bilateral approach to land use regulation has largely facilitated favoritism in the guise of efficiency and certainty. To date, proposed reforms of these bilateral regimes have been more concerned with strengthening judicial review of approved agreements than with actually improving the decisionmaking processes.

With the central purpose of cultivating improved land use regulatory processes, this Installment proposes a collaborative model that incorporates recent insights from public administrative

law, land use planning, and alternative dispute resolution theory into negotiated land use decisionmaking. This model recognizes the limitations of prospective, command and control regulation, but seeks to reincorporate principles of community involvement, local and regional equity, and flexible comprehensive planning into agreement formation and implementation. The model embraces a multilateral orientation and seeks to resolve local land use disputes in a way that fosters unbiased, efficient and well-planned—that is, adaptable and thus durable—land use agreements.

This nuanced, collaborative approach to negotiated regulation is detailed at Part II. The model emphasizes enhancing local democratic institutions by fostering broad and meaningful participation in agreement negotiation, as well as a sustained problem solving, rather than adversarial, approach. The model also promotes plan and agreement adaptability and creative accountability by providing for shared community implementation and monitoring of agreements, with the local government serving as community organizer, facilitator, and information gatherer and distributor. Part II relates this collaborative governance approach to contemporary consensus planning theory, which attempts to legitimize land use planners as facilitators capable of bringing a wide range of affected parties together to jointly make land use decisions.

A fundamental premise of this collaborative model is that an open and participatory decisionmaking process serves both as a check on privileged dealmaking and as a necessary conduit for important information about the relevant subjective and often competing interests of individuals affected by a particular land use decision. This model also draws on recent empirical evidence suggesting that decisionmaking processes that foster contributions from those most affected by decisions result in enhanced participant and public satisfaction with both the decision and the regulatory process.[2] The collaborative model seeks to foster local experimentation with various forms and amounts of public participation in order to cultivate the active, sustained involvement on which the legitimacy of local land use regulation ultimately relies. Part II accordingly proposes that current negotiated zoning and agreement-based regimes be modified with the twin goals of

2. *See infra* Part III.A.1.

making planning processes more participatory and open, and fostering agreements that are more adaptable and accountable to affected parties.

Part III discusses a number of potential challenges to the development of institutional processes designed to facilitate collaborative land use decisionmaking, including the challenges that have confronted similar approaches in the administrative law context. These include: potential increased administrative costs, and ascertaining whether these increased costs yield "better" agreements; the difficulty of fostering participation and problem solving; and the challenges of determining precisely when consensus should be required and how to obtain it. This Part argues that despite these challenges, a collaborative governance model has considerable promise in the local land use domain. This conviction relies in part on research on nascent efforts to foster collaborative local and federal regulatory processes that suggests that the costs associated with adopting a collaborative model are likely to be small in comparison to the benefits—both in terms of participant and public satisfaction with the land use decisions and processes. This Part also contends that some of the potential weaknesses of implementing collaborative governance in the administrative law realm, including the practicability of multilateral dispute resolution and the diminished reliance on governmental expertise, may actually be *strengths* in the local land use realm. Part III thus calls for the incorporation of additional collaborative characteristics into local land use processes, both as a necessary response to existing, biased regulatory approaches and as a welcome return to fostering community participation as an essential source of legitimacy for local government decisionmaking.

## II. A COLLABORATIVE GOVERNANCE MODEL FOR LAND USE REGULATION

### A. *Adapting Regulatory Innovation to Land Use*

The starting point for improving negotiated land use regulation can be found in certain innovations in governance that have begun to percolate in the public administrative law realm. Particularly in environmental regulation, Congress and other regulatory bodies have instituted a number of experimental approaches that seek to reinvent administrative regulation in order

to address claims of excessive adversarialism and illegitimacy in decisionmaking.[3]

These innovative processes seek to incorporate inclusiveness and flexibility into regulatory decisionmaking on a wide variety of environmental and land use issues involving local, state, and federal agencies.[4] The most prominent examples of negotiated administrative processes include regulatory negotiation under the Negotiated Rulemaking Act,[5] habitat conservation planning under the Endangered Species Act,[6] and the negotiation of Final Project Agreements under the Environmental Protection Agency's Project XL.[7] Like development and annexation agreement processes in local land use, these administrative processes allow agencies and regulated entities to deviate from otherwise applicable regulatory requirements.[8]

In these contexts, a normative model has been proposed for evaluating recent regulatory innovations that seeks to accommodate new private-public relationships and harness the capacities of affected private parties to assist in governance.[9] This

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3. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 3, 35 (1997) [hereinafter Freeman I]; Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 6-7 (1982) [hereinafter Harter I].

4. *See* LAWRENCE SUSSKIND ET AL., USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES: A GUIDEBOOK FOR PUBLIC OFFICIALS 19-23 (1999) [hereinafter NEGOTIATION GUIDEBOOK]; Judith E. Innes, *Planning Through Consensus Building*, 62 AM. PLAN. ASS'N. J. 460, 464-65 (1996) [hereinafter Innes I]; *Cases and Commentaries*, THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 679-1010 (Lawrence Susskind et al. eds., 1999) [hereinafter CONSENSUS HANDBOOK]. One early example of the use of collaborative processes in the federal land use context is the first habitat conservation plan developed in the early 1980s in San Bruno, California, under the federal Endangered Species Act ("ESA"). *See* Lindell L. Marsh & Robert D. Thornton, *The San Bruno Mountain Habitat Conservation Plan*, in MANAGING LAND-USE CONFLICTS 114 (David J. Brower and Daniel S. Carol eds., 1987). A diverse group of federal, state and local government officials, landowners, and conservation organizations worked together in a "steering committee" to forge an alternative agreement-based method for complying with the ESA. *See* TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN GROWTH 55-56 (1994).

5. *See* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (2000).

6. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-44 (2000).

7. *See* Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (EPA May 23, 1995).

8. *See, e.g.*, Freeman I, *supra* note 3, at 55-56 (describing how Project XL allows applicants to engage in cross-pollutant or multi-media trading of emissions).

9. *See id.* at 4; Harter I, *supra* note 3, at 103. Professor Freeman's model emphasizes harnessing the capabilities of private and democratic institutions and enhancing them through processes that encourage broad participation, a problem solving orientation, adaptable regulatory solutions, accountability through interdependence and mutual

approach builds on negotiation-based insights that reject the perception of regulation as a top-down, prospective exercise of power best directed by static, detailed, uniform rules.[10] The model proposes the development of regulatory institutions that allow for flexibility and learning within the regulatory process.[11]

This vision of governance as negotiation buttresses the increased use and acceptance of contract in land use regulation. Regulation can properly be understood as a set of negotiated relationships analogous to contract.[12] Efforts to make these contracts explicit do not entail any devolution of governmental authority, but rather are one means of structuring relationships between government and private actors to promote public goals.[13] Contract mechanisms can enhance both governmental and private power by ensuring private involvement in public decisionmaking, while allowing local governments to influence projects in ways they otherwise could not. For instance, a development agreement may enable a local government to request a developer's contribution to community infrastructure that would be considered an

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monitoring, and a flexible, engaged agency. *See id.* at 22. Freeman concludes that though existing innovative administrative processes embody some elements of her model, they still fall short of creating sufficient incentives to promote truly creative, flexible collaboration that is oriented toward problem solving and away from traditional notions of centralized accountability. *See id.* at 67-82.

Others have suggested similar elements for reforming regulatory decisionmaking. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 286-87 (1998). Borrowing from modern corporate innovations on decentralized decisionmaking, Sabel and Dorf's democratic experimentalist model of public administration also features characteristics akin to those in a collaborative governance model, including decisionmaking through pragmatic and deliberative problem solving, provisional solutions and adaptation through learning, and governmental accountability through direct participation. *See id.* at 287-88. Sabel and Dorf, however, also propose interlocal information sharing, a nationwide but decentralized process that fosters experimentation with government service provisions and requires local governments to share information on their programs with other local governments through regional or national coordinating agencies. *See id.* at 320, 345. Regional and national administrative agencies are primarily tasked with ensuring compliance with performance standards and with pooling and disseminating information. *See id.* at 345-46. This system links local governments and citizens to important data from beyond their immediate knowledge, fostering learning from the experiences of others and ultimately enhancing service provision "while reducing the vulnerability created by the decentralized search for solutions." *Id.* at 287-88.

10. *See* Freeman I, *supra* note 3, at 28-29.

11. *See id.*; Dorf & Sabel, *supra* note 9, at 285.

12. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548-49 (2000) [hereinafter Freeman II].

13. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976); Giger v. City of Omaha, 442 N.W.2d 182, 192 (Neb. 1989).

unconstitutional exaction if imposed under a traditional command-and-control scheme.[14] As such, contractual regulation can be more than a zero-sum game.[15] If used properly, negotiated regulatory approaches to land use regulation can foster more responsive and widely accepted land use decisions.

Recent regulatory innovations in administrative law are useful resources for developing a model that addresses the problems with existing local land use decisionmaking. Although different in several key respects,[16] public administrative law does parallel local land use regulation in a number of pertinent ways. Both state administrative agencies and local governments are essentially creatures of the state democratic apparatus, and both maintain delegated power over particular spheres of private activity.[17] Because administrative agencies and local governments derive their authority from delegated power, many have questioned the legitimacy of their decisions.[18] In both regulatory contexts, the solution most typically proposed is to constrain agency or local government discretion through more searching judicial review of decisions.[19]

This Article contends that heightened judicial scrutiny—in

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14. *See* Alejandro E. Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 STAN. ENVTL. L.J. 3, 56-65 (2005) [hereinafter Camacho, *Installment One*].

15. *See* Freeman II, *supra* note 12, at 671.

16. *See infra* Part III.B.

17. Administrative agencies are granted rulemaking, implementation, and enforcement powers in discrete substantive areas of governance within state or national jurisdictions, whereas local governments are granted general police powers—including the power to regulate land use—in distinct geographic areas. *See* Rose I, *supra* note 1, at 868; JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 45 (1998).

18. In administrative law, agency regulation is regularly characterized as inefficient, ineffective, and undemocratic. *See* Freeman I, *supra* note 3, at 3. As detailed in the first Installment of this Article, local government land use regulation development decisions have often been regarded as insular and subject to corruption, as well as inefficient and inequitable. Camacho, *Installment One*, *supra* note 14, at 34-43; *see also* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 347-49 (2d ed. 2000); Rose I, *supra* note 1, at 839.

19. See Camacho, *Installment One*, *supra* note 14, Part V.A, at 63-67, for a discussion of constraints on local government discretion in land use decisions. More searching judicial review has been the most typical prescribed solution. *See, e.g.*, Rose I, *supra* note 1, at 842-43; Freeman I, *supra* note 3, at 3, 10. However, some commentators have recommended an "intensification" of executive or legislative oversight in the case of administrative agencies. *See id.* at 3 n.2. With regard to local governmental decisions, some observers argue for increased state or regional agency oversight. *See* Rose I, *supra* note 1, at 842-43.

land use or administrative regulation—can, at best, serve a limited role in addressing concerns about unbridled discretion in negotiated regulation. Retrospectively limiting the discretion of those best placed to resolve disputes is not the most effective means of ensuring institutional legitimacy and accountability.[20] Rather, any regulatory model which aims to substantively improve the quality of land use decisions must concentrate on improving the decisionmaking process itself.

By drawing on local governments' reliance on participation as a crucial source of legitimacy,[21] the collaborative land use governance model proposed in this Article brings institutional controls to bear directly on improving land use decisionmaking processes. The characterization of project-specific land use decisions as mediations of conflicting property claims, rather than as quasi-judicial or quasi-legislative approvals, lends itself to a collaborative regulatory approach.[22] The collaborative land use governance model develops this vision of local land use project decisions as mediations, focusing on restructuring regulatory processes and agreements to further public goals of efficiency, fairness and long-term and adaptable comprehensive planning.

### B. *Characteristics of the Collaborative Land Use Regulation Model*

The following sections articulate five characteristics of

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20. *See* Freeman I, *supra* note 3, at 95-6.

21. *See infra* Part III.B.2.

22. *See* Rose I, *supra* note 1, at 847, 889-93; Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1168-70. Professor Rose focuses her analysis on suggesting a new judicial review standard for local land use project decisions, rather than on devising more effective regulatory institutional processes. Rose endeavors to make such decisions "fairer" and more rational by drawing upon local governments' unique bases for legitimacy—the ability for residents to either participate or leave the locality—rather than pretending that local bodies act like large legislatures or courts. *See* Rose I, *supra* note 1, at 887, 910. Nevertheless, she advocates considering piecemeal land use changes as mediative because "[a] mediation model is more realistic and less distorting" than models that treat the pervasive local land use deals as if they were either judicial or legislative decisions. *Id.* at 890-91.

Professor Rose describes a judicial review standard that focuses on whether the mediation-like process is both sufficiently participatory (and thus more rational and duly considered) and reasonably predictable (and thus "fair"). *See id.* at 910 ("As the elements of a new reasonableness standard, the test of due consideration should be based on popular participation in the steps of a mediation process, and the test of fairness should be based on predictability—the latter test made effective particularly by the opportunity for exit."). Rose suggests fostering participation at three stages of the process: the identification of disputants and sources of disputes, the exploration of issues, and the explanation of outcomes. *Id.* at 894-900.

collaborative governance tailored to the local land use context. This proposed normative model of collaborative land use regulation seeks to cultivate effective participation and sustained problem solving in land use decisionmaking by situating the planning professional in an active, mediative role throughout the regulatory process. It also insists on fostering land use agreements that are both adaptable and accountable to substantially affected parties.

Instituting these characteristics would require extensive changes to state enabling statutes for negotiated zoning (including contract zoning, incentive zoning and planned unit development regimes), development agreement acts (DAAs), and annexation agreement acts (AAAs).[23] Under the proposed statutory revisions, developers would have three broad options for development approval: (1) to seek as-of-right development permit approval that is fully consistent with the local government's land use regulations and comprehensive plan; (2) to apply for approval of a negotiated zoning agreement, in which the local government and developer negotiate over agreement terms in publicly accessible forums utilizing collective information-gathering incorporating extensive public input, and in which agreements are restricted by substantive standards tying negotiations to project impacts; or (3) to apply for approval of a development agreement, in which the local government, developer and other substantially affected parties negotiate over agreement terms in publicly accessible forums that utilize collective information-gathering, incorporate extensive public input, and require consensus approval by such parties.[24] Irrespective of the process used, it will not terminate with project approval. Instead, land use approvals must incorporate mechanisms that ensure periodic monitoring, provide the developer flexibility to adapt the development as needed, and allow other affected parties a continuing role in any such

23. Changes to these regulatory regimes are most appropriate at the state enabling act level because the structure of existing negotiated regulatory regimes is fashioned largely through state enabling acts—with DAAs and AAAs the most explicit illustrations of this—and because land use regulation is designed to foster adversarialism and competition amongst local governments such that few local governments save those under heavy development pressure would adopt such measures of their own accord.

24. For the development agreement alternative, in circumstances in which consensus becomes infeasible, the developer could subsequently opt for the negotiated zoning process and final review by the local legislative body of the alternatives developed during deliberations.

adaptations. An examination of the potential challenges to and prognosis for successful implementation of this model is provided in Part III.

1. *Broad and meaningful participation.*

A robust collaborative regulatory process encourages thorough participation by all parties affected by a proposed land development. This enhanced participation rests on four fundamental premises: (1) that an open negotiation process can thwart the corruption and unfair dealing so closely associated with conventional negotiated land use regulation; (2) that participatory processes are necessary to obtain important information about the interests and preferences of affected parties; (3) that fostering meaningful participation has a positive impact on both participants' and the general public's satisfaction with the regulatory process and outcomes;[25] and (4) that direct participation serves the important goal of enhancing accountability for governmental services and decisions.[26]

In addition to protecting potentially affected parties, direct participation improves decisionmaking by engaging parties with particular knowledge of local circumstances and the potential impacts of specific land use decisions.[27] Yet participation also has independent democratic value:[28] it provides those most affected by a regulatory decision immediate and ongoing opportunities to represent their own interests in the planning, construction or operation of a development. As detailed in the first Installment of this Article, most state zoning laws require local governments to make final quasi-legislative approvals at open meetings and to provide rudimentary public notice and opportunities to comment before issuing land development permits.[29] However, these participatory procedures are relatively minimal and are often

25. *See* Thomas C. Beierle & Jerry Cayford, *Dispute Resolution as a Method of Public Participation*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 53, 63-66 (Rosemary O'Leary & Lisa B. Bingham eds., 2003) (discussing the instrumental, substantive and normative values of public participation); *see also infra* Part III.A.1 (discussing empirical evidence on the intrinsic value of participation).

26. *See* Dorf & Sabel, *supra* note 9, at 288 (stating that local participation in service provision evaluation can serve to increase the accountability of regulatory institutions).

27. *See id.* at 317 (discussing fundamental value of direct and continuous participation by consumers and others affected in local government service provision).

28. *See* Freeman I**,** *supra* note 3, at 27.

29. *See* Camacho, *Installment One*, *supra* note 14, at 35-40.

fragmented and confusing. They regularly fail to produce substantial, engaged participation in local land use decisions—particularly during the vital early negotiation phases.

Though the broad participation criterion certainly includes traditional procedural requirements, such as public notice and hearings on proposed development, collaborative governance aspires to achieve more substantive public participation.[30] Under the proposed collaborative model, negotiated zoning enabling laws, DAAs and AAAs would, at a minimum, require that all discussions and negotiations regarding a proposed project's impacts, alternatives and conditions be open and accessible to the public. These processes would further strive to actually involve affected parties directly in project analyses, requiring local governments to engage these parties during the initial exploration of areas of potential conflict (the "scoping" of issues) and throughout negotiations, rather than only at the concluding public hearing.[31] In addition, local legislative bodies would themselves be more active in early negotiations. For example, the planning commission and local legislative body could schedule an early discussion of the project, providing details about what government officials see as the proper objectives of negotiations.[32] However, given the frequent pro-development bias of zoning boards,[33] direct input from community members is also imperative.

Participation should also be made an enduring feature of the land use regulatory process.[34] As part of ensuring meaningful

30. *See* Michael P. Buckley, *Stakeholder Analysis Applied to the Republic Square District, Austin, Texas, in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS 49, 61 (Rachelle L. Levitt & John J. Kirlin eds., 1985).

31. *See, e.g.*, Lindell L. Marsh, *Focal Point Planning in Key Largo, Florida, in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, at 29, 37 (encouraging early public participation in plan and agreement processes).

32. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, DEVELOPMENT AGREEMENT MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTEREST 37 (2002) ("One approach to informing the planning commission early on is to schedule the project for discussion at a regular planning commission meeting at the start of negotiations. This provides the planning commission with an opportunity to provide its input to the negotiating team on key policies and objectives to be achieved on behalf of the community through the development agreement.").

33. *See, e.g.*, Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447, 464, 466 (2004) (describing 1937 and 2003 studies of zoning boards finding bias toward development and overrepresentation of professionals in such boards).

34. *See* Freeman I, *supra* note 3, at 27.

participation, interested parties should be "institutionalized"[35] or integrated throughout the regulatory process, from initial city-wide planning through final development, and given direct responsibility for implementing or monitoring elements of the regulatory regime. "[I]nstitutionalized participation involves opportunities to formulate questions as well as potential answers; it requires a blurring of lines between those inside and outside of institutions responsible for governance."[36]

Determining prospectively the optimal type, amount, and timing of participation by interested persons or groups in designing a collaborative land use regulatory regime presents a unique challenge that must also take into account the administrative costs involved.[37] Unfortunately, no systematic experimentation has been conducted to provide information on the relative costs and benefits of varying participation strategies in land use regulation. In the absence of such evidence, two factors should guide the form of participatory right—whether the right to notice and open access, the right to comment, the right to a reasoned response, the right to direct dialogue and negotiation, or the right to sign off or decline a deal—provided to interested parties: (1) the type of interest that the actor has in the project, and (2) the extent of substantive flexibility provided by the regulatory regime.

The first principle, that participatory rights should vary based on the interest of the participant, would generally require that citizens with only generalized interests in a project are provided notice about and open access to negotiations and information about the proposed project's potential impacts and alternatives. Although such a citizen would be permitted to submit comments on meetings or generated information, he or she would not be given extensive power over a project decision. The value of direct and sustained input by such generalized interests is tempered not

35. *Id.*

36. *Id.* Professor Freeman continues:

> Whether participation is meaningful depends in part, then, on the nature of the engagement among parties, as well as on the kinds of regulatory solutions they choose. Those solutions that foster continued engagement and require joint responsibility for implementation, monitoring, and revision are preferable to those that deny parties responsibility and encourage them to disengage after a single interaction.

*Id.* at 28.

37. *See infra* Part III.A.1.

only by the likely costs but also by the fact that such interests would typically be reflected in the local government's general plan and effectively represented by the mediating planner and local legislative officials. However, entities with a significant stake in the proposed project, including the developer and any private or public entity with a property or other designated, substantial interest that is "significantly" affected,[38] should be given a more extensive role in the deliberative negotiating process.[39] These entities should be actively included in early scoping meetings and negotiations to identify potential issues and project alternatives. Other significantly affected local governments should also be included as participants to ensure a thorough analysis of project impacts and to provide important information and/or expertise.[40]

The second principle, that participation should vary based on the extent that other institutional controls limit the discretion of the negotiating parties, would require heightened participation requirements for processes such as development agreements in which few substantive standards restrict the scope of negotiations.[41] Though the flexibility provided by such regimes can allow the developer and other affected parties to develop creative solutions and engage in the trading of preferences, there are few if any institutional safeguards for fostering fair, efficient and well-planned decisions. As such, heightened participation requirements are warranted. Conversely, because negotiated zoning processes do impose criteria that constrain negotiations that roughly protect

38. This significance threshold borrows in large part from state environmental quality act significance threshold requirements, in which a "significant" effect is a term of art, with technical thresholds of significance for a variety of impact areas (e.g., traffic, noise, lighting). *See, e.g.*, Cal. Code Regs., tit. 14 § 15382 (West, WESTLAW through 2005) (defining "significant effect on the environment"); *id.* Appendix G (providing detailed checklist by impact area for potentially significant environmental effects); *id.* § 15064.7 (encouraging local government promulgation of technical thresholds of significance); *see also* RONALD E. BASS ET AL., CEQA DESKBOOK 40, 42 (2d ed. 1999).

39. In some circumstances, the developer may be the only affected party endowed with a substantive right in the project, with the other substantially affected parties provided procedural, participation rights ranging from the right to a reasoned response to comments to the right to direct dialogue and negotiation. In rare circumstances such as those detailed at Part II.A.4., *infra*, other substantially affected parties may be provided the substantive right to agree or disagree to the proposed project.

40. For example, the regulatory regime could designate other local governments as "responsible agencies" (with the local government in which the property is located designated as lead agency), with authority to participate in the decision process or review the project features that significantly affect that jurisdiction.

41. *See* Camacho, *Installment One*, *supra* note 14, at 22-32.

many of the affected parties—most prominently, statutory requirements that the conditions placed on projects be limited to reducing project impacts[42]—participation need not be as extensive.[43]

To be sure, many experienced real estate developers recognize the importance of communicating and working with community groups to maximize the likelihood of successful project approval and implementation. Some developers seek out and integrate community concerns early on in the approval process, regardless of state or local requirements.[44] Increasingly, developers are willing to participate in multilateral negotiation processes as an alternative to standard bilateral negotiations with a local government.[45] However, this is by no means the dominant approach, and a regulatory system that claims to yield decisions that are fair, efficient, or well-planned should not rely solely on a real estate developer's profit incentive, or even the whims of local government staff, to determine when to involve other affected parties. Existing negotiated processes are designed to overvalue the developer's interest in relation to all others. In contrast, a collaborative governance process mandates that more inclusive processes be used in the consideration of all negotiated land use agreements.

Ultimately, what is needed, and what the proposed collaborative governance model calls for, is regulatory experimentation with, and feedback on, the many different forms and levels of participation of interested parties in negotiated land use processes. Only by adaptively managing the regulatory process can we design a mechanism that works toward optimizing meaningful participation in particular land use decisions.

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42. *See id.* at 15-19.

43. Thus, while the development agreement process might require a consensus of substantially affected parties (or of the legislative body) to assent to the agreement, a negotiated zoning process might only require the more traditional majority decision rule. *See infra* Part III.A.4, for a discussion of the potential decision rules for negotiated zoning and agreement-based land use regulatory processes.

44. *See* Joseph P. Clancy, *Negotiating Conditional Zoning Approvals: Mount Prospect, Illinois, and Montgomery County, Maryland*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 30, at 91-95.

45. *See* NEGOTIATION GUIDEBOOK, *supra* note 4, at 3, 19-22 (identifying voluntary multilateral negotiation processes that included developers).

2. *A sustained problem solving orientation.*

One of the core characteristics of collaborative governance is the cultivation of a process that is capable of actually resolving challenging regulatory problems, instead of merely splitting the difference between seemingly conflicting positions. Encouraging the realization of "mutual gain" for all interested parties through joint and transparent information gathering and deliberation is central to the problem solving approach.[46] The problem solving process yields superior land use decisions because it orients participants, through "face-to-face deliberative engagement," toward the development of more novel, achievable, and adaptable solutions.[47] "The goal is to put the need to define quality at the heart of problem solving . . . . Rather than assuming what quality is at the outset, a collaborative regime requires that critical reflection about quality be built into the rule-making and implementation process."[48] Problem solving is a pragmatic approach to decisionmaking that acknowledges that the best ultimate solution to a public dispute is not knowable by any single interested party but rather must be resolved socially.[49]

This problem solving orientation borrows to an extent from the segment of alternative dispute resolution and urban planning literature focusing on consensus-based planning and decisionmaking. Consensus-based land use planning theory, developed in the late 1980s to address the political and professional legitimacy criticisms of traditional land use planning, emphasizes bringing together the wide range of stakeholders affected by a particular decision to determine the best acceptable plan by mutual consent.[50] The affected parties jointly explore the

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46. *See* Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 3, 27-33 [hereinafter *Alternative to Robert's Rules*].

47. Freeman I, *supra* note 3, at 22, 26. See *infra* Part III.A.2 for a discussion of the evidence substantiating and challenging this assertion.

48. *Id.* at 26-27. Furthermore, even if the collaborative process requires a more up-front investment of resources than the traditional, command-and-control regulatory process, the process is still worthwhile if the resulting agreements "ultimately reduce the cost of legal challenge and resistance to implementation." *Id.* at 26.

49. Dorf & Sabel, *supra* note 9, at 285 ("The collaborative investigation of differences in response to doubt is thus central to self- and mutual understanding.").

50. *See* Innes I, *supra* note 4, at 461. Consensus planning aims to achieve agreement by creating an environment of "communicative rationality," in which: (1) discussions involve all interested parties; (2) all participants in the decisional process are empowered and well-informed, particularly about each others' interests; and (3) "conditions of ideal

relevant interests, identify the pertinent facts, develop the possible options and selection criteria, and reach an agreement on the final development project.[51] This consensus-building approach acquires legitimacy by inviting meaningful participation and then channeling this participation toward the development of decisions designed to satisfy, to the greatest extent possible, the interests of the affected parties.[52]

A variant of collaborative problem solving, consensus-based planning is based on the conviction that regulatory decisions that are agreed to by more than a majority are more desirable.[53] While there is no general agreement as to what constitutes consensus, most mediation professionals agree that consensus does not require all parties to be completely content with the result, but rather that the agreement is one that affected parties can tolerate,[54] particularly compared to the parties' other options.[55] At a minimum, consensus does mean a decision rule that requires the assent of more than a majority of participants. Some commentators recommend that parties themselves define what

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speech are met (statements are comprehensible, scientifically true, and offered by those who can legitimately speak and who speak sincerely)." *Id.* at 461. As one influential planner stated: "Communicatively rational decisions . . . are those that come about because there are good reasons for them rather than because of the political or economic power of particular stakeholders." *Id.*

51. *See id.*

52. Local governments can develop solutions and forge agreements that are "more widely supported than those [decisions] made using traditional decisionmaking methods (such as top-down decision making [sic] or even parliamentary procedure)." Lawrence Susskind et al., *Introduction* to CONSENSUS HANDBOOK, *supra* note 4, at xvii [hereinafter *Introduction to* CONSENSUS HANDBOOK].

53. *See Alternative to Robert's Rules*, *supra* note 46, at 5. The established majoritarian model of land use decisionmaking is based on the assumption "that the majority should get what it wants, even if the minority is left with little or nothing." *Id.* at xxii. This approach is epitomized by the ubiquitous Robert's Rules of Order. *See* HENRY M. ROBERT, ROBERT'S RULES OF ORDER (10th ed. 2000). In such a process, few individuals take any responsibility for considering the needs of others, especially those with the least influence or ability to represent their views effectively. *See Alternative to Robert's Rules*, *supra* note 46, at 3-4.

54. *See* NEGOTIATION GUIDEBOOK , *supra* note 4, at 2.

55. The best recourse for a participant to negotiations is referred to by many mediation and facilitation specialists as the "best alternative to a negotiated agreement" (BATNA). *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100 (2d ed. 1991). For project-specific land use decisionmaking, the BATNA would be litigation over the validity of the land use application approval or denial, or, for the developer, submitting to the existing restrictive "as of right" scheme provided for in the locality's zoning code.

should constitute consensus in their particular dispute,[56] while others claim that consensus decisions require unanimity.[57] One commentator takes an intermediate approach, asserting that parties have an affirmative responsibility to ensure that the only dissenting parties are holdouts who believe that their interests are irreconcilable with those of others and better served by remaining outside the agreement.[58]

Yet collaborative problem solving does not *require* consensus approval. Rather, the proposed problem solving approach seeks more broadly "to change the reasons and evidence produced in public debate, and with them the conditions for participation in civic life."[59] As such, it fosters the development of public debate that is focused on providing reasons for, rather than asserting interests in, a particular outcome.[60] Problem solving under the proposed collaborative model is designed to reduce the typically adversarial nature of local stakeholder relationships.[61] During information gathering and deliberation, stakeholder groups engage in open, constructive dialogue by articulating reasons and explanations for their concerns.[62] Though a collaborative process may insist on consensus as a decision rule,[63] collaborative mechanisms can be valuable in circumstances where a regulatory agreement is ultimately adopted through majority rule, or even when no final agreement is reached.[64]

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56. *See* David A. Straus, *Managing Meetings to Build Consensus*, in CONSENSUS HANDBOOK, *supra* note 4, at 287, 303. In administrative negotiated rulemakings, many stakeholder committees developed creative definitions of consensus that allowed parties to disagree without dissenting from the entire agreement, including simple majority vote or unanimity on the statement that there was "no substantial disagreement" or "no significant disagreement." *See* Freeman I, *supra* note 3, at 40 n. 111, 62-63.

57. "While it is not possible to specify the exact percentage of support that would constitute an overwhelming endorsement, it would be hard to make a claim for consensus having been reached if fewer than 80 percent of the participants in a group were not in agreement." *Alternative to Robert's Rules*, *supra* note 46, at 32-33.

58. *Id.* at 6-7, 33.

59. Dorf & Sabel, *supra* note 9, at 288.

60. *See* Freeman I, *supra* note 3, at 26; Dorf & Sabel, *supra* note 9, at 288-89.

61. *See* Freeman I, *supra* note 3, at 24.

62. *See Alternative to Robert's Rules*, *supra* note 46, at 27-28, 44-45. In short, problem solving "forces parties to articulate why one solution is preferable to another." Freeman I, *supra* note 3, at 26.

63. For a discussion of when consensus should and should not be required in local land use negotiated agreements, see *infra* Part III.A.4.

64. *See* Judith E. Innes, *Evaluating Consensus Building*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 631, 640 [hereinafter Innes II].

Under a problem solving orientation, state authorizing acts should require local governments to adopt uniform ground rules[65] for multilateral negotiations to facilitate the joint exploration of interests, facts, options, selection criteria, and provisional solutions. There are three major stages in this problem solving process: (1) joint issue identification, (2) information collection, generation, and sharing, and (3) issue assessment and resolution. Cooperative issue identification begins with an appraisal of major issues, often called a "conflict assessment" or "stakeholder analysis."[66] Such assessments include preliminary consultations with the relevant stakeholders, an initial determination of the various parties, interests, and concerns at stake, and the development of ground rules, such as appropriate timetables and standards of conduct, that help guide the remainder of the process.[67]

Transparency in decisions and in the processes leading up to them is a vital element of the collaborative process. This is especially true during the second, or information collection phase, when data on potential project impacts and analogous, previously implemented projects is assembled.[68] Rather than following the adversarial litigation model of disconnected and insular information generation, participants try to engage in joint fact finding.[69] For example, interested parties may jointly retain technical experts to develop facts and make predictions in areas requiring scientific or specialized analysis.[70] Even if parties ultimately construe the results of these analyses differently, this shared knowledge can promote more credible, creative, and

65. Use of such procedural rules would be similar to the fairly ubiquitous use of Robert's Rules of Order to administer local government hearings. *See* ROBERT, *supra* note 53. Of course, such rules would be based on a wholly different set of principles than those in Robert's Rules of Order. *See, e.g.*, *Alternative to Robert's Rules*, *supra* note 46 (delineating a set of rules to govern a consensus-based decisional process).

66. Buckley, *supra* note 30, at 49-62 (detailing features of stakeholder analysis).

67. *Alternative to Robert's Rules, supra* note 46, at 21-26, 36-44. Conflict assessments also can serve as a useful means of generating the roster of stakeholder participants, getting affected parties to the table, involving these parties in setting the agenda for negotiations, and engaging them in formulating the ground rules governing dialogue. *See id.*

68. Wherever possible, data on similar past projects should include information from both inside and outside the jurisdiction. *Cf.* Dorf & Sabel, *supra* note 9, at 287-88 (proposing a decentralized regulatory system with an information clearinghouse through which regional and national administrative agencies coordinate the collection, dissemination, and evaluation of data on local government service provision).

69. *See Alternative to Robert's Rules*, *supra* note 46, at 29-30, 46.

70. *See* John R. Ehrmann & Barbara L. Stinson, *Joint Fact-Finding and the Use of Technical Experts*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 375, 377.

durable agreements.[71] Joint information gathering also enables parties with less information or technical background to negotiate more effectively and accurately.[72]

The collaborative model's information gathering and sharing phase is to some extent comparable to the environmental impact review (EIR) processes that exist in a minority of states.[73] EIR processes are intended to publicize a project's potential environmental impacts and involve interested parties in the consideration of these impacts and possible alternatives.[74] However, these processes by design rarely serve to cultivate joint and impartial information gathering. Public and private participants, with the obvious exception of the local government staff and project developer, are rarely invited to assist in the selection of expert consultants or given a role in the preparation of initial impact or alternative analyses.[75] EIR processes promote, and therefore regularly involve, battles between experts.[76] As a result, they tend to advantage parties with greater resources and access to the information-gathering process—namely developers.[77] Furthermore, an EIR may focus narrowly on a project's impacts on the physical or natural environment, with no standalone discussion of economic or social impacts.[78] Lastly, while EIR processes require

71. *See id.* at 377-79.

72. *See id.* at 378.

73. *See* Rose I, *supra* note 1, at 896-89 (comparing exploration of issues in mediation to environmental impact review). These state statutory regimes are modeled after the environmental impact statement ("EIS") process of the federal National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347 (2005). *See* BASS ET AL., *supra* note 38, at 5.

74. *See* Rose I, *supra* note 1, at 897.

75. *See, e.g.*, BASS ET AL., *supra* note 38, at 73-74.

76. *See, e.g.*, MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 230-31, 353 (10th ed. 1999) (describing numerous cases involving disputes among experts).

77. Because technical information is typically expensive to generate and analyze, developers' special access in the bilateral regulatory process is compounded by superior resources that provide an informational edge. Community groups that wish to question a project analysis through expert opinion must fund the expert themselves and often do not have substantial resources for such an analysis. Even if a community group is able to fund an expert opinion, in some jurisdictions a city may freely disregard that opinion even if it directly contradicts expert opinions funded by the developer or the government. *See id.* at 353.

78. *See, e.g.*, 40 C.F.R. § 1508.14 (2005) (providing definitions for NEPA); Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (holding NEPA does not require an agency to assess every impact of its proposed action, only impacts on the physical environment); Wisconsin's Envtl. Decade, Inc. v. Wisconsin Dep't of Natural Res., 340 N.W.2d 722, 730 (Wis. 1983) (holding state environmental policy act does not

that most information gathered on a project be shared with the public, they do not guarantee all interested parties access to actual project negotiations. As a result, these processes fall well short of achieving a truly inclusive, problem solving orientation. State statutes that authorize or enable negotiated zoning or development or annexation agreements should therefore be revised to incorporate an open impact review process that requires discussion of projects' potential environmental, economic, and social impacts and the use of neutral experts jointly designated by the significantly affected parties.

The third phase of the problem solving process is deliberation and negotiation. This phase is guided and managed by a land use planner who helps parties develop creative solutions that foster mutual gains by encouraging them to transcend the view of the negotiation process as a zero-sum game and instead focus on "creating value."[79] This phase begins with joint brainstorming to explore and clarify the various interests involved,[80] with an eye towards formulating options that seem to increase the total "pie" of project benefits while continuing to satisfy each party's interests.[81] Next, the parties engage in "integrative bargaining" by applying the results of the brainstorming to make concrete tradeoffs and realize the identified "pie"-expanding opportunities.[82] This process motivates participants to tackle decisionmaking collectively and constructively, while promoting parties' trust in each other and in the process. In so doing, collaborative problem solving increases the likelihood of

require analysis of socioeconomic impacts in absence of significant impacts on natural environment).

79. *See Alternative to Robert's Rules*, *supra* note 46, at 11-12; LAWRENCE SUSSKIND & JEFFREY L. CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 85-89, 178-81 (1987).

80. *See* Sarah McKearnan & David Fairman, *Producing Consensus*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 325, 330 (distinguishing *positions* (stated demands) from underlying *interests* (needs and concerns)); LAWRENCE SUSSKIND ET AL., NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION 24 (2000) [hereinafter NEGOTIATING ENVIRONMENTAL AGREEMENTS].

81. *See* NEGOTIATING ENVIRONMENTAL AGREEMENTS, *supra* note 80, at 24, 26, 228.

82. *See* SUSSKIND & CRUIKSHANK, *supra* note 79, at 180-81. Participants focus on preliminary proposals prepared by the facilitator or a subcommittee, presenting a range of options, then brainstorm to expand available alternatives and cooperatively formulate packages of options for mutual gain, and finally bundle and trade on issues that may be valued differently. *See* McKearnan & Fairman, *supra* note 80, at 330-36; *Alternative to Robert's Rules*, *supra* note 46, at 28, 30, 45, 47.

developing solutions that are both more valuable to the affected parties and more consensual than those reached under the current bargaining approach.[83]

One somewhat flawed illustration of a more mediative approach to land use regulation is the mediated development agreement process the American Planning Association (APA) proposes as a supplement to its standard development permit regime.[84] Local governments can choose[85] to enter into a mediated agreement process with a developer to modify local development regulations if three conditions are met: (1) the developer requests the mediated agreement, (2) has been denied a development permit application or obtained a conditional approval, and (3) alleges that a regulation imposes an undue hardship.[86] In this alternative decisionmaking process, all mediation meetings must be open to the public, and the mediator may invite (and parties may suggest) other relevant stakeholders to attend the negotiations.[87] Unfortunately, even this mediation process remains explicitly bilateral; only the developer and local government are designated the agreement parties, other affected parties are given the opportunity to participate in negotiations only if invited, and these other parties may not be included in agreement enforcement or implementation.[88] Furthermore, the mediated agreement process only applies in the very limited circumstance in which existing development regulations are deemed too restrictive as applied and may result in a takings claim.[89] Nonetheless, this APA innovation is a valuable first step toward designing more open and collaborative land use regulation processes.

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83. See *infra* Part III.A.3 for a discussion of the viability of fostering problem solving in the face of self-interested behavior by participants.

84. *See* AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE (Stuart Meck ed., 2002) § 10-504, at 10-56 to 10-57 [hereinafter APA MODEL CODE]. In addition, a few states have adopted statutes for land use mediation. *See* CONN. GEN. STAT. § 8–8a (West, WESTLAW through 2005); ME. REV. STAT. ANN. tit. 5, § 3341 (West, WESTLAW through 2004); IDAHO CODE § 67-6510 (West, WESTLAW through 2004).

85. The local government may decline mediation. *See* APA MODEL CODE, *supra* note 84, § 10-504(3), at 10-56.

86. *See id.* § 10-504(1), at 10-56.

87. *See id.* § 10-504(6)(b)-(c), at 10-57 ("The mediator may invite any person, organization, or governmental unit to participate in the mediation. The parties may suggest persons, organizations, or governmental units to invite.").

88. *See id.* § 10-504(2)(c), at 10-56.

89. *See id.* at 10-54 (commentary to § 10-504).

It is again important to note that a problem solving orientation does not ultimately rely on participant agreement to be effective. Even in the face of intractable conflict, a participatory, problem solving approach can be valuable by expanding available information on the potential impacts of, alternatives to, and possible mitigating measures for the proposed project, sharpening the dispute by clarifying issues and interests, and even improving adversarial relationships.[90] These features help to diminish the power and informational imbalances that often are the source of favoritism. Where significantly affected parties are unable to agree on an impartial fact-finder, state governments that sanction collaborative processes should consider making technical resources, funding, coordinating support, or even planning staff ombudsmen available to empower disadvantaged parties.[91]

In circumstances of unresolved conflict between parties, the local government's legislative body serves as an ultimate arbiter through a bifurcated process that distinguishes between negotiated zoning and agreement-based regulatory mechanisms. If the developer opts to seek a development agreement, with its considerably greater substantive flexibility, the significantly affected parties would need to come to a consensus for the development agreement to be adopted.[92] If an impasse occurs, the developer could nonetheless return to a more standard negotiated zoning process, one with increased substantive restrictions on negotiations (linking negotiations to project impacts) but only requiring legislative approval and not full consensus by interested parties. In such circumstances, the planning facilitator would present the two or three potential options developed in the collaborative deliberations, for consideration and ratification by the local legislative body.[93]

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90. *See* NEGOTIATION GUIDEBOOK, *supra* note 4, at 3, 22.

91. A planning staff ombudsman could be principally responsible for coordinating a community group, ascertaining the group's preferences and interests, and/or advocating on behalf of the group in deliberations.

92. If an agreement is reached, it could still be subject to initiative or referendum to ensure that more diffuse but important cumulative interests are not disregarded.

93. This problem solving approach, when combined with the criterion of adaptable planning detailed at Part II.B.4, is somewhat similar to Professors Sabel and Dorf's proposed adaptive management of governmental service provision, which offers a learning-by-monitoring process derived from decentralized private business collaborations. Dorf & Sabel, *supra* note 9, at 316-20. In Sabel and Dorf's model, city management sets initial goals after consultation with complementary city service providers. *Id.* at 316. Next, these providers, in consultation with citizen users and those affected by the service,

3. *An active, mediative land use planning profession.*

Existing bilateral land use approaches imprudently assign land use planning professionals the impracticable and unnecessary role of negotiator responsible for knowing and representing various affected local interests with little direct public input.[94] For decades, the planning profession failed to develop a coherent theoretical foundation that answered this critique.[95] The proposed collaborative model provides such a foundation by recasting local land use planning professionals as facilitators, community organizers, and gatherers and distributors of information, rather than ostensibly omniscient or objective agents of the public interest. These roles draw on a key line of contemporary planning theory that charges planners with feasible community organizing tasks for which they are increasingly being trained.[96]

This new vision values the professional planner as a facilitator who helps the various affected parties to deliberate and develop the appropriate plan.[97] The planner pursues common ground[98] by bringing together and coordinating work by developers, other city departments, elected officials, citizen groups, the media, and even

implement programs to further the established goals. *See id.* at 317. The goals, programs, service providers, and ultimately the city management and elected officials, are regularly evaluated. *See id.* at 319.

This corporate approach to innovation, however, is less applicable to project-specific land use regulation, where the focus is not on improving the quality and responsiveness of governmental service provision by experts but rather on the mediation of discrete, conflicting private land interests. The difficult decisions in land use regulation do not involve the relative efficiency of expert government service administration, but rather the attempt to reconcile the various subjective interests of those affected by a particular proposed development or use. In this sense, land use regulation does not resemble a business enterprise or even other, more conventional governmental services, such as police or bus services. In such a context, problem solving is more akin to mediating various property interests, and as such, more applicable methods for fostering problem solving are found in the above discussed dispute resolution literature. Nonetheless, the proposed collaborative land use model includes features that are similar to those in Sabel and Dorf's learning-by-monitoring protocol—in particular, an initial goal-setting process based on past practice and the examination of relevant experience in other cities, close participation by impacted parties, and periodic evaluation and adjustment.

94. *See* Camacho, *Installment One*, *supra* note 14, Part II.B, at 12-14.

95. *See* Innes I, *supra* note 4, at 460.

96. JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES 3 (1999).

97. *See* CONSENSUS HANDBOOK, *supra* note 4, at xviii; Innes I, *supra* note 4, at 466-67.

98. *See* Innes I, *supra* note 4, at 466-69; FORESTER, *supra* note 96, at 3 ("[P]lanning analysts try to build critically informed but pragmatically viable agreements.").

neighboring local governments.[99] In short, the planning professional tackles the "pressing and central challenge of democratic politics: the challenge of 'making public deliberation work,' making participatory planning a pragmatic reality rather than an empty ideal." [100] Planning officials focus "on managerial activities, such as determining which parties ought to participate in which decision-making processes; providing or arranging for the production of information; and facilitating cooperation, negotiating impasses, and promoting consensus."[101] Early in the application process, a planner should be "helping to identify the right participants, assist[ing] them in setting an agenda and clarifying the ground rules by which they operate, and even 'selling' recalcitrant parties on the value of participating."[102] During deliberations, the planner can assist the parties in generating and disseminating information, developing creative resolutions, and emphasizing deliberation over mere self-interested argument.[103] In particularly complex and contentious land use disputes, a local government may even opt to retain a neutral professional mediator/facilitator to help guide the process.[104]

Even when adversarialism and acrimony persist, land use planners can serve a vital function by attempting to correct power and information imbalances during the deliberation process.[105] Planners should serve as "capacity-builders" for interested and

99. *See* Richard L. Fosmoen, *The Public Sector's Perspective*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 30, at 23, 26-27.

100. FORESTER, *supra* note 96, at 3.

101. Freeman I, *supra* note 3, at 31.

102. *Alternative to Robert's Rules*, *supra* note 46, at 8-9.

103. *See id.* at 9; Innes I, *supra* note 4, at 465, 467. These goals can be achieved by building relationships and fostering mutual respect, exploration, and learning. *See* FORESTER, *supra* note 96, at 4.

104. Some suggest that land use disputes may be more suitably mediated by professional neutral mediators than by internal planning staff in situations in which the issues in question are particularly complex and contentious and there is the potential for the application of significant political pressure placed on internal planning staff to steer outcomes. *See* Michael L. Poirier Elliott, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 199, 232-33. Because professional mediators are more experienced and observe a professional code of conduct that emphasizes neutrality and impartiality, they may increase the process' efficacy in some circumstances. *See id.* On the other hand, internal planning staff may have particular knowledge of a local government's institutions, initial plan, and pre-existing community relationships. As a result, in some circumstances internal planning staff may serve as a more effective facilitator than an outside professional. *See id.*

105. *See* FORESTER, *supra* note 96, at 9.

affected parties, "providing technical resources, funding, and organizational support when needed,"[106] and regularly coordinating information gathering and dissemination with expert consultants.[107] Planners may also coordinate or support the involvement of disadvantaged or diffuse, but still affected, parties (including residents of neighboring jurisdictions) to "prevent well-resourced groups from dominating deliberative processes."[108] For example, the planner may provide research to community organizations if joint information gathering becomes unmanageable, or even appoint a staff advocate or ombudsman to represent these weaker parties during negotiations.[109]

After agreement adoption, local government planners should also serve as the chief monitors during implementation and enforcement. They may reconvene affected parties to review construction progress or site operations, or to make amendments to project agreements.[110] To the extent that project agreements allow other interested parties to participate in implementation and enforcement, planning officials may also help orient those parties.[111] If and when participant monitoring fails, planners are responsible for intervening and ensuring that developers continue to comply with project agreements.

Though local government planners play a predominantly facilitative and capacity-building role during the collaborative process, the local government is not expected to be ambivalent about regulatory outcomes or merely ancillary to the decisionmaking process. The local government establishes minimum standards or development guidelines for projects in the local zoning regulations or comprehensive plan.[112] The local

106. Freeman I, *supra* note 3, at 22.

107. Such information may come from project-specific analysis, but it may also come from information gleaned from similar, already approved projects from both within and outside the jurisdiction. *Cf.* Dorf & Sabel, *supra* note 9, at 287-88.

108. Freeman I, *supra* note 3, at 32; *see also* Malcolm C. Rivkin, *Negotiating with Neighborhoods*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 30, at 65, 75 (stating that financial and staff resources must be available, especially for citizen groups, to sustain multi-party negotiations).

109. *See* Freeman I, *supra* note 3, at 81-82. Of course, the administrative costs of such measures must be considered. *See infra* Part III.A.1.

110. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 32, at 40 (detailing implementation strategies that include agreement monitoring and implementation matrices).

111. *See* Freeman I, *supra* note 3, at 32.

112. *Cf. id.* at 31 (stating that government may set minimum standards for

government also retains the ultimate authority to impose its own solutions when impasses occur in the deliberative process.[113] However, this latter authority should be used only as a last resort. A local government that has embraced the collaborative model may "set floors and ceilings and act as the ultimate decisionmaker, [but] it views regulatory success as contingent on the contributions of other participants."[114]

4. *Adaptable comprehensive plans and agreements.*

The collaborative model recognizes that modern land use planning and development are not static enterprises, but rather a continuing process that must be flexible in order to maximize effectiveness.[115] Adaptable planning and permitting, which are natural extensions of a problem solving orientation, draw on a pragmatic notion of decisionmaking as an ongoing, iterative process of design, implementation, and evaluation.[116] Adaptability applies not just to plans and agreements but also to the regulatory process itself; as the process matures, it is evaluated and adjusted to incorporate information such as the value of different forms of participation in facilitating informed decisionmaking, community cooperation, and valuable land use.

This experimentalist understanding of decisionmaking is congruent with modern planning theory, which rejects the notion of static, inflexible plans in favor of ongoing plan evaluation and periodic plan revision to account for changed circumstances or new information.[117] By exchanging rigid and often arbitrary bright-line rules for an underlying comprehensive plan containing goals and standards and the zoning performance standards advocated by many planning theorists,[118] land use decisionmakers can treat like

agreements).

113. *See supra* Part II.B.2.

114. Freeman I, *supra* note 3, at 22.

115. *Cf.* Freeman I, *supra* note 3, at 28 ("[A] flexible, adaptive system capable of responding to advances in science, technology, knowledge, and shifting human judgments will produce better rules that are more likely to accomplish legislative goals.").

116. *See* Dorf & Sabel, *supra* note 9, at 285 (stating that pragmatism accepts "the impossibility of defining first principles that survive the effort to realize them, as a constitutive feature of thought and action, and not as an unfortunate incident of modern political life").

117. *See* Camacho, *Installment One*, *supra* note 14, at 56-65.

118. *See* Camacho, *Installment One*, *supra* note 15, at 15-22 (discussing use of performance standards in impact zoning and PUDs); DOUGLAS R. PORTER ET AL., FLEXIBLE ZONING: HOW IT WORKS 5-6 (1988); BRIAN W. BLAESSER, DISCRETIONARY LAND USE

properties consistently, while still allowing agreements to be tailored to each project.[119] State enabling statutes such as DAAs should require local governments to adopt adaptable long-term comprehensive plans and ensure that any adopted agreements are made consistent with and integrated into these plans.[120]

Customizing regulations to reflect the distinctiveness of particular properties should not be viewed as antithetical to sound comprehensive planning.[121] Similarly, flexible comprehensive plans and adaptable zoning regulations do not necessarily signify a weak regulatory regime.[122] If the regulatory process fosters sustained participation, joint fact-finding and problem solving, a flexible land use regime will not merely enable ad hoc bartering between developers and local governments. Instead, flexibility becomes a strength of the decisionmaking process, allowing for the revisitation or modification of specific provisions as information develops.[123] In short, the collaborative model cultivates an adaptable regulatory process that limits opportunities to exploit flexibility to favor powerful parties and expands opportunities to use it constructively.

The collaborative model not only fosters flexibility in the adoption of comprehensive plans and zoning regulations, but also emphasizes adaptability at the agreement formation and implementation stages. Existing land use planning theory and practice typically focus on developing collaborative processes during the creation of the initial comprehensive plan for a

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CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION 83 (2d ed. 1999) (empirical study concluding that performance zoning standards provide a more satisfactory approval process for all than conventional negotiated zoning processes).

119. A collaborative approach to planning allows for the establishment of "rules sufficiently general that their requirements can be met in any number of ways, allowing for flexible implementation." Freeman I, *supra* note 3, at 29.

120. As development and annexation agreements afford parties incredible flexibility in negotiating the details of land use and development, the goals and standards of the comprehensive plan serve as the only major substantive guidance for, and limits on, such agreements. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 32, at 26, 37 (stating that planning policies provide needed direction in agreement negotiations); APA MODEL CODE, *supra* note 84, at 8-195.

121. Indeed, this approach is consistent with the conventional wisdom in land use planning theory. *See* Rose I, *supra* note 1, at 876-77; *cf.* Freeman I, *supra* note 3, at 29 (stating that a commitment to provisional solutions might require greater willingness to "engage in site-specific rule making to tailor rules to particular problems and contexts").

122. *See* Freeman I, *supra* note 3, at 32-33.

123. *See id.* at 29.

locality,[124] while neglecting the need for greater flexibility and sustained participation at the level of individual project approval and implementation. Local governments increasingly make the significant, long-term land use decisions at the project level through bilaterally negotiated, project-specific amendments to their comprehensive plans and zoning regulations. Because such decisions have traditionally been regarded as essentially static resolutions of development rights, localities have rarely integrated mechanisms that assure either sustained public involvement or the incorporation of new, more accurate information. With the advent of long-term planned unit developments (PUDs) and annexation and development agreements that govern project-specific activity over longer periods of time, there is both an increased need and opportunity for communities to use project agreements as adaptive mechanisms.

To be effective, agreements must be both flexible and enduring.[125] State enabling laws should require agreements to include mechanisms for frequent monitoring, evaluation and revision, particularly where critical information is uncertain, such as where inexact economic projections or unclear environmental or other potential impacts exist. A collaborative process demands careful attention to detailed implementation measures, including monitoring mechanisms; triggers for reconvening the parties in the event of developer noncompliance or significant changed circumstances; and dispute resolution procedures.[126] Feedback mechanisms, including periodic monitoring, information exchange, and evaluation, are also critical.[127] Agreements must include incentives (such as penalties for failure to meet milestones or deadlines) throughout the process to assure implementation[128] while maintaining the substantive flexibility that ensures that the agreement has enduring value.[129]

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124. *See* APA MODEL CODE, *supra* note 84, at 7-63, 7-195 to 7-200.

125. *See* John J. Kirlin, *The Bargaining Process: Trends and Issues*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 30, at 7-8.

126. *See Alternative to Robert's Rules*, *supra* note 46, at 34-35; NEGOTIATION GUIDEBOOK, *supra* note 4, at 15 (listing administrative ground rules for assisted negotiation).

127. *See* Freeman I, *supra* note 3, at 22, 28-29.

128. *See* Fosmoen, *supra* note 99, at 28. For example, an agreement might provide for the liquidation of the bonds governments regularly use for large projects.

129. *See* Robert H. Freilich, *Public/Private Partnerships in Large-Scale Development Projects*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 30, at 20.

While monitoring and making regulatory adjustments, involved parties should draw on project data, as well as available information on similar previous projects. Information pooling and distribution practices by local governments can be particularly valuable in such cases.[130] For example, one jurisdiction has developed a city-wide database for monitoring compliance with executed development agreements. The database catalogues the terms and conditions of agreements and generates reminders as due dates or other triggering conditions arise.[131]

To understand the value of adaptability in land use planning, imagine that the manner or extent to which automobile traffic associated with a new project will adversely impact a particular traffic intersection is uncertain at the time of initial approval. In such a case, the project agreement should require the parties to revisit and adjust any proposed traffic mitigation provisions once the project is built and actual traffic data can be collected and analyzed.[132] Alternatively, the agreement could establish a fund to finance unforeseen but needed traffic control measures; provide for payment of contingency fees once traffic reached specified levels; or even authorize the local government to deny future permits to the project following defined triggering events.

To a certain extent, providing for agreement adaptability can be in tension with the goal of providing certainty to developers—an important purpose of development agreements.[133] Bright-line rules, even if arbitrarily established, provide a level of certainty that more adaptive processes cannot match. Furthermore, a developer's sunk costs may render certain adaptations costly and even wasteful, especially after the development project or a particularly costly improvement has been built.[134] However,

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130. Professors Dorf and Sabel argue that a key role of regional, state, or national governments should be to assemble and disseminate such information among similarly situated localities to facilitate learning from the experiences of others. *See* Dorf & Sabel, *supra* note 9, at 345-48.

131. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 32, at 39 (detailing City of San Diego's "Development Agreement Monitoring System"); *see also* Lindell L. Marsh, *The Future of Development Agreements*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS 153, 158-59 (Douglas R. Porter & Lindell L. Marsh eds., 1989).

132. Similarly, where construction noise impacts are projected but the location or extent of such effects is not clear, or where the effectiveness of conditions intended to buffer such impacts is uncertain, an agreement could provide for periodic review and adjustment to accommodate any information discovered during construction.

133. *See* Camacho, *Installment One*, *supra* note 15, at 14.

134. In such situations, alternative measures may be more appropriate than

subsequent deliberations can take such costs into account. Furthermore, a developer seeking certainty is primarily looking for assurance in the form of a vested right that allows the developer to begin developing a project without fear that the city will change the rules applicable to the property midstream.[135] The adaptability collaborative governance seeks does not prevent formation of this vested right; rather, it simply allows for continued monitoring, evaluation and revision of projects where information is uncertain or conclusions are tentative. Though this adaptive process may lead to design changes that affect project operations, such adaptations can still be congruent with providing the developer a core right to build. The developer's vested right would simply be qualified, as it already is in a number of state DAAs.[136] As such, the regulatory process would acknowledge that the costs of uncertainties intrinsic to land development and planning should be shared by the developer and other parties.

It is important to note that developers also benefit from adaptability, as agreements can afford them considerable flexibility in construction phasing and/or project operation.[137] For example, a development agreement might contain tailored use conversion provisions that would allow the developer to modify site use from retail to office in response to market changes without having to

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demolition of the project improvement.

135. *See* Camacho, *Installment One*, *supra* note 14, at 23-26.

136. Some state DAAs allow a local government to modify regulations applicable to property that is subject to a development agreement if: (1) doing so would not conflict with the regulations applicable at the execution of the development agreement, *see, e.g.*, CAL. GOV'T CODE § 65866 (West, WESTLAW through 2005); LA. REV. STAT. ANN. § 33:4780.27 (West, WESTLAW through 2004); (2) "specifically anticipated and provided for" in the agreement, *see, e.g.*, FLA. STAT. § 163.3233 (2005); (3) state or federal law requires agreement modification, *see, e.g.*, CAL. GOV'T CODE § 65869.5 (West, WESTLAW through 2005); S.C. CODE ANN. § 6-31-80(B) (West, WESTLAW through 2004); (4) wrong information was provided by the developer, *see, e.g.*, FLA. STAT. § 163.3233(2)(e) (West, WESTLAW through 2004); S.C. CODE ANN. § 6-31-80(B) (West, WESTLAW through 2004); VA. CODE ANN. § 15.2-2303.1(C) (West, WESTLAW through 2005); (5) substantial changes have occurred, *see, e.g.*, FLA. STAT. § 163.3233(2)(d) (West, WESTLAW through 2004); S.C. CODE ANN. § 6-31-80(B) (West, WESTLAW through 2004); VA. CODE ANN. § 15.2-2303.1(C) (West, WESTLAW through 2005); or (6) the subsequent law is essential to public health or safety, *see, e.g.*, MD. ANN. CODE, Art. 66B, § 13.01(j)(2) (West, WESTLAW through 2005); HAW. REV. STAT. § 46-127 (WEST, WESTLAW through 2003); WASH. REV. CODE § 36.70B.170 (WEST, WESTLAW through 2005).

137. The advantages of *agreement* adaptability for developers are in addition to the considerable benefits of *plan* adaptability provided through negotiated zoning and agreement-based regulatory tools. *See* Camacho, *Installment One*, *supra* note 14, at Part III.

amend the agreement.[138] In return for such flexibility, the agreement would allow for periodic monitoring so that the affected parties could test (and, as necessary, alter mitigation measures to account for) their initial predictions about the relative impacts of potential uses. By allowing developers to adjust or refine planned development over time, the collaborative model's adaptability can ultimately save developers time and money.

Finally, a more inclusive collaborative approval process may help interested parties to forge relationships, which in turn may increase the likelihood of successful project implementation. "[P]eople are more likely to support an agreement that they had a hand in shaping,"[139] and any trust and cooperation developed through the collaborative process is likely to be beneficial during implementation and, if necessary, enforcement of agreement terms.[140] Detailed implementation procedures that involve the various substantially affected parties ensure a continued relationship—one that can build on any "social capital"[141] developed earlier in the process. Even in the absence of cooperation or trust, thorough, detailed implementation measures should help to ensure that the agreed-upon project will be developed as contemplated, while still providing an inclusive modification process to manage unforeseen circumstances.[142]

5. *Creative accountability: encouraging involvement in implementation and enforcement.*

As detailed in the first Installment,[143] less deferential judicial review has been the most commonly offered solution to concerns

138. The agreement might allow for flexibility in land development and/or use, permitting a developer to modify proposed development construction or existing use or operation of the property.

139. CONSENSUS HANDBOOK, *supra* note 4, at xviii; *see also* William R. Potapchuk & Jarle Crocker, *Implementing Consensus-Based Agreements*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 527, 541; NEGOTIATION GUIDEBOOK, *supra* note 4, at 4.

140. CONSENSUS HANDBOOK, *supra* note 4, at xvii ("[P]articipants gain a mutual respect for and an understanding of other's viewpoints, enabling them to work together more effectively in the long term."); *see also* Potapchuk & Crocker, *supra* note 139, at 541-48 (describing the process of building "intellectual capital" (group-shared understanding) that fosters "social capital," that in turn can lead to "political capital" or clout).

141. "Social capital" is a term developed by Robert Putnam, analogous to trust and cooperation. *See* ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 167 (1993).

142. *See* Potapchuk & Crocker, *supra* note 139, at 546-47.

143. *See* Camacho, *Installment One*, *supra* note 14, at Part V.A.

regarding unconstrained local government discretion in modern negotiated land use regulation. In contrast, the collaborative model presumes that accountability should come primarily from harnessing the capabilities of the local private and public actors most affected by a particular land use decision.[144] Participation during project implementation, enforcement, and modification enhances accountability by ensuring that those who are most affected by the agreement—and thus well positioned to evaluate compliance—are given the opportunity to contribute.[145]

The collaborative model fosters continuing relationships between the major parties affected by a land use decision, which in turn promotes participant interdependence and accountability throughout the regulatory process. As parties contribute to community planning,[146] they gain a sense of ownership in the decisionmaking process. They are not merely beneficiaries of the process, but are also bound by the solutions devised. This emphasis on involving affected parties in implementation and enforcement is not based merely on the theory that privatization would be more efficient or because regulators are viewed as unaccountable.[147] Rather, the objective is to challenge "existing assumptions about what constitutes public or private roles in governance because the most collaborative arrangements will often involve sharing responsibilities and mutual accountability that crosses the public-private divide."[148]

The appropriate role for local government in project implementation should vary according to the relative capabilities of nongovernmental actors.[149] Agreement implementation procedures might include any combination of city inspection, self-monitoring and reporting, supervision by community groups,[150]

144. *Cf.* Freeman II, *supra* note 12, at 549, 638, 663-66 (arguing that private actors do not merely exacerbate the administrative law legitimacy crisis but can foster "aggregate accountability").

145. *See* Dorf & Sabel, *supra* note 9, at 321.

146. *See* Carl M. Moore et al., *Visioning*, in CONSENSUS HANDBOOK, *supra* note 4, at 557, 558 ("Visioning is a process in which people build consensus on a description of their preferred future—the set of conditions they want to see realized over time.").

147. *See* Freeman I, *supra* note 3, at 30.

148. *Id.*

149. *Cf. id.*

150. *See, e.g.*, Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake, 512 N.W.2d 202, 206-07, 207 (Wis. Ct. App. 1993) (upholding development agreement provision giving citizen committee power to create design criteria for public improvements as part of private development).

and third-party certification or auditing.[151] State enabling statutes might even give other significantly affected parties, as limited third-party beneficiaries, a direct right to challenge compliance relating to the bargained for provisions of the agreement.[152] In addition, enabling statutes should require agreement amendments to be publicly considered, with affected parties allowed to participate to the same extent as they would for agreement approval. A land use agreement might even include provisions for the local government to reconvene the parties to review the actual impacts of site operations and determine if agreement modifications are necessary. The central theme of creative accountability is that when the local government and the developer are treated as the exclusive parties interested in implementation and enforcement, the quality of land use and planning as well as the legitimacy of negotiated project agreements suffer. Other private or public actors are often well situated and motivated to help monitor construction and project operations.

This ethic of shared responsibility among public and private parties already exists to a limited degree. For example, development and annexation agreements often contain provisions allowing or requiring private real estate developers to perform certain public duties, such as constructing and/or operating public infrastructure, as a condition on the right to develop.[153] Developers may be required to compile and submit reports detailing their compliance with imposed mitigation requirements. These reports are often prepared or evaluated by independent environmental consultants on behalf of the developer or local government. Rarely, however, are local community groups or neighboring local governments invited to participate directly in monitoring.[154] Developers may only occasionally be required to

151. *See* Freeman I, *supra* note 3, at 22, 30, 96.

152. *Cf.* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 158-59, 202 (2000) (suggesting possibility of including contractual provisions in public/private contracts that allow third-party beneficiaries to enforce agreement commitments) [hereinafter Freeman III].

153. *See, e.g.*, DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 131 at 172, 206-07 (including in appendices development agreements requiring construction of "community room," and street and park improvements for public use); DEVELOPMENT AGREEMENTS 62 (Alice S. Barkley et al. eds., Cal. Continuing Educ. of the Bar, 1983) (including sample development agreement requiring developer installation/construction of street lights and sewer line).

154. *See, e.g.*, Rivkin, *supra* note 108, at 65, 70 (detailing citizen monitoring of performance and enforcement of agreement with developer).

consult with community members regarding particular construction or operational impacts, such as noise or glare impacts, or to work with citizen committees to develop design criteria.[155]

Particularly in the contexts of the long-term, multi-phase developments typically involved in PUDs and development and annexation agreements, local governments should seek approaches that foster shared responsibility throughout the project implementation process. State enabling acts like DAAs and AAAs should augment existing self-monitoring and implementation mechanisms by including supplemental oversight by community groups or other non-party local governments wherever appropriate and feasible. In short, the collaborative governance approach to planning and development recognizes the value of greater community participation in all phases of a land use project.

### C. *Judicial Review of Local Government Land Use Agreements*

Judicial review of local land use agreements can help foster local government accountability at the margins by discouraging local officials from ignoring the mandatory requirements set forth in land use enabling statutes when adopting or implementing agreements. However, judicial review is not the sole or even most effective means of fostering local land use agreements that are efficient, fair and durable. The threat of judicial review is too remote to provide a sufficient incentive for local governments to make considered and widely accepted land use decisions.[156] More importantly, courts are ill equipped to evaluate and determine the most appropriate accommodation of the various parties affected by a typical land use dispute. This is particularly true for large-scale projects that involve the gathering and assessment of considerable technical, social, and economic information, the trading of preferences, and the balancing of numerous public policy concerns affecting multiple, subjective, and disparate interests. As detailed in the preceding sections, the quality of land use decisions must be improved by restructuring the planning process from within, by positioning local planning officials as active mediators of

155. *See, e.g.*, Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake, 512 N.W.2d 202, 206-07 (Wis. Ct. App. 1993).

156. *See* Camacho, *Installment One*, *supra* note 14, at Part V.A.

private land use conflicts, and by making use of various other mechanisms that foster balanced and continuing participant interaction, problem solving, and adaptive long-term planning.

Nonetheless, under the proposed collaborative model, courts do retain a crucial role in ensuring that processes that forge land use agreements meet the procedural prerequisites necessary to foster collaborative governance. Furthermore, courts may review agreements' conformity with applicable substantive standards like regulatory takings requirements or comprehensive plan standards, though they must inevitably defer to the initial decision makers in undertaking such reviews. If the necessary procedures are satisfied and a fair argument exists that the underlying standards have been met, courts should presumptively defer to collaborative agreements and generally not "second-guess" the substantive provisions forged by the affected parties.[157] Likewise, courts should generally defer to local governments' decisions not to enter into land use agreements except in extraordinary circumstances implicating the developer's fundamental property right. In this sense, judicial review under a collaborative model does not depart from judicial review standards that exist under prevailing negotiated land use regulatory regimes.

Limiting the role of courts is appropriate because widening public participation over the life of agreements should address

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157. In the administrative law context, some have suggested that courts review only the sufficiency of the process and not the rationality of the results. One such proposal suggests that a negotiated rule should be "sustained to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties." Harter I, *supra* note 3, at 103. Another argues that a negotiated rulemaking would fulfill the purpose of the public administrative law "hard look" doctrine if the process provided:

> (1) adequate notice; (2) availability of financial resources to disadvantaged groups to help them participate on an equal footing; (3) the keeping of a reasonable record of formal meetings; (4) ample opportunity for all parties to review the final draft; (5) an opportunity for all parties to discuss the results of the review and comment process; (6) a chance for all interested parties to shape the scope of the negotiation agenda, agree on the selection of a facilitator, and receive access to the information they request; (7) a clear explanation by the agency of its obligation to the negotiating committee; and (8) an opportunity for all parties to sign off on a final version of the agreement.

Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 164 (1985). *Cf.* Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1468 (1997) ("[T]he court should be able to take account of consensus as a factor suggesting the reasonableness of the rule. That in turn may justify a more modest amount of factual justification and explanation of rationale than is required in the usual statement of basis and purpose for a rule.").

many of the substantive legitimacy concerns that overshadow current land use negotiations. The prospect of more limited judicial review may also give interested parties an additional incentive to confront substantive conflicts early on, rather than attempting to resolve them retrospectively through litigation.[158]

Negotiated zoning regimes, DAAs and AAAs should require courts to determine whether the approval processes provide for broad and meaningful participation and a sustained problem solving orientation, and whether the agreements themselves incorporate mechanisms that foster adaptability and accountability. First, in order to determine whether the relevant approval process provided for meaningful participation, courts could examine whether all negotiations and deliberations were appropriately noticed and open to the public, as well as whether the public had sufficient opportunities to participate in information gathering and deliberation.

Second, to foster sustained problem-solving, courts should determine if: (1) the project's potential impacts were in fact analyzed through impartial, shared fact-finding related to the project's environmental, economic, and social impacts; or (2) in instances where shared fact-finding was infeasible, if potentially affected groups were provided access to any generated information (and funding, for qualifying entities) to conduct their own analysis. For negotiated zoning processes governed by constitutional and statutory proportionality and nexus standards, courts should review whether a fair argument exists that the agreement complies with such regulatory standards. For development and annexation agreement regimes involving voluntary agreements that allow for few substantive restrictions on bargaining,[159] courts should determine whether the agreement used a consensus decision rule that included all of the substantially affected parties.

Lastly, courts should ensure that agreements provide for sufficient adaptability and accountability through (1) publicly accessible and participatory mechanisms for continual monitoring, evaluation, and revision, particularly where information is

158. *See* Freeman I, *supra* note 3, at 92 (stating without such presumptive deference, "participants will never engage in the prolonged negotiation and planning required to produce" agreement).

159. *See infra* Part III.A.4, for a discussion of the potentially different decision rules applicable to negotiated zoning and agreement-based regulatory mechanisms.

indefinite and conclusions are tentative; (2) incentives for compliance to assist project implementation; and (3) consistency with the policies and goals of an adopted comprehensive plan or other relevant indicia of predictability (such as a previous pattern of approved agreements).[160]

In summary, by articulating clear, uniform procedural requirements, and by mandating transparent and widespread participation in the key negotiation and implementation facets of the land use process, negotiated land use agreement regimes can achieve the predictability and efficiency that render these agreements most attractive to private developers and local governments, while also accommodating the interests of other parties significantly affected by the agreement.

## III. THE CHALLENGES OF IMPLEMENTING A COLLABORATIVE APPROACH TO LAND USE REGULATION

Of course, there are considerable challenges to making local government land use decisions function in a collaborative manner. These include assessing the relative benefits and costs of a collaborative approach; fostering participation and problem solving in light of participant self-interest or apathy; determining when to require and how best to achieve consensus in individual cases; and assessing whether collaborative governance is feasible or appropriate for local land use regulation. In fact, some of these potential concerns have already emerged in other regulatory contexts that employ certain features of this collaborative governance model.

Though these difficulties in implementing a collaborative approach are real, this Article argues that this approach remains the most promising means for reconciling the practical realities of local decisionmaking with the democratic ideal of efficient, fair, and adaptable land use decisions. Therefore, while implementing a collaborative approach to land use agreements may be costly at first, this Part argues that these high initial costs will be recovered in the form of higher quality, more widely supported and more flexible land use decisions. Moreover, as detailed in Part III.B,

160. *See* Rose I, *supra* note 1, at 909 (articulating "indicia of predictability" as perhaps including: (1) demonstrations of "past patterns of change and accommodation," (2) explanations of such patterns "through impact reviews," and (3) explanations of "intended deviations or major policy shifts through continuous reevaluative planning").

these potential obstacles to collaboration are less of an impediment in land use regulation than in the administrative regulatory context given land use governance's local nature and its dependence on participation as a source of legitimacy. In short, the collaborative governance model is well suited to land use regulation, providing the genuine prospect of moving land use decisionmaking away from biased and ad hoc arrangements and toward more efficient, fair, and durable decisions.

### A. *The Challenges of Collaborative Governance*

#### 1. *Assessing the costs and benefits of collaborative governance.*

One possible criticism of a multilateral, collaborative approach to land use regulation is that it could result in more transaction costs for developers and local governments than prevailing bilateral approaches. Perhaps the ideals of more inclusive, sustained participation and shared fact-finding would diminish the cost effectiveness of the existing bilateral model by complicating negotiations. Developers may also face increased uncertainty, which could translate into increased costs for them and for others who seek to benefit from the proposed developments.

However, there is evidence that implementing a collaborative regulatory approach may not cost as much as one might presume; in fact, the approach may even decrease costs as compared to the bilateral approach in the long run. The only broad published study of the burgeoning use of collaborative land use agreements to date—a study that examined land use mediation processes—found that ninety-one percent of participants, including government officials, reported that the process cost less, and eighty-five percent stated that the process took less time, than more adversarial, conventional alternatives.[161] This potential for decreased costs may be due to a decreased likelihood of litigation and the reduced regulatory fragmentation resulting from the consolidation of project approvals into a single inclusive, ongoing, and adaptive process.[162] Furthermore, some commentators have observed that when all interested parties were invited to participate in

161. *See* NEGOTIATION GUIDEBOOK, *supra* note 4, at 22. No quantitative comparative analysis has been undertaken that directly compares the transaction costs of collaboration to those of traditional land use regulation. For a more detailed discussion of this study, see *infra* notes 174-81 and accompanying text.

162. *See* Camacho, *Installment One*, *supra* note 14, at 29-30, 53.

negotiations, participant numbers nevertheless became manageable over time as some affected parties determined that their interests were being adequately represented by other parties and thus chose a less active role in the process.[163]

Several analyses comparing multilateral regulatory approaches in the federal administrative regulatory context to traditional rulemaking[164] also suggest that the transaction costs of collaborative approaches may be no greater than those in conventional rulemaking,[165] though other research offers conflicting data and conclusions.[166] Thus, while additional research

163. *See* Marsh, *supra* note 31, at 30, 36.

164. Administrative rulemaking corresponds in a number of respects to prevailing negotiated regimes in land use regulation. Traditional rulemaking approaches, like negotiated land use approaches, are hierarchically directed by the agency. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 110-11 (2000). Both are viewed as primarily governmental tasks, with private involvement restricted to notice and comment procedures at specific stages of the process. Although negotiation may be less prevalent in federal administrative rulemaking than in typical bilateral land use approvals, there is still a substantial amount of informal negotiation in administrative rulemaking. *Id.* at 112. Furthermore, though federal regulatory negotiation tends to be broader and more policy-oriented than land use agreements, comparing administrative regulatory negotiation to traditional rulemaking can provide insight into the differences between existing bilaterally negotiated land use regulation and the collaborative, multilateral approach advocated herein. The administrative law research is particularly relevant with respect to the value of increases in, and different types of, participation on regulatory decisionmaking.

165. *See* Juliana E. Birkhoff & Kem Lowry, *Whose Reality Counts?*, *in* THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 25, at 27, 35–36 (summarizing studies reporting that participants found environmental mediation processes to be more cost effective and less time consuming); Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rulemaking: Claims, Counter-Claims and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 625 (2000) (concluding that negotiated regulations and conventional rules create comparable risks of litigation); Freeman & Langbein, *supra* note 164, at 120-21, 127 (2000) (emphasizing the limited value of considering only litigation rates and time costs in evaluating rulemaking quality, but also summarizing results in which participants reported that negotiated rulemaking is no more costly and does not result in significantly more litigation than conventional rulemaking); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 41-42, 49 (2000) [hereinafter Harter II] (contending that negotiated regulation processes save rulemaking time and reduce litigation risk as compared to traditional rulemaking).

166. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1282-83, 1298-1302 (1997) [hereinafter Coglianese I] (study of 35 negotiated rulemakings concluding that they provided minimal time-saving benefits and actually produced higher litigation rates as compared to conventional rulemaking). However, Coglianese's results have been contested. *See* Harter II, *supra* note 165, at 41-42, 49 (challenging Coglianese's methodology and arguing that (1) regulatory negotiation reduces rulemaking time by about a third when properly calculated, and that (2) no consensus rule proposed by participants has ever been the subject of substantive

would provide a clearer picture of the costs of including collaborative features in land use decisionmaking, there is at least some evidence that including such features will not increase costs.

In any event, comparisons of collaborative and bilateral negotiated regulation should turn on more than relative transaction costs. Much of the collaborative model's promise stems from its potential to generate land use agreements that are more legitimate and higher-quality—namely, fairer, better planned, and more efficient.[167] But will the model produce the intended result? After all, it is a challenge to even define the criteria for *evaluating* whether a given collaborative process, or the agreement adopted therein, is actually better or more legitimate than the conventional alternative. Depending on the circumstance, legitimacy or quality could be measured by gauging participants' relative satisfaction with the process and adopted agreement, by attempting to "objectively" calculate whether the agreement is more efficient, fair or well-planned, or by surveying general public acceptance or approval of the process or agreement.[168] Establishing objective measures of the quality of regulatory decisions is a difficult task,[169] and perhaps impossible in the local land use setting.[170]

Given these difficulties, and the fact that collaborative characteristics have only recently been incorporated into regulatory processes, it is not surprising that there is little empirical data on their relative value. What *is* surprising is that there are also so few studies assessing the value of current, bilateral development or annexation agreement regimes. Despite their near-universal use, there is little evidence that bilateral negotiated methods are "optimal" based on any barometer, as available information on the quality of these processes and agreements is mostly piecemeal and anecdotal.[171] This lack of evidence alone

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judicial review); Innes II, *supra* note 64, at 638 (similarly challenging Coglianese's methodology). *But see* Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001) [hereinafter Coglianese II] (disputing Harter's criticisms and methodology).

167. *See* Freeman & Langbein, *supra* note 164, at 68 ("[W]hen choosing a process, legitimacy ought to concern us at least as much as cost, time, and litigation rates . . . , especially so where the difference between alternative processes on these three scores is not great."); Innes II, *supra* note 64, at 638-42.

168. *See, e.g.*, Freeman II, *supra* note 12, at 666 (stating that "[a]t bottom, legitimacy is a synonym for public acceptability").

169. *See* Freeman & Langbein, *supra* note 164, at 63, 66.

170. *See infra* notes 232-236 and accompanying text.

171. An early study on development agreements in California provides systematic

points toward instituting the proposed collaborative model's emphasis on adaptive monitoring of regulatory processes through repeated testing and revision. Furthermore, while additional systematic evaluation of agreement-based land use regulation is clearly needed, there are already innumerable anecdotal accounts of pervasive corruption in local bilateral land use negotiations.[172] The collaborative model's transparent, inclusive, and adaptive processes seem likely to address this corruption and the persistent public skepticism it engenders.

In fact, there is some promising evidence that negotiation-based land use approaches with collaborative characteristics can yield better quality, more widely supported decisionmaking processes and agreements. A 1997 analysis by the Consensus Building Institute (CBI) evaluated the voluntary use of collaborative mediations to resolve local land use disputes over project development and growth, environmental cleanup, comprehensive planning, the siting of controversial facilities, infrastructure design, and natural resource management.[173] Notably, over sixty percent of the analyzed cases concluded in an agreement.[174]

The CBI study suggests that the proposed collaborative process can be useful whether or not an agreement is ultimately executed. The study found that the overwhelming majority of participants were satisfied with the collaborative process. A full eighty-six percent of all participants rated the mediation-based collaborative process either very favorably or favorably; "[t]hey thought the negotiated results were better than what they imagined the outcome would have been if they had pursued 'normal' channels

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data only on the types of localities and projects for which such agreements have been used. *See* Richard Cowart, *Experience, Motivations, and Issues*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, s*upra* note 131, at 9-33. The study of forty development agreements does provide a limited evaluation of governmental motivations for using such agreements, as well as qualitative information on the lack of public participation in negotiations. *See id.* at 36-37. However, the study did not conduct an analysis of participant satisfaction or try to measure whether such agreements were efficient, fair or well planned.

172. *See* Camacho, *Installment One*, *supra* note 14, at 42-45.

173. This study included one hundred communities throughout the United States. NEGOTIATION GUIDEBOOK, *supra* note 4, at 1, 19; *see* Consensus Building Institute, *Study on the Mediation of Land Use Disputes, List of Key Findings* (March 1999), *available at* http://www.cbuilding.org/projects/lilpeval/KeyFindings.pdf [hereinafter CBI Study] (last visited Mar. 18, 2005) (on file with author).

174. NEGOTIATION GUIDEBOOK, *supra* note 4, at 22.

instead of consensus building."[175] Even where the collaborative process did not result in a final agreement, participant approval remained relatively high; "64% of participants who viewed their dispute as unresolved thought that the assisted negotiation process had helped the parties make significant progress."[176] Participants in these no-agreement cases reported that the process nevertheless had a number of benefits: it aided the parties in developing the basis for future negotiations, expanded the available information, improved stakeholder relationships through constructive dialogue,[177] clarified issues and interests, and increased participant confidence in government efficacy.[178]

In those regulatory disputes that resulted in an agreement, ninety-two percent of the respondents asserted that their interests were well served by the agreement, eighty-six percent believed that the agreement met all parties' interests, and eighty-eight percent believed the agreement likely produced the best possible outcome for all parties.[179] These figures strongly suggest that collaborative approaches satisfy most participants' individual needs as well as the needs of the group as a whole—both notable indicia of efficiency. The process continued to receive high marks after agreement implementation: seventy-five percent of the participants believed the agreements in question were satisfactorily implemented, while sixty-nine percent stated the agreements were at least more stable than what they probably could have reached through other available legal or regulatory processes.[180]

Participant satisfaction studies are not irrefutable proof that collaborative approaches will objectively yield more efficient or better quality decisions than existing, bilaterally negotiated land use regimes.[181] However, in contexts such as land use, where there

175. *Id.* at 20.

176. *Id.* at 3.

177. *See* CBI Study, *supra* note 173. The study concludes:

> In a selective number of cases, improved relationships allowed the parties to (1) avoid misunderstandings because communication had been enhanced, (2) rework their agreements at a later time when new information or new circumstances arose, [or] (3) avoid subsequent disputes or resolve them more easily because the parties had a new model of how to work things out and a higher level of trust.

*Id.* at 10.

178. NEGOTIATION GUIDEBOOK, *supra* note 4, at 22.

179. *Id.* at 21.

180. *Id.*

181. *See* Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in*

is no commonly accepted "objective" basis for determining whether an agreement's combination of trades appropriately balances relevant interests, subjective measures of legitimacy are highly relevant. When the process is at least inclusive of those affected by the underlying dispute, and the affected parties express basic satisfaction with the process and results, we can conclude, with as much confidence as by any other measure, that the process and adopted agreements are legitimate.

The CBI study also suggests that the potential administrative costs of collaborative governance may be offset by the benefits of more widely accepted agreements and regulatory processes. These benefits may be particularly pronounced for the large-scale, long-term land use projects that are increasingly prevalent in negotiated land use regulation, as such projects almost invariably involve substantial public and private investment, long-term development horizons, and a consequent need for flexibility. Finally, the research suggests that collaborative processes will strengthen long-term relationships between parties and across the community.[182]

The CBI study, though limited in scope, is generally consistent with the growing empirical evidence on the benefits of multilateral collaborative approaches in administrative regulation. For instance, a study comparing participant assessments of federal negotiated administrative rulemaking with traditional hierarchical notice-and-comment rulemaking found negotiated rulemaking to be more cost effective, to result in more efficient rules, and to be a more satisfactory process on the whole.[183] Participants also

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*Regulatory Policy Making*, *in* PROMISE AND PERFORMANCE IN ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 25, at 69-70 [hereinafter Coglianese III] (criticizing use of participant satisfaction studies to demonstrate efficacy of regulatory policymaking in administrative law, and asserting that participant "satisfaction does not necessarily equate with good public policy," "is at best an incomplete measure because it excludes those who do not participate," and is difficult to measure and interpret accurately). *But see* Freeman & Langbein, *supra* note 164, at 65, 126-27 (arguing that even if participant satisfaction is biased, it nevertheless is evidence of increased legitimacy if (1) the underlying process is widely inclusive, and (2) participant satisfaction with or perception of legitimacy of a process and its outcomes is higher than for alternate processes).

182. *See* Langbein & Kerwin, *supra* note 165, at 627 ("[Regulatory negotiation] can be expected to better establish a core relationship of trust, reputation, and reciprocity . . . central to improving net social benefits.").

183. *Id.* 61-62, 110-11 (summarizing Cornelius M. Kerwin & Laura I. Langbein, *An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase I* (1993) and Cornelius M. Kerwin & Laura I. Langbein, *An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase II, A Comparison of Conventional and Negotiated Rulemaking* (1997) (unpublished)).

reported learning significantly more through the multilateral negotiated process,[184] including more information of long-term value.[185] Most importantly, participants reported significantly higher satisfaction—independent of the type of rule being considered, participant affiliation, or participant perception of the economic benefit of the rule.[186] One set of commentators analyzing this data concluded that the negotiated approach significantly enhances the legitimacy of the regulatory process,[187] particularly in light of other evidence indicating that these negotiated processes are broadly inclusive.[188] These findings are congruent with other studies of innovations in administrative regulation that incorporate a number of collaborative characteristics.[189]

This empirical evidence about the salutary effects of collaborative processes is reinforced by social psychology studies suggesting that more inclusive processes enhance participant and public satisfaction, the likelihood of future compliance, and perceptions of legitimacy, irrespective of substantive outcomes.[190]

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184. *See id.* at 111 (stating that participants obtained new technical information, knowledge of the issues, and information on the positions of other affected parties).

185. *See id.* at 121. The value of newly acquired information on the positions of other affected parties, for example, may extend beyond any particular rulemaking.

186. *See id.* at 110-12. The study found that participants were more satisfied than in conventional rulemaking because they considered the outcome to be both beneficial to their net economic self-interest and economically efficient, as well as viewed the alternative process itself as favorable to traditional rulemaking. *Id.* at 66-68.

187. *See id.* at 65, 125-27.

188. The fact that the processes included the wide range of affected parties adds credibility to the participants' higher satisfaction with the negotiated processes, as it decreases the likelihood that such satisfaction is at the expense of unincluded parties. *See id.* at 83, 127.

189. *See* Beierle & Cayford, *supra* note 25, at 60-61 (finding that more intensive participatory processes such as negotiations and mediations are typically more successful than hearings and meetings on measures such as incorporating public values into decisions, improving decision quality, resolving conflict, building trust and educating the public); Birkhoff & Lowry, *supra* note 165, at 36 (summarizing studies reporting that participants found environmental mediation processes more satisfying and more likely to result in agreement); Mette Brogden, *The Assessment of Environmental Outcomes*, *in* PROMISE AND PERFORMANCE IN ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 25, at 277, 287 ("Multistakeholder processes increase both scientific and individually held knowledge about the natural environment."); Laura I. Langbein, *Responsive Bureaus, Equity, and Regulatory Negotiation: An Empirical View*, 21 J. POL'Y ANALYSIS & MGMT. 449, 463 (2002) (concluding that regulatory negotiation is more responsive to relevant stakeholders and that direct participation leads to increased participant satisfaction with outcomes); Langbein & Kerwin, *supra* note 165, at 625-26 (concluding that negotiated regulations typically result in significantly higher participant satisfaction with both final rules and the overall process).

190. *See* Emerson et al., *The Challenge of Environmental Conflict Resolution*, *in* PROMISE

These studies serve as evidence that broad participation in decisionmaking is inherently valuable to participants and the general public. While further research in the local land use context is clearly needed, the extant research on collaborative and similar models of negotiated regulation supports the proposition that local governments should be required to incorporate broader and more intense levels of participation into their current land use processes.[191]

2. *Fostering participation and problem solving.*

Another challenge of successfully implementing collaborative governance is fostering wide participation and a problem-solving orientation in the face of self-interested and potentially divisive behavior by individual stakeholders. Convincing affected parties to be involved in regulatory processes can be a substantial hurdle in itself, as potential participants may be apathetic, preoccupied with other concerns, or unorganized.[192] Some stakeholders will distrust others and resist cooperating,[193] and even where parties want to work together, resource disparities may make it difficult to keep all parties empowered and informed.[194] Moreover, imprecise and speculative information can make conflict seem insurmountable.

The central advantage of the collaborative model, as opposed to existing bilateral negotiated processes and traditional zoning, is that it confronts these concerns head-on and makes them the focal point of the decisionmaking process. Rather than rely on an opaque and adversarial process that allows select parties to indulge their unilateral interests while entirely excluding the interests of other parties, the collaborative model begins by focusing on increasing access and participation. While acknowledging that

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AND PERFORMANCE IN ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 25, at 3, 8; Langbein & Kerwin, *supra* note 165, at 626; Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1311 n.104 (2003) (citing empirical evidence that the public values due process and that fair and inclusive procedures may increase future compliance and perceptions of legitimacy).

191. Moreover, systematically incorporating collaborative features makes it more likely that such features will become an institutionalized element of the regulatory process. As these tools become more widespread and familiar, their costs likely will decline and they will be more likely to result in high-quality agreements. *See* Marsh, *supra* note 31, at 36.

192. *See* Chris Carlson, *Convening*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 169, 186.

193. *See* NEGOTIATION GUIDEBOOK, *supra* note 4, at 6.

194. *See* Carlson, *supra* note 192, at 186-87.

some level of self-interest and rent-seeking is inevitable, the model works to emphasize common goals, remind parties of the rights and *responsibilities* of other stakeholders, and continually link self-interested positions with costs that may be otherwise overlooked. Indeed, the available data suggests that collaborative approaches reduce self-interested behavior[195] and result in wider participation.[196]

To be sure, empowering and informing stakeholders with limited resources remains a significant challenge. Smaller, poorer groups inevitably suffer in regulatory processes from resource and information inequality; despite its egalitarian objectives, a collaborative process still may be unable to fully correct these imbalances. Larger, more sophisticated actors are also likely to invest more time and money in the negotiation process than smaller actors, and "[a]lthough the intense education and learning that occurs during negotiations can help to mitigate information asymmetries, the disparities may still be substantial enough to give disproportionate agenda-setting power to groups with greater resources."[197] Because collaborative processes can be more resource and information intensive than their conventional counterparts,[198] some commentators understandably are concerned that collaborative approaches may further weaken the already limited influence of under-resourced groups.[199]

However, keeping all parties informed and empowered is likely to be less difficult in a collaborative process than in traditional land use zoning or existing negotiated regulatory regimes. At the very least, the proposed model affords resource-poor groups equal access to the regulatory process. In this way, potentially affected

195. *See supra* Part III.A.1. The collaborative model of course does not eliminate the risk of selection bias, in that an interested party's involvement may not be proportional to a project's potential impact on their interest. However, this bias will almost certainly be less than under existing bilateral processes that explicitly favor developers in decisionmaking. Furthermore, though individuals may be reluctant to participate in any regulatory process despite an interest in the outcome, these parties are more likely to be represented in a process that emphasizes meaningful participation opportunities than in a process in which the critical decisions are designed to be made behind closed doors.

196. *See* Freeman & Langbein, *supra* note 164, at 83.

197. *See id.* at 123.

198. *See id.* (stating that participants perceived the regulatory negotiation process to be more resource- and information-intensive than conventional rulemaking). Smaller, poorer groups found the decision to participate in regulatory negotiation more difficult than wealthier, larger groups, and some smaller groups expressed fear that refusal to participate could damage their interests. *See id.*

199. *See id.* at 123-24.

parties are provided the opportunity to assess the value of their participation. Furthermore, when joint data collection is infeasible, provisions for joint information gathering, information sharing, and access to funding for disadvantaged groups can help to correct resource and information imbalances. Collaborative processes make these imbalances less pronounced by valuing the interests of those affected by land use decisions and harnessing their involvement in the process.[200] In addition, because the collaborative model facilitates adaptive management of the regulatory process itself through experimentation, evaluation, and revision, collaborative processes should become more inclusive over time.[201]

Finally, instead of treating the project agreement as a solitary, static event, the proposed collaborative model allows the parties to adapt projects as additional information is acquired. Where site conditions, project impacts, or the extent to which agreement conditions will mitigate such impacts is unclear, a collaborative model requires the project agreement to be structured to acknowledge such contingencies through provisional solutions and periodic monitoring. Unlike existing land use processes, the collaborative process thus recognizes and manages, rather than ignores, the inevitable uncertainty involved in land use decisions.

3. *"Requiring" collaborative processes.*

Some critics may worry that requiring affected parties in land use disputes to engage in problem solving will limit the likelihood of cooperation or agreement. These commentators may point to claims from the litigation arena arguing that making non-binding mediation a requirement contradicts its consensual nature and limits its effectiveness.[202] It is critical to recognize, however, that agreement and cooperation are *not* in any sense compulsory under the proposed collaborative model.[203] Developers have the option of

200. *See* FORESTER, *supra* note 96, at 9-10 (discussing how deliberative planning can moderate power imbalances).

201. *See* Innes II, *supra* note 64, at 631-33; Brogden, *supra* note 189, at 289-92 (finding that success of multistakeholder agreements "requires a plan for accommodating new information . . . naturally occurring fluctuations, and poor outcomes of management regimes").

202. *See* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 572 (1997) [hereinafter Wissler I].

203. *Cf. Introduction to* CONSENSUS HANDBOOK, *supra* note 4, at xx (stating that

submitting to any of the more orthodox regulatory processes provided for in the locality's zoning code, and any other affected parties may still litigate over the validity of agreement approval. Finally, dissenting actors (in particular mobile land developers) still have the option of departing to other localities that better match their subjective interests.[204]

Moreover, even effectively "mandatory" collaboration may not have the ill effects some critics predict. Empirical studies of mediations conducted ancillary to litigation show few differences between voluntary and mandatory mediation processes. Specifically, most studies find no significant difference in settlement rates between programs making participation in mediation purely voluntary and programs requiring mediation as a preliminary step in litigation.[205] Additionally, mandatory mediation does not appear to decrease perceptions of procedural justice or fairness among participants.[206] These studies provide empirical support for the proposition that mandated initial participation in a collaborative land use approval process will not necessarily make the process any less likely to foster agreement.

4. *When to require consensus agreement.*

An additional challenge in implementing a collaborative model is determining whether, and in what circumstances, to require project agreements to be adopted by consensus. Some commentators claim that consensus "is not necessary because the benefits attributed to consensus-based processes can be obtained from other forms of public participation which do not revolve around a quest for consensus."[207] Similarly, others assert that a

parties always may opt out of a collaborative process at any time and "return to whatever form of decisionmaking they used before attempting to operate consensus").

204. *Cf.* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991) (arguing that land developers' substantial geographic flexibility and economic incentives to bargain down exactions help to constrain overreaching municipalities); ELLICKSON & BEEN, *supra* note 18, at 809; Rose I, *supra* note 1, at 886.

205. *See, e.g.*, Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 697 (2002) [hereinafter Wissler II]; Bobbi McAdoo et al., *What Do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RESOL. MAG. 8, 8 (2003); Wissler I, *supra* note 202, at 566.

206. *See* Wissler II, *supra* note 205, at 697; McAdoo et al., *supra* note 205, at 8.

207. Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93, 94 (Eric W. Orts & Kurt Deketelaere eds., 2001)

majority decision rule is preferable to consensus because consensus encourages holdouts and mutual vetoes that can result in the underutilization of resources.[208] In contrast, some scholars maintain that consensus-based approaches promote a different and perhaps more valuable form of participation than traditional mechanisms (such as indirect commenting or advisory participation) because the affected parties are directly involved and all of their interests must be taken into account.[209] Consensus-based approaches may enhance the credibility of decisions because the parties and the public are aware that all of the parties substantially affected by the dispute have been persuaded that the outcome is satisfactory. A consensus requirement can thus be particularly valuable where the legitimacy of the decisionmaking process is questionable.

As commentators on both sides make credible arguments, and due to the lack of empirical data on the subject, determining when consensus should be mandated in collaborative land use negotiations is a difficult task. More data is needed in order to determine the relative benefits and costs of requiring majority or consensus approval for land use agreements. Absent such information, a reasonable starting point might be to require heightened levels of concurrence in circumstances in which: (1) relatively few substantive standards govern and guide a regulatory decision, (2) the decision solidifies a long-term arrangement, and (3) the regulatory device is voluntary, in that the applicant has the option of engaging in alternative regulatory processes should agreement be unattainable. Such is the case for development and annexation agreement regimes. Under such processes, the regulatory decision is of particular import to the community, yet

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[hereinafter Coglianese IV] (claiming participatory benefits of reduced conflict, increased compliance, improved policy, and expanded participation can all occur without consensus decision rule).

208. *See e.g.*, Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 590 (2001); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622-26 (1998).

209. Such a claim has not been examined empirically in the context of local land use agreements, but it is supported by evidence from the administrative law context. *See* Freeman & Langbein, *supra* note 164, at 132-33; Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389, 1411, 1420 (1997) [hereinafter Harter III]. *Cf.* Freeman & Langbein, *supra* note 164, at 134-35 ("We suspect that processes in which the agency occupies a more hierarchical relationship to stakeholders, where interaction is less direct, and where stakeholder contributions are more advisory than binding, will produce comparatively lower satisfaction and comparatively greater conflict.").

remains substantially unchecked by other institutional mechanisms, raising serious concerns about the legitimacy of the process. Furthermore, because development and annexation agreements are alternative regulatory mechanisms where the applicant retains the option of submitting to substitute conventional regulatory processes, they can serve as a useful method for experimenting with the consensus requirement without hindering effectuation of the developer's property interest. Accordingly, processes for negotiating voluntary development and annexation agreements should initially require heightened participation *and* consensus agreement by those significantly affected by the proposed project.[210]

Conversely, consensus approval requirements are less critical for negotiated zoning processes (including contract zoning, PUDs and incentive zoning) that (1) provide rigorous substantive standards that guide and constrain negotiation, (2) serve as the only process through which a landowner may develop land, and (3) produce regulatory agreements that are shorter-term and fairly straightforward to enforce.[211] Of course, the potential absence of consensus requirements for these processes does not deprive the collaborative model of its power to transform regulatory regimes. As discussed above, even when full agreement is not reached in a local land use conflict, most participants will still value processes that facilitate transparency, problem solving, wide and continuing

210. The costs and benefits of such a decision rule can then be evaluated and revised as the collaborative process is adapted to take into account the value of requiring consensus agreement.

211. Most modern incentive zoning ordinances, for example, characteristically constrain negotiations to those development options that are already explicitly delineated in the authorizing ordinance. *See* Camacho, *Installment One*, *supra* note 14, at 19-20. Similarly, state conditional zoning requirements typically provide substantive standards limiting development conditions to the impacts of the zoning amendment being requested, and many PUD ordinances require projects to comply with performance standards that constrain the project terms that may be negotiated. *See id.* at 17-22. Each of these permit regimes is also governed by constitutional nexus and proportionality limitations. Furthermore, negotiated zoning regimes are less voluntary than agreement-based land use regulation in the sense that local governments may not reject properly formulated permit applications, though even these processes are voluntary to some degree, as the property is likely subject to a baseline "as of right" zone that allows some development without contracting with the local government. If a city refused to negotiate a contract, a developer could still apply for a traditional permit to develop in accordance with baseline zoning. Negotiated permits approved through incentive and contract zoning regimes also tend to be shorter-term and relatively straightforward to implement and enforce.

participation, and adaptability.[212] Achieving agreement on issues can be worthwhile to the affected parties, even if the local government's legislative body must ultimately decide how to resolve any remaining areas of disagreement.

5. *Achieving consensus in development and annexation agreements.*

Assuming that consensus requirements are imposed, jurisdictions must confront the complexity of actually obtaining consensus agreements. Even if consensus is understood to require something less than unanimity,[213] achieving consensus will often be a daunting task. Some stakeholders may be unwilling to come to or remain at the table, often for very principled reasons.[214] However, there are many examples of situations where consensus has been achieved under highly acrimonious circumstances,[215] and there is a growing and substantial literature detailing how to organize and manage processes to facilitate agreement.[216]

To structure a negotiation to reach consensus, the principal focus must be on providing stakeholders with not only sufficient capacity to participate, but also sufficient incentives to join and remain a part of the process even as challenges arise.[217] The modified development and annexation agreements processes

212. *See* NEGOTIATION GUIDEBOOK, *supra* note 4, at 3, 20, 22; CBI Study, *supra* note 173, at 10.

213. *See supra* notes 54-55 and accompanying text (discussing meaning of consensus); CONSENSUS HANDBOOK, *supra* note 4, at 6-7, 32-33.

214. For instance, in one of the earliest examples of consensus-based decisionmaking under the federal Endangered Species Act, a division developed among the steering committee's environmental community representatives over a provision in the proposed habitat conservation plan that some were concerned would sacrifice important habitat. *See* MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT 54-55 (1991). Those resisting the compromise opposed the permit and claimed the plan was not a true consensus. *See id.* Other negotiators, however, asserted that consensus and meaningful participation were achieved. *See* Marsh & Thornton, *supra* note 4, at 135 (maintaining that the steering committee's environmental participants "managed to convince the broader constituency of the value and effectiveness of the plan and the process").

215. *See* John Forester, *Dealing with Deep Value Differences*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 464, 479-92; Norman Dale, *Case 10, Cross-Cultural Community-Based Planning: Negotiating the Future of Haida Gwaii (British Columbia)*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 923-50; Michelle LeBaron & Nike Carstarphen, *Case 15, Finding Common Ground on Abortion*, *in* CONSENSUS HANDBOOK, *supra* note 4, at 1031-50; NEGOTIATION GUIDEBOOK, *supra* note 4, at 7, 10, 16.

216. *See supra* Part II.B.2-3.

217. *See* Innes I, *supra* note 4, at 469; LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 27 (1984).

delineated in Part II for which this Article suggests consensus requirements may be appropriate provide considerable incentives for both real estate developers and other community members to participate. Developers would have the prospect of (1) wholesale deviations from otherwise applicable zoning requirements and other substantive development rules; (2) certainty in the form of a vested right to build a project; (3) flexibility to adaptively manage that project; (4) a deferential standard of judicial review; and (5) other benefits stemming from social capital gained in the multilateral negotiation process, including a potentially reduced risk of legal challenges from affected parties. These features could make the development agreement process the most attractive option for many developers, even if consensus agreement were also required. For community members substantially affected by the proposed development, incentives to participate in the consensus-based development agreement process include: (1) opportunities for unparalleled involvement in concrete, long-term community planning; and (2) the prospect of avoiding the more adversarial and potentially costlier alternative of litigation, which is particularly unattractive in light of the deferential standard of review applied to voluntary agreements. In addition, localities could provide developers or other affected parties any number of supplemental incentives for long-term engagement.[218]

Regardless of the specific incentives provided, consensus agreement is a demanding standard for regulatory approval. Adoption of a consensus requirement will almost surely decrease project approval rates, at least as compared to the status quo for development and annexation agreements (in which only two entities—the developer and the local government—must consent before an agreement takes effect). Yet a decrease in the number of development agreements is not necessarily objectionable. Indeed, this Article has pointed to numerous circumstances in which development agreements—in their current incarnations—are often of questionable value to many of the parties most impacted by them. To the extent that consensus requirements can prevent these socially costly development agreements, they do not weaken (and may often strengthen) the proposed collaborative model. In

218. For example, state governments might allow localities to expedite the subsequent approval process for developers who make good faith efforts to participate in a failed consensus-based process, or offer affected community members targeted benefits, such as a community center or a traffic improvement, in exchange for their involvement.

a regulatory process with almost unlimited substantive, procedural, and durational flexibility, the heightened decision rule can serve as a necessary safeguard for fostering processes and consequent agreements that protect the spectrum of interests which they substantially affect.

### B. *The Prospects for Collaborative Governance in Local Agreements*

As discussed above, a number of the potential criticisms of a collaborative land use model are based on similar concerns already raised in the administrative law context. These include charges that collaborative approaches are impractical, illegitimate because they remove regulatory control from expert decision makers, and ultimately unnecessary. As this subpart argues, while these concerns may have some limited force in the administrative regulatory negotiation context, they are ultimately unpersuasive in land use regulation.

As detailed below, a collaborative regulatory process is much easier to implement in the local land use context than in the administrative regulatory setting. Moreover, the local land use context is less vulnerable to concerns about removing expert regulators from primary decisionmaking roles because land use project disputes are rarely resolvable principally through reliance on technical expertise. Rather, it is the opportunity for affected parties to participate in these decisions—an opportunity the proposed collaborative process cultivates—that gives these decisions their legitimacy. Finally, as explained in the concluding section of this Article, while the use of collaborative administrative processes may exacerbate the risk of regulatory capture, collaborative land use processes are more likely to check the considerable opportunities for capture already present in local land use decisionmaking.

#### 1. *The practicability of collaborative local governance.*

There are fewer logistical and organizational obstacles to collaborative approaches in the local land use context than there are in administrative law disputes. A recent empirical study of collaborative regulatory processes found that collaborative dispute resolution is likely to be most valuable as a form of public participation when several conditions exist: (1) representatives of relevant interests can be gathered in a manageable group; (2) agreement implementation largely depends on the participants

and groups they represent; and (3) the pertinent issues mostly implicate private interests, rather than broader public interests.[219] These characteristics correspond more closely to local land use disputes than to conventional administrative law disputes.

Though achieving collaboration and consensus is certainly possible in administrative regulatory contexts, the prospect of achieving a multilateral, participatory agreement on a proposed national rule can be daunting.[220] Because of their scope, federal administrative rules tend to be made over long periods of time, involve many negotiating sessions,[221] and impact hundreds if not thousands of parties from different regions of the country. Simply notifying all of these parties that a given issue is being considered for a potential rulemaking is in itself a logistical challenge. Even if all relevant parties become involved, the interests affected by the rule may be too numerous or varied for the multilateral process to be manageable or for participation to be meaningful. Furthermore, participating in a long-term, nationwide forum can be time consuming and expensive, especially for smaller, poorer, or less organized parties.[222] Indeed, some of the parties with the biggest stakes in the outcome of national administrative law are large but diffuse groups (such as consumers in a product safety rulemaking) that frequently are poorly represented in the negotiation process. Even some proponents of federal regulatory negotiation concede that it may be under-inclusive because the most active stakeholder groups tend not to be representative of the general consumer or median voter.[223] Finally, the wide spectrum of interests and concerns at stake increases the risk of gridlock,

219. *See* Beierle & Cayford, *supra* note 25, at 53, 65. The study also concluded that a collaborative process is more valuable when the issues raised in the dispute are complex, *see id.*, a criterion likely to be met by many local land use and environmental administrative disputes. The study noted that collaborative dispute resolution may still be effective and appropriate even if these criteria are not present, but in such cases should not be the sole form of public participation. *See id.*

220. *See* Freeman I, *supra* note 3, at 77-82 (describing difficulty of getting wide participation for certain agreements). *But see* Freeman & Langbein, *supra* note 164, at 83 (summarizing data indicating regulatory negotiations tend to be broadly inclusive).

221. One analysis found that negotiated and traditional administrative rulemakings took, on average, 2.8 and 3.0 years, respectively. *See* Coglianese I, *supra* note 166, at 1282-83. Another analysis found negotiated administrative rulemakings lasted an average of 1.9 years. *See* Harter II, *supra* note 165, at 49.

222. *See* Langbein, *supra* note 189, at 463 (finding that small businesses typically regard the outcomes of regulatory negotiations as less responsive than do their big business counterparts).

223. *See* Freeman & Langbein, *supra* note 164, at 124.

making agreement formation and implementation that much more difficult.

The organizational obstacles to collaborative, multilateral agreements in local land use regulation are considerably smaller. Multiparty negotiation over project-specific land development is generally logistically simpler. In local land use project disputes, most if not all significantly affected parties will be geographically concentrated, the number of representative parties will be more manageable, and the matters at issue will be comparatively more concrete. These contrasts make it easier to provide notice and access to affected parties, to cultivate those parties' capacities to participate in negotiations, and to achieve agreements that are responsive to all parties' concerns.

Local land use disputes also primarily involve several discrete (if often conflicting) private property interests and fewer diffuse interests than are routinely present for an administrative rulemaking.[224] Because the various parties affected by land use disputes tend to live or work in relative proximity, they may already have long-standing relationships that are likely to persist whether or not any explicit agreement is ever reached. The need to build and manage such relationships is a natural outgrowth of local land use patterns and governance structures, and one that more easily lends itself to collaborative mechanisms. While certainly neighbors may not be any more inclined to agreement than the more unfamiliar participants in administrative rulemakings, it will at least be easier for neighbors to assemble and provide basic information to all parties and to determine whether collective agreement is feasible.

2. *Cultivating local government legitimacy.*

Another concern often raised in administrative regulation is that collaborative processes shift regulators away from determining the general public interest to a more passive, mediative role. One version of this common critique contends that the recent shift to consensus-building processes in administrative law amounts to "a 'decentering' of the state and a retreat from the public interest as

224. To the extent that diffuse interests exist in a local land use dispute, local legislatures may serve as surrogates on behalf of certain diffuse interests within the locality, as they ostensibly are elected to represent the general locality's interest in a project.

the primary goal of government officials."[225] Critics argue that when administrative agencies rely too heavily on private actors and interest group bargaining, they risk abdicating their regulatory responsibilities and generating regulatory outcomes that subvert the primary regulatory goal of determining the public interest.[226] This critique is premised on the notion that decision makers in administrative agencies have scientific or technical expertise that actually allows them to discern some general or objective notion of the public interest.[227] Any participation by private actors is therefore secondary to this fundamental determination by the agency.[228]

This view of the regulatory process may be fitting in the context of administrative rulemaking involving issues that are conducive to scientific debate and colorable claims of objective rationality, such as health and safety standards in environmental regulation. Though assertions of expertise are sometimes questioned even in administrative law,[229] agencies nevertheless rely on expertise in a way that those making land use decisions cannot. Indeed, administrative agencies are delegated authority for making regulatory decisions precisely because of their specialized expertise in the substantive area under their purview.[230]

As explained in Part II.B.3, *supra*, in local land use disputes, defining a unitary "public interest" by reference to objective scientific criteria or expertise is problematic if not impossible,[231] because such disputes involve competing subjective goals such as aesthetics, use compatibility, and growth. Project-specific land use

225. Coglianese IV, *supra* note 207, at 113; *see also* William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1382-87 (1997) (claiming that negotiated rulemaking reduces the agency to a mere participant rather than the authority responsible for and empowered to achieve statutory intent and the public interest).

226. *See* Funk, *supra* note 225, at 1356; *see also* Freeman II, *supra* note 12, at 637, 655-56, 662; Freeman III, *supra* note 152, at 198-99; Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1287-96 (1994).

227. *See* Rose I, *supra* note 1, at 868. Proponents of this approach to regulation focus on decisionmaking through expertise and instrumental rationality, or "the rational determination of facts and their application to legal requirements in a reasoned manner." Funk, *supra* note 225, at 1379.

228. *See* Funk, *supra* note 225, at 1386 ("[W]hile modern rulemaking seeks full participation by interested persons, the agency still determines the public interest."); Freeman II, *supra* note 12, at 558-59.

229. *See* Rose I, *supra* note 1, at 868.

230. *See id.*

231. *See* Camacho, *Installment One*, *supra* note 14, at 50-53.

decisions often do implicate complex questions, such as economic, population, and housing forecasts or environmental impacts, which may be informed by technical analyses. Yet there is typically no single, objective answer to the conflicts presented by land use planning. Reasonable minds regularly differ, for example, on the appropriate use for a property, or whether a particular local intersection should emphasize pedestrian or automotive accessibility. Indeed, the trend toward negotiation-based decisionmaking in land use was motivated in large part by a growing recognition of the limits of objective, expert-driven land use planning.[232] Any meaningful determination of the specific needs and preferences of parties affected by a land use project depends on the expression of these needs and preferences through direct public participation. In this sense, project-specific land use decisions are essentially and fundamentally land use mediations,[233] the resolutions of which ultimately depend on knowledge of local conditions and interests, not technical expertise.

The diminished profile of technical expertise is evident in the very structure of land use decisionmaking. Even under the traditional command and control model, the actors in local land use decision processes with the greatest claim to expertise—professional land use planners—serve as mere advisors to decisionmakers for whom substantive expertise is not a prerequisite: members of the local planning commission or legislative council.[234] Planners are often proficient in the locality's idiosyncratic regulatory processes, as well as its unique natural and built features,[235] and local administrative staff are often trained to develop technical reports on proposed development projects. However, such analyses are not used to calculate any single, "objective" policy solution so much as to inform decisionmakers of potential project impacts, compliance with code requirements, and recommended measures for limiting such impacts. By recognizing the inherently mediative nature of land use regulation, the proposed collaborative model is able to harness the land use

232. *See id.*

233. *See* Rose I, *supra* note 1, at 889.

234. *See id.* at 869.

235. *See id.* Given the pervasive use of expert consultants to collect and evaluate physical and environmental information, the land use planner's putative expertise may be of limited relevance even within the locality's unique landscape.

professional's mediative skills, focusing the planner on coordinating and facilitating participation, community organization, and information generation.

By cultivating the ability of community members to participate directly in, and ultimately shape, the decisionmaking process, the proposed collaborative land use model confronts the most troubling concerns raised regarding the legitimacy of local decisionmaking. Local officials have long been identified as acutely susceptible to corruption and capture by powerful interests,[236] particularly as localized government revenue systems and interlocal competition have created an unrelenting emphasis on attracting new development to localities.[237] In the context of negotiated land use regulation, the problem is further exacerbated by the fact that most local government councils provide only indirect oversight of project agreements, with negotiation and implementation largely left to staff.[238] The proposed collaborative model confronts capture concerns by cultivating one of local government's most distinctive and essential sources of legitimacy: the ability of affected parties to directly participate in and shape the decision process.[239] The collaborative model seeks to more directly aggregate the preferences of affected interests, in contrast to the legislative process's principal reliance on indirect aggregation through government representatives. The proposed collaborative model also enhances accountability *between* local governments by allowing other local governments to participate in the decisionmaking process and influence the outcome. When land use decisions impact communities in other jurisdictions, the affected local governments have a strong incentive to participate in the negotiation, approval, implementation and monitoring processes, and can serve as additional sources of accountability during implementation and enforcement of the agreement.[240] By encouraging affected parties inside and outside of the local government's jurisdiction to assist in regulation,[241] the

236. *See id.* at 855-56.

237. *See* JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 180 (1987).

238. *See* Camacho, *Installment One*, *supra* note 14, at 36-45.

239. *See* Rose I, *supra* note 1, at 887.

240. Though administrative agencies can serve as a limited check on sister agency decisions, the incentives for administrative agencies to do so are considerably weaker than those for local governments pitted against each other in direct fiscal competition.

241. *See* Freeman II, *supra* note 12, at 638.

collaborative model thus seeks to legitimate land use decisions through the longstanding and essentially local attribute of participation.

3. *Capture: the need for collaborative governance.*

Collaborative regulatory processes also have been criticized in the administrative law context for potentially facilitating capture. Administrative regulatory processes have traditionally drawn heavy criticism for granting special access and influence to regulated entities,[242] and recent negotiated regulatory innovations are no different. Some commentators, including proponents of a collaborative regulatory model, are justifiably distrustful of negotiation-based regimes in administrative law to the extent that these may grant exceptional power to certain interested parties at the potential expense of other parties.[243]

In response to this concern, the existing negotiation-based regimes in administrative law actively attempt to thwart capture by mandating broader and more direct participation than traditional regulatory processes. Some empirical research suggests that these efforts have been fairly successful, though room for improvement unquestionably exists.[244] In addition, research suggests that federal regulatory agencies have been moderately successful at encouraging broader involvement in negotiated processes by providing information and monetary incentives (such as direct funding) to interested parties.[245]

In contrast, as described in the first Installment, the modern bilateral agreement-based land use system is the antithesis of inclusive participation.[246] Development and annexation agreement regimes, as currently adopted, are essentially invitations to local government capture. In most jurisdictions, few if any of the

242. *See id.* at 558-59. On capture generally, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3-6 (1971).

243. *See, e.g.*, Freeman I, *supra* note 3, at 81 n.244; Coglianese III, *supra* note 181, at 75-77.

244. *See* Freeman & Langbein, *supra* note 164, at 83, 127. Although the administrative regulatory negotiation process was found to be more inclusive and open, the study also indicated a weakness of the process: because it is typically more resource and information intensive, it tends to impose disproportionate costs on smaller, poorer actors. *See id.* at 84, 123. However, participants did report that these cost disparities did not translate into undue influence over outcomes. *See id.* at 64.

245. *See id.* at 83, 113.

246. *See* Camacho, *Installment One*, *supra* note 14, at Part IV.A.

regulatory features likely to foster robust participation or collaborative behavior are present. These regimes provide minimal opportunities for public participation and rely almost exclusively on bilateral bartering between developers and local governments, while sanctioning agreements that are ad hoc, relatively inflexible and shielded from the public throughout implementation. The need for broader and more transparent participation is thus more acute in land use regulation than in the administrative law context,[247] where any suggestion of a bilateral approach to negotiations is already viewed as unparticipatory and abetting capture.[248] Research suggests that processes that grant affected parties greater and more direct influence are particularly valuable for building confidence in decisionmaking institutions with low levels of public trust.[249] A collaborative governance approach calls for openness, quality participation and enduring accountability precisely to impede collusive regulation, and seeks to improve public trust in land use decisionmaking where unfair dealing is all too familiar.

## IV. CONCLUSION

Prevailing negotiated land use approval processes are exclusionary and inflexible. Despite their pervasiveness, there is astonishingly little evidence that these processes lead to fair, well-planned or efficient land use decisions. Rather, these bilateral negotiations foster land use agreements that freeze developers and localities into rigid, long-term relationships, with little or no meaningful input from other affected parties.

At its most basic level, the collaborative model seeks to make the process of negotiating local land use decisions, particularly those significant decisions likely to be enshrined in development agreements, more open and inclusive. The model aims to energize the land use regulatory process by providing affected parties the opportunity to resolve disputes and empowering such actors to monitor and adjust adopted agreements, instead of relying on

247. As stated by one proponent of collaboration in administrative law, "[o]ne of the best ways to protect against capture may be to empower public interest groups to perform or participate in oversight functions." Freeman I, *supra* note 3, at 30 n.75 (citing IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 71 (1992)).

248. *See* Freeman I, *supra* note 3, at 81 n.244.

249. *See* Beierle & Cayford, *supra* note 25, at 56.

retroactive, external judicial review. Finally, the model emphasizes an adaptive, experimental ethic that encourages decisionmakers to periodically re-examine the design of not only individual project agreements, but also underlying regulatory processes.

A regulatory regime modeled on the collaborative principles set forth in this Article would represent significant progress in overcoming the deficiencies of existing negotiated land use agreement processes. Collaborative techniques may not yield cooperative behavior or agreement all—or even most—of the time. Yet, this does not mean that land use decisionmaking processes should continue to emphasize adversarialism and opacity. Nor should these processes be structured, as they currently are, to favor the participation of some affected parties over others. Rather, existing research suggests that collaborative principles are worth implementing not only because they are likely to produce better *agreements*, but also because they will almost certainly enhance levels of transparency, information sharing, and cooperative behavior in the underlying *process*.

Although implementing the proposed collaborative land use model will be challenging, the model nevertheless has a good deal of promise in the land use context because of the distinctively local and mediative features of land use decisionmaking. Moreover, because development and annexation agreement regimes already function as voluntary alternative processes to more conventional regulatory mechanisms, many jurisdictions have a readily available and appropriate vehicle for exploratory use of collaborative land use processes. Through the proposed collaborative governance approach, local and state governments can begin to reverse land use regulation's long-standing, well-deserved reputation for favoritism and corruption. Unless and until states and localities are willing to experiment with these processes, however, the potential of collaborative governance to foster a more participatory, engaged, and cooperative civic culture will remain only a promise.