SECOND BEST PRACTICES?: ADDRESSING MEDIATION'S DEFINITIONAL PROBLEMS IN ENVIRONMENTAL SITING DISPUTES

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FULL CITATION:

Sean F. Nolon, Second Best Practices?: Addressing Mediation's Definitional Problems in Environmental Siting Disputes, 49 IDAHO L. REV. 69 (2012).

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SEAN F. NOLON*

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^{*} Associate Professor of Law and Director of the Dispute Resolution Program, Vermont Law School. I am grateful for the helpful comments received from Mark Latham, Lawrence Susskind, Amy Cohen, Joan Vogel, Jinjing Liu, as well as numerous participants at Vermont Law School's Colloquium on Environmental Scholarship. Additionally, members of Vermont Law School's summer writing group—Jennifer Taub, Jessica West, and Christine Cimini—provided valuable critique in the final stages of this article. Any shortcomings remain my own. This work would not have been possible without the case study interviews by Rebekah Smith, research assistance by Erick Tobias, and the keen eye of Richard Gadapee.

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ABSTRACT

This article explores the potential value of interested parties who serve a mediative function in environmental siting disputes and whether these interested parties meet the definitional requirements to be called mediators. For almost forty years, local agencies have relied on mediators to manage contentious adjudicative decisions such as the siting of facilities. Who qualifies as a mediator, however, is not always clear. According to some best practices, environmental mediators should be highly trained and experienced professionals who do not have a stake in the outcome of the decision. This combination of experience and lack of interest in the outcome offers the greatest assurance that the mediators will be impartial process managers who can maintain a balance of power and guard against inappropriate substantive bias in the outcome. However, in some successful siting negotiations, interested parties have taken responsibility for managing the process and have assumed the title of "mediator." Labeling these interested parties as "mediators" raises many of the definitional problems confronted by mediation in general. While interested parties can and do perform valuable mediative functions in many disputes, there is also a danger that their bias can lead to corrupt results that harm the parties as well as promote societal misperceptions of mediation. This article presents two case studies where interested parties played the role of a mediator in contentious siting decisions and explores whether the label of "mediator" is appropriate. Interested parties can mediate siting decisions; however, calling them "mediators" raises problems for the instant dispute and for the general understanding of mediation. To the extent that participants afford mediators elevated status, this comes from a mediator's perceived neutrality and talent. By casually referring to unqualified individuals as mediators, participants are, at best, in danger of wasting time in poorly designed and managed processes and, at worst, vulnerable to corrupted outcomes. The author suggests that labeling these interested parties as "quasi-mediators" can clarify some of the confusion surrounding the expectation of mediators while taking advantage of indigenous collaborative capacity among disputants.

I. INTRODUCTION

What does it mean to call someone a "mediator" in the context of an environmental or land use siting dispute? Can an interested party, such as the developer or one of the opponents, play the role of mediator? For example, a mining company proposes to expand its operations near a residential neighborhood. After a contentious first meeting in front of the local decision-making agency, a neighbor offers to assist in the process of negotiation among the parties. She is willing to set the agenda, establish ground rules, manage communications among the parties, design and oversee a joint fact-finding process, among many other things. In short, she is willing to provide the services similar to those provided by a mediator. Would it be appropriate to call her a mediator despite her interest in the outcome and lack of experience? This article explores that question. Specifically, it explores whether the nuanced prohibition against interested and inexperienced parties serving as mediators¹ applies to environmental siting disputes. The author argues that interested parties can provide mediative functions but under the label "quasimediators" instead of "mediators."

While the possibility of interested parties serving as mediators runs counter to some core concepts of mediation,² their presence in many disputes is not entirely uncommon.³ Anthropologists have long pointed out that western notions of mediator impartiality and neutrality

^{1.} Michael L. Moffitt, Schmediation and the Dimensions of Definition, 10 Harv. Negot. L. Rev. 69, 70–71 (2005) [hereinafter Schmediation] (citing the claim that mediators should be professional and neutral); Ronit Zamir, The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward A New Mediation Ethic, 11 Pepp. Disp. Resol. L.J. 467, 467 (2011) ("Non-neutral mediator"... is an oxymoron") (citing SIMON ROBERTS & MICHAEL PALMER, DISPUTE PROCESSES 153–54 (2005)); Christine B. Harrington & Sally Engle Merry, Ideological Production: The Making of Community Mediation, 22 LAW & Soc'y Rev. 709, 729 (1988).

^{2.} See generally Joseph B. Stulberg, Must a Mediator Be Neutral? You'd Better Believe It!, 95 Marq. L. Rev. 829 (2012).

^{3.} Michael L. Moffitt, The Four Ways to Assure Mediator Quality (and Why None of Them Work), 24 Ohio St. J. on Disp. Resol. 191, 206 (2009) (stating that "the very notion that the mediator must be a third-party, rather than one of the affected disputing parties, is often open to challenge"); Rebecca Golbert, An Anthropologist's Approach to Mediation, 11 Cardozo J. Conflict Resol. 81, 94 (2009); Paul Wehr & John Paul Lederach, Mediating Conflict in Central America, in Resolving International Conflicts: The Theory and Practice of Mediation 55–74 (Jacob Bercovitch ed., 1996). The Welfare Association for the Development of Afghanistan (WADAN) conducts a program called "Civic Education & Peace Building Training Program for Local Leaders" that incorporates the traditional methods of conflict resolution back into communities. At the core of this program is the use of local leaders—Maliks—to serve as conflict resolvers. WADAN Civic Education & Peace Building Training Program for Local Leaders, WADAN.ORG, www.wadan.org/impact.asp (last visited Nov. 12, 2012); Brynna Connolly, Non-State Justice Systems and the State: Proposals for a Recognition Typology, 38 Conn. L. Rev. 239 (2005) (providing examples of "insider-partial" mediators in Bangladesh, Philippines, Rwanda, and East Timor).

are not shared by all cultures. 4 This article looks at two land use siting disputes where interested parties took on the role of managing the process and performed many tasks similar to those typically performed by a mediator. Did the fact that the parties took on the label of "mediator" in these disputes amount to a misrepresentation? Did their partiality and lack of experience decrease the likelihood of reaching an agreement? Was it appropriate to call them mediators, or should they have been labeled something else? The answers to these questions have implications specifically for the success of land-use mediations and generally for the ability of society to effectively use mediators when solving complex problems. Despite the widely accepted role of negotiation—and its closely related cousin, mediation—in solving some of society's most intractable problems, 6 there is pervasive confusion surrounding the labels used to describe different processes of consensual decision-making. ⁷ Imprecise use of terms such as mediation, arbitration, collaboration, and adjudication demonstrates the general confusion surrounding these concepts.8 Allowing continued misuse erodes the effectiveness of these processes and limits society's ability to solve difficult problems.

^{4.} Amy J. Cohen, Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal, 11 Harv. Negot. L. Rev. 295, 297 (2006) (stating that "the theory of ADR is out of sync with practices of ADR in developing countries"); see Margaret Y. K. Woo, Law and Discretion in the Contemporary Chinese Courts, 8 PAC. RIM L. & POL'Y J. 581, 597–98 (1999) (pointing out that court-annexed mediation in China is often performed by the judge, while in the U.S., the utility of judges as mediators is hotly contested); see Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337, 364–65 (1986). But see, Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. REV. 485, 512 (1985) (suggesting that "some of the settlement authority of the third party may be directly related to the judge's power, control, or knowledge of the specific case, and the value of the conference may be diminished if another person is used").

^{5.} See, e.g., Jonathan Cohen, Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution, 20 CONFLICT RESOL.Q. 433, 435–36 (making the argument that how we refer to our adversaries affects how we approach a dispute).

^{6.} WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 17 (1988) (stating that "[i]n at least some cases . . . rights-based court procedures are preferable, from a societal perspective, to resolution through interests-based negotiation"). Jeffrey R. Seul, Settling Significant Cases, 79 WASH. L. REV. 881, 884 (2004) (arguing that negotiation—and mediation—"should be viewed as a legitimate alternative to litigation for addressing disputes involving deep moral disagreements").

^{7.} Anecdotally, from the author's teaching experience, most first-year law students struggle to see the distinction between an arbitrator and a mediator.

^{8.} Al Baker, Arbitrator Halts City's Plan to Overhaul 24 Schools, SchoolBook.org (June 29, 2012, 9:05 PM), http://www.nytimes.com/schoolbook/2012/06/29/city-loses-arbitration-on-staffing-for-24-turnaround-schools/ (originally published as "Mediator Halts City's Plan;" the correction was made on July 12, 2012); Travis Anderson, Mediator Finds for Fired Boston Officer, BOSTON GLOBE (July 25, 2012), http://articles.boston.com/2012-07-25/metro/32828712_1_evidence-arbitrator-36-page-decision (describing how an arbitrator ruled for the officer).

Scholars, such as Lon Fuller, have gone to great lengths to clarify the form and limits of adjudicative and consensual processes. 9 Loose application of process labels leads to loose understandings of process. This confusion can eventually lead to abuse that undermines the effectiveness and credibility of mediation and consensual processes in general.¹⁰ At the same time, practical experience has continually informed and improved theoretical frameworks, forcing negotiation scholars to adjust and update descriptions of different concepts. 11 This article explores the theoretical understanding of the mediator's role in environmental siting decisions and uses two case studies to explore the limits of that understanding. The thesis of this article is that, contrary to a general, nuanced, prohibition against interested parties serving as mediators, interested parties can provide valuable mediative functions in siting disputes, assuming appropriate circumstances. One important caveat, however, is that they should not be called mediators. They should instead be called "quasi-mediators." Making this distinction is more than academic hair-splitting since there are real-world implications to who can assume the label of a mediator. Parties who understand the limitations of an interested party serving as a quasi-mediator will be more likely to avoid the complications that may arise. In addition, providing this clarity in the siting context will also improve participants' general understanding of how mediators operate in other consensual processes.

Land use siting disputes touch the lives of many people. These disputes include a range of decisions that are mostly made at the local government level about what to do with a particular parcel of land. The choices presented may involve residential use, such as a housing development; commercial use, such as a shopping mall; industrial use, such as a factory or waste treatment facility; or it could involve a mix of the

^{9.} See, e.g., Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 363 (1978).

^{10.} See, e.g., Lawrence Susskind et al., Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale, 35 COLUM. J. ENVIL. L. 1 (2010) (arguing that the label of "collaborative" adaptive management was erroneously applied in that example). Also, in the author's personal experience mediating environmental disputes, parties may refuse to participate as a result of past experiences where a "mediator" violated their trust by revealing confidential information and mischaracterizing agreements.

^{11.} Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 Ohio St. J. on Disp. Resol. 1, 15–21 (2000) (discussing how Fuller's strict adherence to categories and structures did not foreshadow the fact that most dispute resolution processes are a mix of approaches); *see generally* Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005) (exploring how disputes travel a braided process that mixes adjudicatory and consensual approaches); Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601, 605 (2003) (pointing out the perils of the much praised process of option generation based on social science literature revealing that "people often have great difficulty selecting the value-maximizing option when multiple options are on the table").

three. In many cases these decisions are made with little fanfare; however, those that are controversial take up a tremendous amount of public resources¹² and are difficult to resolve.¹³

Siting decisions are typically conducted in a trial-like manner where the decision-making agency determines the rights of the applicant under governing laws.14 For many siting decisions, this adjudicative process is efficient at producing satisfying and acceptable results. 15 Most of the requests to build houses or construct businesses in a community pass through the decision-making process with relative ease. This pacific norm is typically present when an application raises questions within the authority of the decision-making agency. Conversely, when an application presents questions for which the agency has discretion about how to decide, the adjudicative process may not function as efficiently. 16 In these instances, consensual, negotiated processes are more effective at addressing the suite of needs raised by the application.¹⁷ For example, for a developer who wants to build an as-of-right project that fits squarely in the governing law, the required adjudicative process will likely produce a timely decision. If however, the developer applies for a project where the agency has considerable discretion, the adjudicative process may result in delays and unsatisfying decisions. This is because, with a discretionary decision, the agency is not only performing an adjudicative function—determining claims of right—but is also creating new rights within the agency's enabling authority. 18 When these discretionary decisions outgrow the limitations of adjudicative process, consensual processes are more appropriate. 19 In the event that negotiations reach an

15. Sean F. Nolon, *The Lawyer as Process Advocate: Encouraging Collaborative Approaches to Controversial Development Decision*, 27 PACE ENVIL. L. REV. 103, 126–27 (2009) [hereinafter Nolon, *The Lawyer as Process Advocate*].

^{12.} Vicki Been, Compensated Siting Proposals: Is It Time to Pay Attention?, 21 FORDHAM URB. L.J. 787, 787 (1994).

^{13.} Stewart E. Sterk, Structural Obstacles to Settlement of Land Use Disputes, 91 B.U. L. Rev. 227, 228–29 (2011).

^{14.} *Id*

^{16.} Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 846 (1983) (arguing that piecemeal zoning changes should not be treated as adjudicative processes and are better handled through mediative processes).

^{17.} Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 871–72 (2008) (referencing the evidence that attorneys involved in environmental disputes recognize the value of addressing interests in negotiation and mediation); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794–95, 801–04 (1984).

^{18.} Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 883 (2005) (describing agreement-based regulations where agencies engage in transactions to uphold existing rights and to create new obligations).

^{19.} Fuller, *supra* note 9, at 404 (arguing that the adjudicative process confronts difficulty when attempting to order arrangements among parties).

impasse, the parties can ask a mediator to help them reach an agreement on siting issues.²⁰

There are, however, barriers to bringing in mediators such as cost, supply, and resistance of the parties. When these barriers prevent the hiring of a mediator, interested parties may step forward to perform some of the mediative functions that would be performed by a disinterested, experienced (e.g. professional) mediator. The danger of using an interested party serving in the place of a professional mediator is that he may use his position of privilege to skew the outcome in favor of his particular interest. If the interest is financial, he may be inclined to encourage parties to select outcomes that advance his interests instead of pareto-optimal outcomes. This can undermine the integrity of the process for the instant dispute as well as all future mediations. There are situations, however, where an interested party will be able to put his interest aside and use expertise related to mediation to serve a valuable mediative function in a siting dispute that has reached an impasse. ²¹

That is exactly what happened in East Middlebury, Vermont and Somerville, Massachusetts. In Vermont, the neighbor of a proposed mine offered to manage the negotiations among the mining company and the surrounding neighborhood. Despite the fact that she lived nearby and would be affected by the proposed mine expansion, she served as a mediator who helped the parties reach an agreement that formed the basis of the final approval for the mine. In Somerville, on the outskirts

20. See, e.g., EDITH NETTER, ZONING AND PLANNING LAW HANDBOOK 179 (Kenneth H. Young ed., 1992); Barbara McAdoo & Larry Bakken, Local Government Use of Mediation for Resolution of Public Disputes, 22 URB. LAW. 179, 183 (1990); John R. Nolon, Golden and Its Emanations: The Surprising Origins of Smart Growth, 23 PACE ENVIL. L. REV. 757, 783 (2006) (describing a land use mediation over a bond issue to raise \$9.5 million for open space development rights acquisition); J. B. Ruhl, Thinking of Mediation As A Complex Adaptive System, 1997 BYU L. REV. 777, 785 (1997) (using a land use mediation as the central example to explore the functionality of mediation).

^{21.} E.g. Sean F. Nolon & Susan Shashok, J.P. Carrera Mine Conflict (unpublished manuscript) (on file with author); Doug Foy and Ann Tate in Assembly Square (Todd Schenk, Putting the Pieces Together: Looking Back at the Path To a Mediated Agreement at Assembly Square 9, LINCOLN INSTITUTE OF LAND POLICY (April 2009); Michael Finnegan in NYC Watershed (Michael C. Finnegan, New York City's Watershed Agreement: A Lesson in Sharing Responsibility, 14 PACE ENVTL. L. REV. 577 (1997)); John Bailey in the Yukon Wolf Management Dispute (Susan Todd, Building Consensus on Divisive Issues: A Case Study of the Yukon Wolf Management Team, 22 ENVIL. IMPACT ASSESSMENT REV. 655 (2002) (citing John Bailey, Resolving a Wildlife Management Conflict: The Public Development of a Wolf Conservation and Management Plan for the Yukon Territory, Canada (paper presented at the 1993 International Conference on Wilderness, Norway; 1993)); see Russell Train who mediated the Scenic Hudson litigation (ALLEN R. TALBOT, SETTLING THINGS 6-24 (1983)). For other examples where the mediation function was performed by a range of unidentified parties, see Carl F. Fossette & Ruth Fossette, The Story of Water Development in Los ANGELES COUNTY 161-71 (1986) and Sean F. Nolon & Emily M. Beck, COLLABORATIVE DEVELOPMENTS: A REPORT ON DEVELOPMENT APPROVALS ACHIEVED THROUGH COLLABORATION (The Land Use Law Ctr., Working Paper) (on file with author).

of Boston, the Assembly Square site had been a challenge for the community for decades. After the last manufacturing jobs left the site in the 1970s, the city entertained several commercial development ideas, none of which produced viable alternatives. Peighbors and city residents, who were increasingly frustrated with what they saw as inappropriate, big-box style development, proposed an alternative vision for the site that emphasized mixed-use and pedestrian oriented development. After many years of legal and political battles, two proponents of the mixed-use vision were hired to mediate among the developers and the principal opponents. In both disputes, these interested parties were able to avoid the dangers that others may (and have) succumbed to by helping the parties reach a mutually satisfying agreement.

While these interested parties were in fact mediating, this article argues that they should not be called mediators.²⁴ Despite the varied definitions of mediators and mediation,²⁵ being called a mediator raises certain expectations.²⁶ Using the label of mediator endows a process manager with a level of privilege that may not be appropriate for the interested parties featured in these case studies.²⁷ At the most basic level, parties expect mediators to have experience resolving disputes²⁸ and

24. But see, Rebecca Golbert, An Anthropologist's Approach to Mediation, 11 CARDOZO J. CONFLICT RES. 81, 94 (2009) (arguing that the label of mediator is context and mode specific such that "mediator" may be an appropriate label for an interested party in some cultures).

^{22.} Squares and Neighborhoods—Assembly Square, SOMERVILLE, MA MAYOR JOSEPH A.CURTATONE, available at http://www.somervillema.gov/departments/ospcd/squares-and-neighborhoods/assembly-square.

^{23.} Id.

^{25.} Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7, 11 (1996) (stating that "[in] mediations, goals and methods vary so greatly that generalization becomes misleading") [hereinafter Riskin, Understanding Mediators' Orientations, Strategies, and Techniques]; Kimberlee K. Kovach & Lela P. Love, Mapping Mediation: The Risks of Riskin's Grid, 3 HARV. NEGOT. L. REV. 71, 80 (1998); Leonard L. Riskin, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, 79 NOTRE DAME L. REV. 1, 3–4 (2003) (claiming that "an enormous range of diverse processes were called mediation, yet there was no widely accepted system for describing or identifying the variants"); Ellen A. Waldman, Identifying the Role of Social Norms in Mediation: A Multiple Model Approach, 48 HASTINGS L.J. 703, 704 (1997) (asking the question "what exactly is a 'mediated solution?"); Schmediation, supra note 1, at 72; Charles Pou, Jr., "Embracing Limbo": Thinking about Rethinking Dispute Resolution Ethics, 108 PENN ST. L. REV. 199, 209–10 (2003).

^{26.} Schmediation, supra note 1, at 71 (describing how mediators are expected to be impartial, trained professionals, skilled at facilitating communication).

^{27.} See generally James R. Coben, Mediation's Dirty Little Secret: Straight Talk about Mediator Manipulation and Deception, 2 J. ALT. DISP. RESOL. EMP'T 4 (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923951.

^{28.} While there is no certifying board for mediators to ensure competence, most mediations take place under the assumption that the mediator has the requisite experience to perform the task. Schmediation, supra note 1, at 102 (citing EEO RESOLVE, DEFENSE LOGISTICS AGENCY, http://www.dla.mil/ EEO/Pages/Resolve.aspx (last visited Oct. 29, 2012) (stating that "[a] mediator is a trained professional in conflict resolution"); Mediation Works Incorporated Divorce Mediation Questions & Answers, http://www.mwi.org/services

to be impartial.²⁹ This presents a problem for parties who have an interest in the outcome and who are not trained mediators. Being called a mediator assumes a level of disinterest that, by definition, an interested party does not possess. Few interested parties are likely to have the battery of skills used by a professional mediator to manage complicated and controversial decisions. As a result, an interested party serving as a putative mediator is in the position to cause serious harm.

The problem this article confronts is whether this possibility of harm should categorically bar an interested party from providing valuable mediative functions in siting disputes. Some scholars may not see this prohibition as a problem, arguing that the path of caution is preferable to jeopardizing the integrity of the process. While prudent, this conservative approach would leave a subset of disputes in danger of being unresolved. If funds are not available to hire a professional mediator, should a capable interested party not be allowed to assist the negotiation? This article argues that appropriate circumstances exist for interested parties to serve mediative functions but that measures should be taken to clarify their role.

One measure is to refer to these interested parties as "quasi-mediators." The quasi-mediator label preserves their responsibilities as a mediator, at the same time suggesting that they are not fully cloaked with all of a mediator's privileges and immunities. Using this label puts the parties on notice that the interested party is not a "true" mediator and should not be treated as one. Qualifying their participation will likely reduce the possibility of prejudice. In addition to calling them quasi-mediators, interested parties should only consider performing mediative functions in siting disputes under the appropriate circumstances. ³¹

This use of the term "quasi-mediator" is consistent with how some social scientists studying mediation in small-scale societies have used the term.³² According to their observations, quasi-mediators, in the form

[/]div_qa.htm (last visited Oct. 29, 2012) (stating that "[a] mediator is a trained professional who helps people with differences have productive conversations").

^{29.} While it is difficult to make general statements about mediation, most mediator opening statements mention the importance of impartiality. Schmediation, supra note 1, at 79, n. 3. See, e.g., MEDIATORS CODE OF PROFESSIONAL CONDUCT (Colo. Council of Mediators, 1995), available at http://www.coloradodivorcemediation.com/spotlight/Colorado-Mediators-Code.asp) (providing that "[m]ediation is a process in which an impartial third party, a mediator, facilitates the resolution of a dispute by promoting voluntary agreement (or 'self-determination') by the parties to the dispute"), and N.J. Sup. Ct. Standards of Conduct for Mediators in Court-Connected Programs, NEW JERSEY COURTS, www.judiciary.state.nj.us/notices/n000216a.htm (last visited Oct. 29, 2012) (stating that "[m]ediation is a process in which an impartial third party neutral (mediator) facilitates communication").

^{30.} See infra Part IV.A.

^{31.} See infra Part IV.B.

^{32.} One of the three ways that "quasi-mediator" has been used is similar to how it is used in this article—an interested party who serves a mediative function. See Golbert,

of interested parties, can effectively convey the trustworthiness of the opponents to their own side, can explore no-agreement options when discussing alternatives to negotiation, and can help develop a constituency for a problem-solving effort among those who doubt the efficacy.³³ The aim of this article is not to suggest that quasi-mediators are more effective than mediators but to argue that interested parties can serve valuable mediative functions in siting disputes.

The two cases presented in this article identify four conditions that make a siting dispute appropriate for an interested party as a quasimediator.³⁴ First, the interested party must have an understanding of collaborative decision-making and group dynamics. 35 Second, the opposition must be open to some form of development on the site, and the developer must be open to mitigating impacts. 36 Third, the quasimediator's interest must be disclosed, and all parties must consent to

supra note 3, at 94-95; Louis Kriesberg, Formal and Quasi-Mediators in International Disputes: An Exploratory Analysis, 28 J. of Peace Res. 19, 19-27 (1991); Louis Kriesberg, Mediation in Conflict Systems, 29 Sys. Res. and Behav. Sci. 149, 156 (2012); Paul Wehr & JOHN PAUL LEDERACH, RESOLVING INTERNATIONAL CONFLICTS: THE THEORY AND PRACTICE OF MEDIATION 55-74 (Jacob Bercovitch ed., 1996) (these authors do not use the label quasimediator, instead they use "inside-partial mediator").

"Quasi-mediator" has also been used to describe a negotiator who attempts to reconcile differences among "stabilizers" and "de-stabilizers" within a negotiation team. See, e.g., Jeffery Miller & Thomas Colosi, Fundamentals of Negotiation: A Guide for ENVIRONMENTAL PROFESSIONALS 7 (1989); THOMAS COLOSI, INTERNATIONAL NEGOTIATION: ART AND SCIENCE 15 (1989); Suzanne Lieberman, Settlement and the Use of Negotiation: Lessons for the Black Canyon of The Gunnison, 12 U. DENV. WATER L. REV. 467, 474 (2009); Stephen B. Goldberg, Mediating the Deal: How to Maximize Value by Enlisting A Neutral's Help at and Around the Bargaining Table, 24 ALTERNATIVES TO THE HIGH COST OF LITIG. 147-48 (2006) (describing a mediator hired to advise one team of negotiators who ended up assisting in the negotiation with the other parties); Scott R. Peppet, Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?, 19 Ohio St. J. on Disp. Resol. 283, 364 n. 268 (2004).

A third meaning for quasi-mediator is when an arbiter serves in the capacity similar to a neutral evaluator. See, e.g., Sidney P. Ottem, The General Adjudication of the Yakima River: Tributary for the Twenty-First Century and a Changing Climate, 23 JOURNAL OF ENVIL. LAW AND LITIG. 275, 343 (2008); Bobby Marzine Harges, Appropriate Dispute Resolution Inside The State Courts—A Closer Look at the Power, Duties, and Responsibilities of Court Commissioners and Hearing Officers in Domestic Cases, 9 Loy, J. Pub. Int. L. 1, 16 (2007); Carlos Scott López, Reformulating Native Title In Mabo's Wake: Aboriginal Sovereignty and Reconciliation in Post-Centenary Australia, 11 Tulsa J. Comp. & Int'l L. 21, 40 (2003); Jerry P. Roscoe, Mediating Bioethical Disputes, Time to Check the Patient's Pulse? DISPUTE RESOL. MAGAZINE, Spring 2003, at 21–23.

- 33. While these are all tasks that independent mediators can perform, Kriesberg suggests that an interested party as quasi-mediator may be more effective at overcoming barriers to trust among more recalcitrant members of a group. Kriesberg, International Disputes, supra note 28, at 24. Whether or not a quasi-mediator is more effective at this than a professional mediator is up for debate, but the possibility exists.
 - 34. See infra Part III.
- Stewart E. Sterk, Structural Obstacles to Settlement of Land Use Disputes, 91 B.U. L. REV. 227, 250-53 (2011).
 - 36. See infra Part III.

allowing the quasi-mediator to serve a mediative function.³⁷ Finally, the timing must be right for negotiation.³⁸

The mediation of siting disputes differs from court-annexed mediations that serve as the basis for so much mediation scholarship.³⁹ Before elaborating on the appropriate conditions in part IV, the author looks at the mediation of siting decisions in part II. Once that foundation is laid, a discussion of the two case studies is presented in part III.

II. MEDIATION OF SITING DECISIONS

Not all siting decisions are appropriate for mediation, let alone a quasi-mediator. This section explores the nature of siting decisions to identify that subset of situations where the consensual and collaborative approaches, like negotiation and mediation, are appropriate to pave the way for the discussion of when interested parties can serve as quasi-mediators.

A. The Nature of Siting Decisions

1. Mostly Local

Siting decisions arise in local communities when a landowner applies for permission to construct a shopping mall, an office building, or a factory.⁴⁰ Once the landowner decides she would like to construct a project, she must obtain approval from the appropriate governmental agencies.⁴¹ Under the structure of our federal form of government, the principal authority for granting this type of land use approval is reserved by the states and delegated to the local level of government.⁴² This is why towns, counties, and cities are usually prominent players in decisions about siting land use projects.⁴³ However, few controversial siting deci-

39. See generally Lawrence Susskind, Consensus Building and ADR: Why They Are Not the Same Thing, in The Handbook of Dispute Resolution 358 (Michael L. Moffitt & Robert C. Bordone eds., 2005) [hereinafter Susskind, Consensus Building and ADR).

42. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law,* 26 HARV. ENVTL. L. REV. 365, 373 (2002) (stating that "[i]t is widely understood that local governments have been given a key, if not the principal, role in land use regulation") (citing ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 768 (3d ed. 2000). *See also* PLATER ET AL., *supra* note 40.

^{37.} See infra Part III.

^{38.} See infra Part III.

^{40.} See Zygmunt J. B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 1164 (2d ed. 1998).

^{41.} Id. at 1167.

^{43.} See, e.g., Scott Nishimura, Two Groups Opposing Walmart Neighborhood Market Zoning Case, TARRANT BUSINESS BLOG (Jan. 9, 2012, 7:33 AM), http://blogs.startelegram.com/dfwjobs/2012/01/ two-groups-opposing-walmart-neighborhood-market-zoning-case-in-fort-worth.html; Mary Pat Hoag, Neighbors Oppose Feedlot Expansion, NORFOLK

sions are entirely local; depending on the nature and scale of the project, state and federal agencies may also need to be involved to varying degrees. ⁴⁴ Siting decisions with regional implications and on topics expressly regulated by state and federal government frequently involve a braided decision-making process among local, state, and federal agencies. ⁴⁵ To illustrate, in New York state, a landowner must obtain approval from the local government to operate a gravel mine while the mine operation (hours of operation, methods of extraction, noise mitigation) is regulated by the State Department of Environmental Conservation. ⁴⁶ In addition, the disturbance of any endangered species or their habitat can be regulated by the Environmental Protection Agency under the Endangered Species Act. ⁴⁷

2. Variable Scale

The scale of siting decisions can be tremendously varied. Some decisions involve residential projects like subdivisions, townhouses, or apartment buildings. Others may be commercial projects like shopping malls, office complexes, or big-box developments. Yet others may be industrial projects like factories, waste treatment plants, or public utilities. Within these categories, proposals can range from small and modest to large and significant: a five-unit subdivision compared to a two hundred-unit townhouse development; the renovation of an existing shopping center compared to a new big-box development; the approval of a light industrial facility compared to a hazardous waste treatment facility. The scale can obviously affect the extent of the controversy.

As raised in the previous section, scale may determine if state and federal agencies are involved.⁴⁸ A large development on a state road will often require state approval for vehicular access and possible infrastructure upgrades.⁴⁹ Large utility projects, like wind turbines, may need

DAILY NEWS, Feb. 17, 2012, http://www.norfolkdaily news.com/news/neighbors-oppose-feedlot-expansion/article 1f3886dc-5986-11e1-bcb2-019bb30f31a.html.

^{44.} See generally Laurie DiChiara, Wireless Communication Facilities: Siting for Sore Eyes, 6 BUFF. ENVTL. L.J. 1, 2 (1998); Jeffrey H. Goldfien, Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes, 2006 J. DISP. RESOL. 435 (2006); Michael Diamond, "Energized" Negotiations: Mediating Disputes over the Siting of Interstate Electric Transmission Lines, 26 Ohio St. J. on DISP. RESOL. 217 (2011); Patricia E. Salkin & Ashira Pelman Ostrow, Cooperative Federalism and Wind: A New Framework for Achieving Sustainability, 37 HOFSTRA L. REV. 1049, 1063–67 (2009).

^{45.} Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project,* 42 URB. LAW. 287, 306 (2010).

^{46.} See generally Joan Leary Matthews, Siting Mining Operations in New York—the Mined Land Reclamation Law Supersession Provision, 4 Alb. L. Envil. Outlook 9, 9 (1999).

^{47. 16} U.S.C. § 1531 (2012).

^{48.} See PLATER ET AL., supra note 40.

^{49.} See generally Jack Estill et al., Taxing Development: The Law and Economics of Traffic Impact Fees, 16 B.U. Pub. INT. L.J. 1 (2006).

state approval.⁵⁰ Federal agencies may also be involved when development causes storm water runoff,⁵¹ impacts large wetlands,⁵² endangered species,⁵³ federal lands,⁵⁴ or national security.⁵⁵

3. Mostly Adjudicative

Siting decisions are, by nature, adjudicative decisions where governing agencies—the various boards, commissions and departments charged with approval authority—are asked to make "authoritative determinations on questions raised by claims of right "56 The consequence of this adjudicative nature is that many land use agencies conduct approvals in an adversarial, trial-like manner. 57 Some scholars have observed a trend that land use regulation has become more contractual than adjudicative.⁵⁸ While this may be the case with legislative actions, such as zoning regulations, siting decisions where the agency has limited authority are often conducted in trial-like procedures. Typically, the decision-making process starts with a landowner submitting an application to a decision-making agency seeking approval to developer her land. Assuming proper jurisdiction over the decision, the agency will then compare the application to the governing law to see if the proposed development is allowed.⁵⁹ Before making a decision, the agency will often be obliged to seek comments from the public. 60 After this pub-

^{50.} Salkin & Ostrow, supra note 44, at 1088.

^{51.} John H. Minan, General Industrial Storm Water Permits and the Construction Industry: What Does the Clean Water Act Require?, 9 CHAP. L. REV. 265, 272 (2006).

 $^{52.\;}$ Rapanos v. United States, 547 U.S. 715 (2006) (discussing two cases where developers were required to obtain approval from the Army Corps of Engineers permitting the filling in of wetlands).

^{53.} Marc J. Ebbin, *Is the Southern California Approach to Conservation Succeeding?*, 24 ECOLOGY L.Q. 695, 696–98 (1997) (describing the application of the Endangered Species Act by the Environmental Protection Agency in California).

^{54.} Michael Axline, Federal Lands and Invisible Hands, 25 ECOLOGY L.Q. 611, 621 (1999).

^{55.~} Troy A. Rule, Airspace in a Green Economy, 59 UCLA L. Rev. $270,\ 306{-}10$ (2011) (describing how wind turbines can impede the functionality of military radar systems).

^{56.} Fuller, supra note 9, at 368.

^{57.} Stewart E. Sterk, Structural Obstacles to Settlement of Land Use Disputes, 91 B. U. L. Rev. 227, 228 (2011); Naved Sheikh, Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?, 18 CORNELL J.L. & PUB. POL'Y 223, 226 (2008); R. Lisle Baker, Exploring How Municipal Boards Can Settle Appeals of Their Land Use Decisions Within the Framework of the Massachusetts Open Meeting Law, 44 SUFFOLK U. L. Rev. 455–56 (2011).

^{58.} Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 Stan. L. Rev. 591, 593 (2011) (stating that "[i]nstead of the traditional, hierarchical permit process, land use approvals are now increasingly the subject of negotiations leading to binding contracts between local governments and development interests").

^{59.} See Sterk, supra note 57, at 246.

^{60.} Id. at 263.

lic comment, the agency can deny, approve, or approve with conditions. ⁶¹ This simplification of the many procedural requirements present in approval processes represents the basic, four-part structure of application, review, comment, and decision that is present in the vast majority of siting decisions.

The adjudicatory nature of the process often leads to an adversarial climate found in other adjudicatory processes like litigation. ⁶² For most siting decisions, this adversarial climate does not interfere with efficient decision making. ⁶³ Most siting decisions are a simple matter of applying the facts to the law—does this application for a single-family home comply with the governing zoning law? However, when agencies are confronted with more controversial decisions where they have greater decision-making discretion, the normally predictable and structured adjudicative process can spiral out of control. ⁶⁴

In controversial decisions, sides form among the proponents and opponents. Each group then tries to capture as much support from the wider community. Go Once the required hearings begin, the opposing sides focus their attention on influencing the decision-making agencies. Proponents bring in experts and make prepared presentations. Deponents bring in their experts, refute claims made by developers, and raise new issues to be addressed by the agencies. The result is that both sides distort information, making it difficult for the agency to identify the relevant facts, and the process becomes unwieldy. The goal becomes beating the other side instead of finding the best outcome. Once a decision is made in one forum, those opposed to the result will attempt to prevent the decision from taking effect by challenging it in another. For example, the decision by a planning board approving a gravel mine may be overturned by a lawsuit challenging the process used by the lo-

62. While this is the generally stated result, there are certainly exceptions. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 413 (2001) (discussing the nuance of Fuller's adjudication analysis in the context of how modern courts become involved in complex decisions).

^{61.} Id. at 264.

^{63.} Some research suggests that citizens prefer adjudicative land use decisions to other forms of decision-making. Tom Tyler & David Markell, *The Public Regulation of Land Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. OF EMPIRICAL LEGAL STUD. 538 (2010). However, in addition to the small sample size, the surveys used do not specifically address processes preferred in controversial land use decisions where results may be more difficult to implement without broad community support.

^{64.} SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR GOVERNMENT BUSINESS, AND CITIZENS' GROUPS 1–17 (2d ed. 2001).

^{65.} *Id.* at 11–17.

^{66.} Id. at 14.

^{67.} Id.

^{68.} Id.

^{69.} Id.

^{70.} Michael B. Gerrard, *The Dynamics of Secrecy in the Environmental Impact Statement Process*, 2 N.Y.U. ENVIL. L.J. 279, 290 (1993).

^{71.} MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 29 (1973).

cal agency. 72 While this adversarial dynamic is frequently seen when communities confront controversial decisions, adjudicative processes are typically accompanied by efforts to negotiate. 73

B. The Role of Negotiation in Siting Decisions

1. Frequency

The adjudicative nature of siting decisions does not eliminate the possibility of negotiated outcomes.⁷⁴ In the great diversity of land use siting decisions, some decisions tightly constrain an agency's decisionmaking authority while other decisions are allowed significant discretion. For example, depending on the state and the municipality, some planning boards may have the authority (and discretion) to require subdivision applications to cluster the units away from important community resources at densities greater than the underlying zoning. 75 When such flexibility exists, the decision-making process allows the applicant, the neighbors, and the municipality an opportunity to negotiate. ⁷⁶ This opportunity to negotiate can come before the required process begins, 77 during the required process, 78 or after a decision has been made. 79

See, e.g., Merson v. McNally, 688 N.E.2d 479 (N.Y. 1997) (challenging the local process used to approve the expansion of a gravel mine).

Before filing an application, a preliminary conference with the Code Enforcement Official is required to discuss the nature of the proposed use and to classify it as a Major or Minor Project. If the Code Enforcement Official classifies the project as a Major Project, a preliminary meeting with the Planning Board is required to discuss the nature of the proposed use and to determine the information that will need to be submitted in the Site Plan.

Town of Amenia, N.Y., ZONING LAW § 121-62A (2007).

78. Merson v. McNally, 688 N.E.2d 479 (N.Y. 1997) (sanctioning informal, voluntary, multi-party negotiations during local environmental review process); State Environmental Quality Review Act, N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.3, 617.2(b)(1) (2009) (waiving applicable time periods for environmental reviews); N.Y. TOWN LAW § 276(8) (McKinney 2009) (allowing subdivision time frames to be extended by mutual consent of owner and planning board). See also, John R. Nolon, Time Warps in the Environmental Review Process, Land Use Law Center (on file with author) [hereinafter Nolon, Time Warps in the Environmental Review Process.

^{73.} Jean R. Sternlight, Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia, 80 NOTRE DAME L. REV. 681, 690-700 (2005).

^{74.} Sterk, *supra* note 57, at 246.

State law in New York allows towns to delegate the authority to cluster subdivisions to the planning boards. N.Y. Town Law § 278 (McKinney 2012).

^{76.} Alejandro Esteban Camacho, Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, 24 STAN. ENVTL. L.J. 269, 318-19 (2005).

^{77.} The Town of Amenia site plan law has the following pre-application require-

While calculating the exact frequency of negotiation opportunities in siting decisions would be impossible, so ample opportunity exists in each community. Seizing these opportunities can have significant impacts on a community. The case studies featured in this article demonstrate how siting decisions can present negotiation opportunities. How these negotiations are handled is very important. If decision makers do not supplement the required decision-making process, the adjudicative nature will amplify competitive, and adversarial interactions among the parties.

2. Negotiation of Siting Decisions

a. Polycentric Nature of Siting Decisions

Controversial siting decisions, which are appropriate for negotiation, do not fit well in adjudicative processes. ⁸³ As described by Lon Fuller in *The Form and Limits of Adjudication*, these are the decisions where "the polycentric elements have become so significant and predominant [in the dispute] that the proper limits of adjudication have been reached." ⁸⁴ A polycentric dispute ⁸⁵ is like a web that has many centers. Typically, these disputes involve multiple related issues among multiple parties. A decision affecting one center will pull on other centers and have ripple effects throughout the web. As Fuller points out, polycentricity is a matter of degree—even the simplest disputes have polycentric elements. ⁸⁶ While identifying a place on the polycentric continuum where adjudication is inappropriate, and negotiation is appropriate, is not an exact science, ⁸⁷ controversial siting decisions have the potential to test the limits of adjudicatory processes by being "substantially poly-

^{79.} Conn. Gen. Stat. Ann. § 8-8a (West 2012). See also Sterk, supra note 57, at 245–46 (2011) (addressing the obstacles to settlement that arise after a decision has been made and litigation commenced).

^{80.} There are well over 35,000 entities with some decision-making authority over land use matters. Each of these entities likely makes multiple types of land use decisions (e.g. site plan, subdivision, signage permits). The U.S. Census of Gov'ts, http://ftp2.census.gov/govs/cog/2007/techdoc govorg.pdf (last visited Oct. 29, 2012).

^{81.} Nolon, Time Warps in the Environmental Review Process, supra note 78.

^{82.} See generally LAWRENCE SUSSKIND ET AL., MEDIATING LAND USE DISPUTES: PROS AND CONS 14 (2000) (a study describing the benefits of land use mediation).

^{83.} Fuller, supra note 9, at 398.

^{84.} Id

^{85.} Based on the "polycentric task" that Fuller derived from MICHAEL POLANYI, THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS 171 (1951); Fuller, *supra* note 9, at 394.

^{86.} Fuller, *supra* note 9, at 397. For example, the settlement of a medical malpractice suit between a doctor and patient implicates other parties such as insurance companies, the hospital, business partners, family members, and friends.

^{87.} Robert G. Bone, Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation, 75 B.U. L. Rev. 1273, 1318 (1995).

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centric."⁸⁸ For example, an agency that fails to consider the other broader implications may approve a development with conditions that have unintended consequences for the community. Depending on when these unintended consequences are realized, the agency decision may be overturned by subsequent legislative, judicial, or political challenges.

In siting decisions where polycentric elements are likely to overwhelm the agency's administrative process, some form of negotiation should be employed. So Negotiation among the parties who represent the different "centers" or issues is a more suitable process for exploring different solutions to polycentric disputes. Well-run negotiation processes allow the parties to share information and explore the implications of proposals more efficiently than a typical administrative process. According to Fuller, "transactional" processes, such as negotiations, are more suited to deal with the challenges presented by polycentric disputes. So

Negotiations in siting disputes are supplemental to, not substitutes for, the agency decision-making process. ⁹² Courts commonly overturn agreements that are used as a substitute for a required administrative process. ⁹³ Any agreements reached in a siting dispute must be sent to the governing agency or agencies to become part of the required decision-making process. ⁹⁴ The case studies featured in this article provide examples of how agreements reached among the disputants were then subject to approval from the governing land use agency. ⁹⁵

In addition to being supplemental, public policy negotiations, like land use sitings, must have a connection to the agency charged with making the decision. ⁹⁶ The extent of the connection may vary depending on the context. At one extreme, an agency representative can serve as a liaison to connect the negotiating group with the agency. ⁹⁷ Maintaining

^{88.} Fuller, supra note 9, at 397.

^{89.} Id. at 400.

^{90.} Id.

^{91.} Id

^{92.} See Nolon, The Lawyer as Process Advocate, supra note 15, at 147; see also Lawrence E. Susskind, Keynote Address: Consensus Building, Public Dispute Resolution, and Social Justice, 35 FORDHAM URB. L.J. 185, 196 (2008) (stating that "consensus building is a supplement to and not a replacement for traditional decision-making") [hereinafter Susskind, Keynote Address].

^{93.} See, e.g., Lake Cnty. Trust Co. v. Advisory Plan Comm'n, 904 N.E.2d 1274 (Ind. 2009) (holding that the land use commission could not be bound to an agreement reached by its attorneys in a settlement conference); Murphy v. City of W. Memphis, 101 S.W.3d 221, 222-25 (Ark. 2003); Brownsboro Rd. Area Def., Inc. v. McClure, No. 2002-CA-002559-MR, 2004 WL 1909337, at *5 (Ky. Ct. App. Aug. 27, 2004) (municipal settlement upheld).

^{94.} See Nolon, The Lawyer as Process Advocate, supra note 15, at 147.

^{95.} See infra Part III.

^{96.} Menkel-Meadow, supra note 11, at 29 (stating that negotiations that make law for others should be connected to some governmental decision-making entity).

^{97.} See, e.g., Susan Todd, Building Consensus on Divisive Issues: A Case Study of the Yukon Wolf Management Team, 22 ENVTL. IMPACT ASSESSMENT REV. 655, 662 (2002).

a connection to the decision maker helps to keep the negotiators on task; there may be issues that the agency must deal with that are not priorities for the stakeholders. ⁹⁸ An agency serves to remind the negotiators of the totality of obligations that an agreement must satisfy once it enters the required decision-making process. ⁹⁹

3. Mediation as Assisted Negotiation

Mediation fits Fuller's requirements as a transactional process that can be used to successfully manage polycentric siting decisions. ¹⁰⁰ While mediation has many definitions, ¹⁰¹ "assisted negotiation" ¹⁰² is an evocatively useful label. Typically, mediation involves a neutral third party (without decisional authority) who assists disputants who have reached an impasse in negotiation. ¹⁰³ Beyond that understanding, the actual form mediation takes is very diverse. Similarly, the functions performed by mediators vary tremendously depending on the type of dispute, the issues being negotiated, the disputants involved, and the approach of the mediator. ¹⁰⁴ Cognizant of this variety, the next section describes some of the functions that mediators can use (and have used) to assist disputants in land use siting negotiations.

C. Role of Mediators in Siting Decisions

1. Mediative Functions

While mediators engage in very specific functions to help parties reach agreement,¹⁰⁵ there is little agreement on a discrete set of strategies that should be used in any given situation.¹⁰⁶ Mediators help parties

^{98.} See Menkel-Meadow, supra note 11, at 30.

^{99.} Without agency guidance, a negotiated agreement may address a more narrow range of issues than those that the decision-making agency must satisfy. For example, if a negotiated agreement fails to protect a resource (like a wetland) that the agency is required to protect, the agreement should be deemed deficient in the required decision-making process.

^{100.} See Menkel-Meadow, supra note 11, at 11.

^{101.} Lela P. Love & Stewart E. Sterk, Leaving More Than Money: Mediation Clauses in Estate Planning Documents, 65 WASH. & LEE L. REV. 539, n. 14 (2008).

^{102.} JAY FOLBERG, ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 223 (2005) (stating that "[m]ediation is a process of assisted negotiation in which a neutral person helps people reach agreement").

^{103.} Lawrence Susskind, An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus, in The Consensus Building Handbook 3, 8 (Lawrence Susskind et al. eds., 1999) [hereinafter Susskind, An Alternative to Robert's Rules of Order].

^{104.} See generally Leonard L. Riskin, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, 79 NOTRE DAME L. REV. 1 (2003).

^{105.} JOSEPH B. STULBERG & LELA P. LOVE, THE MIDDLE VOICE MEDIATING CONFLICT SUCCESSFULLY 23 (2009). See generally Christopher W. Moore, The Mediation Process: Practical Strategies For Resolving Conflict 272 (3d ed. 2003).

^{106.} See Schmediation, supra note 1, at 70 (describing the "definitional problem" presented by different forms of mediation such as evaluative, facilitative, transformative,

reach agreement using a diverse array of strategies to fulfill their mediative functions. ¹⁰⁷ Some of the commonly performed functions include the following: identifying the parties who should participate, helping the parties identify the issues that are subject to negotiation, improving communication, translating (reframing) information among the parties, exploring interests, helping generate options for each issue that satisfy parties' interests, conducting reality-testing no-agreement options, building trust among the parties, legitimizing agreements, and ensuring implementation. ¹⁰⁸ Multiple strategies can be used to perform these, and other mediative functions. Since cataloging these mediative functions and deciding which strategies can be used is not the aim of this article, only a few are discussed in this section. ¹⁰⁹

Mediators perform these functions to provide process discipline in a number of contexts. Most siting disputes lack a pre-existing negotiation infrastructure similar to what you would find in an institutional or court-annexed setting. ¹¹⁰ As a result, new negotiating groups are often established for each siting dispute because a different set of stakeholders will be implicated. ¹¹¹ Therefore, who participates in a siting negotiation is a significant question to be addressed in every siting mediation. ¹¹² If an important party is left out, any agreement reached will be

etc.); Sally Engle Merry, *Disputing Without Culture*, 100 Harv. L. Rev. 2057, 2064 (1987) (reviewing Stephen B. Goldberg, et al., Disputing Without Culture Dispute Resolution (1985)) (stating that "[d]ispute resolution is shaped by the culture of those who practice it"); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47, 100 (1996) (defining "mediation" depends on one's perspective and background).

107. Different types of mediators use different types of strategies. Historically mediator approaches have been organized into three different categories: facilitative, evaluative, and transformative. See generally Riskin, Understanding Mediators' Orientations, Strategies, and Techniques, supra note 25. While there is no uniform view of the strategies that mediators should use, there are some core strategies used by most mediators. For just a few thorough descriptions of mediator strategies, see generally STULBERG & LOVE, supra note 105; MOORE, supra note 105.

- $108. \quad \textit{See generally} \ \texttt{STULBERG} \ \& \ \texttt{LOVE}, \ \textit{supra} \ \texttt{note} \ 105; \ \texttt{MOORE}, \ \textit{supra}, \ \texttt{note} \ 105.$
- 109. See generally STULBERG & LOVE, supra note 105, MOORE, supra note 105.
- 110. Many multi-party disputes occur within organizations and institutions that have structures for processing disputes—grievance processes, collective bargaining, and ombuds offices are some examples. In the land use context, it is the rare community that has any process other than the minimally required legal process to deal with disputes. This lack of structure has led some scholars to label this type of siting mediation as "consensus building" instead of "mediation." See Susskind, Consensus Building and ADR, supra note 39, at 359–60 (arguing that the process of "mediation" differs depending on whether it is used prior to a lawsuit being filed or after).
- 111. See Lawrence Susskind et al., Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials 14-15 (1999).
- 112. Siting negotiations frequently rely on ad hoc creations of negotiating groups. Since there is often no existing negotiating committee and there are no legal requirements defining who must be involved, the mediator must make sure the right parties are at the table. Typically, this involves identifying the issues to negotiate, who is interested in those

suspect and vulnerable to challenge.¹¹³ An experienced mediator plays a central role, talking to the principal parties to find out who needs to be included in the process and how. In the Somerville dispute, the quasimediators identified the most entrenched parties to participate in the negotiations.

Similarly, parties often need help agreeing on which issues will be subject to negotiation. For example, a mediator may come into a dispute after the environmental review process has been conducted. Typically, most environmental impact statements (EISs) are drafted to address every conceivable issue that might come up, no matter how insignificant or mundane.114 Failure of the decision-making board to address any one of these issues may result in the approval process being overturned if the decision is challenged. 115 A mediator who is brought in after this broad scope of the EIS has been determined should work with the parties to identify which of the issues are the most important. These priority issues should be the focus of the negotiations, leaving the other issues to be dealt with through less time-consuming processes. This effort to identify the relevant issues will focus negotiation process and make it more efficient for the parties. In the East Middlebury case study, the quasi-mediator helped identify the important issues (hydrogeology, acoustics, ecology, air quality, safety) and structured the negotiation process around those.

Similarly, challenges are presented by the hostility and mistrust that often arises from past interactions in siting disputes. Barriers to communication often prevent the parties from sharing valuable information that could be used to reach an agreement. An experienced mediator will work systematically to overcome these and many other barriers to construct an effective negotiating environment. In Somerville, the quasi mediator had the parties start some negotiations by explaining their understanding of the other's position.¹¹⁶

2. Mediator Best Practices

Any inquiry into the best practices of mediation quickly leads to a tangled debate over the appropriate form of mediation and how to define

issues, and who has the capacity to represent those interests. See Susskind, Keynote Address, supra note 92, at 193–94; Susskind, An Alternative to Robert's Rules of Order, supra note 103, at 20–23.

^{113.} For an example of a local land use mediation that ended in a lawsuit because one of the interested parties was left out of the negotiations, see John R. Nolon & Jessica A. Bacher, *Changing Times-Changing Practice: New Roles for Lawyers in Resolving Complex Land Use and Environmental Disputes*, 27 PACE ENVIL. L. REV. 7, 37–38 (2010).

^{114.} See 40 C.F.R. § 1508.25 (2012).

^{115.~} See, e.g., Se. Ala. Conservation Council v. Fed. Highway Admin., 649 F.3d 1050, 1057 (9th Cir. 2011).

^{116.} See Susskind, An Alternative to Robert's Rules of Order, supra note 103, at 10-11.

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appropriate skills.¹¹⁷ Despite this controversy, most experts agree that a mediator should be competent and avoid conflicts of interests.¹¹⁸ Several practice guides for environmental mediators provide mostly consistent advice. ¹¹⁹ Environmental mediators should strive to let stakeholders make their own informed decisions, manage the process as impartially as possible, avoid conflicts of interest, and only contract for work that they are able to perform.¹²⁰ The mediator guidelines addressed by this article are those related to conflicts of interest and competence.

Conflicts of interest can arise when the mediator has a substantive interest in the particular siting decision or has a pre-existing relationship with one of the parties.¹²¹ The consequence of this conflict can be that the mediator skews the results to favor her desired outcome. Real and significant conflicts of interest erode a mediator's ability to behave impartially and undermine party self-determination.¹²² A mediator who intentionally places her substantive desires above the stated goals of the participants is clearly violating core ethical practices of mediation.¹²³ Similarly, a mediator who takes on work for which he is not qualified clearly violates ethical norms of professionalism.¹²⁴

One of the common critiques of interested parties as mediator is that they, by definition, have a conflict of interest. ¹²⁵ In the Carrara Mine case, the mediator was a neighbor of the site. She had a real and tangible interest in what happened. In the Somerville case, one of the

^{117.} Michael L. Moffitt, *The Four Ways To Assure Mediator Quality (And Why None of Them Work)*, 24 Ohio St. J. on Disp. Resol. 191, 204–14 (2009) (describing the ways public and private institutions could regulate mediator quality).

^{118.} See Schmediation, supra note 1; see also Zamir, supra note 1. See infra Part IV.B for a discussion of how these concepts apply to quasi-mediators.

^{119.} See generally JIM ARTHUR ET AL., A PRACTICAL GUIDE TO CONSENSUS (1999); Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement Seeking Processes, SOC'Y OF PROFS. IN DISPUTE RESOL., http://law.gsu.edu/cncr/pdf/papers/BestPracticesforGovtAgen cies.pdf (last visited Oct. 21, 2012); see also Susskind, An Alternative to Robert's Rules of Order, supra note 103.

^{120.} See generally FLEISCHER ET AL., ASS'N FOR CONFLICT RESOLUTION, Ethical Guidance for Members of the Environment and Public Policy Section, ASS'N FOR CONFLICT RESOL. http://acrepp.org/sites/default/files/Ethical%20Guidance%20for%20EPP%20Section%20Members Sept%202011.pdf (last visited Oct. 21, 2012).

^{121.} See infra Part IV.A.

^{122.} Stulberg, supra note 2, at 833–39; Joseph B. Stulberg, Must A Mediator Be Neutral? You'd Better Believe It!, 95 MARQ. L. REV. 829, 833–39 (2012).

 $^{123. \}quad \text{MODEL STANDARDS FOR CONDUCT OF MEDIATORS Standard II (2005), } \ available \\ at \quad \text{http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/modelstandards_conduct_april2007.authcheckdam.pdf.}$

^{124.} *Id.* at Standard IV.

^{125.} See Dwight Golann & Eric Van Loon, Legal Issues in Consensus Building, in The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 495, 516–17 (Lawrence Susskind et al. eds., 1999); see also Bounds of Advocacy: Mediator, Attorney as Mediator or Arbitrator, Am. ACAD. OF MATRIMONIAL LAW., http://www.aaml.org/library/publications/19/bounds-advocacy/8-mediator (last visited Nov. 12, 2012).

mediators, Anne Tate, provided the guiding framework for the Task Force's smart growth vision of the parcel. The other, Doug Foy, had represented the State of Massachusetts when this dispute began. These parties' interests in the outcome exceeded that of a professional mediator.

Another critique relevant to quasi-mediators is that these interested parties cannot be mediators because they do not have the skill to perform the requisite mediative functions. Professional environmental mediators typically have significant training and experience in multi-party dispute resolution and mediation. This training and experience is critically important in controversial siting disputes. The intensity of hostility is often severe. Having well-honed skills and a battery of experiences will increase the likelihood that a mediator can help the parties find common ground in siting disputes. Understandably, some scholars fear that interested parties who provide mediative functions are not likely to have the appropriate background and/or experience to manage the complexities they will confront. 127

While this might be true in some circumstances, there are certainly circumstances where an interested party may have the skills to match the challenge. An interested party may have acquired mediative skills through professional experience or even through training programs. The interest-based bargaining techniques that serve as the foundation for mediation have been made popular through books like *Getting To Yes*¹²⁹ and *The Fifth Discipline*. In addition, each year a host of mediation and negotiation training programs are offered for a wide variety of professionals seeking to enter the field or to become better at conflict management. Given the abundance of opportunities to learn interest-based approaches, it is not inconceivable for an interested party to have obtained a set of skills enabling her to provide valuable mediative functions in siting disputes. In fact, as will be discussed later, the quasi-

^{126.} While there are no certifying entities for environmental and public policy mediators, organizational and court-connected programs have rosters of environmental mediators. Most of these rosters have training and experiential thresholds that must be met before being listed. See, e.g., Program Overview, THE U. S. INST. FOR ENVIL. CONFLICT RESOL., http://www.ecr.gov/Resources/Roster/Roster/Overview.aspx (last visited Nov. 12, 2012). The Vermont Environmental Court also maintains a list of mediators. Roster of Mediators, VT. JUDICIARY, http://www.vermontjudiciary.org/GTC/Environmental/MasterDocumentLibrary/Environmental%20Div%20Mediator%20list.pdf (last visited Nov. 12, 2012).

^{127.} See MOFFITT, supra note 3, at 196.

^{128.} For a discussion of what those skills should be and what circumstances increase their likelihood of success, see infia Part IV.C–D.

^{129.} See ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 2d ed. 1991).

^{130.} See Peter M. Senge, the Fifth Discipline: The Art and Practice of the Learning Organization (1990) (applying concepts similar to interest-based negotiation in the business management context to promote the learning organization).

^{131.} Posting of Maria R. Volpe, to NYC-DR@listserver.jjay.cuny.edu (Oct. 3, 2012) (on file with author) (showing a list of 126 training programs on the east coast over a twenty-four month period).

mediators in these case studies had exposure to some best practices of interest-based negotiation from their professional experience. ¹³²

3. Stages of Siting Mediations

While the utility of mediation and negotiation is well recognized in controversial siting decisions, 133 many participants have only a limited understanding of how collaborative processes such as mediation ought to be structured. 134 This section describes the history, the theory, and the practice of siting mediation to lay the foundation for discussing the role of quasi-mediators in siting disputes. In a typical siting mediation, as in any collaborative process, the parties must go through stages in order to increase the likelihood of reaching agreement. ¹³⁵ Generally, a collaborative process includes five stages: gathering information, generating options for solutions, evaluating options, deciding among options, and then implementing the agreement. 136 The mediator's job is to manage the process so that appropriate tasks are completed in each stage. 137 While there are many different labels that are used for these stages, the following five labels work well to capture all of the others: convening, assessing, deliberating, deciding, and implementing. 138 Getting the parties to follow these stages can be challenging; some groups may move too quickly to the deciding stage without paying adequate attention to the previous stages.¹³⁹ For this reason, mediators benefit from a battery of practical experience and knowledge to help the parties move through each stage. This section describes those five stages, how the mediator can assist, and then offers some examples of how professional mediators have participated in environmental mediations.

^{132.} See infra Part IV.C-D.

^{133.} Susskind et al., supra note 111.

^{134.} See Sterk, Consensus Building and ADR, supra note 39, at 359–60 (discussing the merits of a mediative approach in three pages but not providing any parameters for the process).

^{135.} See Stulberg & Love, supra note 105, at 45.

^{136.} Id. at 49–123; MOORE, supra note 105, at 68–69.

^{137.} STULBERG & LOVE, supra note 105, at 49–123; MOORE, supra note 105 at, 68–69.

^{138.} See, e.g., LAWRENCE E. SUSSKIND & JEFFERY L. CRUIKSHANK, BREAKING ROBERT'S RULES: The New Way to Run Your Meeting, Build Consensus, and Get Results app. F (2006). "Evaluation" is sometimes viewed as a necessary sixth stage to make sure what was implemented conforms with what was agreed to and to improve processes in the future. Id.

^{139.} PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 600–03 (2010) (describing Irving Janis' work on groupthink).

a. Convening

Environmental mediators use convening as a way to lay the groundwork for the rest of the negotiation. It Since facility-siting disputes require some form of agency decision, the first step is getting the decision-maker to convene the mediation. It as the convener, the decision-maker signals the importance of a negotiated process and enlists the mediation team to start working. For example, in 1973, Washington Governor Daniel J. Evans convened a mediation of flood control dams on the north and south branches of the Snoqualmie River. It he hired Gerald Cormick and Jane McCarthy as the mediators. This mediation effort is often noted as one of the first siting mediations in the United States where professional mediators were brought in to manage the negotiation. It

Having the agency as the convener serves as an endorsement of the process. ¹⁴⁴ In addition, this involvement increases the likelihood that any agreement reached later in the process will be integrated into the final decision. ¹⁴⁵ Usually the mediator will have the convener help identify who should be involved in the process, what roles the different parties should play, what resources are available to support the process, how long the process will take, what the process will look like, and how success will be defined. ¹⁴⁶ Convening may be initiated by the agency or

^{140.} Susskind & Crukshank, supra note 138, at 23-24.

^{141.} Philip J. Harter & Deborah Dalton, *Better Decisions Through Collaboration and Consultation*, 19–25 (Oct. 22, 2008), http://www.epa.gov/pubinvol/collaboration/better decisions.pdf.

^{142.} GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 14–15 (1986); SCOTT MERNITZ, MEDIATION OF ENVIRONMENTAL DISPUTES: A SOURCEBOOK 89 (1980).

^{143.} See BINGHAM, supra note 142, at xvii; MERNITZ, supra note 142, at 89; Michelle Ryan, Alternative Dispute Resolution in Environmental Cases: Friend or Foe?, 10 Tul. ENVTL. L.J. 397, 399 (1997); Charlene Stukenborg, The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts, 19 U. DAYTON L. REV. 1305, 1310–11 (1994); Bryan M. Johnson & Paul J. Krupin, The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of a Successful Battle that May Have Lost the War, 27 WILLAMETTE L. REV. 613, 624 (1991).

^{144.} See Merrick Hoben & David Fairman, The Nexus of Corporate, Client, and Community Public Engagement: Lesson Learned from the Americas, CONSENSUS BUILDING INST. (May 2006), http://cbuilding.org/talks/nexus-corporate-client-and-community-public-engagement-lesson-learned-americas.

^{145.} BINGHAM, *supra* note 142, at 104. There is evidence from other fields that having the decision-maker involved increases the likelihood of a sustainable outcome. Elinor Ostrom has identified eight design principles that are present in sustainable management regimes for common pool resources. *See* ELINOR OSTROM, GOVERNING THE COMMONS 90 (1990). The seventh principle, "[t]he rights of appropriators to devise their own institutions are not challenged by external governmental authorities" acknowledges the experience of many mediators—that having the decision maker agree to honor any agreement that is reached dramatically increases chances of success. *Id.*

^{146.} See generally Chris Carlson, Convening, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 169, 170, 187 (Lawrence Susskind et al. eds., 1999); Michael L. Poirier Elliott, The Role of Facilitators, Mediators, and Others, in

by parties who are dissatisfied with the status quo and seeking to improve conditions. ¹⁴⁷ If a party convenes the process, however, the mediation should only go forward if the decision-making agency states that it will consider any agreement reached in negotiations. ¹⁴⁸

b. Assessment

Once the convener has endorsed the process, the mediators will begin to assess the dispute with the parties. 149 This assessment consists of interviews with interested parties and will result in an assessment report. 150 This stage gives the parties a better idea of what is at stake in the dispute and what issues are subject of the mediation. 151 Since mediation requires parties to make significant investments of time and resources up front, many mediators use an assessment to make sure the situation is appropriate and that all the parties are ready to participate. 152 For example, if the parties feel that they are more likely to accomplish their goals through adjudication, mediation may not be appropriate. 153 If conditions are not appropriate, a mediator should discourage investment in a mediation and offer suggestions about when the process might be appropriate in the future. 154 In the Snoqualmie siting example above, Cormick and McCarthy spent several months getting to know the parties and establishing trust. 155 Their assessment process took five months of informal conversations before they could begin deliberating. 156

CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 199, 206–07 (Lawrence Susskind et al. eds., 1999).

- 147. See Susskind & Cruikshank, supra note 138, at 170–71.
- 148. This commitment does not mean that the agency will substitute the agreement for its decision or the mediation for the required process; the agency must still follow its required process and come up with a decision. The agreement can form the basis of a proposal that the agency would then consider as it would any other proposal. *See* Carlson, *supra* note 146, at 184.
 - 149. Susskind & Cruikshank, supra note 138 at 170.
 - 150. See id.
 - 151. See id.
- 152. See Susan Carpenter, Choosing Appropriate Consensus Building Techniques and Strategies, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 84–85 (Lawrence Susskind et al. eds., 1999).
- 153. See Dwight Golam & Eric E. Van Loon, Legal Issues in Consensus Building, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement, 498 (Lawrence Susskind et al. eds., 1999).
- 154. See Gregory Sobel, Coastal Zone Regulation in Delaware, in Negotiating Environmental Agreements: How to Avoid Escalating Confrontation, Needless Costs, and Unnecessary Litigation 143, 144–145 (Lawrence Susskind et al. eds., 2000).
- 155. MERNITZ, *supra* note 142, at 90 (citing GERALD W. CORMICK & JANE MCCARTHY, ENVIRONMENTAL MEDIATION: A FIRST DISPUTE 5–6 (1974) (unpublished manuscript) (on file with author) (prepared for Community Crisis Intervention Center, Environmental Mediation Project, Washington University, St. Louis, Missouri)).
 - 156. Id.

Since the assessment may be the first contact mediators have with disputants, they must plan accordingly. The experience parties have with the assessment will shape their impression of the mediation. Mediators often start the assessment by interviewing the parties to find out how they are affected by the proposed siting decision. While the explicit purpose of the assessment is to gather information about the dispute, mediators will also use the assessment to answer any questions about the mediation and start probing the parties' alternatives to reaching agreement. He

Parties involved in controversial siting disputes are likely to be suspicious of answering questions from a relative stranger.¹⁶¹ How much information they reveal in an assessment interview will depend on how safe they feel.¹⁶² Therefore, mediators must carefully plan how the assessment is conducted. To address these concerns, mediators structure interviews in ways that minimize suspicion and build trust.¹⁶³ Interviews may be conducted in a party's home or office as a way to increase parties' comfort.¹⁶⁴ The mediators ask questions designed to collect facts and opinions that are unlikely to surface in public hearings and other adjudicative processes.¹⁶⁵

After the mediators interview the parties, they start drafting an assessment report to summarize the information collected. ¹⁶⁶ The mediators organize the report around the issues that were raised in interviews while making sure not to attribute any of the issues to specific parties or credit any ideas to one person or group of people. ¹⁶⁷ The parties then have a chance to review a draft of the report before the final is circulated to the general public. ¹⁶⁸ This gives interviewees an opportunity to correct any errors and see the different issues that must be addressed. ¹⁶⁹ If any information was left out or incorrect, the parties have the opportunity to correct the report. ¹⁷⁰ Once reviewed and approved by the parties, the report can be used as a procedural roadmap. ¹⁷¹ Some assess-

^{157.} See Carlson, supra note 146, at 173.

^{158.} See id.

^{159.} See Lawrence Susskind & Jennifer Thomas-Larmer, Conducting a Conflict Assessment, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 103 (Lawrence Susskind et al. eds., 1999).

^{160.} See Elliott, supra note 146, at 222.

^{161.} See Carlson, supra note 146, at 120.

^{162.} See id. at 173-75.

^{163.} See Susskind & Thomas-Larmer, supra note 159, at 99.

^{164.} See id. at 114.

^{165.} Id. at 113-14.

^{166.} Id. at 128–29.

^{167.} *Id.* at 128–30.

^{168.} *Id.* at 130.

^{169.} See id.

^{170.} See id.

See Susskind & Thomas-Larmer, supra note 159, at 129.

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ments will even include process design recommendations for the parties to consider. 172

A final point to make about assessment relates to the purpose. While the assessment is principally designed to collect information from the parties, the interaction allows the mediator to provide information and answer questions about the mediation. The assessment allows mediators to assess how familiar parties may be with collaboration and provides the opportunity to clarify the goals of the process. Many mediators will use this interview process to help parties think about the future and what they can do by themselves compared to working with others. The second of the purpose.

c. Deliberating

If, after an assessment, the parties decide to go forward with the mediation, the parties begin deliberating over the substance—the proposed facility, in the context of this article. 177 The principal goal in the deliberation stage is to explore and expand on the information identified in the assessment report to start discussing the options for reaching agreement. 178 Face-to-face deliberation allows the participants to provide more detail about information in the assessment, discuss priorities, and also build trust. 179 Inconsistencies and confusion about motives and facts can be addressed at this stage. 180 Once parties have a better understanding of all the issues that must be addressed, they can start to explore options that will form the foundation of an agreement. 181

Once the interests and issues are understood, mediators get the parties to consider as many options for agreement as possible. ¹⁸² This typically happens through brainstorming-like processes that are diver-

^{172.} See id. at 99.

^{173.} See Elliott, supra note 146, at 222.

^{174.} See Carpenter, supra note 152, at 77.

^{175.} See Elliott, supra note 146, at 222.

^{176.} This is where the mediator serves as an "agent of reality" (author's expression) helping the parties evaluate their alternatives in other procedural fora. See Stulberg & Love, supra note 105, at 25–26.

^{177.} See Chris Carlson, Convening, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 177 (Lawrence Susskind et al. eds., 1999).

^{178.} Susskind & Cruikshank, supra note 138, at 86-87.

^{179.} See David Strauss, Managing Meetings to Build Consensus, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 287–90 (Lawrence Susskind et al. eds., 1999).

^{180.} See id.

^{181.} See id.

^{182.} See Lawrence Susskind & Gerard McMahon, The Theory and Practice of Negotiated Rulemaking, 3 YALE J. ON REG. 133, 137 (1985).

gent in nature.¹⁸³ Divergent conversations force participants to confront contradictory information and to recognize the complexity presented by the dispute.¹⁸⁴ Participants find this experience confusing, disturbing, and frustrating ¹⁸⁵ and, not surprisingly, they would rather move through it quickly to avoid the discomfort. ¹⁸⁶ Mediators can help put this frustration in perspective by focusing participants on their ultimate goal of reaching agreement. ¹⁸⁷ If a mediator is not used in these deliberative processes, groups can disband or fall prey to the effects of group polarization. ¹⁸⁸ Mediators can manage the group interaction, making sure that adequate time is spent discussing the potential options for agreement and minimizing polarizing influences. ¹⁸⁹ Without a diverse set of options on the table, deliberations are unlikely to produce a solution that satisfies the range of interests that typically arise in siting disputes. ¹⁹⁰

d. Deciding

After the divergent process of deliberation, where parties uncover a wide range of options to address the issues, the next stage requires parties to agree on the most attractive options. ¹⁹¹ The deciding stage marks the transition from information gathering to evaluating the options that will form the building blocks of an agreement. ¹⁹² While this stage is still deliberative in nature, the parties now engage in convergent deliberation where the aim is to narrow choices rather than expand them. ¹⁹³ The goal of this stage is to select a set of options that will serve as the basis for agreement on the siting proposal. ¹⁹⁴ In the Snoqualmie Dam siting dispute, the parties spent several months debating different options and eventually reached an agreement. ¹⁹⁵ In summary, they agreed to build a flood control dam on the north fork of the river, adding levees on the

185. MICHAEL DOYLE & DAVID STRAUSS, HOW TO MAKE MEETINGS WORK 20 (1976).

^{183.} Brest & Krieger, supra note 139, at 13-14, 66-67.

^{184.} *Id*

^{186.} Brest & Krieger, *supra* note 139, at 600 (discussing the phenomena of groupthink as a consequence of avoiding divergent processes).

^{187.} MOORE, supra note 105, at 196-97.

^{188.} Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000) (where views of less assertive parties get marginalized by more dominant opinions).

^{189.} *Id.* Sunstein points out that having a diverse membership, providing for caucusing, and having clear decision making rules helps to avoid or minimize polarization. For an explanation of how mediators accomplish these three goals, see Carpenter, *supra* note 152, at 61–97.

^{190.} See Brest & Krieger, supra note 139, at 63 (discussing the necessity of multiple ideas to solve a complex problem in a satisfactory way).

^{191.} *Id.* at 13–14.

^{192.} *Id.*

^{193.} *Id.* at 13–14, 600–01.

^{194.} See Sarah McKearnan & David Fairman, Producing Consensus, in Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement 329–30 (Lawrence Susskind et al. eds., 1999).

^{195.} BINGHAM, supra note 142, at 239–40.

middle fork and an agreement to protect sensitive areas from development. 196

Deciding presents significant obstacles in even the simplest disputes. First, there are the obvious substantive obstacles presented by getting multiple parties to reach agreement in complicated siting decisions. 197 Second, deciding presents psychological barriers of which most participants are completely unfamiliar and unaware. 198 Often a substantive solution will be possible—meaning the parties have room to agree but some psychological barrier prevents the parties from reaching agreement on a mutually satisfying outcome. 199 Trained and experienced mediators expect to see these obstacles and have a range of techniques to overcome them. 200 For example, in disputes with significant hostility and lack of trust, the parties will likely feel reluctant to suggest solutions for fear that they will be bound by their suggestions. This hesitance to think creatively will prevent good ideas from being discussed.²⁰¹ Mediators can defuse the climate by asking parties to agree that everyone is free to "invent ideas without committing" to them. 202 This useful approach frees parties to develop ideas while not worrying about being held to that idea in the future should a better option arise.²⁰³

Another psychological obstacle arises when parties approach a final decision. In many disputes, the interactions of opposition have gone on for so long that parties come to feel defined by their opposition to the other party and their ideas.²⁰⁴ The prospect of reaching agreement with a sworn enemy can cause parties to have second thoughts because it challenges their identity.²⁰⁵ This cognitive dissonance can present a very real obstacle to ending a dispute.²⁰⁶

^{196.} *Id.* at 240. In the end, the north fork dam was never built because the chosen site was not geologically sound. *Id.*

^{197.} See Brest & Krieger, supra note 139, at 600–01 (discussing the obstacles involved in getting groups to cooperate in complex problem-solving situations).

^{198.} Amos Tversky & Daniel Kahneman, Conflict Resolution: A Cognitive Perspective (1993); Kenneth Arrow, et al., Barriers to Conflict Resolution 56–57 (1995) (explaining how the phenomenon of loss aversion, concession aversion, and reactive devaluation combine in some situations to decrease the likelihood of parties coming to agreement).

^{199.} See generally ARROW ET AL., supra note 198.

^{200.} Id.

^{201.} See Susskind & Crukshank, supra note 138, at 27, 90-91.

^{202.} Id.

^{203.} Id.

 $^{204.\;\;}$ Robert Mnookin, Bargaining with the Devil: When to Negotiate, When to Fight 34–35 (2010).

^{205.} *Id.* at 18 (documenting the "negative traps" that lead to refusal as: tribalism, demonization, dehumanization, moralism/self-righteousness, zero-sum fallacy, fight/flight, and call to battle).

^{206.} Moore, supra note 105, at 317–321 (discussing how mediators can use process techniques to help parties overcome these types of barriers); see also Margaret A. Neale & Max H. Bazerman, Cognition and Rationality in Negotiation 163–70 (1991).

In the deciding stage, mediators must be prepared to deal with many obstacles. Some of those obstacles can be overcome by making substantive adjustments so that all the parties are satisfied with the outcome. Other obstacles have more to do with parties' perceptions and can be more difficult to deal with. Of Good mediators have a range of techniques to help parties overcome both substantive and procedural obstacles to reaching agreement. Some examples include using joint problem statements to get parties focused on the future instead of the past, Of Visits to the site and other facilities, It and use of a single-text document to summarize the parties' evolving agreement.

e. Implementing

After parties reach an agreement, it must become a reality. In most siting disputes, this requires some agency to make a decision. Typically, the major elements in the agreement are integrated into an application and then submitted to an agency. The agency then follows the required decision-making process to make the ultimate decision. This stage is often overlooked by the parties who have, up to this point, been focused on reaching agreement. Mediators help with implementation by encouraging the parties to craft nearly self-enforcing agreements and to establish mechanisms to resolve any disputes that arise during and after the required decision-making process.

III. CASE STUDIES

It is the mediator who helps the parties pass through the above stages. Whether the mediator is an interested party or not, as the designated process manager, he is responsible for moving the parties through these stages. The following two cases provide examples of how this can be done by interested parties in a siting dispute.

^{207.} See generally TVERSKY & KAHNEMAN, supra note 198.

^{208.} See MOORE, supra note 105, at 332–46 (providing a thorough description of some psychological issues that arise in closure and how mediators can help redefine relationships); see also STULBERG & LOVE, supra note 105, at 96 (discussing how mediators help parties overcome cognitive dissonance by raising awareness of cost of continuing the conflict).

 $^{209.\;\;}$ Lawrence Susskind et al., Mediating Land Use Disputes Pros and Cons $26\,(2000).\;\;$

^{210.} Id

^{211.} Id.

^{212.} See generally Sterk, supra note 13, at 239.

^{213.} Id.

 $^{214. \}quad \textit{See supra} \ \text{Part I}.$

^{215.} See Susskind & Cruikshank., supra note 138, at 133–34.

A. J.P. Carrara Mine, East Middlebury, Vermont²¹⁶

J.P. Carrara & Sons had been operating a twenty-three acre gravel mine in East Middlebury, Vermont for decades. 217 The mine supplied aggregate material for the main Carrara facility 2.5 miles away. During peak periods, three dump trucks ran continuously between the mine and the facility amounting to approximately seventy trips per day.²¹⁸ Over the years, residential development built up around the site. In the 1980s, the company acquired a thirty-six acre parcel adjacent to the mine for future expansion.²¹⁹ When the company decided to seek the permits to expand operations into that parcel in 2007, it did not anticipate any objections. It had been operating for years without any complaints from the residents and did not expect any in response to its application. Consistent with that belief, the company submitted the application to the local Development Review Board without much concern and without hiring any experts to address the issues.²²⁰ However, close to sixty neighbors showed up at the first public meeting to express their dissatisfaction with the mine over the years.221 This was the first time they had had a forum to state their complaints about the operation, and they made it clear that they had significant concerns with the proposed expansion. Over the course of three more hearings, residents expressed their concerns about water quality, noise, air quality, ecology, traffic, and pedestrian safety. By this point the company realized that this might not be as simple as it had thought and realized experts would need to be hired.²²²

During these hearings, one of the neighbors, Susan Shashok, recognized the possibility for reaching some common ground and started talking to other neighbors about designing a process for going forward. She approached both sides and asked if they wanted her to facilitate the conversation about alternatives to the proposed application. ²²³ The community was willing, but Carrara was hesitant. ²²⁴ Shashok began by convening a core negotiating committee (that called itself the "Pit Crew") and kept in touch with a larger circle of concerned residents

^{216.} The information about this project comes from interviews on file with the author.

 $^{217.\,}$ Interview with Bill Townsend, Property Manager, J.P. Carrara and Sons, Co. (June 2007).

^{218.} Id.

^{219.} Id.

^{220.} Id

^{221.} See, e.g., Interview with Susan Shashok, Neighbor of J.P. Carrara Mine (June 2007).

^{222.} Id.

^{223.} Id

^{224.} Townsend, supra note 217.

through conversations and email.²²⁵ She organized the Pit Crew meetings and helped set the agenda. The Pit Crew met eight to ten times, had many individual conversations, attended hearings, and made site visits. They spent their time gathering information, searching for experts, and applying for grants in case Carrara did not sign on. The Pit Crew also liaised with a broader circle of interested parties. During this time, Shashok kept meeting with Carrara's lead negotiator, Bill Townsend, to let him know what was happening. After a few months, the company eventually agreed to join the process.²²⁶

Once everyone was on board, Shashok helped design and implement a joint fact-finding process to deal with the five issues that mattered most to the community—hydrogeology, acoustics, ecology, air quality, and safety.²²⁷ She interviewed the four experts and checked their references to be sure that she could trust them. Once she signed off on the experts, Carrara hired them. After the experts were hired, they worked with subcommittees of residents that included Townsend and Shashok. The subcommittees would meet, and then Shashok would disseminate their notes to the larger group and solicit feedback.²²⁸

This joint fact-finding process²²⁹ proved to be very effective at getting a commitment from the company. Initially, Townsend was skeptical about hiring joint experts and he proceeded hesitantly—leaving room to back out.²³⁰ He wanted to take the process one issue at a time rather than committing to collaboratively address every issue. The group chose to address hydrogeology and water quality first and ended up selecting an expert Townsend felt good about. Since he expected them to choose an anti-development expert, he was pleasantly surprised when they all agreed on an expert who seemed balanced, objective, and on board with the process. That experience served as a template for addressing the other issues. Townsend said that he would not have consented to hire four experts up front, but because they proceeded one issue at a time, it made sense.²³¹ He said of this process, "What I realized going forward was that whether I thought any given issue was important or not, other people did."²³² He added, "The regulatory burden mattered less than just

^{225.} Shashok, supra note 230.

^{226.} Id.

^{227.} Id

^{228.} Id.

^{229.} Joint fact-finding is a common technique in multi-party mediation processes. Joint fact-finding processes have been used to address complex scientific and technical questions like those raised by the siting decisions. Michael N. Widener, *Bridging the Gulf: Using Mediated, Consensus-Based Regulation to Reconcile Competing Public Policy Agendas in Disaster Mitigation*, 74 Alb. L. Rev. 587, 618 (2011) (citing L.E. Susskind & H.A. Karl, *Balancing Science and Politics in Environmental Decision-Making: A New Role for Science Impact Coordinators* 3 (Sci. Impact Collaborative, Mass. Inst. Tech., Working Paper, 2009), available at http://web.mit.edu/dusp/epp/music/pdf/SIC Paper FINAL.pdf).

^{230.} See Townsend, supra note 217.

^{231.} Id.

^{232.} Id.

making people comfortable."233 It was not just Townsend who changed opinions—in the end the residents agreed to forego a traffic study because they felt comfortable with the agreement reached. 234

Townsend overcame his initial skepticism when he realized that the desire to collaborate on the neighbors' behalf was genuine. 235 He saw that the neighbors were not absolutely opposed to any impact whatsoever—they just needed to understand why certain components were important and see the impacts mitigated. 236 Once channels of communication were open and trust was built, other opportunities to generate value began to emerge. For example, large bridge beams had to travel with a police escort on approved routes at state-approved times.²³⁷ This had led to a pattern of transporting them in the middle of the night, which led to light and noise problems for the residents along the route.²³⁸ "We were just doing what we were told," said Townsend, "but not everyone knew that."239 This came up as an ancillary issue in the collaborative process, and once Townsend became aware of it, they worked with the state to change the protocol. 240 This, in turn, built further trust. "We changed, and people saw that."241 Similarly, as the process went on, more and more concerns about the western portion of the expansion came to light. Key stakeholders lived near this portion, and it became apparent that lots of mitigation would be needed to get the noise level below the regulatory threshold of thirty-five decibels. In addition, there were serious ecological concerns. Carrara eventually decided not to develop that portion of the property. 242 These choices showed the neighbors that the company was reasonable and helped to build more trust.²⁴³

After two years of meetings, Carrara and the neighbors agreed to amend the Development Review Board application based on the experts' findings.²⁴⁴ They withdrew the proposed expansion into the western portion and adopted mitigation measures consistent with the experts' recommendations. In addition, they honored a number of ancillary agree-

^{233.} Id.

^{234.} See id.

^{235.} Id.

^{236.} A critical moment occurred at the first hearing, where the first comment was a letter read by Shashok. At one point the letter stated, "We recognize the value of sand and gravel in our lives." The company saw that the residents recognized the value to their work. This acknowledgement that the company was not simply "evil" helped Towsend to consider the idea of collaboration. *See* Shashok, *supra* note 221.

^{237.} Townsend, supra note 217.

^{238.} Id.

^{239.} Id.

^{240.} Id.

^{241.} *Id.*

^{242.} Memorandum on Case Study on East Middlebury Gravel Pit Expansion (on file with author).

^{243.} Id.

^{244.} Id.

ments on related issues that came up in discussions. For example, in response to neighborhood concerns, Carrara paid for the construction of a new crosswalk and a fence around a playground near the truck route. The experts hired for the process agreed to serve as consultants going forward, and Carrara committed to hold an annual community meeting. During the Development Review Board's approval process, two final hearings were held to provide an opportunity to ask the consultants clarifying questions. No one challenged or opposed their findings. ²⁴⁵ At a final hearing on September 28, 2009, Shashok read a statement on behalf of various members of the Pit Crew that expressed their acceptance of the amended application. ²⁴⁶ On November 11, 2009 the East Middlebury Development Review Board issued a Notice of Decision approving the amended application. ²⁴⁷

1. Mediative Functions of the Quasi-Mediator

As the quasi-mediator, Shashok performed a variety of functions that many mediators perform.²⁴⁸ First, she organized the overall process design. She met with the group of neighbors to create an ad hoc negotiating group. Then she met with the applicant to gain his trust and make the case for negotiation. Her core goal was for everyone to have the opportunity to participate "so that even the whiners and complainers could have their chance."249 After the negotiation began, she set up a joint factfinding process by identifying the four major issues. Then she helped the stakeholders agree on which consultants to hire for each of the issues to avoid a "battle of the experts." 250 In addition to large group meetings, she shuttled back and forth between groups to build support for ideas and discover problems. 251 She set ground rules for meetings. 252 She maintained lines of communication with the constituents who were not actively participating. She facilitated community involvement in the project by organizing an event to help design the beams for a new bridge. Her encouragement that they were all in it together was authen-

^{245.} Id.

^{246.} Id

^{247.} Notice of Decision: JP Carrara and Sons Inc., School House Road, Middlebury Development Review Board, (Nov. 10, 2009) (unpublished manuscript) (on file with author). This approach and its outcome were similar to those in a New York gravel mine case documented in In re Merson v. McNally, 688 N.E.2d 479 (N.Y. 1997). See also John R. Nolon, Golden and Its Emanations: The Surprising Origins of Smart Growth, 23 PACE ENVIL. L. REV. 757, 785–87 (2006).

 $^{248. \;\;}$ Memorandum on Case Study on East Middlebury Gravel Pit Expansion, supra note 242.

^{249.} Id.

^{250.} Id.

^{251.} Id

^{252.} Her ground rules were: "1. Talk to me; 2. Be honest with me; and 3. Be respectful even when it's hard." Id.

tic—everyone, including the quasi-mediator, was part of the community.²⁵³

B. Assembly Square, Somerville, Massachusetts

The Assembly Square case study presents a very different set of circumstances. This was an industrial site in the middle of a major urban area. The number of stakeholders was much larger, the history of development on the site was more extensive, the site had contamination issues, and the quasi-mediators were brought in after years of fighting instead of at the beginning of the dispute. The similar conditions were present that allowed interested parties to serve valuable mediative functions.

Formerly one of Boston's economic and manufacturing hubs, the 145-acre Assembly Square site in the city of Somerville began its decline after the Ford assembly plant closed in 1958. half manufacturing activity ceased by the 1970s, leaving the site blighted and polluted. The site's location along the Mystic River, large acreage, and rich transportation infrastructure (both rail and road) soon drew the attention of developers. The City proposed two different revitalization plans during the 1980s and 1990s. The first plan resulted in a failed mall and a second produced nothing. He late 1990s, the area was known for crime and environmental degradation, seeing little activity outside of a Home Depot and a few other light industrial sites. The city suffered the unfortunate epithet of "Slummerville."

In the late 1990s, the Taurus development consortium ("Taurus")²⁶⁴ purchased the site and proposed to restart the failed mall and build large, "big-box" outlets including an IKEA.²⁶⁵ According to a group of

254. William Shutkin, A River (And \$5 Billion of Transportation Infrastructure) Runs Through It: Sustainability Slouches Towards Somerville's Waterfront, 28 B.C. ENVIL. AFF. L. REV 565, 570–71 (2001).

261. As just one example Whitey Bulger, the fugitive who was apprehended in California in 2012, was based in Somerville. Andy Metzger, *Whitley Bulger's Organized Crime Career had Strong Ties to Somerville*, WICKED LOCAL SOMERVILLE (Jul. 1, 2011), http://www.wickedlocal.com/somerville/ news/x1722636674/Whitey-Bulgers-organized-crime-career-had-strong-ties-to-Somerville#axzz29Tebr J1m.

^{253.} Id.

^{255.} Id.

^{256.} Id. at 570.

^{257.} Id.

^{258.} Id. at 572.

^{259.} Id. at 579.

^{260.} Id.

^{262.} Shutkin, supra note 254, at 572.

^{263.} Id. at 568.

 $^{264. \}quad \textit{Id.}$ at 577. The consortium was comprised of Taurus Financial Group and the National Development Corporation.

^{265.} *Id.* at 576–77.

residents, this plan failed to take advantage of the resources on and around the site. 266 In response, they created the Mystic View Task Force ("Task Force") to promote an alternative vision of mixed commercial and residential development in contrast to Taurus' strictly commercial proposal. 267 The Task Force was comprised of residents, business owners, planners, and politicians. 268

After a year of meetings and planning events, the Task Force developed a detailed plan and organized a community forum to discuss the future of the parcel.²⁶⁹ Their plan proposed dense residential development along with pedestrian-scale commercial development.²⁷⁰ Additionally, they strongly opposed the big-box retail development and large parking lots proposed by Taurus.²⁷¹ In response, Mayor Dorothy Gay asked the developers to postpone any permit requests while the city undertook a comprehensive planning effort. 272 The mayor hired the Cecil Group, a reputable Boston urban planning firm, to draft a plan for the site in consultation with an advisory committee of residents, business leaders, and city officials.²⁷³ While both Taurus and the Task Force participated in the planning process, they remained committed to their divergent visions for the site.²⁷⁴ In October 2000, the city published a plan recommending a compromise vision with big-box retail to stimulate jobs in the short-term, followed by mixed-use and other retail development decades in the future.275 The plan worked for Taurus but not for the Task Force. 276 After many years of back and forth, it was apparent, based on words and deeds, that Mayor Gay was frustrated with the process and preferred the Taurus proposal.²⁷⁷

When the mayor and the developers started to move forward on the portions of the plan they favored, the Task Force and other groups turned to litigation to stop them.²⁷⁸ This led to numerous lawsuits and three failed attempts to mediate before the final successful attempt lead by the quasi-mediators.²⁷⁹ The first mediation barely qualified as mediation. Shortly after papers were filed in court, the parties voluntarily agreed to meet with a mediator to discuss settlement options.²⁸⁰ Taurus

^{266.} Id.

^{267.} Id. at 572.

^{268.} Id. at 571.

^{269.} Id. at 573.

^{270.} Id. at 578-79.

^{271.} Id.

^{272.} Id. at 577.

^{273.} Id.

^{274.} Id.

^{275.} Id. at 576.

^{276.} Id. at 578.

^{277.} Id. at 577.

 $^{278.\;}$ Hoben & Fairman, supra note 144, at 5; see~supra Part II.C.3 for a description of conflict assessment.

^{279.} Id. at 4.

^{280.} Id.

structured the process and did little to engage the Task Force. For example, the developers picked the location, the mediator, and the thirdparty witnesses who could attend.²⁸¹ The mediator did little to build relationships among the parties and explore mutually agreeable options.²⁸² Instead, he served more as a detached referee than a facilitator of the conversation. The result was an acrimonious, adversarial meeting that devolved into an argument where each side advanced the merits of its position and discounted the others.²⁸³ In the end, this mediation further distanced the parties from each other by placing an emphasis on their differences and confirming their most unfavorable assumptions about the other parties.²⁸⁴

The second mediation attempt took place in the judge's chambers and was equally flawed. 285 The judge met only with the lawyers and not the parties.²⁸⁶ This likely led to a narrowing of the issues because the lawyers were not as well-versed on the details as the parties and were more likely to focus on the legal claims at issue in the underlying litigation. 287 After a couple of days, the judge dismissed the attorneys without any agreement reached.²⁸⁸ Shortly after that, the judge recused himself, claiming that the parties were unreasonable and unwilling to negotiate. 289

A third attempt at mediation was made in 2003 when Mayor Gay hired the Consensus Building Institute ("CBI"), a mediation firm in Cambridge, to conduct a conflict assessment. 290 While this effort was the best-designed process of all three mediations, the timing of the assessment was not ideal for helping the parties reach agreement.²⁹¹ First of all, Mayor Gay was up for re-election. 292 Both sides felt confident that she would lose and that the new administration would be more favorable to its own vision. In addition, both Taurus and the Task Force believed that its current adversarial strategy was serving its interests.²⁹³

^{281.} Id.

^{282.} Id. at 5.

^{283.} Id.

^{284.} Schenk, supra note 21.

^{285.} Id.

^{286.}

Jeffrey R. Seul, Litigation as a Dispute Resolution Alternative, in The 287.HANDBOOK OF DISPUTE RESOLUTION 336, 340 (Moffitt and Bordone, eds., 2005) (explaining that litigation focuses attention on the issues "that can be expressed in terms of rights or liabilities recognized under existing law."); see also, Menkel-Meadow, supra note 17, at 771.

^{288.} Schenk, supra note 21.

^{289.}

^{290.} Hoben & Fairman, supra note 144, at 3.

^{291.} Schenk, *supra* note 21, at 8.

Susan Ryan-Vollmar, Trouble in Hipville, THE BOSTON PHOENIX, 292. http://www.bostonphoe nix.com/boston/news features/other stories/documents/03154867.asp (last visited Nov. 14, 2012).

^{293.} Hoben & Fairman, supra note 144, at 3.

The developers felt that they were making progress with the city, and the Task Force felt that it was doing well in the community and in court. The Task Force also believed that it had time on its side.²⁹⁴ In the end, CBI concluded that mediation was not appropriate at that time but left the door open for the possibility in the future should conditions change.²⁹⁵

Over the next few years, that is exactly what happened. In 2003, Mayor Gay was voted out, ²⁹⁶ and in 2005 Taurus sold its interest to a new consortium. The new mayor, Joseph Curtatone, served as an effective convener²⁹⁷ by keeping lines of communication open with the developers and the Task Force. The new development consortium, Federal Realty Investment Trust ("FRIT") had experience with mixed-use development like that envisioned by the Task Force. ²⁹⁸ In addition, IKEA designated a new representative who was more open to the idea of negotiation. ²⁹⁹

Mayor Curtatone suggested that the developers hire a mediator to manage negotiations with the Task Force. 300 The only hitch was that the Mayor suggested Doug Foy and Anne Tate—two people who were not professional mediators and had strong historical ties to the Task Force.³⁰¹ Foy helped develop the state's Smart Growth Plan a few years earlier, had participated in the CBI assessment as a representative of the state, and was the former head of the Conservation Law Foundation—a regional environmental advocacy group. 302 Tate, a planning professor at the Rhode Island School of Design, had been one of the guiding voices behind the Task Force's vision for the site. 303 In short, Tate and Foy were strongly aligned with the Task Force and their vision. 304 Mayor Curtatone argued that hiring Foy and Tate was in the developers' best interests.305 Similar to the East Middlebury case where Carrara was hesitant to join negotiations with Shashok, Foy's and Tate's connection to the Task Force was a cause for concern among FRIT and IKEA.³⁰⁶ Eventually, Foy and Tate (with the help of Mayor Curtatone) were able to gain the trust and respect of the developers. 307 Despite their status as interested parties, they were able to perform valuable mediative func-

295. Id. at 5.

^{294.} Id.

^{296.} SOMMERVILLE, MA, MAYOR JOSEPH A. CURTATONE, http://www.somervillema.gov/de partments/mayor (last visited Nov. 14, 2012).

^{297.} See supra Part II.C.3.

^{298.} Schenk, supra note 21 at 6.

^{299.} Id. at 13.

^{300.} Id.

^{301.} Id. at 14.

^{302.} Id

^{303.} Shutkin, supra note 254, at 572.

^{304.} Id.

^{305.} Schenk, supra note 21, at 15-16.

^{306.} Id. at 16.

^{307.} Id.

tions that helped the parties reach an agreement in the fall of 2006.308 This agreement ended almost two decades of conflict over the fate of the Assembly Square site. 309 Construction began on the site in the spring of 2012.310

1. Mediative Functions of the Quasi-Mediators

In their role as quasi-mediators, Foy and Tate helped manage the process using several strategies often employed by mediators. 311 First, they conducted separate interviews with the parties similar to a conflict assessment. 312 Second, they helped the parties shift focus away from hostile interactions in the past to a compatible vision of the future possibilities for the site. 313 Third, they worked to shift the conversation from the narrow legal issues of the pending litigation to broader issues that were equally important to the parties. 314 Fourth, they helped put in place a joint fact-finding process. 315 Fifth, they organized a core negotiating group and arranged for them to meet in private.³¹⁶ This enabled the parties to break the cycle of using the media to promote their positions and attacking the other side. 317 Sixth, during the negotiations, they started discussions by having each party take the perspective of the other side.318 They did this by asking one side to explain the motivation behind the other parties' position. 319 Each party was required to do this before they presented their own position. 320 Lastly, they engaged in a practice that is somewhat controversial in mediation—they offered a possible substantive solution for the parties to consider³²¹ by floating the idea of a new train station to the existing rail line through the site.

^{308.} Id.

^{309.} Id. at 19.

^{310.} Chris Orchard, Check it Out: Construction Begins in Assembly Square, SOMERVILLE PATCH, http://somerville.patch.com/articles/check-it-out-construction-begins-inassembly-square (last visited Nov. 14, 2012).

^{311.} Schenk, supra note 21, at 14.

^{312.} James E. Kunde, Dealing with the Press, in Consensus Building Handbook: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 435-36 (Lawrence Susskind et al. eds.,

^{313.} Id.

^{314.} Id.

^{315.} Id.

^{316.} Id.

^{317.} Id.

^{318.} Id.

^{319.} Id.

^{320.}

Jacqueline M. Nolan-Haley, Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective, 7 HARV. NEGOT. L. REV. 235, 278 (2002) (discussing now "mediator proposals" can hinder agreement and damage a mediator's effectiveness).

IV. ANALYSIS

The question addressed by this article is: should interested parties like Shashok, Tate and Foy, who play a mediative function, be labeled mediators or quasi-mediators? To answer this question, this section explores how standards used by mediation associations define who qualifies as a mediator based on the mediator's interest and ability. As described below, these guidance documents provide only general parameters that are not specific enough to definitively answer the question. Instead of arguing that this guidance allows for an expansive definition of who is a mediator, the author proposes that certain conditions and characteristics allow interested parties to perform mediative functions in siting disputes under the label of "quasi-mediators." Once parties determine that collaborative processes are appropriate in a siting dispute, they can rely on the lessons learned from these two case studies to expand opportunities for reaching agreements with the help of quasi-mediators when professional mediators are not available or appropriate.

A. Model Standards, Ethical Guidance, and the UMA

While no national credentialing body exists for environmental mediators, ³²² three guiding sources can be consulted: The Model Standards of Conduct, the EPP Ethical Guidance, ³²³ and the Uniform Mediation Act. ³²⁴ The American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution jointly adopted the Model Standards of Conduct for Mediators ("Model Standards") in August 2005. ³²⁵ To supplement these standards, the Association for Conflict Resolution's Environment and Public Policy Section ("EPP")—the group that serves environmental mediators—adopted the Ethical Guidance for EPP Section Members ("EPP Guidance") in September 2011. ³²⁶ In addition, the Uniform Mediation Act ("UMA"), adopted by the Na-

^{322.} Some community dispute resolution centers certify which mediators are eligible to conduct mediations in their jurisdiction based on experience and training. See FAQ's, AUSTIN DISPUTE RESOL. CTR., http://www.austindrc.org/information-resources/faqs.php (last visited Nov. 14, 2011). In addition, some courts and institutions have rosters of mediators who meet designated criteria. See Mediator and Arbitrator Qualifications, UTAH STATE COURTS, http://www.utcourts.gov/mediation/roster/ (last visited Oct. 16, 2012). These certification and roster programs are only relevant for mediators who want to participate in those institutions; mediators who offer their services in other ways are not bound or limited by those regimes.

^{323.} See Fleischer et al., supra note 120.

 $^{324.\,}$ Model Standards of Conduct for Mediators (ABA 2005), available at http://

 $www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct april 2007.authcheckdam.pdf.$

^{325.} *Id.*; see also Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195, 239 (2006).

^{326.} See Fleischer et al., supra note 120.

tional Conference of Commissioners on Uniform State Laws and, in some form, by ten states and the District of Columbia, ³²⁷ provides additional guidance on the best practices for mediators. While the Model Standards and the EPP Guidance were adopted for a slightly different purpose than the UMA, all of them can be used to identify the parameters of what is called mediation and who is a mediator. ³²⁸

The subject of this article—whether interested parties can serve as mediators in land use siting disputes—is addressed primarily as a "conflict of interest" under these three documents and secondarily as competence. Under the Model Standards, a conflict of interest can arise from involvement in the subject matter or from a relationship between the mediator and a disputant that "reasonably raises a question of a mediator's impartiality."³²⁹ The mediator can proceed if all parties agree after disclosure, ³³⁰ unless the "conflict of interest might reasonably be viewed as undermining the integrity of the mediation."³³¹ So the Model Standards allow interested parties to be labeled "mediators" as long as the interest is disclosed and the interest will not undermine the integrity of the process. Therefore, it is the interest of the mediator that is the determining factor under the Model Standards, not the behavior of the mediator.

Under the UMA, a conflict of interest includes "a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party." In a break from the Model Standards, the UMA requires a mediator to be impartial unless the parties agree to let the mediator serve after disclosure of the conflict. 333 The

^{327.} MICHAEL B. GETTY ET AL., NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS DRAFTING COMMITTEE, UNIFORM MEDIATION ACT, § 6(a)(1) (2003), available at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf.; Enactment Status Map, UNIF. L. COMM'N, http://uniformlaws.org/Act.aspx?title=Mediation%20Act (last visited Nov. 14, 2012).

^{328.} The Model Standards and EPP Guidance were adopted to offer guidance on best practices for mediators and the UMA was envisioned to help clarify when mediation communications are privileged. More specifically, the UMA tries to meet the following three obligations: (1) the reasonable expectations of parties regarding confidentiality, (2) the integrity of the mediation process, and (3) the policy that parties have the ultimate decision-making authority or self-determination. See Andrea K. Schneider, Which Means to an End Under the Uniform Mediation Act?, 85 MARQ. L. REV. 1, 2 (2001). For the UMA to have effect, it must be adopted by the state in which the mediation took place. To date, ten states, including Vermont, have adopted some form of the UMA. UNIF. LAW COMM'N, supra note 327.

^{329.} MODEL STANDARDS OF CONDUCT FOR MEDIATORS, supra note 324, at Standard III.A.

^{330.} Id. Standard III.C.

^{331.} Id. Standard III.E.

^{332.} GETTY, ET AL., supra note 327, § 9(a)(1); see also Phyllis E. Bernard, Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act, 85 MARQ. L. REV. 113, 130 (2001).

^{333. &}quot;A mediator must be impartial, unless after disclosure of the facts required in subsection (a) and (b) to be disclosed, the parties agree otherwise." GETTY, ET AL., *supra* note

UMA also allows for a mediator to continue after disclosure and consent, but does not have any further requirement of reasonableness like the Model Standards and EPP Guidance do.³³⁴ Unlike the Model Standards and the EPP Guidance, the UMA defines "mediator" and "mediation."³³⁵ Unfortunately, the circular nature of those definitions does not offer any valuable guidance for the topic of this article.³³⁶

The EPP Guidance differs from the UMA and the Model Standards by offering a more circumscribed definition of conflict of interest. EPP Guidance makes no provision for party consent after disclosure of an interest to permit a mediator to continue. 337 According to the EPP Guidance, consent has no effect on whether a party can mediate. 338 In addition, the EPP Guidance advises mediators to avoid "actual" conflicts as well as the "appearance" of a conflict. 339 Unlike the Model Standards, the EEP Guidance places emphasis on the possibility that the conflict may undermine the integrity of the process even if the parties want the mediator to continue. 340 This distinction in emphasis is explained in the EPP comments:

The test to apply is . . . whether the [mediator's] interest could be reasonably viewed as undermining the integrity of the process. If, for example, [the mediator's] interest could lead the [mediator] to skew the outcome of the process or to limit the full participation of some because [he or she] had opposing interests, that would undermine the integrity of the process. 341

³²⁷, § 9(2)(g). While the language in this section is slightly different, the intent was probably similar to the language included in the Model Standards.

^{334.} See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, supra note 324.

^{335.} GETTY, ET AL., *supra* note 327, at § 2(1) (stating that "[m]ediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute"); *id.* § 3 (stating that "[m]ediator' means an individual who conducts a mediation").

^{336.} Id.

^{337.} FLEISCHER ET AL., supra note 120, at Principle III.A.

^{338.} Id

^{339.} *Id*

^{340.} *Id.*; Model Standards of Conduct for Mediators, *supra* note 324, at Standard III.E. In the Model Standards, party consent after disclosure is addressed in Standard III.C–D, while the guidance to withdraw if "the conflict of interest might reasonably be viewed as undermining the integrity of the mediation" follows in Standard III.E. Comparatively, in the EPP Guidance, party consent is not mentioned at all except to specify that consent does not cure a conflict. *See id.* "When acting as a neutral, if a Section member's conflict of interest might reasonably be viewed as undermining the integrity of the process, the member shall withdraw from or decline to proceed with the process *regardless of the expressed desire or agreement of the convenor, participants, or constituencies to the contrary."* FLEISCHER ET AL., *supra* note 120, at Guidance III.E.

^{341.} FLEISCHER ET AL., supra note 120, at Guidance III E. See also ASSOCIATION FOR CONFLICT RESOLUTION, ETHICAL GUIDANCE FOR MEMBERS OF THE ENVIRONMENT AND PUBLIC POLICY SECTION 12 (2011), available at http://acrepp.org/sites/default/files/Ethical %20Guidance%20for%20EPP%20Section% 20Members_Sept%202011.pdf.

Both the Model Standards and EPP Guidance use the mediator's interest as the litmus test—not mediator's performance.342 These standards allow interested parties to be labeled "mediators" so long as the interest is not so significant that it will undermine the integrity of the process.³⁴³ But there is no direction on how to determine a disqualifying interest.344 The UMA would allow a mediator with a disqualifying conflict of interest so long as the parties knew and consented.³⁴⁵

Applying these best practices to the East Middlebury and Somerville cases, it is the mediators' interest in the outcome that determines if the integrity of the process is undermined and whether the parties consented. In East Middlebury, Shashok was a neighbor. 346 She and her neighbors would have to live with whatever was allowed in the expanded mine. Her quality of life and her property values would be directly affected by the facility. Could this be a sufficient interest to undermine the integrity of the process? In Somerville, Tate was an urban planning professor who advocated for smart growth, mixed-use developments.347 Foy, in addition to founding a prominent regional environmental group, was the architect of the state's smart growth land use plan. 348 Foy's and Tate's interests in the outcome were not as an adjacent property owner; however, they were heavily invested (interested) in seeing a smart growth, mixed-use project at Assembly Square. Arguably, Shashok, Tate and Foy had a sufficient interest to "skew the outcome" in their favor, but the guidance does not help make that determination. Therefore, using this guidance, one could argue that their interests were not substantial, and they could be called mediators.

The interest-of-the-mediator threshold of the Model Standards and EPP Guidance also fails to recognize another important aspect of the mediator's behavior. What if the mediator's interest is significant enough to warrant skewing the outcome or limiting participation, but she refrains from partial, biased, and corrupt behavior? Can she appropriately be labeled a mediator? The Model Standards and EPP Guidance suggest that she cannot. Instead of engaging in an effort to identify the type or extent of interest that disqualifies an interested party from being labeled a mediator, this article suggests applying a different label.³⁴⁹

See generally Fleischer et al., supra note 120; Model Standards of 342.CONDUCT FOR MEDIATORS, supra note 324.

^{343.} FLEISCHER ET AL., supra note 120.

See id.; MODEL STANDARDS OF CONDUCT FOR MEDIATORS, supra note 324.

^{345.} GETTY ET AL., supra note 327.

See supra Part III.A.1. 346.

See supra Part III.A.2. 347.

See id. 348.

The idea that behavior rather than the interest should be the determining factor is consistent with other scholars. Zamir, supra note 1, at 3 (citing Sara Cobb & Janet Rifkin, Practice and Paradox: Deconstructing Neutrality in Mediation, 16 LAW & Soc. INQUIRY 35, 37 (1991)).

Interested parties who want to serve a mediative function should be labeled "quasi-mediators."

Adopting this label has the potential to decrease confusion about the role of mediation in siting disputes specifically and in disputes generally. Mediation already suffers from a definitional problem. ³⁵⁰ In addition to the different concepts of mediation among cultures, ³⁵¹ there are different expectations of mediation within a culture. The "western" mediation community recognizes many different forms of mediation: facilitative, evaluative, transformative, and other hybrid forms of mediation. ³⁵² Outside of the mediation community, confusion around mediators and arbitrators is common. ³⁵³ Using the "quasi-mediator" label for interested mediators in siting negotiations would make strides toward helping parties understand what to expect: a different type of impartiality.

B. Conditions that Favor a Quasi-Mediator in Siting Disputes

There are several conditions that made the East Middlebury dispute appropriate for the use of a quasi-mediator. First, some of the common obstacles to a collaborative approach did not arise. The possibility of negotiation was introduced early in the process. Carrara assumed that the approval process would not be complicated or contentious and therefore had not invested in experts to prepare the application. As a result, they were more flexible in the negotiation process because they had not committed (through investment and time) to a particular result. Second, the neighbors quickly became organized and expressed their interest in negotiating with the applicant early in the process. They were not opposed to the mine at that location, but they wanted the impacts mitigated. Third, while initially reluctant, Carrara was willing to consider negotiating how the mine would be operated. Fourth, the company was a small local business with some members of the Carrara family living in East Middlebury. This may have helped to build trust. Fifth, Carrara was not in a rush for the decision to be made because its need for the new mine was several years off. Therefore, they were able to give the process enough time to produce a result. Fifth, Shashok was willing and capable of serving as the quasi-mediator and did not need to get paid. This was important because Carrara and the Development Review Board were not willing to hire an independent mediator, and the stakeholders, who were willing, were not able to pay for one.

Somerville had a very different set of circumstances in the beginning. Consequently, the dispute was not ripe for negotiation until much

^{350.} See Schmediation, supra note 1, at 3.

^{351.} See Stulburg, supra note 2; see also Moffitt, supra note 3, at 3 and accompanying text.

 $^{352.\,}$ Douglas H. Yarn, Dictionary of Conflict Resolution 272–84 (1st ed. 1999).

^{353.} See supra text accompanying note 7.

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later in the process. The principal condition that was not present was an agreement about how the site would be used. 354 While there was agreement that some development on the site was needed, the Taurus consortium and the Task Force had very different visions of that development. 355 This substantive disagreement about appropriate use led to a very competitive and position-oriented approach to the decision. The parties spent years battling over which vision was more appropriate. When a new development consortium took over, the visions became aligned, and along with several conditions, this situation became appropriate for an interested party to serve as a quasi-mediator. First, after ten years of legal and political battles, a stalemate had been reached, and negotiation offered the most likely route to resolution. 356 Second, a new mayor was elected who served as a more effective convenor of the process. 357 Third, the negotiators' positions softened on both sides over time. 358 The new development consortium that took over a portion of the site from Taurus had experience with mixed-use development. This shift in substantive focus brought the developers more in line with the Task Force's vision. ³⁵⁹ Similarly, the Task Force's focus shifted to recognize the benefits of enhanced infrastructure and improved air quality.³⁶⁰ Fourth, IKEA's negotiation dynamics changed—they designated a new negotiator who made an effort to build personal relationships with the other stakeholders. For example, before their meetings with the Task Force, the IKEA representative invited everyone to dinner under the one condition that they not talk about the project. This probably played a large role in overcoming some of the relationship barriers that had built up over the years. Also, the opening of the IKEA in nearby Stoughton, Massachusetts, removed the urgent pressure to build a store in Somerville. Fifth, the new development consortium decided to follow the mayor's advice by hiring Foy and Tate to serve as quasi-mediators.

C. When a Quasi-Mediator Might Be Appropriate

Before tackling the difficult question of deciding to use a quasimediator, the first task is determining whether a collaborative approach (such as negotiation or mediation) is even appropriate. Determining the potential for collaboration generally requires balancing several factors along a spectrum of other factors. ³⁶¹ A useful guidebook on the subject,

^{354.} Schenk, supra note 21, at 2.

^{355.} Id.

^{356.} Id. at 12.

^{357.} Id. at 13.

^{358.} Id.

Id. at 12-13. 359.

Id. at 14.

 $S\!e\!e$ Franklin E. Dukes & Karen Firehock, Collaboration: A Guide for ENVIRONMENTAL ADVOCATES, 58 (James L. Wilkinson et al. eds., 2001) (written and pub-

Collaboration: A Guide for Environmental Advocates, identifies a set of questions³⁶² and then a scorecard that should be considered when determining the "Need For Caution, Consultation and Process Disci-

lished by a group of mediation providers and environmental advocates who created this publication to explore when and in what form negotiation is appropriate for managing environmental disputes); see also SUSSKIND ET AL., supra note 111, at 2:

If you answer 'yes' to at least 6 of the 8 questions below, then you should consider using assisted negotiation: 1. Are the issues in your land use dispute clearly defined? 2. Are the key parties willing to talk about a possible settlement? 3. Is the outcome of the dispute uncertain if no agreement is reached? 4. Are the stakes high? 5. Are the issues of significant public concern? 6. Is the public frustrated with how the dispute has been handled thus far? 7. Is the government agency involved losing public trust? 8. Are some of the parties involved likely to have long term relationships?

362. Dukes & Firehock, supra note 362:

General questions of suitability:

- Is the issue of sufficient significance to warrant the effort?
- Will participants be able to maintain their basic values and principles?
- Is the issue "ripe" for discussion (such as a stalemate unacceptable to several parties)?
- Are key parties willing to participate?
- Do relevant decision-making agencies support the effort?
- Is sufficient time available (and allocated) to address the key issues?
- Is implementation of any agreement likely?
- Does success as defined by participants appear to be a reasonable possibility?

Specific questions:

- 1) Does this approach promise to protect and enhance environmental protection?
 - Is there appropriate legal protection such that enforcement of current laws and regulations will be continued or strengthened?
 - Are there sufficient drivers (incentives) for all parties that provide sufficient leverage to compel fair negotiations?
 - Is appropriate representation available, including organizations with a state constituency for state lands and resources and with national constituencies for federal lands and resources?
- 2) Is the process being proposed or developed likely to be fair and effective?
 - Are other environmental organizations aware of and involved with this effort?
 - For initiatives convened on behalf of public entities, is there a clear understanding of the purpose and sufficient opportunities for linkage with those entities throughout the effort?
 - Will you and other participants have considerable say in the design of the process?
- 3) Are you and/or your organization suited for participation?
 - Is this effort consistent with your organizational mission?
 - Are meetings held at reasonable times and locations for you and other participants to attend regularly?
 - Do you have a representative with sufficient expertise—technical knowledge, negotiation skills, and political skills – to participate effectively?
 - Does your representative match up with other participants in terms of experience and capability?
 - Does your representative have time to prepare for, attend, and participate effectively in meetings?

pline." 363 After a party answers the questions on a scale of 1–10, the higher the score, the more freedom and flexibility the parties have in participating in a siting negotiation. 364 The lower the score, the greater the need for caution, consultation, and process discipline. 365

363. Id. at 59.

Scorecard for Determining the Need for Caution, Consultation, and Process Discipline

Greater Caution, Consultation And Process Discipline More Freedom and Flexibility

| 11114 1 1000 | <i>D</i> 150 | эринс | | | | | | | |
|---|--------------|---------|-------------------------|---|-----------------------------------|-------------------------|----------|-------------------|------------|
| Very High 12- | | | a Conce 31-52 | | dium Le 3-78 | ess Con 79-10 | | ttle Cor 103-1 | |
| 1. Large Scope | | | | | Limited Scope | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 2. Larger Constituency Represented | | | | | Limited Constituency Represented | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 3. Public Lands and Resources Private Lands and Resources | | | | | | | | | Resources |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 4. Long-Term Impact | | | | | Briefer Impact | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 5. Policy/Regulatory Direct Action/Implementa | | | | | | | | | ntation |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 6. Precede | ent for (| Other S | ettings | | | Unique | e to a P | articula | ar Setting |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 7. Greater Authority | | | | | Less Authority | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 8. Mandated | | | | | | Voluntary Formation | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 9. Power Disparities | | | | | Power Balanced | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 10. Fundamental Values at Stake Lesser Significa | | | | | | | | | nificance |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11. Extensive Conflict | | | | | Minor Conflict | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 12. Bargaining and Agreement- Seeking | | | | | Dialogue and Information Exchange | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 364. <i>Id.</i> | | | | | | | | | |

^{364.} *Id.* 365. *Id.*

This guidance can be used to gauge when conditions may be appropriate for using an interested party as a quasi-mediator. Inherent in this guidance is the idea that some disputes are more appropriate than others for collaboration. The more appropriate for collaboration, the more freedom parties have in deciding how disputes are managed. The scorecard serves as a warning system indicating when greater care should be taken and therefore when closer attention needs to be paid to who provides mediative functions. If, for example, analyzing a dispute on the scorecard strongly discourages collaboration, a quasi-mediator should probably be avoided. On the other hand, if a dispute produces a higher score, quasi-mediation may be appropriate. As a general principal, professional neutrals should probably manage disputes that score in the low to middle ranges.

While not definitive, this scoring system and the experience from these cases can help advocates and agencies make more informed decisions about employing quasi-mediators in siting disputes.

D. Characteristics of a Quasi-Mediator

Even given the right conditions, the use of a quasi-mediator is only appropriate if the right person is available. In East Middlebury, while Shashok was not a trained mediator, she had many of the right characteristics to perform the important mediative functions, and she had the time to manage the process. ³⁶⁶ She was a former corporate manager who was now a stay-at-home parent. ³⁶⁷ She missed her management work and was excited to use her spare time to help. ³⁶⁸ Over the two years, she estimated that she volunteered eight hundred hours managing the process. ³⁶⁹ Her previous employment in management had given her some experience with group decision-making processes. ³⁷⁰ Shashok was also committed to the community, curious about the issues, and optimistic about the potential for collaboration. ³⁷¹ She was trustworthy and worked hard from the beginning to gain the trust of the neighbors and Carrara. ³⁷²

Doug Foy and Anne Tate, while also not trained mediators, had a wealth of experience in collaborative negotiations and in land use planning.³⁷³ As the head of the Conservation Law Foundation for many years, Foy had experience with joint fact finding and other collaborative negotiation processes with energy companies.³⁷⁴ Tate's experience as a

^{366.} Nolon & Shashok, supra note 21.

^{367.} Id.

^{368.} Id.

^{369.} *Id.*

^{370.} Id.

^{371.} *Id.*

^{372.} Id

^{373.} Schenk, supra note 21, at 14.

^{374.} *Id*

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planner and professor probably helped her manage the negotiations with Foy. 375 Both were trusted by the community groups due to their past involvement. Foy and Tate had expressed their preference for mixed-use projects similar to that proposed by the Task Force for Assembly Square. 376 They were committed to the community and to the idea of implementing a mixed-use development on this site. Also, they were able to gain the trust of the development consortium early in the process with the help of the mayor. 377 Foy and Tate were able to move the parties through the stages of siting mediation. 378 They conducted interviews similar to an assessment. 379 They helped the parties move beyond the narrow issues raised in litigation to broader goals that allowed for novel solutions. 380 They encouraged the parties to come up with options and helped them figure out which were the most viable. 381

There is much that can be learned from these two case studies. While there are several distinguishing factors, there are also many commonalities that reveal when interested parties can serve as quasimediators in siting disputes. The cases were different in terms of demography, historical use, and timing. Somerville was an urban setting with a longer history of development around and on the site than in East Middlebury. Somerville affected a much larger number of people than did the Carrara mine. Years of industrial activity left Assembly Square polluted whereas Carrara's parcel was relatively undeveloped. This pollution made decision making more complex because other agencies were involved and a different set of advocates was implicated. Finally, and most importantly, the Assembly square parties were not interested in collaborative negotiations in the early stages of the dispute. Sas

Despite these differences, several similarities made these situations appropriate for quasi-mediation. First, the stage was set for substantive agreement.³⁸⁴ The residents in both cases were not opposed to development on the sites—they just wanted appropriate development. Once the parties had aligned their views about the value of negotiation,

377. Id.

^{375.} See Faculty: Anne Tate, RHODE ISLAND SCH. OF DESIGN, http://www.risd.edu/Architecture/ Anne Tate/ (last visited Nov. 14, 2012).

^{376.} *Id.*

^{378.} See supra Part II.C.3.

^{379.} Schenk, supra note 21, at 16.

^{380.} Id.

^{381.} *Id.*

^{382.} See supra Part III.A.1–2.

^{383.} Id.

^{384.} In negotiation terminology, a zone of potential agreement (ZOPA) existed among the involved parties. Noah G. Susskind, *Wiggle Room: Rethinking Reservation Values in Negotiation*, 26 Ohio St. J. on Disp. Resol. 79, 90 (2011) (stating that "commonly defined as the range of possible values the negotiators could potentially agree upon").

they were able to make progress toward an agreement. In East Middlebury, this happened in the early stages of the process, while in Somerville this alignment only happened after many years of contentious battles. Second, the decision-making agency was supportive and willing to integrate the agreement that was reached into its final decision. For example, in Somerville, the mayor personally convened the negotiation and was available to ensure that it was adopted. In East Middlebury, while the Development Review Board did not take a leading role in convening the negotiation, town planners appeared to play an advisory role in the negotiation process. 385 Finally, an interested party, who had appropriate group decision-making and problem solving experience, was available and willing to serve a mediative function in the negotiation.³⁸⁶

E. Benefits and Dangers of Quasi-Mediators in Siting Decisions

Being able to rely on a quasi-mediator provides an opportunity to improve a collaborative process or overcome impasse in a siting negotiation that otherwise might not be available. Circumstances may arise that reduce the likelihood of hiring a professional mediator: funds may not be available, and the parties may not be comfortable bringing in an outside party as a neutral. In the event that an interested party with the requisite experience is available and the conditions are appropriate, serving a mediative function as a quasi-mediator will benefit the community. 387 When choosing between an ineffective collaborative process or impasse and the use of an interested party as a quasi-mediator, the community may be better off relying on the quasi-mediator.

Despite these potential benefits, the dangers of using an interested party as a quasi-mediator in a siting negotiation should not be overlooked. If the conditions are not appropriate, the community will be better off without the intervention. If inexperienced, a quasi-mediator may make the situation worse. She may not be able to manage the contentious interactions. She may not be familiar with the stages of a siting mediation. She may not establish good channels of communication with the decision-making agency. This inability to deliver any of the valuecreation benefits of collaboration would end up wasting the parties' time and likely poison the water for future collaborative efforts. Even if she were experienced enough to skillfully manage the process, her bias might be so significant that she would skew the outcome in her favor. Neither of these outcomes is ideal.

^{385.} Nolon & Shashok, supra note 21.

^{386.}

Amy J. Cohen, Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal, 11 HARV. NEGOT. L. REV. 295, 297 (2006) (demonstrating how an quasi-mediator in a used community specific tactics to effect a positive change during mediation).

VI. CONCLUSION

Disinterested and experienced professional mediators have successfully managed many contentious siting disputes. The foundational notion that mediators in these disputes should not be interested parties is promoted to protect disputants from wasting time in a process that might produce an unfair (and unsuccessful) outcome. This article does not challenge that logic. Serious problems can arise when inappropriate parties assume the role of mediator.

Despite the soundness of this injunction, however, there are many siting disputes where hiring a professional mediator is not feasible. In addition, there are examples where interested parties, equipped with collaborative expertise, have successfully guided disputants to reach mutually satisfying agreements. Rather than ignore these instances as aberrations, this article identifies the conditions that contributed to the success and argues that the "quasi-mediator" label be used to decrease the likelihood of harm.

Agencies and community leaders confronted with the complexity of a significant siting decision need as many tools as possible to reach acceptable outcomes. The guidance of the Model Standards, EPP Guidance, and the UMA to avoid mediators with conflicts of interest should not be treated as a strict prohibition. Instead, the guidance should be seen as appropriate caution. A caution that raises conflicts of interest as a discussion among the parties while at the same time giving them the authority to capitalize on expertise that may exist among their ranks. This is surely a better outcome than blocking the progression of a collaborative process simply because a professional mediator is not available. With this caution in mind, allowing an interested party to provide mediative functions, while labeled as a quasi-mediator can benefit disputants while advancing societal understanding of what functions a mediator plays.