OVERPARTICIPATION: DESIGNING EFFECTIVE LAND USE PUBLIC PROCESSES

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There are more opportunities for public participation in the planning and zoning process today than there were in the decades immediately after states adopted the first zoning enabling acts. As a result, today, public participation, dominated by nearby residents, drives most land use planning and zoning decisions. Enhanced public participation rights are often seen as an unqualified good, but there is a long history of public participation and community control cementing racial segregation, entrenching exclusion, and preventing the development of affordable housing in cities and suburbs alike. Integrating community engagement into an effective administrative process requires addressing the various ways in which existing public participation processes have failed to serve their purported goals. This Article critically examines how public participation operates in land use planning and approvals. It then proposes a new model, drawing lessons from other administrative processes, in an effort to balance public input, legal standards, and expertise.

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INTRODUCTION

A community room overflows with neighbors protesting a for-profit, out-of-town real estate developer's efforts to bypass local zoning. The developer seeks to build what the neighbors believe is a noxious use on the site of an existing housing development. State law favors the developer: a

statute limits the grounds on which the municipality can deny zoning approval. The developer trots out experts-for-hire who submit thick reports dismissing resident concerns about safety, property values, and traffic.

The neighbors organize. Posting on social media and putting flyers in mailboxes, they inform the community about the proposed development. They rely on their knowledge about the neighborhood to describe the detrimental impacts that the development will have on their community. They educate themselves about the land use approvals and corporate subsidies sought by the developer. They make Freedom of Information Act requests in an effort to expose backroom dealings between local officials and the out-of-town developer.

In response, the local planning and zoning commission slows the process and keeps the public hearing open for almost five months. Neighbors become lay public relations experts. Thanks to their mobilization, local newspapers decry the project. The neighbors push creative legal arguments to support killing the development proposal. Ultimately, the planning and zoning commission, citing public testimony against the project, applies the neighbors' novel legal strategies to deny the application for zoning relief. The town agrees to defend the strategy when the developer appeals the denial in court.

The neighbors' arguments echo those made by both academic and practicing proponents of the community development movement.[1] The people most affected by a proposed redevelopment project are those who live adjacent to it.[2] Public participation mechanisms should both ensure that residents have the opportunity to express local needs and require that the redevelopment meet those needs.[3] If the neighbors oppose the project, it should not occur.[4] Where existing law favors real estate developers disfavored by the community, local government should not hesitate to embrace novel legal arguments to empower the community.[5]

So, as a community lawyer teaching a community development clinic, did I celebrate the perseverance, ingenuity, and political savvy of the community? Was I comforted to see that moneyed development interests and their lying, opportunistic, rapacious lawyers could be overcome by political mobilization?

Well, no. I was one of those lawyers.[6] My client, a small, volunteer-run housing authority, sought, in partnership with a for-profit affordable housing developer, to redevelop a fifty-unit affordable housing complex for elderly

1. William H. Simon defines community economic development as "(1) efforts to develop housing, jobs, or business opportunities for low-income people (2) in which a leading role is played by nonprofit, nongovernmental organizations (3) that are accountable to residentially defined communities." WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, & THE NEW SOCIAL POLICY 3 (2001).

2. *See infra* Part II.B.

3. *See infra* Parts II.B, II.C.2.

4. *See infra* Part II.B.

5. *See infra* Part II.B.

6. (Though I prefer to describe myself as truthful, strategic, and pro bono.)

individuals. The complex, built prior to the adoption of the Americans with Disabilities Act of 1990[7] (ADA), had reached the end of its useful life, and its dated design did not serve its residents' needs. Once rehabilitated, the new ADA-compliant development would house sixty-seven low-income families in a state-of-the-art building in a well-off, disproportionately white, waterfront suburb just a few miles from a small, racially diverse city. Far from comforted, I was appalled to hear neighbors use the rhetoric of community to kill affordable housing in an exclusionary suburb.[8]

In fact, local control, community empowerment, and public participation are among the building blocks of residential segregation. It has long been the case that there is nothing inherently inclusionary about American notions of "community" or "public participation." For generations, white neighborhoods have shielded themselves in the rhetoric of community control.[9] In just one example, during the civil rights era, the *Chicago Tribune* excused violent white rioters responding to a nonviolent civil rights protest by faulting the desegregation advocates for marching in a white neighborhood: "The demonstrators knew they were asking for trouble when they invaded the Gage Park community."[10]

There are, tragically, countless such examples. How, then, can earnest cries for public participation to empower poor and marginalized people be squared with the use of the same tool to exclude poor people and people of color from tony, well-resourced neighborhoods? The community development and land use literatures are rife with the assumption that, when it comes to community control and public participation in development and

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7. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

8. Notably, they also weaponized the language of environmentalism, preservation of Native American history, and public safety, using progressive rhetoric to advance a regressive result.

9. *See, e.g.*, JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 206–07 (2018). To this day, "[o]pposition to housing development is more likely in areas with highly educated and non-Hispanic White residents, with no relationship to national political preferences." JONATHAN ROTHWELL, TERNER CTR. FOR HOUS. INNOVATION, LAND USE POLITICS, HOUSING COSTS AND SEGREGATION IN CALIFORNIA CITIES 11 (2019), http://californialanduse.org/download/Land%20Use%20Politics%20Rothwell.pdf [https://perma.cc/HQU8-7XGB]. That opposition often manifests as cries for protecting or enhancing local control of zoning. *See, e.g.*, John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 836–37 (2019); Jacqueline Rabe Thomas, *Senate Passes Controversial Zoning Reform Bill*, CONN. MIRROR (May 28, 2021), https://ctmirror.org/2021/05/28/senate-passes-controversial-zoning-reform-bill/ [https://perma.cc/UX3T-TB8K]; Lisa Prevost, *A Push for Zoning Reform in Connecticut*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/2021/02/26/realestate/connecticut-zoning-reform.html [https://perma.cc/C5R5-DD6R]; Edward Ring, *State Legislature Continues Its Assault on Local Zoning Decisions*, CAL. POL'Y CTR. (May 6, 2020), https://californiapolicycenter.org/state-legislature-continues-its-assault-on-local-zoning-decisions/ [https://perma.cc/7YPZ-S7P2]; Geoff Beckwith, *Legislature Should Protect Local Decision-Making over Zoning, Land Use*, MASS. MUN. ASS'N (Nov. 2017), https://www.mma.org/advocacy/legislature-should-protect-local-decision-making-over-zoning-land-use/ [https://perma.cc/J5LK-962C].

10. BERYL SATTER, FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA 200 (2009) (emphasis added).

redevelopment projects, poor and marginalized people benefit from more community engagement and public participation.[11] Often, however, when it comes to land use decision-making, public participation is utterly dysfunctional—and poor people bear the brunt of that dysfunction.

There are two possible responses to broken public participation processes: policy makers can eliminate the opportunity for public input or they can better design participation processes. This Article proposes both reducing opportunities for public participation and improving the processes that remain. It sets out how to improve the public participation process that accompanies planning and zoning—the rules applicable to all users of property. It then argues that there ought to be extremely limited participation opportunities when zoning officials apply those rules to individual development proposals. In short, this Article calls for planning and zoning to draw on lessons from other administrative processes, which distinguish rulemaking from adjudication.

These proposed reforms are responsive to the failures of today's land use and zoning processes. This Article will begin by surfacing and analyzing assumptions about public participation. It will then propose models for more effective forms of public participation. Part I describes the ways in which land use and related laws enshrine public participation in the real estate development process. Part II describes common arguments in favor of enhanced public participation and the history that grounds many of those arguments. Part III critiques the ways in which public participation takes place, both in practice and as idealized in the literature. Part IV proposes a redesign of public participation and community engagement in the land use sphere.

I. LAND USE AND ZONING'S PUBLIC PARTICIPATION REQUIREMENTS

The law bakes community control and public participation into the land use process. No other local government function, whether budgeting, policing, or education, features or prioritizes public participation to the degree seen in land use law.[12] The contours of those requirements have

11. *See infra* Part II.

12. American cities require an enormous number of new housing units each year to apply for discretionary approvals, the process for which includes public participation. *See infra* Part I.B. In San Francisco, for example, *every unit* is subject to a discretionary approval. *See* Moira O'Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L.J. 1, 49 (2019). O'Neill and her co-authors did a deep dive into five California jurisdictions' review of development proposals and found that "[a]ll five jurisdictions we examined require discretionary review for residential developments of five or more units. These discretionary review processes apply even if these developments comply with the underlying zoning code." *Id.* Outside California, discretionary review is similarly widespread. Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1622, 1632 (2021) ("[Z]oning ordinances increasingly make land-use decisions discretionary. A locality may expressly retain, for example, the power to approve or reject a final site plan, subdivision map, or permit for a

shifted, however, in the one hundred years since state and local governments began adopting zoning regulations.

A. The Standard State Zoning Enabling Act

In 1924, the U.S. Department of Commerce published the Standard State Zoning Enabling Act[13] (the "Standard Act") with the hope, quickly realized, that states would adopt and "[m]odify this standard act as little as possible."[14] By the terms of the Standard Act, states delegate their police power to local governments to adopt zoning codes, provided those codes meet the limitations set forth in the Standard Act.[15] With respect to the process by which each local government adopts a zoning code, the Standard Act—for the most part—deferred to local governments: "The [local] legislative body . . . shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed."[16]

The Standard Act does, however, require one element of the process: a public hearing, to be held at least fifteen days prior to initial adoption of or later amendment to a local zoning code.[17] The Standard Act is explicit that the public hearing should be open to all "citizens."[18] The Standard Act explains that the hearing must be open to those who do not own property in the relevant zoning district:

> This permits any person to be heard, and not merely property owners whose property interests may be adversely affected by the proposed ordinance. It is right that every citizen should be able to make his voice heard and protest against any ordinance that might be detrimental to the best interests of the city.[19]

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multifamily project." (footnote omitted)). In fact, when by-right development is permitted, observers will express surprise that no participatory process is available to them. Daniela A. Tagtachian et al., *Building by Right: Social Equity Implications of Transitioning to Form-Based Code*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 71, 88 (2019); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 122 n.137 (2015). In the local budgeting context, by contrast, even a city like New York—which has a touted, established participatory budgeting scheme—only subjects 0.4 percent of its annual budget to participatory processes. *See* Colin O'Connor, *Participatory Budgeting Grows in NYC—Why Isn't Every Council Member Doing It?*, GOTHAM GAZETTE (Oct. 23, 2015), https://www.gothamgazette.com/government/5946-participatory-budgeting-grows-in-nyc-why-isnt-every-council-member-doing-it [https://perma.cc/LA2C-TN5W].

13. U.S. DEP'T OF COM., ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926) [hereinafter STANDARD STATE ZONING ENABLING ACT]. The Department of Commerce formed an advisory committee in 1921 and published the first Standard State Zoning Enabling Act in 1924. *Id.* cmt. at iii, 3. In 1926, it published a revised version. *Id.* cmt. at i.

14. *Id.* cmt. at 1.

15. *Id.* § 1.

16. *Id.* § 4 (footnote omitted).

17. *Id.*

18. *Id.*

19. *Id.* § 4 n.28.

While the Standard Act grants participation rights to all, it prioritizes participation by nearby property owners. If immediately adjacent property owners or the owners of 20 percent of nearby lots object to a proposed rezoning, a 75-percent supermajority of the zoning commission must approve a rezoning.[20]

Notably, the Standard Act distinguishes between decisions to adopt or modify generally applicable zoning provisions[21] and site-specific decisions.[22] The Standard Act endows zoning commissions with the first category, the power to recommend legislative action to enact and amend zoning ordinances.[23] It charges boards of adjustment with the second category, the power to make exceptions upon request of a party seeking relief from the ordinance.[24]

The second category, site-specific relief, typically takes one of two forms. First, a property owner might seek permission (termed a special permit, special exception, or conditional use permit) to conduct a use conditionally permitted by the zoning ordinance.[25] Second, property owners might seek relief from a zoning ordinance that imposes unduly onerous burdens on the development or use of their parcels.[26] These are commonly termed variances.[27] In the case of adjustment decisions, the Standard Act requires that the aggrieved party be permitted to present evidence.[28] It further requires that all meetings be public and that any interested member of the public be permitted to attend and observe.[29] It does not permit members of the public to testify or otherwise provide evidence in support of or in opposition to an adjustment application.[30]

The Standard Act's distinction between zoning decisions and adjustment decisions comports with administrative law's distinction between legislative and adjudicative proceedings. Zoning adoption and changes implicate broader interests. Adjudicative proceedings, applying a generally applicable standard to a single parcel, present narrower issues.

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20. *Id.* § 5.

21. *Id.* § 6. This Article refers to such decisions as "zoning decisions."

22. *Id.* § 7. This Article refers to such decisions as "development approvals" or "adjustment decisions."

23. *Id.* § 6.

24. *Id.* § 7. In contemporary practice, these boards are more frequently called boards of zoning appeals (or zoning boards of appeals).

25. *Id.* § 7(2).

26. *Id.* § 7(3).

27. *See id.*

28. *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 13, § 7.

29. *Id.* The rights to attend and observe adjudications, as well as access records and filings, are, of course, core rights in and of themselves. *See generally* Judith Resnik, *The Functions of Publicity and of Privatization in Courts and Their Replacements (from Jeremy Bentham to #MeToo and Google Spain)*, *in* OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY 177 (Burkhard Hess & Ana Koprivica Harvey eds., 2019).

30. *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 13, § 7 (specifying only that "[a]ll meetings of the board shall be open to the public").

B. Contemporary Public Participation Requirements

Zoning enabling acts have evolved since the 1920s, but they continue to require public hearings prior to zoning decisions. Today's zoning enabling acts, like the original zoning enabling acts modeled after the Standard Act, "generally require that city councils grant notice and an opportunity to be heard to landowners whose land will be zoned"[31] and make such opportunity to be heard available to anyone who attends the public hearing.[32] Often, there

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31. Nicolas M. Kublicki, *Land Use by, for, and of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 PEPP. L. REV. 99, 109 (1991); *see also* 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 8:13 (rev. 5th ed. supp. 2021) (surveying notice requirements for public hearings prescribed in various state zoning enabling acts). Many zoning enabling act provisions require notification to nearby local property owners adjacent to or within a certain radius of proposed zoning code adoptions or amendments. *See, e.g.*, CAL. GOV'T CODE §§ 65091(a)(4), 65854 (West 2021); IDAHO CODE § 67-6511(2)(b) (2021); MINN. STAT. § 462.357, subd. 3 (2021); N.J. STAT. ANN. § 40:55D-62.1 (West 2021); 45 R.I. GEN. LAWS §§ 45-24-51, 53(d)(2) (2021); TEX. LOC. GOV'T CODE ANN. §§ 211.006(b), 211.007(c) (West 2021); VA. CODE ANN. § 15.2-2204(B) (2021); *cf.* MASS. GEN. LAWS ch. 40A, § 5 (2021) (notice of certain zoning changes required for nonresident property owners who have specifically requested such notice). Others require that nearby owners be notified about applications to zoning bodies regarding specific projects, such as applications for special use permits, conditional uses, special exceptions, or variances. *See, e.g.*, CAL. GOV'T CODE §§ 65091(a)(4), 65905 (West 2021) (notice required for variances, conditional uses, and appeals); IDAHO CODE §§ 67-6512(b), 6516 (2021) (special use permits and variances); N.J. STAT. ANN. § 40:55D-12 (West 2021) (all "applications for development," including major site plans and variances); OKLA. STAT. tit. 11, § 44-108(C) (2021) (all variances or exceptions other than "minor" ones); 45 R.I. GEN. LAWS §§ 45-24-41, 42, 66 (2021) (variances, special-use permits, and appeals). Even in states where notice to abutters is not statutorily mandated, localities are usually free to establish these requirements via ordinance. *See, e.g.*, CONN. GEN. STAT. §§ 8-3, 8-3c, 8-7, 8-26 (2021) (allowing, but not requiring, localities to provide for additional notice in all matters requiring public hearings, including zone changes, special permits, variances, appeals, and subdivision proposals); DARIEN, CONN., ZONING REGULS. §§ 1041–1043, 1114 (2021) (imposing additional notice requirements to abutters for zoning amendments and applications to zoning commission); NEW ROCHELLE, N.Y., CODE §§ 331-121, 331-134, 331-146 (2021) (requiring notice to abutters for zoning changes and applications for special permits, variances, site plans and subdivision approval); SCARSDALE, N.Y., CODE § A319-13 (2019) (requiring notification for appeals to zoning board); SYRACUSE, N.Y., ZONING RULES & REGULS. § 2, art. 5(3)(d)(3) (2019) (same); *see also* N.Y. TOWN LAW § 267-a cmt. (McKinney 2021) (noting that while New York's statutes do not require notice beyond publication for hearings on applications to zoning boards of appeals, "most local zoning laws provide for additional notification in the form of a mailing to property owners within a designated distance of property which is the subject of an application and/or posting conspicuous notices of the hearing on the property"). *But see* N.Y. SMSA Ltd. P'ship v. Twp. Council of Twp. of Edison, 889 A.2d 1129, 1132 (N.J. Super Ct. App. Div. 2006) (interpreting use of mandatory "shall" language to conclude that notification requirements in New Jersey's state enabling act set a ceiling that localities could not exceed with more stringent requirements).

32. *See, e.g.*, CAL. GOV'T CODE § 65351 (West 2021) ("During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of citizens, California Native American Indian tribes, public agencies, public utility companies, and civic, education, and other community groups, through public hearings and any other means the planning agency deems appropriate."); CONN. GEN. STAT. § 8-7d(a) (2021) (providing that "any person or persons may appear and be heard and may be represented by agent or by attorney" at hearings concerning zoning amendments and formal petitions, applications, requests or appeals); MASS. GEN. LAWS ch. 40A, § 5 (2021) ("No zoning ordinance or by-law or amendment thereto shall be adopted until after the planning

are two required public hearings: one before an administrative agency and a second before a legislative body.[33] Furthermore,

> [t]he courts have found that, even if a state statute does not provide for notice and a hearing prior to the enactment of a zoning regulation, a regulation adopted without notice and a hearing may be held unconstitutional as contrary to the notice and hearing requirements required by procedural due process.[34]

In the case of adjustment decisions, however, enabling acts are not so uniform. The Standard Act did not anticipate public participation in connection with adjustment decisions.[35] In the post-urban renewal era, some states added public participation requirements to the adjustment process.[36] Today, in about one-half of states, zoning enabling statutes do not distinguish between zoning and adjustment decisions with respect to public participation requirements.[37] In these states, which include high-housing-cost states like California, Massachusetts, and New York, contemporary statutes require public hearings open to all participants in both types of proceedings.[38] In addition, some local governments impose additional public participation requirements on top of those mandated by state law. In Cambridge, Massachusetts, for example, when considering an application for conditional approval, the Planning Board is required to do the following:

> [C]onsider what reasonable efforts have been made [by the would-be developer] to address concerns raised by abutters and neighbors to the project site. An applicant seeking a special permit . . . shall solicit input from affected neighbors before submitting a special permit application. The application shall include a report on all outreach conducted and

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board in a city or town, and the city council or a committee designated or appointed for the purpose by said council has each held a public hearing thereon, together or separately, at which interested persons shall be given an opportunity to be heard."); OKLA. STAT. ANN. tit. 11, § 44-109(4) (2021) (providing that "any party may appear in person or by agent or by attorney" at hearings held in connection with appeals to boards of adjustment); 45 R.I. GEN. LAWS § 45-24-66 (2021) (same); TEX. LOC. GOV'T CODE ANN. § 211.006(a) (West 2021) ("A regulation or boundary [pertaining to zoning amendments] is not effective until after a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard.").

33. *See, e.g.*, CAL. GOV'T CODE §§ 65854, 65856 (West 2021).

34. Douglas A. Jorden & Michele A. Hentrich, *Public Participation Is on the Rise: A Review of the Changes in the Notice and Hearing Requirements for the Adoption and Amendment of General Plans and Rezonings Nationwide and in Recent Arizona Land Use Legislation*, 43 NAT. RESOURCES J. 865, 870–71 (2003).

35. *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 13, § 7; *see also supra* notes 30 and accompanying text.

36. "Since 1973, many states have adopted statutory provisions requiring municipalities to implement procedures that increase public awareness and participation in the planning and zoning processes." Jorden & Hentrich, *supra* note 34, at 876.

37. Anika Singh Lemar, 50 State Survey of Zoning Enabling Acts (2021) (unpublished dataset on file with author). Case law can also play a part here by requiring, as a matter of due process, that nearby property owners receive notice and an opportunity to be heard in connection with a development approval application. *See, e.g.*, Scott v. City of Indian Wells, 492 P.2d 1137, 1141–42 (Cal. 1972).

38. *See, e.g.*, CAL. GOV'T CODE § 65905 (West 2021); MASS. GEN. LAWS. ch. 40A § 15 (2021); N.Y. GEN. CITY LAW § 27-B (McKinney 2021); N.Y. TOWN LAW § 274-B (McKinney 2021); N.Y. VILLAGE LAW § 7-725-B (McKinney 2021).

> meetings held, shall describe the issues raised by community members, and shall describe how the proposal responds to those issues.[39]

Therefore, the ordinance assigns to the developer the responsibility to conduct community outreach and respond to community concerns, even before applying for land use approvals.

Requiring public hearings in connection with project-specific approvals collapses the Standard Act's distinction between zoning and adjustment decisions. The distinction between zoning and adjustment decisions is further diminished because zoning ordinances today are more restrictive than they were prior to the late 1960s.[40] Under such ordinances, if the existing zoning does not permit anything, or anything realistic, to be built as-of-right, then every developer must seek a development-specific approval. Indeed, across the country, the urban "zoning pattern . . . is one of universal low density, where any development with higher densities is treated as a variance."[41] Much of what exists in urban centers is out of compliance with local zoning codes; either it predates the adoption of zoning or it was constructed only after seeking land use approvals that required extensive public participation processes.[42]

Responding to restrictive zoning ordinances,[43] developers seeking to build multifamily housing and mixed-use developments must seek zone changes for site-specific applications. The market demands these types of developments, but too often zoning, even in urban areas and nearby suburbs, fails to anticipate them. As a result, developers seek site-specific,

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39. CAMBRIDGE, MASS., ZONING ORDINANCE § 5.28.28.1(d) (2019).

40. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 325 (5th ed. 2021) (explaining that jurisdictions with zoning power "increasingly use . . . 'wait and see' zoning, in which undeveloped land is placed in a [development-restrictive] holding category, such as agricultural use, until someone expresses an interest in developing the land for a more intense use"). Theories explaining why exclusionary zoning became rampant starting in the 1960s and 1970s emphasize many different causes, ranging from inflation, *see* William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, *in* EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 13, 13–37 (Lee Anne Fennell & Benjamin J. Keys eds., 2017), to misguided, sprawl-inducing environmentalism, *see* WILLIAM A. FISCHEL, ZONING RULES!: THE ECONOMICS OF LAND USE REGULATION 205–07 (2015), to racism, *see* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 107–10 (2004); David S. Schoenbrod, *Large Lot Zoning*, 78 YALE L.J. 1418, 1420–21 (1969). Likely, all three phenomena played a significant role.

41. EVE BACH ET AL., CMTY. OWNERSHIP ORG. PROJECT, THE CITIES' WEALTH: PROGRAMS FOR COMMUNITY ECONOMIC CONTROL IN BERKELEY, CALIFORNIA 29 (1976), https://ecommons-new.library.cornell.edu/bitstream/handle/1813/40494/CitiesWealth.pdf?sequence=2&isAllowed=y [https://perma.cc/TCP7-AFYU].

42. *See, e.g.*, Quoctrung Bui et al., *40 Percent of the Buildings in Manhattan Could Not Be Built Today*, N.Y. TIMES (May 20, 2016), https://www.nytimes.com/interactive/2016/05/19/upshot/forty-percent-of-manhattans-buildings-could-not-be-built-today.html [https://perma.cc/5WNN-KSP6]; Markeshia Ricks, *Report: Re-Zone Westville Village*, NEW HAVEN INDEP. (Mar. 16, 2017, 2:14 PM), https://www.newhavenindependent.org/index.php/archives/entry/westville_zoning/ [https://perma.cc/GK7M-2UM8].

43. Over the last five decades, highly restrictive zoning ordinances have become common not only in the suburbs first designed to exclude affordable housing but also in cities. *See infra* note 103 and accompanying text.

parcel-specific zone changes, rendering the zone change not a generally applicable regulation but instead a development-specific modification. These are effectively adjustment decisions cloaked as zoning decisions.

Additional public participation requirements are sometimes layered onto zoning and land use requirements. Some states, most notably New York and California, impose state-level environmental review requirements on adoption of an amendment to zoning ordinances.[44] These "little NEPAs"[45] include their own public notice and comment opportunities in connection with land use and transportation planning decisions. These notice and comment opportunities sit on top of the public hearing requirements in zoning enabling statutes and zoning ordinances.

Many states facilitate redevelopment by enabling acquisition and disposition of blighted sites.[46] These urban redevelopment statutes also include public participation requirements.[47]

There are many more opportunities for public participation in the development process today than there were when states first began adopting zoning enabling acts. Part II describes some of the arguments in favor of that enhanced public participation. This backdrop informs Part III's critique of contemporary public participation processes and Part IV's calls for reform.

II. WHY PUBLIC PARTICIPATION?

In Part III, I critique the ways in which public participation takes place and the effects it has on the development process, both in practice and as idealized in the literature. Before I do so, in this part, I describe arguments in favor of enhancing public participation requirements and the urban development history that often undergirds those arguments.

Arguments in favor of adding public participation requirements to development processes typically center accountability to existing residents[48]: the idea that new real estate development should meet the needs and desires of people who already live in the neighborhood or town where the proposed

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44. *See, e.g.*, CAL. PUB. RES. CODE §§ 21000–21189.70.10 (West 2021); N.Y. ENV'T CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2021).

45. NEPA references the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347, under which the Environmental Protection Agency has promulgated regulations that require the issuance of an environmental impact statement (EIS) and an opportunity for public participation in the development of the EIS whenever the federal government undertakes major actions that may impact environmental concerns. *See generally* 40 C.F.R. § 1502 (2021). While NEPA does not apply to local and state zoning decisions, some little NEPAs, modeled on the federal act, do. Most little NEPAs, however, apply to governmental siting or funding decisions but exempt zoning decisions from their purview. *See* 2 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S: THE LAW OF ZONING AND PLANNING § 21.50 (rev. 4th ed. Supp. 2019).

46. *See* John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning*, 37 REAL EST. L.J. 234, 237 (2008).

47. *See id.* at 237, 242–43.

48. *See* Barbara L. Bezdek, *Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality*, 33 ST. LOUIS U. PUB. L. REV. 3, 26 (2013).

development is located. In most localities, developers need only seek land use approvals if their proposed development does not meet the strictures of the local zoning ordinance.[49] Advocates for more public participation demand, instead, that all proposed developments be subjected to public hearings.[50] They seek accountability through a public process that prioritizes public participation.

A. Unaccountable Government: The Scars of Urban Renewal

In the wake of disastrous, federally funded, locally implemented experiments in urban renewal, early community development proponents fought for, and won, additional avenues for public participation in the redevelopment process.[51] Mid-twentieth century urban renewal projects razed existing neighborhoods in favor of highways or new developments—sometimes commercial, but often public housing. According to many critics, redevelopment was a top-down process that ignored local preferences and disregarded social capital embedded in existing communities. Redevelopment agencies ignored the value existing residents ascribed to their neighborhoods.

While there are many valid criticisms of urban renewal, one frequent argument is that these projects ignored community perspectives. Local

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49. *But see* O'Neill et al., *supra* note 12, at 49 (stating that San Francisco, unlike other cities included in the survey, subjects all development to discretionary approvals). Of course, if the zoning ordinance is highly restrictive, developers may, in practice, have to seek approvals for all proposed projects. Zoning ordinances that limit development to single-family housing on large lots are considered exclusionary for this reason. Aesthetic zoning ordinances, which overlay subjective approvals based on the appearance of a proposed building, also, in effect, require every proposed project to seek and obtain discretionary approvals. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1535 (2015).

50. *See, e.g.*, Tom Angotti, *"As-of-Right" Development: An Invitation to Ethical Breaches?*, GOTHAM GAZETTE (June 19, 2003), https://www.gothamgazette.com/development/1866-qas-of-rightq-development-an-invitation-to-ethical-breaches [https://perma.cc/7C2K-YPVR]; Al Norman, *What's Wrong with 'As-of-Right' Zoning*, GREENFIELD RECORDER (June 24, 2020), https://www.recorder.com/my-turn-norman-city-council-34778458 [https://perma.cc/3S4Z-7H9L]. San Francisco is the best-known example of a major American city with no as-of-right development. Every proposed project is subject to a local approvals process. *See* O'Neill et al., *supra* note 12, at 49.

51. *See* David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 708 (2003) (reviewing WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, & THE NEW SOCIAL POLICY (2001)) ("A third important criticism of Urban Renewal focuses on deficiencies in the processes used to make these consequential redevelopment decisions. There is a strong sense that residents of blighted communities were not given a meaningful role in decisions about the redevelopment projects that affected them most acutely. Growth coalitions—forged by governing regimes of mayors in league with state officials, business elites, and a cheerleading local press—favored, and managed to secure, decisional processes designed to give actual community residents little voice."); Bezdek, *supra* note 48, at 28–29; Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 871 (2000); Damon Y. Smith, *Participatory Planning and Procedural Protections: The Case for Deeper Public Participation in Urban Redevelopment*, 29 ST. LOUIS U. PUB. L. REV. 243, 248 (2009).

government officials, armed with federal dollars, razed neighborhoods populated largely by low- and moderate-income people to make way for highways and private development.[52] The highways bifurcated neighborhoods and facilitated white flight.[53] Meanwhile, the much-anticipated private development often never came. The textbook example is New Haven, Connecticut's Oak Street neighborhood, an immigrant enclave razed to make way for a highway, called "the Connector," that would have connected I-95 to I-84, had it ever been built.[54] With federal funds, the local redevelopment authority cleared nearly nine hundred homes and over three hundred small businesses for the planned highway connector.[55] Authorities displaced thousands of people.[56] Other than a small artery leading into downtown and a parking garage serving Yale New Haven Hospital, the land remained vacant through the Great Recession.[57] Elsewhere in the city, when private development did come, it did not last. The downtown mall built on urban renewal land in the 1950s failed to resuscitate New Haven as the region's shopping center.[58] The mall lost its anchor tenant in the 1980s and collapsed entirely in the early 2000s.[59] Analogous examples exist in cities across the country.[60]

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52. Andrew Small, *The Wastelands of Urban Renewal*, BLOOMBERG CITYLAB (Feb. 13, 2017), https://www.bloomberg.com/news/articles/2017-02-13/how-the-bulldozer-became-an-urban-block-buster [https://perma.cc/PDJ2-699X].

53. *See* Robert A. Solomon, *Building a Segregated City: How We All Worked Together*, 16 ST. LOUIS. U. PUB. L. REV. 265, 281–90 (1997).

54. *See* LIZABETH COHEN, SAVING AMERICA'S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE 127 (2019); *see also* DOUGLAS W. RAE, CITY: URBANISM AND ITS END 333–37 (2003). The failure of urban renewal was not that New Haven never built the Connector. New Haven and cities across the country consummated most of the highway projects that they attempted. Urban renewal's failure was that its policy agenda turned out to be wrong. The car-centric approach to urban revitalization was simply, as an objective matter, an ineffective, counterproductive way to try to improve cities. *See, e.g.*, Nathaniel Baum-Snow, *Did Highways Cause Suburbanization*?, 122 Q.J. ECON. 775 (2007) (finding that highway development has significantly contributed to central city population decline).

55. *History*, DOWNTOWN CROSSING NEW HAVEN, https://downtowncrossingnewhaven.com/history/ [https://perma.cc/WNW5-VZ4C] (last visited Oct. 29, 2021).

56. *See* RAE, *supra* note 54, at 340–41.

57. *See id.* at 333–34. Over the last decade, the abandoned highway route has begun to be redeveloped as high-end office space, laboratory space, and a chain drug store among other uses. *See New Haven's Downtown Crossing Project*, DOWNTOWN CROSSING NEW HAVEN, https://www.downtowncrossingnewhaven.com [https://perma.cc/D7BF-ARMH] (last visited Oct. 29, 2021) (providing updates on the status of the redevelopment).

58. COHEN, *supra* note 54, at 108.

59. *Id.* Consistent with the story I tell in Part II, a private-sector developer redeveloped the mall as market-rate housing and Class A office space in 2003. Tara York, *Chapel Square Mall Gets Turned . . . Inside Out*, NEW HAVEN REGISTER (Jan. 18, 2004), https://www.nhregister.com/news/article/Chapel-Square-Mall-gets-turned-INSIDE-OUT-11662256.php [https://perma.cc/9EGD-L7GD].

60. *See* Herbert J. Gans, *The Failure of Urban Renewal*, COMMENT. (April 1965), https://www.commentary.org/articles/herbert-gans/the-failure-of-urban-renewal/ [https://perma.cc/AM3E-JDWM] (providing contemporaneous examples of urban renewal's failures in many American cities).

Over the course of the 1960s and 1970s, massive federal subsidies for urban development slowed and the threat of unaccountable governmental development abated. Rather than spend large amounts directly, the federal government funneled smaller amounts through state and local government. The United States Housing Act of 1937[61] and its 1949,[62] 1954,[63] and 1959[64] successors directed federal subsidies to local governments, and later to nonprofit entities, to construct housing.[65] The later statutes also dedicated significant funds for the clearance of blight.[66] The housing legislation of the 1960s[67] provided below-market interest rates to certain housing developers and rental assistance to tenants.[68] The Housing and Urban Development Act of 1968[69] directed affordable housing production subsidies to both nonprofit and for-profit housing developers.[70]

In the Nixon years, the federal government placed a moratorium on housing subsidies.[71] The moratorium ended with the Housing and Community Development Act of 1974,[72] which "eliminated most categorical urban development programs, including Urban Renewal, and replaced them with a community development block grant" program that enabled localities to choose how to allocate the funds.[73] While the program still exists, the total amount of funding, adjusted for inflation, is now a fraction of what it was in 1974 and is spread out over many more jurisdictions.[74]

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61. Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437).

62. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended in scattered sections of 12 and 42 U.S.C.).

63. Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590 (codified as amended in scattered sections the U.S.C.).

64. Housing Act of 1959, Pub. L. No. 86-372, 73 Stat. 654 (codified as amended in scattered sections of 12, 40, and 42 U.S.C.).

65. John R. Nolon, *Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 URB. LAW. 249, 253–54 (1982).

66. GRACE MILGRAM ET AL., CONG. RSCH. SERV., A CHRONOLOGY OF HOUSING LEGISLATION AND SELECTED EXECUTIVE ACTIONS, 1892–1992, at 32, 52–53, 57–58, 79, 85 (1993).

67. Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149 (codified as amended in scattered sections of the U.S.C.); Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified as amended in scattered sections of the U.S.C.).

68. Nolon, *supra* note 65, at 254–55.

69. Pub. L. No. 90-448, 82 Stat. 476 (codified as amended in scattered sections of the U.S.C.).

70. Nolon, *supra* note 65, at 255.

71. *See* Agis Salpukas, *Moratorium on Housing Subsidy Spells Hardship for Thousands*, N.Y. TIMES (Apr. 16, 1973), https://www.nytimes.com/1973/04/16/archives/moratorium-onhousing-subsidy-spells-hardship-for-thousands-stricter.html [https://perma.cc/4DAR-YMKQ].

72. Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in scattered sections of the U.S.C.).

73. Nolon, *supra* note 65, at 255.

74. *See* BRETT THEODOS ET AL., URB. INST., TAKING STOCK OF THE COMMUNITY DEVELOPMENT BLOCK GRANT 3–4, figs.1–2 (2017).

As federal funding dwindled, low-income neighborhoods struggled, not with unaccountable development, but with disinvestment,[75] both private and public. Disinvestment did create space, however, for more bottom-up real estate development. "The Community Economic Development (CED) movement arose out of the resulting struggle of urban residents, particularly those in distressed inner cities, to access public and private capital to build and operate essential community facilities and services."[76] The movement supported (and continues to support) small-scale development undertaken by community development corporations, which are locally controlled nonprofit organizations. Community development corporations rely on what limited pots of federal and local subsidy remain in the post-urban renewal era, as well as grant funding,[77] to build affordable housing, child care centers, and small-scale retail shops in low-income communities.[78] For decades, the community development movement furthered accountable development by undertaking projects directed by community residents acting through locally controlled nonprofit, mission-motivated organizations.[79]

B. Unaccountable Markets: The Threat of Gentrification

For a time, neither government nor the private sector expressed much interest in developing land in urban centers. As a result, unaccountable development did not pose a threat to urban residents.[80] Eventually, however, urban areas saw a renewed interest from the middle class and the wealthy. In the wake of this shift in desirable living patterns, community development practitioners enlarged their focus to include not only government-sponsored and funded development but also private development.

At first, low-income communities saw redevelopment take the form of public-private partnerships involving government subsidies, whether in the form of tax credits, cash, or land.[81] Because the decision to grant a subsidy is often a political one, the subsidy process required some amount of public

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75. The term "disinvestment" is a misnomer in some ways. In many neighborhoods, Black homeowners and renters invested significant amounts of time and money in their neighborhoods, only to see those resources siphoned off by predatory absentee lenders and landlords. *See generally* SATTER, *supra* note 10.

76. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2001–02 (2007).

77. *See* Build Healthy Places Staff, *CDC (Community Development Corporation)*, BUILD HEALTHY PLACES NETWORK (Nov. 16, 2015), https://www.buildhealthyplaces.org/sharing-knowledge/jargon/cdc-community-development-corporation/ [https://perma.cc/J2D9-SUFL].

78. SIMON, *supra* note 1, at 4 (describing small, locally controlled nonprofit organizations developing affordable housing, child care centers, and a grocery store in low-income neighborhoods in Boston).

79. *See id.*

80. As Professor John Mangin puts it, "[i]n the 1960s, '70s, and beyond, many cities were desperate for any development they could get." John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 92 (2014).

81. *See* Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., May–June 1995, at 55, 62, 67 (describing the centrality of subsidies in urban economic revitalization efforts).

input.[82] As market-rate housing and commercial projects in low-income neighborhoods proved their profitability, however, government subsidies were no longer defining features of redevelopment projects.[83] The public hearing requirements embedded in land use approvals processes ensured that public participation continued to play a significant role in the redevelopment process.[84]

Simultaneously, as described above, grant subsidies for affordable housing production became increasingly rare.[85] The Reagan-era Low-Income Housing Tax Credit program (LIHTC)[86]—which, because it relies on a corporate tax credit, requires private market participation[87]—was ascendant; today, it is the largest subsidy for affordable rental housing.[88] In states that do not dedicate capital funds or tax subsidies to housing production, LIHTC is effectively the only available production subsidy for low-income housing.[89] Small-scale, community-controlled developers must partner with large-scale nonlocal developers—both for-profit and nonprofit—in order to navigate program requirements and satisfy the investors' and syndicators' requirements for participating in LIHTC developments.[90] And small-scale

82. *See supra* notes 46–47 and accompanying text.

83. *See* Bruce Katz & Julie Wagner, *Transformative Investments: Remaking American Cities for a New Century*, BROOKINGS INST. (June 1, 2008), https://www.brookings.edu/articles/transformative-investments-remaking-american-cities-for-a-new-century/ [https://perma.cc/BWV4-VHQL]. I use the term "redevelopment projects" to refer to development of land that has been previously developed. There are jurisdictions, notably California, where this term has had a more specific technical definition. *See* CAL. HEALTH & SAFETY CODE § 33010 (West 2021) (defining "[r]edevelopment project").

84. RICHARD FLORIDA, THE NEW URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT 42–45 (2017); *see supra* Part I.

85. *See supra* notes 73–74 and accompanying text.

86. 26 U.S.C. § 42.

87. Similarly, the New Markets Tax Credit and Opportunity Zones programs rely not on small, community-based nonprofit organizations but instead on large, institutional investors to enact the federal government's community economic development strategy (to the extent a strategy other than corporate tax avoidance exists at all). *See generally* 26 U.S.C. § 45D; *id.* § 1440Z-2.

88. *What Is the Low-Income Housing Tax Credit and How Does It Work?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work [https://perma.cc/PGC5-DL9U] (May 2020).

89. CORIANNE PAYTON SCALLY ET AL., URB. INST., THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES 15 (2018) ("LIHTC is the only major funding source for producing and preserving affordable rental housing."). Federal tax subsidies for homeownership—disproportionately claimed by wealthy taxpayers—constitute the largest federal housing subsidy by far and remain, for the most part, unscathed. *See* Jenny Schuetz, *Under US Housing Policies, Homeowners Mostly Win, While Renters Mostly Lose*, BROOKINGS INST. (July 10, 2018), https://www.brookings.edu/research/under-us-housing-policies-homeowners-mostly-win-while-renters-mostly-lose/ [https://perma.cc/XN78-CALJ].

90. *See* Teresa M. Santalucia, Beginner's Guide to Nonprofit and Affordable Housing Partnerships (unpublished manuscript at 66–68) (on file with author); *see also* SCALLY ET AL., *supra* note 89, at 5. Investors typically require substantial financial guarantees, for example, that small-scale developers cannot provide.

projects are not feasible using LIHTC because the regulatory burdens impose significant transaction costs.

As private actors played a larger role in urban redevelopment projects, development became not only a goal of, but also a threat to, community development practice. Increasing land prices made it difficult for community development corporations and other local actors to purchase property.[91] Thus, a fundamental tenet of community economic development practice—"a leading role is played by nonprofit, nongovernmental organizations"[92]—came under attack. And with outsiders now interested in developing previously underinvested areas, the development process risked becoming, once again, unaccountable to the community. All development, not just large-scale government-sponsored redevelopment, now posed a risk. While capital is mobile, low-income people typically are not,[93] and that lack of mobility exacerbated the danger posed by unaccountable development. Poor people cannot easily leave a place that no longer serves their needs for another place that does. As one democracy scholar concisely and eloquently put it, "a permeable boundary makes equal civic membership impossible."[94]

Development projects initiated by outsiders reflected and reinforced the increased value of land in the central city.[95] Rising urban land prices made locally controlled development increasingly difficult, and higher land prices reflected neighborhoods' increasing desirability. The underlying desirability reflected in increased land prices made it likely that developers would construct high-end retail and market-rate housing—goods and amenities that did not directly serve the needs of existing residents.[96] Worse, fear of gentrification and displacement made such amenities seem like net negatives. "Objections to the political and cultural displacement of gentrification by long-term residents emphasize the residents' lack of voice in shaping the direction of their neighborhood; that when improvements arrive they are not the intended beneficiaries."[97] It is far from clear that private development drives displacement, particularly in the majority of American cities other than New York, San Francisco, or Washington, D.C.[98] Nevertheless, it is

91. Heather Way et al., *Uprooted: Local Efforts to Mitigate Displacement in Gentrifying Neighborhoods*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 39, 47 (2019).

92. SIMON, *supra* note 1, at 3.

93. Kelsey Berkowitz, *Stuck in Place: What Lower Geographic Mobility Means for Economic Opportunity*, THIRD WAY (Jan. 28, 2019), https://www.thirdway.org/report/stuck-in-place-what-lower-geographic-mobility-means-for-economic-opportunity [https://perma.cc/FRE9-L8A4] (observing that "college graduates are more mobile than people who have a high school diploma or less").

94. Email from Cynthia Farrar to author (Dec. 13, 2020) (on file with author) (quotation included in comment on document attached to email correspondence).

95. *See* ALAN MALLACH, THE DIVIDED CITY: POVERTY AND PROSPERITY IN URBAN AMERICA 112–13 (2018).

96. *See id.* at 107–08, 112–13.

97. Olatunde C.A. Johnson, *Unjust Cities?: Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 866–67 (2019).

98. *See generally* SHANE PHILLIPS ET AL., UCLA LEWIS CTR. FOR REG'L POL'Y STUD., RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS (2021) (collecting empirical studies of market-rate development on local housing

quite clear that, for many, fear of gentrifying investment has overtaken fear of disinvestment as a driving force behind community development practice.[99]

The focus on "accountable development" caused community development practitioners to become reactive public participants, reliant on the public participation process to influence their neighborhoods, rather than proactive builders. As Professor Scott Cummings describes it, while traditional community development generally uses background legal rules to structure corporate entities and real estate deals that advance economic mobility, when community development practitioners respond to private development, "[t]he background rules that proved most critical . . . were rights to participate in political decision making, particularly those embedded in the land use and environmental review process."[100] Maintaining their focus on accountable development, community development practitioners and proponents sought to ensure that these private development projects served the interests of existing communities. "Governance and participation in decisionmaking also provides a buffer to some of the concessions to the inevitability of market-oriented urban development in the 'accountable development' framework."[101]

One of the mechanisms they used to influence private development was, and remains, planning and zoning law and process. Scholars and activists have long understood that exclusionary zoning can make housing unaffordable in individual suburban towns.[102] At least since 1980, restrictive zoning has also played a substantial role in the design and building of cities.[103] Restrictive zoning is just that: restrictive. It restricts development such that developers who seek to build anything—of any scale—must pursue discretionary approvals. Those discretionary approvals entail processes that accommodate extensive public participation.[104]

Using these approvals processes, community development practitioners turned from using public participation to inform what locally controlled organizations built to using public participation to oppose development by

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affordability). *See also* Laurie Goodman et al., *To Understand a City's Pace of Gentrification, Look at Its Housing Supply*, URB. INST. (June 24, 2020), https://www.urban.org/urban-wire/understand-citys-pace-gentrification-look-its-housing-supply [https://perma.cc/5PXZ-EH7A] (suggesting that gentrification is slowed, not hastened, by permitting the development of new housing supply).

99. *See* MALLACH, *supra* note 95, at 101 (arguing that some people "see every empty house as a stalking horse for gentrification," even in cities where gentrification is unlikely "in the foreseeable future"); Miriam Axel-Lute, *Talking About Revitalization When All Anyone Wants to Talk About Is Gentrification*, SHELTERFORCE (Oct. 24, 2019), https://shelterforce.org/2019/10/24/talking-about-revitalization-when-all-anyone-wants-to-talk-about-is-gentrification/ [https://perma.cc/K785-889G].

100. Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 59, 70 (2008).

101. Johnson, *supra* note 97, at 867.

102. *See generally* Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Schoenbrod, *supra* note 40.

103. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692 (2013).

104. *See supra* notes 36–39 and accompanying text.

outsiders. As described by Professors Sheila Foster and Brian Glick, community development "attorneys use the procedural tools embedded in land use laws, namely, the opportunity for public testimony and comment on proposed development projects, both to organize residents and to form coalitions of interests around the common goal of contesting the development and influencing public officials' ultimate decisions."[105] They do not rely solely on making decision-makers aware of substantive issues; instead, they lean on the power of delay inherent in the process: "attorneys also often use such tactics to delay the regulatory process in the hope that the developer will eventually back out or make concessions."[106] In Professor Foster and Glick's telling, in contemporary community development practice, the opportunity to participate in regulatory decision-making is the primary lever used to ensure that new development meets the needs of existing communities.[107]

While Foster and Glick write from their experience representing community groups in New York, Cummings echoes their work in his description of land use battles in Los Angeles: "The structure of the entitlements process permits well-organized opposition groups with strong political connections to delay or even prevent key approvals."[108] Cummings recounts the importance of labor groups to building a coalition strong enough to "make a credible threat of disrupting the entitlements process [made possible by the participation process] . . . which would have increased costs and uncertainty for the developer."[109] As a result, the coalition successfully negotiated a community benefits agreement with the developer.[110]

More recently, Daniela A. Tagtachian, Natalie N. Barefoot, and Adrienne L. Harreveld write from their experience partnering with communities in Miami-Dade County to decry zoning rules that permit administrative agencies to approve development applications without first soliciting public input.[111] The authors describe Miami's recent adoption of a form-based code, a type of zoning ordinance intended to instantiate pedestrian-friendly development that accommodates a range of housing types and affordability

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105. Foster & Glick, *supra* note 76, at 2053–54.

106. *Id.* at 2054.

107. *Id.* at 2053–54. This focus on existing communities risks becoming an argument in favor of the status quo and, therefore, an argument unlikely to serve the needs of people who do not thrive in the status quo—low-income people and disempowered minorities. Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 6 (2017); *see infra* Part III.D.

108. Cummings, *supra* note 100, at 65. The development in question also implicated California Environmental Quality Act (CEQA) review, which included opportunities for public comment and contestation, and public subsidies, which required city council approval following a public hearing.

109. *Id.*

110. For more on community benefits agreements, see Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010); Julian Gross, *Community Benefits Agreements*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 189 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

111. Tagtachian et al., *supra* note 12, at 81.

levels.[112] These codes tend to permit greater density and diversity of uses than traditional Euclidean zoning ordinances do.[113] Form-based codes require that developers design their projects in accordance with the "form"—the city's planning mandate. If a proposed development comports with the form-based code, the applicant need not seek additional discretionary approvals.[114]

The form-based code, prior to adoption, is often the subject of public debate and participation.[115] Cities and towns that have adopted form-based codes typically engage in years of public hearings and outreach prior to code adoption.[116] Tagtachian, Barefoot, and Harreveld acknowledge that Miami hosted hundreds of meetings over the course of more than five years to solicit public input about the new code before the city adopted it in 2009.[117] Nevertheless, they decry the developments rendered as-of-right by the form-based code.[118] They describe large-scale developments, including hotel, office space, retail, and housing (both affordable and market-rate), approved by the city without any formal, enforceable opportunity for public input.[119] Because such pathways did not exist for public participation, "the community los[t] the leverage that they would have had if the developer needed to get a discretionary land use permit in order to build."[120]

C. Accountability Through Public Participation

While community organizations make use of existing public participation processes,[121] both practitioners (like Tagtachian, Barefoot, and Harreveld) and scholars argue for even more opportunities for public participation in the redevelopment process. Participation proponents describe existing public

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112. "A form-based code is a land development regulation that fosters predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code. A form-based code is a regulation, not a mere guideline, adopted into city, town, or county law." *Form-Based Codes Defined*, FORM-BASED CODES INST., https://formbasedcodes.org/definition/ [https://perma.cc/M4SS-7R52] (last visited Oct. 29, 2021).

113. *See* John M. Barry, Note, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 314 (2008).

114. *See* Mary Newsom, *So, What Exactly IS a Form-Based Code and Why Should Anyone Care?*, PLANCHARLOTTE (Nov. 4, 2014), https://plancharlotte.org/story/so-what-exactly-form-based-code-and-why-should-anyone-care [https://perma.cc/MC83-JJHJ].

115. "Like a comprehensive land use plan and resulting implementing land use regulations, form-based codes take into account the community's vision for the municipality as articulated through a series of meetings or 'charettes,' utilized to reach an agreement on the physical form of the neighborhood." 3 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 23:3 (rev. 5th ed. Supp. 2021).

116. "This process can take from as little as one year, but in at least one case took seven years to complete." *Id.*

117. *See* Tagtachian et al., *supra* note 12, at 83.

118. *See id.* at 86–88.

119. *See id.*

120. Tagtachian et al., *supra* note 12, at 88.

121. I am not, of course, arguing that practitioners should not use the participation processes available to them and their clients in order to best represent their clients' needs and desires.

participation processes as "relatively minimal,"[122] arguing that opportunities for public participation come late in the redevelopment process and that public testimony is not taken seriously by decision-makers.[123] Because existing communities embody social capital not accounted for by government or incoming private developers, if the redevelopment process is to "account for a community's social capital in land use law and policy,"[124] it must take place "in consultation with the public."[125] Only the existing residents have the knowledge necessary to account for existing resources, needs, and social capital.[126]

Therefore, participation proponents, community development practitioners foremost among them, have long advocated for "full neighborhood hearings on new construction and 'general approval' by [current] neighborhood residents as a precondition for new construction."[127] Professor Audrey McFarlane, commenting on both urban redevelopment programs and land use processes, proposes that participation processes ought to be longer than is currently typical and institutionalized in "sub-local or community-based decision-making bodies."[128] Further, she argues that participation requirements must be enforceable, "either in a set of sanctions for failure to provide for meaningful citizen participation or, at the very least, a guarantee that some level of an ability to affect the outcome of a decision-making process is provided."[129] The remainder of this part sets out advocates' and scholars' arguments in favor of enhanced participation rights. I respond to these arguments in Part III.

1. Does Local Government Effectively Represent Residents' Interests?

Participation proponents argue that local governments are not fully able to serve the interests of current residents. Absent robust public participation, the benefits of new development will accrue to outsiders, typically for-profit developers, and the costs will be incurred by the existing community.

According to participation proponents, local government fails residents in at least three ways. First, local government does not have the power to negotiate with developers on behalf of residents. Because subsidy no longer

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122. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions II*, 24 STAN. ENV'T L.J. 269, 279 (2005) (noting that "these participatory procedures are relatively minimal") [hereinafter Camacho, *Mustering II*].

123. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENV'T L.J. 3, 28–29 (2005) [hereinafter Camacho, *Mustering I*].

124. Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 532 (2006).

125. *Id.* at 546.

126. Camacho, *Mustering II*, *supra* note 122, at 279.

127. BACH ET AL., *supra* note 41, at 22.

128. McFarlane, *supra* note 51, at 931.

129. *Id.* at 930. McFarlane separately argues that "the community must be included early within a decision-making process, in fact at the agenda-setting stage of the process." *Id.* at 930. This argument is consistent with my recommendations in Part IV.

plays a significant role in urban redevelopment projects, "city/local government has become a weaker player in a more dispersed system of influence/power that drives urban development today."[130] Second, negotiations are not transparent to residents. Professor Alejandro Esteban Camacho argues that "important land use decisions are frequently made in closed-door negotiations that exclude many affected parties, further disenfranchising those with the least influence and fewest resources."[131] Finally, local officials engaged in such negotiation struggle to adequately represent varied community interests and sometimes make decisions in their individual interests, not those of residents.[132]

Process proponents generally make use of the claim that the "growth machine" controls local politics, an argument put forth by Professor Harvey Molotch in the 1970s.[133] "Growth machine" adherents argue that local government and local review processes are captured by real estate developers. Real estate developers find common cause with local government actors seeking to grow the city and expand the local tax base—and therefore the value of a city's real estate—at any cost.[134] Partly because of such capture, "the community segments most harmed by such favoritism [toward real estate developers] are often the same ones who have historically been denied influence in local politics, namely low-income and minority neighborhoods."[135]

In the eyes of participation proponents, because local government privileges developers' desires and fails to meet residents' interests, the positive impacts of development accrue to the developer and municipality. Governmental redevelopment decisions suffer from a "legitimacy challenge": "The legitimacy challenge arises from the tremendous power over neighborhoods' wellbeing, wielded by politicians whose elections depend upon campaign donations and by unelected agency officials with limited oversight."[136] Meanwhile, the negative impacts of development accrue to the residents of the community undergoing or adjacent to redevelopment. "[T]he negative impacts of such deal-making [i.e., bilateral negotiations between locality and developer over zoning approvals] all too often fall on community members with little direct influence on the planning process."[137] As a result, such bilateral decision-making is illegitimate and can only be legitimated by additional collaboration with neighbors and

130. Foster & Glick, *supra* note 76, at 2006.

131. Camacho, *Mustering I*, *supra* note 123, at 6.

132. *See id.* at 52.

133. *See generally* Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309 (1976).

134. Camacho, *Mustering II*, *supra* note 122, at 280; Camacho, *Mustering I*, *supra* note 123, at 39, 44, 47, 52; McFarlane, *supra* note 51, at 896, 931 (referring to the disproportionate power wielded by "the growth coalition").

135. Camacho, *Mustering I*, *supra* note 123, at 43.

136. Bezdek, *supra* note 48, at 26.

137. Camacho, *Mustering I*, *supra* note 123, at 5.

community members.[138] Professor Carol M. Rose, in a seminal piece, described "[p]articipation or voice [as] a particularly venerable legitimator of local government,"[139] at least as regards minor, nonexclusionary zoning adjustments or regional environmental issues.[140] In fact, according to participation proponents, if there is sufficient public participation, the scope of judicial review can be narrowed because "widening public participation over the life of agreements should address many of the substantive legitimacy concerns that overshadow current land use negotiations."[141]

2. Do Public Hearings Bring Local Knowledge and Interests to Bear?

Participation proponents also argue that public participation processes can ameliorate information failures by allowing "[c]itizens [to] provide informational inputs" where "land use conflicts represent information shortfalls."[142] The public hearing process is an opportunity to elicit information about potential development impacts that may not be known to planning and zoning commissions. "Information about land use intentions, impacts, and valuations is fragmented among a multitude of owners and other constituents who are distributed across time and space. If bargaining were costless, this dispersed information would be automatically aggregated in the process of making land use deals."[143]

Participation proponents assume that the decisions to be made during the land use process are not technical in nature.[144] Current residents will be the most affected by the redevelopment, and current residents have valuable

138. "[A] nuanced conception of public regulation rooted in collaborative governance theory can legitimize negotiated land use regulation by incorporating principles of local and regional equity and deliberative democracy. By reformulating the negotiation and implementation processes to include a more multilateral and adaptive orientation, negotiated approaches to land use regulation can foster civic engagement and cooperation, achieving not only fairer but also more effective land use decisions." Camacho, *Mustering I*, *supra* note 123, at 7; *see also* Edward W. De Barbieri, *Urban Anticipatory Governance*, 46 FLA. ST. U. L. REV. 75, 87 (2018) ("Developing stakeholder buy-in leads to greater legitimacy of outcomes.").

139. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 883 (1983). *Planning and Dealing* focuses on "piecemeal changes in local land regulations," decisions that have implications beyond local boundaries. *Id.* at 841. In the years since it was published, however, economists have developed a richer understanding of the extraordinary degree to which local land use regulations have detrimental extraterritorial impacts on both affordability and segregation. *See, e.g.*, William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 317 (2004); Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, AM. ECON. J.: MACROECONOMICS, April 2019, at 1, 2; Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443 (2020).

140. *See* Rose, *supra* note 139, at 846 (setting out an analysis of local government legitimacy as to "piecemeal local land decisions").

141. Camacho, *Mustering II*, *supra* note 122, at 304–05.

142. Lee Anne Fennell, *Crowdsourcing Land Use*, 78 BROOK. L. REV. 385, 385–86 (2013).

143. Fennell, *supra* note 142, at 388.

144. Camacho, *Mustering II*, *supra* note 122, at 322, 325–26.

knowledge, experience, and preferences that ought to inform the redevelopment process.[145] Professor Rose argues that land use hearings are akin to negotiations between interested parties, not judicial determinations applying the law to a set of judicially determined facts.[146] As a result,

> [a]ny meaningful determination of the specific needs and preferences of parties affected by a land use project depends on the expression of these needs and preferences through direct public participation. In this sense, project-specific land use decisions are essentially and fundamentally land use mediations, the resolutions of which ultimately depend on knowledge of local conditions and interests, not technical expertise.[147]

To the extent development decisions turn on matters not currently within the knowledge of existing residents, the process itself will educate them: "Engaging participants in a public process generally leads to them being better informed and more educated."[148] Thus, proponents of public participation argue that additional public participation can legitimate redevelopment decisions by balancing the costs and benefits between outside developers and inside neighbors.[149]

3. Does Public Participation Result in Progressive Redistribution?

Participation proponents argue that enhanced public participation processes will include traditionally excluded voices and will result in greater redistribution from the wealthy to the poor. Again, participation proponents assume that the people most affected by redevelopment are those who reside in the area to be redeveloped. Because, as evidenced by the urban renewal period, redevelopment can irreparably disrupt the existing community, robust public participation processes are necessary to protect the resources and social capital in that community.

Proponents argue that extensive participation processes serve an instrumental function by redistributing the benefits of redevelopment from wealthy outsiders to low- or moderate-income residents.[150] Sherry R.

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145. "Greater opportunities for public involvement are proposed as an antidote to these democracy deficits, to enhance accountability and transparency, and to produce better informed and thus improved results." Bezdek, *supra* note 48, at 26; *see also* Camacho, *Mustering II, supra* note 122, at 273 (arguing for "planning processes [to be] more participatory and open").

146. *See infra* note 235 and accompanying text.

147. Camacho *Mustering II*, *supra* note 122, at 326.

148. De Barbieri, *supra* note 138, at 87.

149. Of course, public processes and adjudications need not include public participation in order to serve an educational purpose. All open proceedings, whether or not public participation is permitted, serve an educational purpose. Professor Judith Resnik recounts Jeremy Bentham's commitment to open judicial proceedings in part because he believed they functioned to educate the populace. In her words, "all of us have entitlements in democracies to watch power operate and to receive explanations for the decisions entailed. The observers are, in this account, a necessary *part* of the practice of adjudication." Resnik, *supra* note 29, at 209. Open proceedings that do not permit public participation ought to play a larger role in land use administration, a point to which I return in Part IV.

150. *See, e.g.*, Bezdek, *supra* note 48, at 30; Camacho, *Mustering II*, *supra* note 122, at 315; McFarlane, *supra* note 51, at 930.

Arnstein's 1969 essay on citizen participation in the planning process[151] is particularly influential. Arnstein argues that participation redistributes power.[152] Only robust participation processes meet the "heavy burden of countering marginalization of poor black communities and residents."[153]

When existing residents lack capital, they cannot exert power by participating in the marketplace by purchasing and redeveloping land. They therefore look to the political sphere to influence the space in which they live. The political sphere is also susceptible to vastly unequal power dynamics, but participation proponents argue that public participation plays an equalizing role. "Scholars studying urban politics recognize the value of public participation as a means to reduce existing power asymmetries in political decision-making."[154] Where use of the public participation process pressures a developer to promise a portion of the development profits to individual community actors through a community benefits agreement, "[the] outcome is redistributive because it extracts greater resources for the community through bargaining than it would otherwise be entitled to under law."[155]

The redistribution argument is bolstered by the notion that wealthy communities have long exerted control over their built environment. "This movement has grown directly from the increased power of low- and moderate-income neighborhoods. They have demanded the same degree of control for themselves long exercised in the wealthier districts."[156] In the interest of fairness, then, low-income communities ought to have the same power.[157]

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151. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. OF PLANNERS 216 (1969).

152. *Id.* at 216 (Citizen participation "is the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programs are operated, and benefits like contracts and patronage are parceled out. In short, it is the means by which they can induce significant social reform which enables them to share in the benefits of the affluent society.").

153. McFarlane, *supra* note 51, at 897.

154. Bezdek, *supra* note 48, at 32.

155. Cummings, *supra* note 100, at 71–72.

156. BACH ET AL., *supra* note 41, at 29.

157. It is notable, however, that when the political process fails to advance the concerns of the wealthy, they turn to the marketplace. They can purchase land rather than see it developed for uses they dislike. They can leave a neighborhood that no longer suits their preferences. In fact, their ability to leave amplifies their voices at public participation proceedings as they can credibly threaten to move their homes and their tax dollars to another municipality if their current town evolves in ways they do not like. *See, e.g.*, LISA PREVOST, SNOB ZONES: FEAR, PREJUDICE, AND REAL ESTATE 93–100 (2013) (recounting the failed redevelopment of a parcel in tony Darien, Connecticut: when wealthy neighbors could not stop the construction of a mixed-income development through the typical public participation processes, an anonymous donor gave the local land trust enough money to purchase the parcel and hold it as vacant land in perpetuity); *see also* Plaintiffs' Consolidated Opposition to Defendants Incorporated Village of Garden City's, Garden City Board of Trustees' and Nassau County's Motions for Summary Judgment at 22, MHANY Mgmt. Inc. v. Incorporated Village of Garden City, 985 F. Supp. 2d 390 (E.D.N.Y. 2013) (No. 05-cv-2301), 2011 WL 13262332 ("Another resident compared his idea of the specter of multi-family housing . . . to the 'full families living in one bedroom townhouses, two bedroom co-ops,' 'overburdened and overcrowded' schools and

4. Does Public Participation Have Intrinsic Value?

A final argument in favor of public participation is its "intrinsic value."[158] Professor McFarlane identifies arguments that local decision-making around land use and development is an appropriate forum for direct democracy, or something like it.[159] Because public participation processes serve an educational function, they facilitate the very construction of the community.[160] Recognizing that this idealized version of public participation is rare, McFarlane nevertheless argues that even where participation does not manifest as productive discourse, "meaningful participation . . . is ultimately participation that is really an act of resistance."[161]

D. Is Poor People's Participation Different?

Cummings, Glick, Foster, Tagtachian, Barefoot, and Harreveld all represent or work alongside community organizations made up of poor people and oftentimes people of color. They do not share the same motivations as the white, suburban crowd that booed my client. On the one hand are wealthy, typically white, community participants who have long benefited from exclusionary practices. On the other are poor, often Black, community participants who, as a result of racism, poverty, and white flight, have never exercised control over their neighborhoods and should perhaps be entitled to different rights and protections. Today, the minority of poor people who live in now-desirable neighborhoods, for the first time, have some ability to use the participation process to ensure that they benefit from market-rate development.

In the context of local control of land use decision-making, many have tried to differentiate between strains of resistance to new development:

> [D]evelopment in neighborhoods currently populated primarily by people excluded from other neighborhoods by racial and ethnic discrimination in the past (and in some places, still today) now threatens to impose burdens that the residents are not choosing to assume. That critical difference raises

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'overrun' sanitation that he and his wife had intended to leave behind when they moved out of Queens County."), *aff'd sub nom.* MHANY Mgmt., Inc. v. County of Nassau, 819 F.3d 581 (2d Cir. 2016); *MHANY*, 985 F. Supp. at 402 ("I moved here from Brooklyn so that when I walked out of my house I did not turn to my left and see apartment buildings." (quoting another resident's comment in opposition)); Dews v. Town of Sunnyvale, Tex., 109 F. Supp. 2d 526, 546 (N.D. Tex. 2000) ("We lived in Mesquite for 17 years . . . and we left because of the terrible effects that high-density development can have on what would otherwise be a great neighborhood." (alteration in original) (quoting resident's comment at town council meeting in opposition to multifamily project)).

158. McFarlane, *supra* note 51, at 902.

159. *See id.*

160. *See id.* at 912 ("[P]articipatory deliberation and action educates people to see their common interests, and therefore, community grows out participation."). *But see infra* note 249 and accompanying text.

161. McFarlane, *supra* note 51, at 928.

> a host of legal and social justice issues that need to be confronted forthrightly.[162]

Usurpations of local control have long distinguished between "good" local control and "bad" local control.[163] Is it possible to make similar differentiations in connection with public participation?

Professor Andrea J. Boyack distinguishes between those seeking to address negative externalities of a proposed development and those simply seeking to exclude potential neighbors.[164] Those engaging in exclusion will always claim that they, too, are simply seeking to exclude negative externalities.[165] Nevertheless, Boyack's distinction has intuitive appeal. She recognizes that "[t]he value preserved in upholding a community's right to exclude is an aspect of 'status property,' and protection of status typically

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162. Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV'T L. 217, 248 (2018); *see also* John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1315, 1322–25 (2020) (acknowledging that there are policy reasons to provide additional process rights to historically disempowered communities, but proposing instead to provide residents of gentrifying neighborhoods transferable development rights).

163. For example, anti-snob zoning laws, which date back to the 1960s, do not apply in towns where a certain minimum percentage of local housing stock is already affordable, however that term is defined by statute. *See* Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 303 (2019).

164. *See generally* Andrea J. Boyack, *Limiting the Collective Right to Exclude*, 44 FORDHAM URB. L.J. 451 (2017).

165. Affordable housing opponents are often sophisticated enough to couch their opposition in concerns about the environment and traffic safety. Often, they resist openly stating that they are opposed to new neighbors or housing for low-income people. *See, e.g.*, Alexander Cramer, *'Square Peg in a Round Hole.' Neighbors Say Proposed Apartment Complex Doesn't Belong.*, PARK REC. (Feb. 24, 2021), https://www.parkrecord.com/news/summit-county/square-peg-in-a-round-hole-neighbors-say-proposed-apartment-complex-doesnt-belong/ [https://perma.cc/QX2W-QZ88] (quoting residents' general opposition to affordable housing on environmental and traffic grounds and noting that some residents expressed "support for affordable housing projects in general, but opposed this specific proposal"); Molly Kraus, *Zucchini-gate or Bust: Berkeley's Battle for Affordable Housing*, BERKELEY POL. REV. (Oct. 31, 2017), https://bpr.berkeley.edu/2017/10/31/zucchini-gate-or-bust-berkeleys-battle-for-affordable-housing/ [https://perma.cc/B6HL-N54L] (describing resident's objection to a proposed housing project based on concerns about reduced light on her garden); Max Marin & Michaela Winberg, *"Fecal Samples" Against Gentrification?: Research Activism Raises Red Flags in West Philly*, BILLY PENN (Mar. 29, 2021, 5:10 PM), https://billypenn.com/2021/03/29/west-philly-poop-study-fecal-matter-gentrification-development-research-temple-gauthier/ [https://perma.cc/7TB9-TQUE] (describing antidevelopment research study "to investigate if the development would adversely affect the neighbors' microbiota and increase the risk of developing colorectal cancer"); Jessica Williams, *Plan for Affordable Housing in Leonidas, Lower Garden District Faces Neighborhood Criticism; Mayor, City Council in Support*, NOLA (Sept. 8, 2020, 6:00 AM), https://www.nola.com/news/politics/article_f47834c8-ed3e-11ea-8560-8763bdb26542.html [https://perma.cc/8MGB-VU9J] (quoting assertion that public criticisms of an affordable housing project's design, while purportedly based on historic preservation and building safety issues, were in fact a pretext for "protesting the arrival of low-income neighbors, who are often Black and Brown"); *see also* Mai Thi Nguyen et al., *Opposition to Affordable Housing in the USA: Debate Framing and the Responses of Local Actors*, 30 HOUS., THEORY & SOC'Y 107, 119–20 (2013) (collecting examples of affordable housing opponents "appropriat[ing] 'rational' planning jargon and socially acceptable language," such as concerns over traffic and overconcentration of poverty, "in order to frame the message of their opposition").

benefits society's 'haves' at a cost to society's 'have nots.'"[166] She worries, however, that "similar goals to preserve a neighborhood's character also motivate community efforts to exclude in a very different context: resistance of development by poorer, ethnic enclaves."[167]

Professor Boyack does not seek to solve the problem by providing different public participation rights to different categories of participants. Instead, she proposes that the ultimate decision-maker undertake a utilitarian analysis of whether a community ought to be entitled to exclude: "A community's right to exclude is unjustifiable unless its purported benefits outweigh its costs, including costs borne by society and various would-be community residents."[168] Using "community exclusionary powers . . . to promote property values or group identity rather than to combat a legitimate problem of negative externalities or a true tragedy of the commons" should be disfavored, in Boyack's analysis, by land use decision-makers.[169] In fact, extensive informal public participation mechanisms would render Boyack's solution less feasible. Her solution would best be accomplished in an administrative process that required data collection and analysis in addition to public comment.

Professor Rachel Godsil differentiates categories of public participants not on the basis of exclusionary motivation but, instead, on the grounds that urban redevelopment is less subject to extensive land use regulatory review than is suburban greenfields development. According to Godsil, "our legal system has adequate mechanisms in place, such as zoning and subdevelopment permitting requirements, to address community interests in the context of a suburb or small town."[170] In existing urban spaces, on the other hand, land use laws do not provide a mechanism for residents to participate in the decisions that lead to neighborhood change.[171] The renewed interest of well-off people in an existing neighborhood, because it does not require a change in use, cannot be addressed through land use decision-making. For example, the conversion of a multiunit brownstone to a single-family home does not "require zoning changes. This means that in-place residents of gentrifying neighborhoods lack many of the current land use controls that others utilize to protect their autonomy, and new devices are needed to afford that protection."[172] Godsil's argument assumes that the contested changes in urban neighborhoods do not require zoning changes. While that is true in the case of a brownstone reverting to single-family use, it is not necessarily true more broadly.[173]

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166. Boyack, *supra* note 164, at 466.

167. *Id.* at 464.

168. *Id.* at 481.

169. *Id.* at 483.

170. Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 324 (2013).

171. *See* Godsil, *supra* note 170, at 334; *see also* FLORIDA, *supra* note 84, at 58–60.

172. Godsil, *supra* note 170, at 334.

173. In fact, I argue below that redevelopment projects are typically more difficult, partly because of public participation processes, than are "greenfields" projects. *See infra* notes 315–17 and accompanying text.

Meanwhile, "the in-place residents in neighborhoods subject to gentrification consider their neighborhoods to have been intentionally abandoned and allowed to deteriorate by both governmental actors and the forebears of the people now seeking to 'gentrify.'"[174] Residents of neighborhoods undergoing gentrification lack "autonomy," which is a function of both racism and market power. "Once gentrification is contextualized as part of the continuum that includes exclusion from suburbs, denial of resources, and white abandonment of cities, the paradox is explained. Gentrification of predominantly Black and Latino neighborhoods, like housing discrimination and exclusion, denies autonomy to the in-place residents."[175] Land use laws do not provide a mechanism for existing residents, long disempowered by government housing subsidies and the real estate market, to opine on, much less influence, changes in their neighborhood. "The move of suburbanites back to cities may be seen as continuing a cycle in which others exercise autonomy, while poor people of color often lack a corresponding choice."[176]

Notably, Professor Godsil's answer is not more participation or local control but, instead, subsidies for existing residents to stay in neighborhoods that experience dramatic housing cost increases.[177] Godsil would provide vouchers, as-of-right, to residents of existing neighborhoods that see a 25-percent increase in cost in a two-year period.[178] Again, narrowing and limiting public participation processes would not affect Godsil's solution to the problem of gentrification. Similarly, Professor John Infranca opts not to provide additional participation requirements, for fear that the enhanced process will have unanticipated negative consequences, but instead proposes the allocation of transferable development rights to long-term residents to compensate them and provide a market-based mechanism that would allow them to benefit financially when their neighborhoods change.[179]

Others, starting from baseline assumptions similar to Godsil's, Infranca's, and Boyack's, argue in favor of differential treatment of different categories of public participants. Urban planner Thomas Rudel argues that "more effective land-use planning may require a concerted effort to democratize the regulation of real estate development"[180] and further argues that such democratization will vary by geography:

> In suburbs it may involve measures to insure the presence of disadvantaged, elderly homeowners in decision making processes; in cities it may involve legislation to facilitate citizen initiatives in land-use planning. In both instances the reforms would increase the likelihood that land-use

174. Godsil, *supra* note 170, at 324.
175. *Id.* at 332.
176. *Id.* at 333.
177. *See id.* at 335.
178. *See id.*
179. Infranca, *supra* note 162, at 1315, 1322–25.
180. THOMAS K. RUDEL, SITUATIONS AND STRATEGIES IN AMERICAN LAND-USE PLANNING 131 (1989).

> authorities will pursue policies which reflect the sentiments of a wide range of their constituents.[181]

Others do not ignore the fact that extensive, powerful, informal public participation processes can privilege "bad" NIMBYs,[182] but they decline to opine on the specific contours of what the participation process should look like.[183]

Can the design of public participation in the land use realm empower the historically disempowered? Answering that question requires understanding the hazards of public participation, which I endeavor to describe in the next part.

III. HOW PARTICIPATION WORKS

> "The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you."
>
> —Sherry R. Arnstein[184]

I am not the first community development lawyer to quote Arnstein's comparison of public participation to vegetables. But I might be the first to wonder whether it is possible to have too much of a good thing. As an affordable housing developer's lawyer eating loads of spinach, how do I remember those hearings described in the first pages of this Article? Hundreds of neighborhood residents turned out to decry the local housing authority's plans to redevelop a forty-year-old housing development. The current complex includes fifty studio and one-bedroom units, limited to occupancy by elderly and disabled individuals.[185] The housing authority's redevelopment plans increase the number of units to sixty-seven and open

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181. *Id.* at 131–32.

182. NIMBY is an acronym for "Not In My Backyard." It was originally used to describe residents objecting to siting noxious uses, but "NIMBYism has grown substantially over time." FLORIDA, *supra* note 84, at 24. Today, NIMBY residents in both cities and suburbs routinely object to the development of new housing units in their neighborhoods or municipalities, with serious consequences for housing prices, housing segregation, and the environment. Been, *supra* note 162, at 218, 221–23, 227–35.

183. *See, e.g.*, McFarlane, *supra* note 51, at 931 ("Of course, these recommendations in some ways are directed at the easy question: Why is participation important? The harder question of how to implement participatory schemes remains unanswered . . . . The answer to the hard questions will necessarily be determined by the circumstances and context of particular places."). Anti-snob zoning laws effectively distinguish between towns that should have control over local zoning and those that should not. Lemar, *supra* note 163, at 303. These same laws, by cabining local control, similarly limit the import of public participation in those towns whose zoning powers are cabined as a result of their failure to produce affordable housing.

184. Arnstein, *supra* note 151, at 216.

185. While housing discrimination based on "familial status" is illegal under the federal Fair Housing Act, 42 U.S.C. § 3604(a)–(e), in 1988, Congress enacted an exception, further refined in 1995, that permits housing developments to limit occupancy to elderly residents. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(d), 102 Stat. 1619, 1622–23 (codified as amended at 42 U.S.C. § 3607(b)); Housing for Older Persons Act of 1995, Pub. L. No. 104-76, §§ 2–3, 109 Stat. 787, 787 (codified as amended at 42 U.S.C. § 3607(b)(2), (5)).

occupancy to all low-income people, without regard to age or disability status. Half of the new units will be two-bedroom units that can accommodate families. Nothing riles up suburbia like the threat of low-income children infiltrating the school district. The town residents who turned out to oppose the project made no effort to hide their vitriol.[186]

Of the over one hundred project opponents, as far as my students and I could tell, all were white. In fact, the only people of color in the room were one of my students and me. Most opponents were middle-aged, though a few brought teenage children with them. Many were loud. They cheered when a commissioner or witness said something they liked. They jeered when someone said something with which they disagreed. On multiple occasions, they physically accosted the chairperson of our client's board. The chair of the commission repeatedly asked them to quiet down so as not to disrupt the meeting. In an effort to hear all public comments, the chair held the agenda item over multiple meetings, lasting over three months in total, and permitted people to speak more than once, thus privileging the loudest, most strident voices. Extending the hearings caused my client to miss a once-a-year funding application deadline, only adding to the costs imposed by the delay.[187]

Just a few of the current project tenants attended the hearings. Even fewer testified. One who did, the president of the tenants' association, described his daily ordeal: crawling out of his wheelchair to use the bathroom in his studio apartment, constructed years prior to the passage of the Americans with Disabilities Act. Most tenants, however, citing the stress and difficulty of testifying in favor of a project despised by so many of their neighbors, refused to testify. They feared being heckled by the audience. Their disabilities did not permit them to testify in front of over one hundred people. The forum simply did not work for them. It is further worth noting that no potential future tenants—or a group representing their interests—testified either.

In other words, in the midst of the commissioners' efforts to maximize public participation, the process silenced many voices. Elderly and disabled tenants feared testifying. And many supporters of the project opted to write

186. Some might wonder whether the process I describe here would have proceeded differently had my client engaged in even more public outreach in the course of designing the redeveloped housing. To that I respond as follows. First, the housing authority and its selected developer went so far as to engage in a monthslong pause in order to locate another site in town "better-suited" to multifamily development. The town eventually determined, conveniently enough, that no such sites existed. Further, there is no reason to believe that longer public dialogues will lead to creative solutions. Instead, such dialogues often entrench people's views. Finally, perceived economic incentives and thinly veiled racism cannot be ameliorated through dialogue; they can only be ameliorated through the fair application of reasonable laws, including civil rights laws—a remedy that was repeatedly stymied by public participation in this case.

187. Like many wealthy suburbs, the town in question has a fraught and litigious history of opposing affordable housing development. *See* Lisa Prevost, *Judging Eminent Domain*, N.Y. TIMES (Dec. 2, 2007), https://www.nytimes.com/2007/12/02/realestate/02wczo.html [https://perma.cc/VBU4-JPYX].

letters of support or letters to the editors of the local newspapers rather than appear in person. One such letter writer bemoaned the tenor and substance of the hearings:

> Lately, there has been a lot of concern in my neighborhood about the [proposed public housing] renovations . . . . [S]ome have used derogatory terms to describe potential new residents of [the public housing]. This appears to be based on prejudice due to the 'low income' designation of the apartments. I do not take issue with people expressing their concerns about the [public housing] renovations, but I do take issue with people expressing their views at the expense of the dignity of others. When we characterize an entire group of people as deficient due to an attribute of that group—skin color, sex, religion, or income—we divide our neighborhoods and only damage our sense of community. Discussions marked with respect and concern for all involved are certainly more representative of the [town] that we all know and love.[188]

Indeed, discussions were instead marred by vitriol, fear, and unfounded assumptions about affordable housing residents. Town resident William Woermer testified:

> The drug addicts are going to be here, believe me. Retirees, disabled, old people—I have no objection to renovate the whole place and make it nice for them. But don't get too much of that riffraff in. There will be a lot of riffraff. Then we go onto, with a project like this, you need security guards in the area.[189]

The proceedings were horrible, but they were also quite typical. As journalist Nikole Hannah-Jones recounted in a recent event hosted by the National Low Income Housing Coalition, white communities become "almost violent" in their opposition to affordable housing if they think Black and Brown people will move in.[190] We have long known that public participation in land use processes operates differently than it does in other administrative spheres. A 1983 lecture delivered at the Institute on Planning, Zoning, and Eminent Domain provided a how-to for opponents of applications for zoning approvals. George A. Staples, a lawyer citing his representation of developers, opponents of developers, and municipalities in support of his claim that his "views are totally impartial, completely without bias, and absolutely objective," started by pointing out that opponents rarely need a "professional presentation."[191] Instead, "the most effective opposition to zoning [approvals], particularly in the smaller city, is warm bodies, the

188. Christine Simpson, Letter to the Editor, *At the Expense of Dignity*, ZIP06 (Feb. 14, 2018, 8:00 AM), https://www.zip06.com/letters/20180214/at-the-expense-of-dignity [https://perma.cc/G35J-9Z8A].

189. Jacqueline Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, CONN. MIRROR (May 22, 2019), https://ctmirror.org/2019/05/22/separated-by-design-how-some-of-americas-richest-towns-fight-affordable-housing/ [https://perma.cc/6BYN-LMCH].

190. Nikole Hannah-Jones, Racial Equity During and After the COVID-19 Pandemic, Address at the National Low-Income Housing Coalition (July 7, 2020).

191. George A. Staples, *Zoning for the Real World: A Primer for Lawyers, Realtors, and Public Officials New to Zoning*, 1983 INST. ON PLAN. ZONING & EMINENT DOMAIN 47, 59.

warmer the better."[192] Staples then proceeded to list "a number of time-tested techniques which should be used" in every attempt to oppose a grant of zoning approval:

> Disparage renters as those who have no investment in their property. Talk about loss of property values . . . . Speak of the home being the only investment of the residential property owner . . . . Talk about potential garbage problems. If there is little public transportation in the area, mention that there is no bus service to get these low-class folks to work. Talk about the adverse effect of cramming people together into small places . . . . Mention pressure on schools and possible increases in taxes to provide services for multifamily developments . . . . Talk about high density. (This term has very little meaning, but it is a real fight phrase.) . . . Talk about inappropriate access and increased traffic which will endanger school children, particularly small elementary school age children. Anytime there is a zone change, you can always talk about the violation of the existing plan and a breach of faith with those who purchased in reliance on the existing zoning. Nobody really knows what planning is, so you are free to talk about bad planning.[193]

The list will sound familiar to anyone who has attended a zoning hearing, urban or suburban, where a new multifamily development is under consideration. Staples further advises:

> [I]t is advantageous to encourage your people to grumble and make derisory noises every time the opposition makes a point and to clap loudly any time one of your own speakers makes a point or sits down. Be sure to bring crying babies to the council room so that the board will realize that you are so concerned that you are willing to deprive the poor little tykes of sleep in order to stamp out this terrible evil being proposed.[194]

Staples suggests that opponents engage in "a bit of local chauvinism" by talking "about how great this community is and how we have to protect it against becoming another downtown Chicago," even if nothing about the proposed development (such as a sixty-seven-unit apartment building on five acres of land) is akin to a Chicago skyscraper.[195]

Staples acknowledges that this approach is "silly" but argues (accurately, in my own experience) that "it is also very effective."[196] Staples strongly advises both developers and municipalities to seek legal counsel and engage professional engineers to make their case and decide the case, respectively.[197] Project opponents, on the other hand, are advised that a "logical presentation and an effective spokesman," while "not absolutely necessary," might "add a whole lot of class to the operation," which ought to do whatever is necessary to "persuade the board to reject this fiendish plan

192. *Id.*
193. *Id.* at 59–60.
194. *Id.* at 60.
195. *Id.* at 61.
196. *Id.* at 60.
197. *Id.* at 48, 58, 63.

to destroy their neighborhood."[198] If "whatever is necessary" includes exaggeration and lies, no worries. Staples further comforts "the squeamish . . . that there is little legal recourse against those who tell great lies and spread atrocious nonsense at zoning hearings."[199]

The advice Staples gives resides squarely in the category of "Funny Because It's True." The notion that it is possible for public participation fora to facilitate "discussions marked with respect and concern for all"[200] is a fundamental tenet of community development practice. But does that notion accord with reality? In practice,

> [b]ecause public hearings afford no real dialog, they lack the elements necessary for a truly deliberative decision-making process. Public hearings are a poor form for the development of adequate information about complex community problems, do not promote a shared baseline of understanding, and do not even attempt to promote a consensus.[201]

At best, then, they provide a forum for individual members of the public to list grievances, one at a time, not in discussion with one another, in three-minute increments. But, as anyone who has attended a local public hearing or watched an episode of *Parks and Recreation* knows, public hearings and other opportunities for participation can further devolve from there.

A common response to the query why local land use law administration does not resemble other regulatory regimes is that local control, infused with lots of opportunities for public participation, lends legitimacy to a particularly personal realm of administrative law. Perhaps informal processes are appropriate where the topic approaches the personal—and nothing is quite as personal as one's neighborhood and neighbors. Recognizing this sensibility, in a recent article, Professors David Markell, Tom Tyler, and Sarah F. Brosnan use survey data to assess people's preferences as to how best to resolve land use disputes, especially in a context where those disputes involve not only monetary but also sentimental value.[202] They found that respondents best trusted referenda to protect sentimental value but preferred to submit land use disputes to judicial procedures.[203] In other words, the desire to protect sentimental value did not dictate their choice of venue, and respondents prioritized protecting monetary value over protecting sentimental value.[204] Nevertheless, Markell, Tyler, and Brosnan argue that in a realm where "sentimental values are important, procedural justice is particularly important to stakeholders."[205] Depending

198. *Id.* at 61.
199. *Id.* at 61.
200. Simpson, *supra* note 188.
201. Bezdek, *supra* note 48, at 35.
202. *See* David Markell et al., *What Has Love Got to Do with It?: Sentimental Attachments and Legal Decision-Making*, 57 VILL. L. REV. 209 (2012).
203. *Id.* at 229.
204. *Id.*
205. *See id.* at 260.

on the context, procedural justice might require a neutral decision-maker, or it may require public decision-making in the form of a referendum.[206]

While the framework is helpful, it does not dictate a conclusion. This part describes various failures of public participation fora. These failures ought to inform proposals to redesign public participation processes, a task I undertake in Part IV.

A. Public Participation Provides a Forum for Local Prejudice and Misinformation

Public participation proponents often cite the importance of local knowledge in determining how best to craft a real estate development project.[207] Residents have lived experience with local traffic patterns, noise, crime, and other aspects of living in a neighborhood. Public participation proponents argue that local knowledge is necessary to craft an appropriate redevelopment project.[208] While they, like Professor Carol M. Rose, may acknowledge that locals lack technical expertise, public participation proponents nevertheless advocate for hearings and charrettes, arguing that these serve as educational fora. Participation serves procedural goals: "to publicize issues, to draw in interested parties, to examine alternative solutions, and to satisfy the public that the issues have been fully explored . . . . [T]hey give interested persons a sense of participation in the decision . . . ."[209]

It is hard to square theoretical insistence on knowledge sharing and dialogue with the experience of attending public hearings related to the planning process, whether related to comprehensive planning, rezonings, or approvals for individual projects. This should not be a surprise. "Passing judgment on the efficacy of a land use decision requires extensive speculation about proposed future actions. Unlike disputes about liability for past actions such as nuisance and trespass claims, zoning disputes present largely counterfactual fact questions."[210] Resident expertise does not lie, however, in predicting the impacts, from traffic to nearby property values, of a proposed development project. Local expertise lies, instead, in describing the current neighborhood and expressing desires for the neighborhood's future. These are necessary, but not at all sufficient, elements of an effective neighborhood planning process.

In fact, local accounts of the effects of a proposed development often conflict. Where neighbors disagree, one will accuse the other of seeking to cash out. Where an expert opinion contradicts residents' preferences,

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206. *Id.* at 241.

207. *See* Fennell, *supra* note 142, at 391 (recounting the importance of soliciting public input given land use law's theoretical grounding in the need to coordinate uses across many property owners).

208. *See supra* Part II.C.2.

209. Rose, *supra* note 139, at 897.

210. Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 60 (2012).

residents do not seek to understand complicated engineering reports and traffic studies. Instead they retrench, discredit expert opinions procured "for hire," and insist on the merits of local knowledge over outsiders' expert opinions. Residents insisting that the traffic volume is higher than a traffic study suggests will argue that the expert conducted the study on a slow day. Rarely do residents leave a room having questioned the assumptions with which they walked in.[211]

Public hearings do not resemble the rational, problem-solving dialogues described by participation proponents. They consist largely of one person after another using the allotted time to recite the assumptions with which they entered the room, refusing to question those assumptions, cheering others who hold the same assumptions and jeering at people who do not. These are often more shouting matches than conversations. They certainly are not dialogues that result in an informed consensus.

In one telling example drawn from legislative advocacy work done by the clinic that I teach, a homeowner sought a special permit to expand her

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211. William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development*, 83 J. POL. 1747, 1761–62 (2021) (finding that ideological arguments for housing development were unlikely to shift homeowners' views enough to overcome considerations based on self-interest); Plaintiffs' Consolidated Opposition to Defendants Village of Garden City's, *supra* note 157, at 23 ("Another example of the subtle forms of discrimination in this case is the way that the residents continued to claim that their opposition was based on . . . concerns over schools and traffic issues even after [the city's consultant] explained that multi-family zoning would be more to their advantage on these issues than single-family zoning."); Sean Tubbs, *Albemarle Planning Commission Pans Multifamily Development After Focused Opposition from Neighborhood*, CHARLOTTESVILLE CMTY. ENGAGEMENT (Mar. 5, 2021), https://communityengagement.substack.com/p/albemarle-planning-commission-pans [https://perma.cc/4J3F-6LQZ] (recounting public hearing presentation by homeowners' association that hired an independent consultant to challenge developer's traffic study); *see also* KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 118, 120 (2020) (describing one resident who "commissioned his own traffic study as he feels the impact of cars and children on the area have not been adequately addressed" and another who "critiqued a developer's traffic study and stormwater analysis" based on his own engineering knowledge). *But see* Jerusalem Demsas, *How to Convince a NIMBY to Build More Housing*, VOX (Feb. 24, 2021, 10:00 AM), https://www.vox.com/22297328/affordable-housing-nimby-housing-prices-rising-poll-data-for-progress [https://perma.cc/E3PN-FT3S] (describing poll results showing that strong economic arguments for upzoning may be more effective in shifting voter opinions). The death of local journalism only exacerbates this problem. No impartial source exists to make sense of the morass of contradictory information presented at land use hearings. Untrained journalists, operating Patch and Patch-like websites, serve as mouthpieces for NIMBYs. Neighborhood-based social networking sites, such as Nextdoor, are even worse. *See* RANDY SHAW, GENERATION PRICED OUT: WHO GETS TO LIVE IN THE NEW URBAN AMERICA 197 (2020) (describing online organizing efforts on Nextdoor to defeat pro-density and affordable housing legislation in Noe Valley, California); Kate Walz & Patricia Fron, *The Color of Power: How Local Control over the Siting of Affordable Housing Shapes America*, 12 DEPAUL J. SOC. JUST., Winter 2018, at 1, 9 n.29 (describing opposition to Chicago mixed-income development project in "a closed Facebook group" whose members "frequently posted thinly veiled comments rooted in racist and classist misconceptions about affordable housing and voucher holders").

home-based day care.[212] Applicable state law prohibits towns from erecting zoning and other local law barriers to state-licensed home-based day cares that serve no more than six children.[213] This means that no town can override a person's right to operate such a day care. Unfortunately, towns are permitted to require operators of larger home-based day cares, serving between seven and twelve children, to seek zoning approvals.[214] A child care provider in Fairfield County, Connecticut, sought to expand her existing program, which served six children, to serve twelve children.[215] The Zoning Board of Appeals denied the provider's application twice.[216] As required by the local zoning code,[217] notice of the public hearing at which her application would be considered was delivered to her neighbors.[218] One of her neighbors organized the other neighbors in opposition to the project.[219]

The applicant's neighbors testified against issuance of the permit.[220] Unaware that land use approvals often devolve into popularity contests, the applicant had not rallied anyone to testify in support of her application.[221] It quickly became clear that the neighbors' "local knowledge" contradicted objective truths. First, they made claims about the provider's expertise in child care,[222] refusing to acknowledge that she was, in fact, licensed by the State of Connecticut[223] and had a certification in early childhood education.[224] Nothing in the record suggested that the applicant, an African American immigrant, was inexperienced. Second, and crucially, until they received notice of the application to increase the day care capacity, the

212. *See Hearing on S.B. 87 Before the Conn. Gen. Assembly Hous. Comm.*, 2021 Leg. 98 (Conn. 2021) [hereinafter *S.B. 87 Hearing*] (testimony of Emmanuella Lauture, Owner, Ma Maison Childcare).

213. *See* CONN. GEN. STAT. § 8-3j (2021) ("No zoning regulation shall treat any family child care home . . . in a manner different from single or multifamily dwellings."); *id.* § 19a–77(a)(3) (defining a "family child care home" as "a private family home caring for not more than six children").

214. *Compare* CONN. GEN. STAT. ANN. § 8-2(d)(1) (West 2021) ("Zoning regulations . . . shall not . . . [p]rohibit the operation of any family child care home or group child care home in a residential zone"), *with id.* § 8-3j (providing only that family child care homes—not group child care homes—must be treated the same as "single or multifamily dwellings" by applicable zoning regulations). *See also id.* § 19a–77(a)(2)(A) (defining a "group child care home" as a facility in which "not less than seven or more than twelve related or unrelated children [are cared for] on a regular basis").

215. *S.B. 87 Hearing*, *supra* note 212 (testimony of Emmanuella Lauture, Owner, Ma Maison Childcare).

216. *Id.*

217. *See* STAMFORD, CONN., ZONING REGULATIONS § 19.C.3(a) (2021).

218. *See Zoning Board of Appeals*, CITY OF STAMFORD, at 2:34:25–2:34:35 (May 9, 2018), http://cityofstamford.granicus.com/player/clip/7118?view_id=19&redirect=true.

219. *S.B. 87 Hearing*, *supra* note 212 (testimony of Emmanuella Lauture, Owner, Ma Maison Childcare).

220. *See Zoning Board of Appeals*, *supra* note 218, at 3:09:52–4:13:22.

221. *See id.* at 2:34:02–4:19:35 (showing testimony from many opponents of Ms. Lauture's application and testimony from only Ms. Lauture and her attorney in support of the application).

222. *See id.* at 4:01:12–4:01:31.

223. *S.B. 87 Hearing*, *supra* note 212 (testimony of Emmanuella Lauture, Owner, Ma Maison Childcare).

224. *Id.*

neighbors were all unaware that a day care already operated on the site.[225] Whatever their concerns about noise and parking might have been, surely the fact that they had never noticed six children making noise and six families dropping off children at the site daily ought to have been informative.

In a recent interview, Warren Logan, an Oakland transportation planner, describes the problem succinctly. Individuals have important knowledge about their daily commutes. Every day they make informed decisions about how to get to work efficiently. As a transportation planner, Logan wants to hear directly from commuters, especially those least likely to attend a formal public meeting. Logan acknowledges, however, that commuters' knowledge has limits:

> If you ask a lot of people . . . what would you do to fix the congestion problem, they might say 'widen the road.' And from an engineering standpoint, that is the last thing you should do. That's where a transportation planner has to wrestle with what people might assume would be the best solution, and what is technically the best situation, without being [paternalistic].[226]

Note that while some public participation is willfully ignorant or dishonest, Logan worries that even well-intentioned (but inexpert) participation can have nefarious impacts on local development and governance decisions.

It is hardly surprising, then, that when a development is built despite public opposition, it often does not yield the negative impacts anticipated by public testimony. One frequently hears from neighbors of once-controversial development projects: "Now that it's in, it's ok." One of the most contentious real estate developments of the last century was the Ethel R. Lawrence Homes, the affordable housing project built as a result of *Southern Burlington County NAACP v. Township of Mount Laurel*.[227] Neighbors decried the development's potential nefarious impacts: lower property values, more crime, more traffic, and overburdened public schools.[228] The project was built only after decades of civil rights litigation.[229] Examining the impacts of the Ethel R. Lawrence Homes on both residents and neighbors, researchers found that none of the claimed nefarious impacts came to pass.[230] Neighbors were even wrong about the impact on property values, a data point one might assume could be reliably crowdsourced.[231] The development had

225. *See Zoning Board of Appeals*, *supra* note 218, at 3:03:22–3:03:32, 4:14:00–4:14:10.

226. Sarah Holder, *A City Planner Makes a Case for Rethinking Public Consultation*, CITYLAB (Aug. 15, 2019, 4:43 PM), https://www.citylab.com/transportation/2019/08/city-planning-transportation-oakland-community-engagement/596050/ [https://perma.cc/U9UA-RV6L].

227. 336 A.2d 713 (N.J. 1975) (finding that New Jersey municipalities must zone in furtherance of statewide general welfare and, in doing so, accommodate the development of affordable housing).

228. DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 44, 46 (2013).

229. *See id.* at 41–43.

230. *See id.* at 65–70.

231. *See id.* at 118–19.

significant positive impacts on the people who moved in,[232] none of whom were "existing residents" or "neighbors" whose views would have been credited or prioritized during the public participation process.

Relatedly, as Professors Katherine Levine Einstein, David M. Glick, and Maxwell Palmer recount at length, participants in public processes often present irrelevant information.[233] An apartment building in a suburban town might, for example, require public hearings in the context of receiving approval from an inland wetlands agency or a board of zoning appeals. The applicable statute will establish what information is relevant to the agency or board's decision. Perhaps the inland wetlands agency must consider drainage and the possibility that the development will increase the frequency of local floods. Members of the public will often appear and testify as to wholly irrelevant matters.[234] A common example is professed concern for public finances, where a member of the public will argue that the development will increase government expenditures, by increasing crime or the population of school-age children, and fail to bring in commensurate property tax revenues. The argument is wholly irrelevant to the question at hand but undoubtedly has an impact on the board or agency members hearing it. There is no mechanism to limit such comments, much less their effect on decision-makers.

Professor Rose acknowledges that public processes can involve more venting than information sharing.[235] She argues, however, that public processes remain valuable because they facilitate mediated decisions that are less likely to lead to litigation. Unfortunately, the mediated results are generally predictable and often bad. Public participation processes, as documented by researchers, decrease the amount of new housing constructed and increase the number of parking spaces.[236] Both of these "mediated" results inflate housing prices with little commensurate societal benefit.[237] As one recent paper concluded, "the degree of political opposition to housing development predicts higher prices" and, because "[o]pposition to housing development is more likely in areas with highly educated non-Hispanic White residents," there are implications for segregation.[238] Where the results predictably preference a privileged subset of the citizenry, mediation is not a legitimizing force.

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232. *See id.* at 148–84. Because of the overwhelming demand for the units at Ethel Lawrence Homes, tenants were selected on a "first come first served" basis. *See id.* at 62. The tenant selection process made it possible for researchers to compare life outcomes between those who were selected and those who were not. *See id.* at 125. It also created a situation in which, even if public participation processes had been open to and inclusive of future residents, those future residents had very little incentive to participate, because any one potential tenant had a small chance of success in obtaining a unit, even if it were built.

233. *See* EINSTEIN ET AL., *supra* note 211, at 87–88, 92–93.

234. *See id.*

235. *See* Rose, *supra* note 139, at 898.

236. *See* EINSTEIN ET AL., *supra* note 211, at 53.

237. *Id.*; *see also* DONALD SHOUP, THE HIGH COST OF FREE PARKING 152–53 (2005).

238. ROTHWELL, *supra* note 9, at 11.

Because public hearings impose minimal constraints on public testimony, public participation processes do not provide a mechanism for resolving conflicting testimony or preferences. Even literature lauding the ability to meet progressive goals by using public participation processes recognizes that the community does not speak with one voice. Professors Foster and Glick, for example, describe various entities claiming to speak on behalf of the community in the context of Columbia University's expansion plans in West Harlem.[239] Ironically, Glick's client, a nonprofit community group governed by low-income neighborhood residents, questioned the legitimacy of the Community Board, a hyperlocal governmental structure erected in response to the failures of urban renewal.[240] Professor Cummings describes a divide between community organizations in Los Angeles, not on the substance of the redevelopment proposal, but on the question of whether the agreement between the coalition and the developer ought to require the groups to cede the right to challenge the redevelopment's approvals during the local administrative process.[241] Under these circumstances, it is not at all clear that public participation yielded a "better" result, as conveyors of local knowledge disagreed. Disagreement among locals can lead to confusion, delay, and additional costs. Professor Einstein tells the story of an affordable housing development incurring over one year of delay and $100,000 of additional costs to address neighbor concerns regarding traffic, only to be delayed further by a second group of neighbors who were not involved in the first dispute.[242]

B. Public Participation Protects Social Capital, but the Wrong Kind

There may be reasons why low-income communities merit public participation rights, even when such rights are inappropriate in wealthy communities. Low-income communities may be heavily reliant on spatially constrained social capital.[243] As just one example, in her book *All Our Kin*, Professor Carol B. Stack documents the ways in which low-income Black communities rely on family and friends for daily needs, such as child care.[244] New development might disrupt those relationships by displacing a friend or relative or increasing transportation time between a child's home and her

239. Foster & Glick, *supra* note 76, at 2010, 2016. Foster and Glick also discuss a controversy over which community group, if any, had the authority and legitimacy to represent existing residents of central Brooklyn in connection with the large-scale redevelopment of Atlantic Yards. *Id.* at 2025.

240. *Id.* at 2050.

241. Cummings, *supra* note 100, at 66 (noting that various groups "split over the final terms of the agreement, with AGENDA and the community coalition refusing to sign on as coalition members, citing the waiver of the right to oppose the project as incompatible with their organizational missions").

242. EINSTEIN ET AL., *supra* note 211, at 26.

243. "Social capital" refers to "the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals." Foster, *supra* note 124, at 529.

244. CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 90–107 (1974).

grandmother's. Low-income families lack the wealth and income to easily replace such relationships with marketplace transactions. It might be more crucial to maintain social capital networks in low-income communities than it is in more well-off communities, where a decrease in social capital might have less devastating negative impacts.[245] Professor Sheila Foster endorses New York City community organizations' advocacy to protect community gardens cultivated on municipally owned lots as one example of social capital meriting protection.[246] New York City sought to sell the lots to housing developers.[247] Foster does not expressly say it, but presumably one reason that it is especially important to protect community gardens in low-income neighborhoods is that community residents cannot easily replace those resources once lost. On the other hand, one might be skeptical of a wealthy suburb "conserving" land on which a developer seeks to develop affordable housing because the town's residents likely do not lack access to open space.[248]

Social capital, however, is a fraught concept. While in popular literature it is presumed to be an unmitigated good, in reality, social capital has a dark side.[249] It can be used either to include—bridging social capital[250]—or exclude—bonding social capital.[251] Relying on social norms rather than legal rules to ensure that public participation is dialectic, inclusive, and productive is not likely to be a successful strategy.

In fact, exclusionary bonding social capital is more common than inclusionary bridging social capital.[252] The former cements insular communities while the latter brings disparate groups together. Even the most lauded of public participation processes, upon examination, are often examples of bonding, not bridging, social capital. Crafting participation processes requires determining who the participants ought to be. The more limited the community, the easier it is to define and meet its needs. Communities based on sharing a common space, such as a workplace or neighborhood, are likely to be better organized than those based on some other common trait. Broader communities are more likely to include

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245. In insular wealthy communities, if the social capital disrupted is bonding, rather than bridging, the disruption may actually have positive impacts. (For explanations of bonding and bridging social capital, see *infra* notes 249–51 and accompanying text.) Successful desegregation efforts might fall into this category of positive social capital disruptions.

246. *See* Foster, *supra* note 124, at 575–76.

247. *See id.* at 535.

248. *See supra* note 157. Well-off suburbs and their residents routinely purchase land slated for multifamily housing and, instead, dedicate it to "conservation." *See* Ellickson, *supra* note 12, at 1616; Thomas, *supra* note 189; PREVOST, *supra* note 157, at 99–100.

249. *See generally* Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811 (2013).

250. *Id.* at 819.

251. *Id.* at 818.

252. *See id.* at 841 ("Bridging capital often has a limited radius, necessitating a plethora of bridging ties to ensure broader solidarity (for example, labor unions bridged across race but not income). And once achieved, bridging ties and capital may morph into bonding capital. While bridging capital has some value to residential property, it is doubtful that it can fully remedy the negative externalities of local bonding capital.").

divergent perspectives and desires that then need to be mediated and compromised. As a result, the project of defining the community is more likely to be exclusionary than inclusionary.

Where historic and current racial discrimination and segregation have created the community in question, the notion of community is even more problematic. In fact, some of the most active participation fora are those focused on exclusion. Professor Barbara L. Bezdek cites both business improvement districts (BIDs) and suburban NIMBYs as examples.[253] The problem, however, is not specific to these public participation processes. As one academic planner observing land use processes in a range of New England towns, from rural to urban, noted: "Governments with jurisdiction over large numbers of people tend to serve unusually heterogeneous constituencies . . . . [T]he racial, ethnic, and class differences within [an urban] constituency make it difficult for residents to build the coalitions necessary to challenge the developers' control of the regulatory process."[254]

A difficulty of using social capital and community preservation theory to undergird policy is that it is not easy to define social capital with precision. Commentators are quick to conflate social capital with a predetermined good. As Professor Stephanie M. Stern describes it, "social capital is present when positive effects accrue . . . . [T]here appears to be no upward bound on the amount of social capital deemed optimal for communities."[255]

Returning to urban renewal's textbook example, one New Haven neighborhood, Wooster Square, is often held up, in contrast to the rest of the city, as an urban renewal success story.[256] As you might hear the story from a local tour guide, having seen the failures of urban renewal in other New Haven neighborhoods, Wooster Square residents organized to protect their neighborhood when it was targeted for construction of I-91.[257] For much of the twentieth century, Wooster Square was a tight-knit community comprised mostly of Italian immigrants and their descendants.[258] They successfully convinced local and federal authorities to reroute the proposed highway a few blocks east of the neighborhood heart, Wooster Square Park.[259] They also persuaded authorities to allocate money to renovate existing housing rather than raze it and replace it.[260] Luisa DeLauro, who later served as the neighborhood's alder for a record-setting thirty-five years, and her husband

253. Bezdek, *supra* note 48, at 15; *see also* Smith, *supra* note 51, at 264; Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 509–10 (2017).

254. RUDEL, *supra* note 180, at 124.

255. Stern, *supra* note 249, at 818.

256. Adrien A. Weibgen, *There Goes the Neighborhood: Slums, Social Uplift, and the Remaking of Wooster Square* 2 (Yale L. Sch. Student Legal Hist. Papers, No. 24, 2013), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1024&context=student_legal_history_papers [https://perma.cc/2LRX-UZL8].

257. *See id.* at 8–10.

258. *See id.* at 4–6.

259. *See id.* at 9–10.

260. *See id.* at 14–16, 39.

Ted led the movement.[261] Today, a sculpture dedicated to DeLauro sits in Wooster Square Park. It is a stylized kitchen table, intended to pay homage to DeLauro's own kitchen table, said to be the headquarters for the community organizing campaign.[262]

Like the sculpted kitchen table, the tour guide account is stylized. It excludes a significant portion of the history. The location to which I-91 was rerouted was also a residential portion of Wooster Square.[263] Urban renewal in Wooster Square did in fact raze housing—the housing occupied by the poorest Wooster Square residents.[264] In its place, urban renewal built a highway and, on the other side of the highway, cleared plots for light industrial development.[265] The Wooster Square public participation process was successful in part because it excluded people.[266] Organizers limited the community they represented to residents between Olive and Hamilton Streets, a span of just half a mile.[267] Nearly everyone east of Hamilton Street[268] was displaced to make way for I-91 and light industrial development,[269] just as residents of Oak Street[270] and the Dixwell neighborhood had been displaced in the preceding decades.[271] In fact, almost 8000 people, the residents of 70 percent of housing units in Wooster Square, were displaced.[272] More people were displaced during Wooster Square's

261. *See* Mary O'Leary, *Luisa DeLauro, Mother of Connecticut U.S. Rep. Rosa DeLauro, Dies at 103*, NEW HAVEN REG. (Sept. 10, 2017, 6:09 PM), https://www.nhregister.com/news/article/Luisa-DeLauro-mother-of-Connecticut-U-S-Rep-12187053.php [https://perma.cc/P5BR-SE7N] (noting that "the DeLauros had a lot of influence in finding homeowners who used . . . tax credits and renovation grants to fix up neglected properties in the area"). Luisa DeLauro's daughter, Rosa DeLauro, has served as the neighborhood's congresswoman since 1991.

262. *See id.*

263. *See* Weibgen, *supra* note 257, at 12–13.

264. *See id.* at 10.

265. *See id.* at 26–27; COHEN, *supra* note 54, at 130.

266. *See* Weibgen, *supra* note 257, at 19–24.

267. *See id.* at 19.

268. The one housing development permitted to remain standing was a public housing project called Farnam Courts. *See id.* at 11. For decades, Farnam Courts stood sandwiched between I-91 and a coal-fired power plant, until the power plant was shuttered in 1992. *See English Station*, NEW HAVEN BLDG. ARCHIVE (Apr. 27, 2019), https://nhba.yale.edu/building?id=58e6b948adb817121752a5f4 [https://perma.cc/TRB9-A5YM].

269. *See* Weibgen, *supra* note 257, at 8–13.

270. *See id.* at 14, 22, 24. At the time it was destroyed, the Oak Street neighborhood was very diverse and included African American, Jewish, Irish American, and Italian American households. *See id.* at 22; RAE, *supra* note 54, at 137, 271.

271. *See* Weibgen, *supra* note 257, at 51. Dixwell was then and is now the smallest neighborhood in New Haven. As of 2017, Dixwell's population was just 5000 people. INSPIRED CMTYS., INC. & DATAHAVEN, NEWHALLVILLE AND DIXWELL NEIGHBORHOOD COMMUNITY INDEX 2 (2019), https://www.ctdatahaven.org/sites/ctdatahaven/files/Newhallville_Dixwell_Neighborhood_Index_web.pdf [https://perma.cc/2T3F-Q3PH]. Nevertheless, it was historically the commercial and cultural center of New Haven's Black community. *See* MANDI ISAACS JACKSON, MODEL CITY BLUES: URBAN SPACE AND ORGANIZED RESISTANCE IN NEW HAVEN 55, 67–69 (2008).

272. *See* Weibgen, *supra* note 257, at 51.

urban renewal "success story" than during the rest of New Haven's urban renewal horror stories.[273]

One need not rely on historical examples to make this point. Digging deeper into Foster's account of community gardens, one finds community activists seeking to protect a limited resource for their own benefit at the expense of a larger pool of people who could use the land if it were developed as housing.[274] The social capital story is not straightforward. If the gardens served as a venue for socializing and community organizing across existing communities, however defined, perhaps they advanced bridging social capital—which is not easily replaced. If, however, they served preexisting insular communities, they were hardly irreplaceable. If the plots were few and limited, it is far from clear that the gardens served a greater good than additional housing did. In fact, by pushing rents for existing housing down, the construction of new housing might have served to advance existing social capital by limiting displacement.

In her examination of community meetings, even in an urban neighborhood, sociologist Eva Rosen expressly found that "although low- and middle-class blacks live in close proximity, this does not lead to the creation of bridging social capital."[275] In her in-depth examination of the use of housing choice vouchers in a low-income, Black Baltimore neighborhood, Rosen finds that community meetings are generally attended by local homeowners who are skeptical and weary of the role that renters and voucher-holders play in their neighborhood:

> These "community" meetings are in fact only attended by a very particular segment of the community. Not only were they older. Not only were they largely homeowners. They were homeowners who lived in [relatively well-off pockets of the neighborhood] . . . . And fewer renters know about the community meeting.[276]

Rosen recounts attending one such meeting with Sue, a Black renter and a lifelong neighborhood resident. Even though Sue is the same race as the majority of other community residents in the room and occupies a similar income stratum, she does not feel comfortable participating in the meeting. In practice, the community meeting is for homeowners, not renters, and she knows her input is not welcome.[277] As Rosen describes it:

> The "community" meeting was only geared toward a certain segment of the community. It's an example of bonding social capital, where people with things in common—in this case homeowners—can share information and skills and gain access to resources such as the energy grant. But the

273. *See id.*

274. *See* Foster, *supra* note 124, at 535–36 & n.29.

275. EVA ROSEN, THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD 184 (2020).

276. *Id.*

277. *Id.* ("Although Sue is an unassisted renter in Oakland Terrace, she grew up in a family with a similar class background as many of the meeting attendees. Yet she felt alienated at the meeting because she was one of the few renters, and her concerns and needs were different from those of the residents at the meeting.").

> community meeting fails to build bridges across groups—even though it could do so in theory—because its agenda is constructed by a single group of people, that is, homeowners.[278]

Because exercising social capital through local community meetings and local government processes is likely to result in insularity, it actually "increase[s] the need for legal safeguards."[279] Land use public processes are not immune: "[s]ocial capital theory itself may justify land use protectionism."[280] Social capital cannot serve as a blanket rationale for public participation. A more nuanced understanding of social capital ought to inform a redesigned role for public participation.[281]

C. Public Participation Redistributes Wealth and Resources, but in the Wrong Direction

Arguments about social capital preservation are explicit in the community development and land use literature.[282] In theory, public participation opportunities also provide a mechanism to counterbalance low-income people's inability to participate in the marketplace.[283] Today, low-income communities lack control over their neighborhoods in part because they cannot leave their neighborhoods. Market power requires the ability to exit and to exercise purchasing ability. Low-income residents have less ability to exit both because of irreplaceable social capital and because of their lack of wealth.[284] Moving is expensive. And the more desirable a neighborhood is, the higher the cost of housing in that neighborhood. Because poor people cannot effectively participate in the marketplace, perhaps they require a greater ability to participate in the public process around real estate development.

The majority of low-income people who live in low-income neighborhoods, however, cannot exercise power and influence by testifying at local land use hearings simply because, without new development, there

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278. *Id.* at 185–86.

279. Stern, *supra* note 249, at 820.

280. *Id.* at 849.

281. Notably, Stern takes a cautious approach, not advocating against all devolved decision-making but, for example, arguing for a "more cabined role for neighborhood direct democracy programs." *Id.* at 856.

282. *See supra* Part III.B.

283. Presumably, the effects of urban renewal on communities of color would have been substantially less disastrous had displaced families had the resources to depart for more desirable neighborhoods. That is, in fact, what happened to white families displaced by urban renewal who, unlike their Black counterparts, enjoyed access to subsidized mortgage lending and a welcoming suburban housing market. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 65, 70, 74 (2017). As Rothstein recounts, the housing market was not just unfriendly to Black individuals, it was violent—and that violence was undertaken under color of law.

284. Notably, the inability to exit or credibly threaten to exit also dampens the efficacy of low-income people's exercise of public participation rights. As Carol M. Rose puts it, "the opportunity for exit has been a constant threat behind voice at the local level." Rose, *supra* note 139, at 886.

are no land use hearings to attend.[285] The value of increased participation opportunities accrues only to people living in the places facing development pressures. Public participation empowers only those people who live in neighborhoods attractive to developers, and those people are disproportionately well-off. Most low-income neighborhoods are not facing gentrification pressures.[286] Only a small minority of all low-income people reside in desirable, gentrifying neighborhoods.[287]

Finally, while participation proponents cite a need to counterbalance developers' market power, they do not often acknowledge the power imbalances inherent to public participation fora. There is nothing inherently inclusive about participation.[288] And the political sphere often replicates the inequities apparent in the economic sphere. It is hardly surprising, then, that researchers studying participation processes find that participants are not representative of the broader population[289] and that participants' contributions are not valued equally.[290]

Researchers find that participants testifying at Boston-area land use hearings are whiter, wealthier, and more opposed to housing development than the population of the neighborhoods in which they reside or voters in those neighborhoods.[291] Even in wealthy towns, the people who participate in land use hearings are still wealthier than their average neighbor.

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285. Some scholars estimate that only 20 percent of low-income census tracts underwent gentrification in recent decades. *See* Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 33 (2018). Other studies suggest that even fewer low-income areas have gentrified. *See* MALLACH, *supra* note 95, at 123–44. However, low-income communities are disproportionately targeted for undesirable uses, such as the operation of power plants. These uses are often subject to a different land use and public participation regime centralized at the state level. *See, e.g.*, CONN. GEN. STAT. § 22a-20a (2021) (requiring undesirable facilities seeking to locate in heavily impacted neighborhoods to engage in additional community engagement and public participation prior to filing permit applications). This is, in any event, properly addressed with enhanced participation rights tied specifically to environmental injustices and limited to communities disproportionately impacted by such uses. *See id.*; Press Release, U.S. Sen. Kamala D. Harris, Harris, Booker, Duckworth Introduce Comprehensive Legislation to Help Achieve Environmental Justice for All (July 30, 2020), http://web.archive.org/web/20200809065634/https://www.harris.senate.gov/news/press-releases/harris-booker-duckworth-introduce-comprehensive-legislation-to-help-achieve-environmental-justice-for-all.

286. *See* MALLACH, *supra* note 95, at 102, 111; JASON RICHARDSON ET AL., NAT'L CMTY. REINVESTMENT COAL., SHIFTING NEIGHBORHOODS: GENTRIFICATION AND CULTURAL DISPLACEMENT IN AMERICAN CITIES 4, 29 (2019), https://ncrc.org/gentrification/ [https://perma.cc/9QG5-88K4] (navigate to the link labeled "Download the full report (PDF)"). And even where there are gentrification pressures, often that gentrification manifests as converting four-unit townhomes to single-family houses, a conversion that does not require land use approvals. *See* Godsil, *supra* note 170, at 334.

287. *See* Zuk et al., *supra* note 285, at 33; MALLACH, *supra* note 95, at 123–44.

288. "[T]he ability of groups to participate—and the likelihood that such participation actually shifts policy outcomes and power disparities—depends critically on how much power is actually at stake in the first place." K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 722 (2020).

289. *See generally* EINSTEIN ET AL., *supra* note 211.

290. *See generally* Caroline S. Tauxe, *Marginalizing Public Participation in Local Planning: An Ethnographic Account*, 61 J. AM. PLAN. ASS'N 471 (1995).

291. EINSTEIN ET AL., *supra* note 211, at 109.

Unsurprisingly then, almost two-thirds of mayors nationwide report that while "policy areas like schools and policing [are] dominated by majority public opinion," when it comes to housing development, "a small group with strong views" dominates public discussion.[292]

Other research concludes that even where participation is widespread, authorities use race and class to prioritize some voices over others. "[Setting participation as a goal] assumes that government can employ neutral tactics and obtain a fair result even in the face of significant hierarchies of power,"[293] but there is no reason to make such an assumption. In fact, participants with less formal education, less wealth, and less political power can be "systematically disempowered by the formal planning process, so that their voices carr[y] less weight in decisions."[294] A host of illegitimate factors will influence a decision-maker's willingness to take testimony seriously. Researchers posit that those factors include homeownership status,[295] the likelihood that participants might bring litigation to enforce their preferences, and participants' ability to make political donations or otherwise influence the electoral process.[296] These factors vary positively with household wealth and income. As a result, public participation processes do not counteract wealth and income disparities; they exacerbate them.

Even the most vocal proponents of robust public participation recognize the power differentials that manifest in these processes:

> The applause [for the principle of citizen participation] is reduced to polite handclaps, however, when this principle is advocated by the have-not blacks, Mexican-Americans, Puerto Ricans, Indians, Eskimos, and whites. And when the have-nots define participation as redistribution of power, the American consensus on the fundamental principle explodes into many shades of outright racial, ethnic, ideological, and political opposition.[297]

In the context of public participation processes associated with environmentally hazardous land uses, a key member of the environmental justice movement noted that these processes, far from being progressive in their impact, redistributed environmental resources from poor to rich:

> While the drafters of environmental laws may have thought those laws were "neutral," their application has caused the inequities in the siting of unwanted facilities. The result of the laws is unequivocal: poor people and

292. *Id.* at 119.

293. McFarlane, *supra* note 51, at 917.

294. Tauxe, *supra* note 290, at 472.

295. *See* Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 904–10 (2011) (describing lack of evidence to support commonly held assumptions about homeowners' engagement in their communities as compared to renters' engagement). Ultimately, "[t]he pattern that emerges across multiple, large-sample-size, well-controlled studies is that homeownership increases voting, property upkeep, and some forms of local investment, but has no or modest effects on neighboring, socializing, working to solve local problems, or participating in voluntary or local organizations." *Id.* at 929. Notably, homeowners' self-interest drives exclusionary behavior and policy preferences that, if redistributionist in effect, redistribute wealth from the poor to the well-off. *See id.* at 907.

296. *See* Tauxe, *supra* note 290, at 478.

297. Arnstein, *supra* note 151, at 216.

> people of color bear a disproportionate share of environmental burdens. And while we may decry the *outcome*, environmental laws are working as designed.[298]

When public participation motivates decision-making, formal rules and standards suffer. "Lacking substantive standards, such statutes depend on the vigor of the political process for achieving environmental goals. In the end, it is those with political clout who win in the administrative process or siting decision."[299]

Even within racial and class groups, public participation prioritizes and entrenches status differentials.[300] Homeowners have more legitimacy than renters. Long-standing, and therefore older, residents have more legitimacy than recent transplants, who will generally be younger. The identity of participants and the perspectives they provide are predictable and, as recounted above, the tone of the hearings is angry.[301] As a result, people with conflicting perspectives choose not to participate.[302]

Where an administrative body fails to advance redistributive goals despite public participation, the public participation requirement itself does not provide a mechanism to challenge the substance of the decision. Public participation requirements are procedural in nature and, where they are not met, they give rise to procedural attacks. Such attacks can delay development, sometimes enough to kill a development, particularly given the cyclical nature of real estate markets.[303] While the settlement process might further redistributive goals, there is no guarantee that this will take place. In fact, the mediated settlement often involves concessions that increase the cost of housing, a result contrary to progressive goals.[304] A well-designed public participation process ought to tackle and address these power differentials.

D. Public Participation Prioritizes Current Residents, but at the Expense of Everyone Else

As described above, public participation proponents routinely assume that the people most affected by a real estate development project already live in the neighborhood where the development will take place.[305] This assumption is echoed in public participation processes, which prioritize existing resident voices in formal and informal ways. Formally, only neighbors typically receive notice of public hearings mailed to their homes.[306] Some zoning enabling acts and zoning codes also require posted notice in addition to

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298. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 646 (1992).

299. *Id.*

300. *See supra* note 275 and accompanying text.

301. *See supra* notes 184–201 and accompanying text.

302. *See supra* notes 187–88 and accompanying text; *infra* note 372.

303. *See* Smith, *supra* note 51, at 271.

304. *See* EINSTEIN ET AL., *supra* note 211, at 4.

305. *See supra* note 145 and accompanying text.

306. *See* 3 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S: THE LAW OF ZONING AND PLANNING § 57:53 (rev. 4th ed. Supp. 2019).

mailings[307] but, again, existing residents are the people most likely to see the posted notice. Informally, planning and zoning commissioners tend to prioritize the voices of existing residents. When delivering testimony, people commonly describe themselves not as neighbors or residents, but as homeowners, and recite the length of their tenure in the neighborhood, all to secure legitimacy in the eyes of the people—themselves disproportionately homeowners—making land use planning decisions.[308]

Certainly, existing residents are affected by new development in a way that others are not. New construction may deviate from their previous expectations as to what local resources their property affords them, regardless of whether the property is owned by a homeowner or leased by a tenant. Courts and legal scholars have long prioritized owners' expectations when considering whether certain property rights ought to be protected.[309]

Prioritizing the preferences of existing residents makes neighborhood change more difficult. Even if one assumes that existing communities deserve more say in development than outsiders do, the tools available to existing communities are crafted to delay development and preserve the status quo, rather than to encourage the development of beneficial goods and resources. Zoning codes that prioritize the status quo risk sacrificing one of the key characteristics of the urban environment: dynamism.[310] Demographics change. Average household size changes. The average number of children per family changes. The average age at which people become parents changes. Birth rates go up, and birth rates go down. Housing preferences evolve. The nature and location of jobs and industry respond to

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307. *See, e.g.*, PARK RIDGE, ILL., ZONING ORDINANCE § 3.3(c) (2019).

308. *See, e.g.*, John Eligon, *Residents Feared Low-Income Housing Would Ruin Their Suburb. It Didn't.*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2020/11/05/us/affordable-housing-suburbs.html [https://perma.cc/X5GL-AC22] (quoting resident: "We built our brand-new home here because we worked hard to become residents . . . not because we got a handout, not because somebody paved the way for us"); Jacqueline Rabe Thomas, *Many Ideas, but Little Agreement, on How to Address Connecticut's Affordable Housing Issues*, CONN. MIRROR (Mar. 18, 2021), https://ctmirror.org/2021/03/18/many-ideas-but-little-agreement-on-how-to-address-connecticuts-affordable-housing-issues/ [https://perma.cc/X7FS-X758] (recounting a hearing before a Connecticut state legislative committee in which one participant testified, "[a]s a homeowner, we should be able to have a local voice"); Doug Trumm, *How I Was Sidelined from the Wallingford Community Council*, URBANIST (May 30, 2016), https://www.theurbanist.org/2016/05/30/how-i-was-sidelined-from-the-wallingford-community-council [https://perma.cc/HK5W-KZSM] (describing neighborhood council election dominated by homeowners); *see also* Erica Drzewiecki, *Housing Project Plan in Newington Faces Opposition*, NEW BRITAIN HERALD (Aug. 28, 2018, 7:21 PM), http://www.newbritainherald.com/NBH-Newington+News/334189/housing-project-plan-in-newington-faces-opposition [https://perma.cc/P764-BTNA] (quoting resident: "I'm not in favor of this [affordable housing] project for the lovely town of Newington where I've lived most of my life").

309. *See* Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 431, 462 (2015) (arguing that expectation ought to play a lesser role in property theory when property is distributed highly unequally and often unjustly).

310. Lemar, *supra* note 49, at 1539–42 (arguing that defining "aesthetic zoning codes" by reference to existing housing entrenches status quo housing design without regard to the benefits of neighborhood change).

technological innovation and economic booms and busts. Transportation costs rise and fall.

Neighborhoods, particularly those proximate to amenities, must evolve as well. Too often neighborhoods are not allowed to change as a result of land use regulations, whether aesthetic strictures tied to existing context or prioritization of existing residents in decision-making.[311] As a result, quality of life suffers because households are not able to find housing that meets their needs and preferences. Poor households are most likely to lose when demand outpaces supply. It is no surprise, then, that empiricists studying public participation in land use hearings worry that "rather than empowering under-represented interests, these institutions could, in fact, be amplifying the voices of a small group of unrepresentative individuals with strong interest in restricting the development of new housing."[312] In practice, when residents are asked to respond to changes in their community, they will opt for the status quo over new development.[313]

1. Everyone Else Incurs the Costs of Sprawl

When law makes public participation core to the redevelopment process, development will be easier and cheaper in places where there is no public to participate. Unfortunately, urban redevelopment is significantly more difficult than greenfields development, which uses farmland and forest land to build housing, rather than redeploy sites in the urban core adjacent to transit and jobs.[314] Redevelopment requires engaging in land assemblage and wading through messy title histories and encumbrances.[315] Urban sites are often brownfields, requiring cleanup and assignment of existing and potential liabilities to those harmed by pollutants.[316] Despite these hindrances to development, urban parcels are expensive as a result of their proximity to transportation infrastructure and jobs.[317]

One oft-overlooked component of the urban redevelopment process is the cost and indeterminacy resulting from public participation. Developers can identify zoning requirements by reading a zoning code and can do so before incurring significant predevelopment expenditures. No one, however, can predict what is likely to arise out of the public participation processes. Those processes, moreover, do not begin until developers invest significant funds in the design and engineering process. Public participation, therefore, puts significant predevelopment expenditures at risk. Subdividing a farm into one-acre residential lots is not likely to affect any existing residents and is

311. *See generally* Lemar, *supra* note 49.

312. EINSTEIN ET AL., *supra* note 211, at 15–16.

313. *See* FISCHEL, *supra* note 40, at 329.

314. *See* Michael Lewyn, *Yes to Infill, No to Nuisance*, 42 FORDHAM URB. L.J. 841, 849–50 & n.56 (2015) (defining "'greenfield' sites").

315. *See, e.g.*, Porter, *supra* note 81, at 62 ("Assembling small parcels into meaningful sites can be prohibitively expensive and is further complicated by the fact that a number of city, state, and federal agencies each control land and fight over turf.").

316. *Id.* at 63.

317. *Id.* at 57.

unlikely to give rise to public outcry. Because low-income people are less likely to participate in public meetings and receive less credence from decision-makers, public participation processes may also direct redevelopment projects to poor neighborhoods rather than wealthy ones, potentially resulting in displacing gentrification.[318]

Requiring the expenditure of significant predevelopment dollars before one can apply for approvals does not simply raise the cost of development. It also erects a barrier to entry for those developers who cannot afford to risk predevelopment expenditures. Expensive predevelopment processes privilege large-scale developers who diversify their risk across multiple projects. Developers with the political power to push through despite public opposition benefit from barriers to entry erected by public participation processes. Such processes disadvantage small-scale developers.

Extensive, unpredictable public participation processes, then, are simply one additional barrier to redirecting housing development from sprawling suburbs to existing infrastructure in already-developed cities and suburbs. And because the processes privilege the participation of well-off neighbors, they also direct development away from desirable, well-resourced, wealthy neighborhoods to low-income neighborhoods with less political power to oppose development.

2. Everyone Else Incurs Higher Housing Costs

Public participation processes also enable anticompetitive behavior by homeowners. The trope of the all-powerful developer looms large in the arguments of those who seek to increase local residents' opportunities to participate and influence private development.[319] Recent empirical work, however, calls into question the hypothesis that developers control local politics.[320] As theorized by Professor Robert Ellickson as early as 1977, and subsequently developed further by Professor William Fischel, homeowners exert disproportionate power in the planning process—and they exert their power in order to stymie, rather than to encourage, development.[321]

While both developers and tenants have an interest in abundant supplies of housing, landlords and homeowners do not. "The residential *owner* role in particular comprises a perceived prerogative to exert control over housing supply and the social composition of residents . . . . [I]t is not surprising that land cartelization and NIMBYism are little-questioned aspects of residential life."[322] Homeowners and landlords use the regulatory tools at their disposal (i.e., zoning laws) to limit construction of new housing. Zoning is often "the

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318. EINSTEIN ET AL., *supra* note 211, at 45–46.

319. *See supra* Part II.A.

320. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 231–33 (2014); Schleicher, *supra* note 103, at 1698.

321. *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 406 (1977); FISCHEL, *supra* note 40, at 292.

322. Stern, *supra* note 249, at 862.

product of entrenched economic interests engaging in protectionism and burdening the broader public to further their own economic interests. The politics of property protection change considerably with increased attention to these dynamics."[323]

Homeowners not only act in their self-interest—property value preservation and inflation—they conflate their self-interest with the public interest. Processes that preference the "community" and define the relevant community as current residents or homeowners embrace a kind of "greed is good" approach to policymaking. Homeowners at land use hearings frequently testify that a zoning decision is in the public interest only if it inflates or preserves property values.[324] "Social capital theory thus entrenches private-regarding norms by eliding a balancing between broader social benefits and local group interests and claiming that action to advance the latter will provide the former."[325] Conflating homeowners' self-interest with the public interest then "deters communication to understand the needs of the larger community."[326]

In fact, homeowners can be analogized to cartels.[327] Robert Ellickson first posited an economic model centered on the monopolistic behavior of homeowners in a 1977 article.[328] Cartels coordinate behavior among firms in an effort to inflate prices and maximize profits to cartel members; one mechanism is to depress production of a good.[329] As a result, buyers overpay and "scarce capital [remains] in the hands of persons who are not using it

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323. Serkin, *supra* note 107, at 8.

324. *See, e.g.*, Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 11, Step By Step, Inc. v. City of Ogdensburg, 176 F. Supp. 3d 112 (N.D.N.Y. 2016) (No. 7:15-CV-925), 2015 WL 13021218 (quoting public comment in opposition to proposed rezoning for mental health support home: "[W]e need new single family homes to enhance our tax base, not the proposed [project] to drain our home equity"); Josh LaBella, *Fairfield Residents: Proposed 5-Story Apartment Complex 'Detrimental' to 'Safety and Well-Being,'* CTPOST (Sept. 20, 2020, 12:12 PM), https://www.ctpost.com/local/article/Fairfield-residents-Proposed-5-story-apartment-15577896.php [https://perma.cc/TE7S-QN33] (quoting neighborhood organization president's claims that "predatory developers . . . 'reap[] the benefits'" of Connecticut's builder's remedy statute "to the detriment of neighborhood property values").

325. Stern, *supra* note 249, at 864.

326. Bezdek, *supra* note 48, at 15.

327. *See, e.g.*, A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 195 (2009) ("Local land use policies and regulations also give homeowners certain cartel rights by letting them (but typically not renters) object to requests for zoning changes.").

328. *See* Ellickson, *supra* note 321, at 400–03.

329. *See* Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 885, 886–87 (2012). It is reasonable to wonder why homeowner cartels—comprised of many individual parties, more than would generally be considered sustainable for a cartel—do not fragment. The answer is likely twofold. First, unlike other cartels, they have access to a statutory enforcement mechanism—zoning—and need not rely on more informal mechanisms of enforcement. Second, as set out by William Fischel, homeowners' investment risk is undiversified and their interests are unidimensional, providing little incentive to break off from the cartel. *See generally* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2005).

efficiently."[330] Because cartels involve multiple producers, they must include a mechanism by which producers coordinate behavior.[331] Zoning codes play this role in the case of homeowners depressing housing production and inflating housing prices. While cartels are typically prohibited by section 1 of the Sherman Act,[332] in the case of housing, "the suburban land cartel is more effective than traditional cartels because members can openly coordinate behavior and have a perfect mechanism to enforce mutual compliance: zoning law."[333]

Because they are comprised of multiple firms, each of which can act on its own, cartels, unlike monopolies, are fragile creatures. Each member stands to profit by breaking away from the cartel. As a result, the cartel must create and enforce a mechanism to prevent each member's departure. In order for a cartel to sustain itself, it must have mechanisms both to know when an individual member has broken away and to punish individual members when they do so. As Professor Christopher Leslie explains,

> [c]artels try to create stability through enforcement regimes. In order to deter cheating and to remedy cheating when it occurs, stable cartels need to develop enforcement mechanisms that monitor the sales (and prices) of cartel members, penalize firms that sell more than their cartel allotment, and compensate those who have not received their agreed-upon share of the cartel profits.[334]

Cartelization, then, often requires two stages.[335] In the first stage, the actors "reach[] a consensus on a plan to restrict output or otherwise curb rivalry."[336] In the second stage, the cartel must track each member's output and punish those who overproduce.[337] All the while, the cartel must erect barriers to entry by new firms not subject to the cartelization plan.[338] Zoning serves multiple functions in this schema. It is the primary enforcement regime that applies to any firms that enter after adoption of the cartelization plan. It also serves as a barrier to entry, barring firms that might desire to produce more housing than set out in the cartelization plan.[339]

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330. Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning*, 24 FORDHAM URB. L.J. 23, 61 (1996).

331. *See* Christopher R. Leslie, *Balancing the Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels*, 96 WASH. U. L. REV. 1, 2 (2018).

332. 15 U.S.C. § 1.

333. Dietderich, *supra* note 330, at 61.

334. Leslie, *supra* note 331, at 1, 2.

335. Randall D. Heeb et al., *Cartels as Two-Stage Mechanisms: Implications for the Analysis of Dominant-Firm Conduct*, 10 CHI. J. INT'L L. 213, 216–17 (2009).

336. *Id.* at 217.

337. *See id.*

338. *See id.* While this analysis focuses on the need for the cartel to manage individual homeowners, it is also the case that, for exclusionary zoning to have effects on the larger market, there is also the need for a cartel manager to manage across local governments. Ellickson analyzes the management of the cartel across localities. *See* Ellickson, *supra* note 321, at 434.

339. By upzoning statewide, states can limit local authority to zone in ways that limit or strip supply constraints from the zoning code. These interventions go to the heart of the homeowners' cartel's efforts to constrain supply so as to increase price.

Within that larger regime, public hearings before planning and zoning boards serve an important function. Public hearings permit the cartel to track individual members' commitment to the profiteering enterprise. The loudest objectors to a project will solicit signatures on petitions and donations to fund lawyers. They will ask their neighbors to put up lawn signs and testify at hearings. The public hearing process gives cartel leaders an opportunity to determine if there are cartel members at risk of breaking away. It also permits the cartel to punish those who do not commit themselves to the cartel.[340] Homeowner cartels abuse the power allocated to individual actors in the land use planning process. In the words of one scholar, "[a]lthough the right to exclude may be an essential stick in property's metaphorical bundles, it is a right to be exercised by and for the benefit of individuals, not a tool for inequitable, collective control."[341]

While at least one scholar acknowledges that conventional arguments in favor of public participation empower NIMBYs alongside the urban poor,[342] no public participation proponent proposes a mechanism by which to distinguish the disenfranchised poor from the well-connected rich. Damon Y. Smith argues that urban poor public participants are not guarding the status quo but simply trying to influence the nature of the change.[343] He does not set forth a normative position that would permit courts or other decision-makers to distinguish between the two.

As described in this part, project-specific public participation is an ineffective approach to addressing gentrification and other problems facing low-income communities. Worse, by facilitating exclusion in well-off neighborhoods, it exacerbates the housing affordability crisis.

Ultimately, the question of what role public participation ought to play is one of institutional design.[344] What should the public participation process look like? Who are the decision-makers, how are they selected, and at what points in the process do they make their decisions? In various spheres of local government, these questions are contested constantly, from whether to have elected or appointed boards of education,[345] to what powers ought to be

340. At a small-town New England land use hearing at which I represented the applicant, one project opponent compared neighbors' objections to the development to puritanical social policing as described in *The Scarlet Letter*. The project opponent did not make the comparison as a critique but instead as a celebration of neighbors' efforts to control development. The project opponent implored the commissioners to understand that, consistent with New England's puritanical roots, there were and there ought to be "social strictures, there were social behaviors—this is the land of shunning and social regulation on what people would build, what people would wear." Application of Thomas and Elizabeth Halsey for a Certificate of Design Appropriateness to Construct a New Single Family Dwelling at 28 Potter Court, at 30 (Noank Fire Dist. Zoning Comm'n July 17, 2012) (transcript on file with author).

341. Boyack, *supra* note 164, at 497.

342. Smith, *supra* note 51, at 256–57.

343. *Id.* at 266.

344. *See* Rahman & Simonson, *supra* note 288, at 682.

345. *See* Sam Brill, *The Law of School Catchment Areas*, 30 STAN. L. & POL'Y REV. 349, 364 (2019).

held by civilian review boards in the policing context.[346] Part IV proposes a redesign of land use public participation.

IV. REDESIGNING PUBLIC PARTICIPATION PROCESSES

It is not enough to say that public participation is important. The design of community engagement processes matters. Only a well-designed process can ensure that "countervailing interests and community groups . . . assert their views, to hold governments and other actors to account, and to claim a share of governing power."[347]

Crafting an effective community engagement forum requires responding to the various ways in which existing public participation processes fail, not just their potential to succeed. When public participation motivates decision-making, formal rules and standards suffer. As argued above, current public participation structures preference some voices over others, put a thumb on the scale in favor of the status quo, and fail to ensure that irrelevant, often false, information does not drive the decision-making process. As a result, public participation processes delay development, direct development to poor neighborhoods and greenfields, and increase the cost of housing.[348] A redesigned public participation process ought to avoid these results. An effective public participation system must account for the way in which the current system disadvantages already disadvantaged voices, redistributes wealth upwards, equates local knowledge and local self-interest, stifles change, and slows housing development to the detriment of housing affordability.

State zoning enabling acts and local zoning ordinances ought to prioritize public participation where local knowledge is necessary and relevant to decision-making. Simultaneously, these laws must acknowledge where local knowledge is irrelevant at best.[349] And they ought to require rigorous data collection, investigation, and analysis in addition to—and as a check

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346. *See* Rahman & Simonson, *supra* note 288, at 701. As Professor Monica C. Bell has explained in the criminal justice context, community engagement can take many forms. *See* Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV.: SOC. SCI. RSCH. ON RACE 197, 198 (2019). It can be transformational, upending policymaking and perceptions about what is possible. *Id.* More frequently, however, even people who are not abused by and even benefit from the existing system exert no control over that system. *Id.* They do not influence it, they simply enjoy its benefits, while being lucky not to be subjected to its failures.

347. Rahman & Simonson, *supra* note 288, at 690.

348. K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2493 (2018) ("Conventional approaches to participation and accountability have had mixed results in the context of [housing] . . . provision."). Rahman's discussion is not limited to housing and instead focuses on basic necessities, which he sometimes terms "public goods." *See id.* at 2450. Housing does not meet the classic definition of a public good, though it is undoubtedly a basic necessity.

349. None of this is to suggest that fixing the process can fix the substantive problem of massive artificial constraints on housing production (though a more robust planning process would, one hopes, force states and local governments to focus on the connection between zoning and housing prices). States ought to narrow local governments' zoning authority so as to remove their ability to constrain supply. *See* Lemar, *supra* note 163, at 353.

against—public participation. For example, rather than rely on current property owners' fears about possible property value depression, planners can look to data: "Hedonic regression analysis can measure the effects of particular uses—from wind turbines to community gardens—on neighboring property values. Grounding land use decisions in these data represents a considerable advance over proceeding by intuition."[350] Effectuating these reforms requires returning to the Standard Act's original distinction between zoning decisions and adjustment decisions.[351] The planning and zoning process ought to be informed, not dictated, by public participation. There is little place for public participation, however, at the time of individual development approvals.

A. Learning from Other Administrative Processes

Public participation is important to planning processes, but we should be deeply skeptical of public participation's role in approving any individual development proposal. Introducing public participation requirements at the stage of individual development approvals encourages communities to be reactive rather than proactive. It detracts from the planning and zoning process by giving angry neighbors an opportunity to kill a project even if the project is consistent with state and local law, including laws concerning planning and zoning. The planning process is undermined by inconsistent application of law (the plan and the zoning) to fact (a specific development proposal).

Recall the distinction between planning and zoning processes and adjustment decisions (development approvals) described in Part II. As described above in Part III, residents can identify problems in their neighborhood and their wishes for the neighborhood. These inputs are fundamental to, but should constitute just one component of, the planning and zoning process. But public participation and hearings are less appropriate when an individual developer seeks development approvals—a variance, special exception, or a rezoning specific to its parcel. In these cases, the code and the zoning enabling act set applicable standards and factors that ought to be applied by a neutral arbiter.[352]

If the planning process is robust, we should be able to make the development approvals process more predictable.[353] Most forms of development ought to be as-of-right under the zoning resulting from the planning process. Skeptics might point out that development approvals processes attract more participation than planning processes do. That, however, is precisely the problem created by the current system. Under the

350. Fennell, *supra* note 142, at 392.

351. *See supra* notes 24–30 and accompanying text.

352. Contemporary planning processes frequently collapse the distinction between planning and zoning—a fundamental problem with contemporary zoning ordinances. *See supra* Part I.B.

353. This proposal is consistent with the push for stronger planning, as discussed in Hills & Schleicher, *supra* note 12, at 116–17.

current system, there is little incentive to participate in the planning process, as the approvals process for any given development, subject to the whims of those who choose to testify, does not respect the planning document. As a result, fewer people participate in planning, and those who do participate are undermined by later participants in the development approvals process. If the planning process mattered and was less subject to being overruled during later development approvals processes, it would attract more attention and participation.

Thankfully, we have an off-the-rack solution. Like the federal Administrative Procedure Act[354] (APA), the Model State Administrative Procedures Act[355] ("Model State APA") includes public participation, but does not rely on participation as a primary legitimating force. Instead, it relies on the agency's rigorous evaluation of the substance of the decision in question, taking into account both public comment and the agency's independent analysis. Courts considering whether a regulation meets the requirements of the APA look to whether there is reasoned decision-making, consistent with the authorizing statute, for the regulation.[356]

Similarly, legislatures, local governments, and courts ought to distinguish between rulemaking (zoning regulations) and contested cases (development approvals) in the land use context. Undoing the collapsed distinction requires both changing formal rules regarding public participation and trusting the planning process enough to permit more uses as-of-right in the zoning code. As Professor Adam MacLeod argues, in the land use context "courts generally fail to distinguish between facial and as-applied challenges, [and] between generally-applicable regulations and individualized assessments."[357] Like courts, state zoning enabling acts and local agencies also ought to recognize the difference between development approvals and adopting and amending generally applicable zoning ordinances. Public participation is appropriate in the zoning process but not in the development approvals process.[358]

With respect to public participation requirements, contemporary zoning enabling acts should distinguish between zoning decisions and development approvals. Consistent with the Standard Act and the Model State APA, public participation should be welcome at the planning phase and cabined at the development approvals phase. In the planning phase, zoning enabling acts ought to identify substantive ends for planning processes[359] and require that planners and commissioners consider all available data, including public

354. 5 U.S.C. §§ 551–559.

355. REVISED MODEL STATE ADMIN. PROCEDURE ACT (NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 2010).

356. *Id.* § 508 cmt.

357. MacLeod, *supra* note 210, at 55.

358. In the development approvals process, participants should meet the standard for intervention if they seek to participate. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT § 409.

359. MacLeod, *supra* note 210, at 57 ("[S]tate legislatures should amend their enabling acts to require local governments to articulate specific means-ends . . . .").

comment, when making zoning decisions intended to serve those ends. The agency ought to issue written decisions that respond to the comments submitted. At the development approvals phase, most development ought to be as-of-right, consistent with the plan. And where an agency is applying a regulation to a specific applicant, as is the case with development approvals, public participation is not appropriate. The conditions of approval ought to be objective. At neither phase should commissioners be permitted to punt decision-making to popularity contests in the form of public hearings. Robust judicial review must support these changes.

B. Planning as Rulemaking

Public participation requirements are appropriate at the planning stage, including adoptions of and revisions to comprehensive plans, zoning codes, and zoning maps. At the planning stage, information received from the public can be both vetted and supplemented as part of a more wide-ranging rulemaking process.

1. The Role of States

Community control can entrench structural inequality when the neighborhoods exercising that control are highly segregated along race and class. Professors Jocelyn Simonson and K. Sabeel Rahman argue that truly empowering input must happen "upstream," at a stage in the administrative process when real choices are made.[360] When places are segregated and the places where poor people live are themselves poor, "upstream" must include changes at the state and federal levels, not just at the local and neighborhood levels.

Two things must happen upstream. First, where statewide interests are at stake, some actual policymaking and planning must happen at the state level.[361] In other words, if the local approvals process constitutes planning and dealing, some issues that may otherwise come up in a negotiated result should be nonnegotiable because they result in an undersupply of housing or other nefarious effects. Second, the state must lay out local public participation requirements and limitations, as proposed in the remainder of this part. Finally, state law must require that local planning is meaningful. In order to be meaningful, local plans must be regularly updated, and they must address the goals enunciated at the state level. The resulting plan must have the force of law, or the planning process must ensure that the plan is immediately translated into an enforceable zoning code.[362]

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360. Rahman & Simonson, *supra* note 288, at 725–27.

361. *See* Lemar, *supra* note 163, at 296.

362. An example is Minnesota's Metropolitan Land Planning Act, which included a planning requirement that ultimately gave rise to a citywide upzoning in Minneapolis in November 2020. Stephen P. Katkov & Jon Schoenwetter, *Minneapolis's Great Experiment: An Introduction to the Minneapolis 2040 Comprehensive Plan*, BENCH & BAR MINN., Mar. 2020, at 21, 23.

2. Setting Out Goals and Purposes

Some zoning enabling acts no longer enumerate purposes of zoning,[363] as the Standard Act did.[364] While the purposes listed in the Standard Act are overly broad, states ought to remove vague, easily manipulated purpose provisions, such as "consideration as to the character of" the zoning community."[365] And they ought to identify data relevant to those purposes, such as impacts on housing affordability, public health, and environmental impacts, such as vehicle miles traveled. While the agency will receive comments that are unrelated to the inquiry at hand, the Model State APA's requirements that the agency explain the final rule[366] and respond to comments[367] can, in effect, cabin the impulse to subject decision-making to a popularity contest. The process must be able to discern opposition based on facts from opposition based on bias or irrational fear.[368]

Because zoning is biased in favor of the status quo,[369] the planning process ought to be framed in terms of change. What about their community would participants like to see improved? As Warren Logan suggests,[370] even when they do not have the expertise to posit solutions, residents can identify problems which then might be solved through better planning and land use decisions. A planning process that explicitly describes the problem paves the way for later determinations of whether the problems have, in fact, been solved or exacerbated. In the context of planning and rezoning decisions,

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363. California and Massachusetts, for example, do not have purposes provisions in their zoning enabling acts. *See generally* CAL. GOV'T CODE §§ 65000–66499.58 (West 2021); MASS. GEN. LAWS ch. 40A (2021).

364. *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 13, § 3.

365. CONN. GEN. STAT. § 8-2(a) (2021). Connecticut, at the urging of fair housing advocates, has enacted legislation that strips from the zoning enabling act authorization for towns to adopt zoning provisions aimed at preserving the "character" of their communities, recognizing that this overly broad term has been used to perpetuate segregation. *See* CONN. GEN. STAT. ANN. § 8-2(b)(3) (West 2021) (replacing considerations of "character" with considerations of "physical site characteristics"); *id.* § 8-2(d)(10) (prohibiting municipalities from considering neighborhood "character" when reviewing most land use applications). However, legislators were so troubled by the removal of "character" considerations in zoning that they replaced it with an equally nebulous definition: "physical site characteristics." *Id.* § 8-2(b)(3).

366. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 313 (NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 2010).

367. *Id.* § 313(1).

368. The U.S. Department of Housing and Urban Development has described this distinction as follows: "[c]ommunity opposition . . . based on factual concerns (concerns are concrete and not speculative, based on rational, demonstrable evidence, focused on measurable impact on a neighborhood)" and opposition "based on biases (concerns are focused on stereotypes, prejudice, and anxiety about the new residents or the units in which they will live)." U.S. DEP'T OF HOUS. & URBAN DEV., HUD GUIDANCE, ASSESSMENT OF FAIR HOUSING TOOL FOR STATES AND INSULAR AREAS, app. C at 3 (2016). See *infra* notes 382–88 and accompanying text for a discussion of potential lessons one might draw from this tool.

369. Bob Ellickson uses the term "frozen neighborhoods" to describe the many ways in which planning law works to halt the evolution of urban and suburban places. Ellickson, *supra* note 248, at 1. In my own work, I have described this phenomenon as "zoning as taxidermy." *See generally* Lemar, *supra* note 49.

370. *See supra* note 226 and accompanying text.

bureaucrats and commissioners ought to solicit public input widely, from within the city limits and beyond. Logan describes attending community festivals and get-togethers to solicit perspectives on local transportation infrastructure.[371] He does not rely exclusively on traditional public meetings, which, he explicitly recognizes, preference the perspectives of "wealthy homeowners."[372] There is no reason to preference the neighbors, and participation ought to be solicited broadly. While zoning enabling acts require that notice be given to neighbors,[373] anyone ought to be able to register with the state to receive notice of land use hearings.[374] This would allow affordable housing advocates, the homebuilders' lobby, disability advocates, advocates for social services agencies, and others to receive notice and share their expertise. Crucially, however, the results of those participation processes must be filtered through planners and commissioners required to consider factors other than public opinion as presented in the public process.

3. Inclusive Public Participation

Traditional public hearings are insufficient and should be supplemented with outreach to community organizations, historically disenfranchised communities, communities unlikely to attend public hearings, and communities susceptible to silencing by traditional public hearings.[375] The zoning enabling act or zoning ordinance ought to set precise processes for outreach and require the planning agency to interrogate whether the community engagement process was effective. The process ought to reach those least likely to attend and testify at traditional public hearings through outreach at public schools, neighborhood festivals, and religious institutions: places where people congregate even if they do not have strong feelings about real estate development. In addition, the participation process must rely on data collection requirements to ensure that effective outreach occurs. Robust data collection requirements, reviewable by courts, are crucial to ensuring that public outreach is effective.

The substantive rulemaking inquiry must include the opportunity for public comment and, at the agency's discretion, may include a public

371. *See* Holder, *supra* note 226.

372. *Id.* At an event sponsored by the Federal Reserve Bank of Minneapolis, Minneapolis City Councilperson Lisa Bender recounted advising planning staff to talk to people about their lives at festivals in addition to holding meetings required by statute. She also described hearing from renters that they would not attend formal hearings because their opinions were discounted in those fora. Minneapolis Fed, *Fall 2019 Institute Conference—Day* 1, YOUTUBE, at 3:28 (Oct. 13, 2019), https://www.youtube.com/watch?v=KRMdqU0IIqs [https://perma.cc/97QL-T7AU].

373. *See supra* notes 306–07 and accompanying text.

374. Connecticut requires each individual town to make such registries available. CONN. GEN. STAT. § 8-7d(g)(2) (2021). There is no mechanism for individuals or organizations to register with the state. Instead, one must register with each of 169 towns plus every sub-local government—such as fire districts, homeowners' associations, and beach associations—that exercises zoning authority by delegation of the State of Connecticut.

375. *See supra* note 372.

hearing.[376] The same requirements should apply to zoning decisions. Testimony ought to be limited to certain subject matters listed in the zoning enabling act. The Model State APA anticipates that agencies will make extensive use of the internet to publicize and receive comments. In the land use context, this mechanism can serve to counter the overinfluence of "neighborhood defenders"[377] and "homevoters."[378] Even so, in addition to receiving public comments, given the politicized context of land use decisions, it is likely that local agencies will often choose to hold public hearings even though such hearings are, in theory, optional.

The scope of agency review ought to be broader than simply hosting public hearings and channeling public input.[379] As is the case in other regulatory processes, the planning and zoning process should be accompanied by rigorous data collection, including regarding the state's housing needs.[380] Rigorous data consideration and a judicial review process that ensures that decisions are based on data ought to be legitimating forces. The Affirmatively Furthering Fair Housing (AFFH) rule—adopted pursuant to the Fair Housing Act[381] by the Obama-era Department of Housing and Urban Development (HUD) and revoked and replaced by Trump's HUD—can serve as a model.[382] The AFFH rule "is significant not only as it applies to the AFFH mandate but also more broadly as a potentially innovative mechanism that could herald experimentation and new approaches to realize equity concerns more broadly."[383] The Assessment of Fair Housing (AFH) rubric required localities that receive certain federal funding to complete a detailed analysis, based on data provided by HUD, relating to segregation.[384] The AFH also required significant community engagement including, but not

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376. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 306 (NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 2010). The Model State APA also noted that "Article 2 is intended to provide easy public access to agency law and policy that are relevant to agency process." *Id.* § 201 cmt.

377. *See generally* EINSTEIN ET AL., *supra* note 211.

378. *See generally* FISCHEL, *supra* note 329.

379. The process could require, for example, as Professor Tim Iglesias has proposed, that zoning jurisdictions expressly consider impact on housing affordability. *See* Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 476–77 (2003) ("The HIA requirement would be enacted by state statute to promote this goal. The statute would consist of procedural requirements . . . and an explicit legislative policy that local governments 'avoid or mitigate significant adverse housing impacts whenever it is feasible to do so.'").

380. Surprisingly few states require local governments to consider housing affordability and need in their planning and zoning process. Exceptions include New Jersey and, in recent years, California.

381. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of the U.S.C.).

382. Ironically, HUD suspended typical public participation requirements in connection with revocation of the AFFH rules. Press Release, U.S. Dep't of Hous. & Urb. Dev., Secretary Carson Terminates 2015 AFFH Rule (July 23, 2020), https://www.hud.gov/press/press_releases_media_advisories/hud_no_20_109 [https://perma.cc/8VWY-NCYK].

383. Katherine M. O'Regan & Kenneth Zimmerman, *The Potential of the Fair Housing Act's Affirmative Mandate and HUD's AFFH Rule*, CITYSCAPE: J. POL'Y DEV. & RSCH., 2019, no. 1, at 87, 95.

384. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 368, at 2–3.

limited to, public hearings.[385] The tool also required a description of outreach activities, including using "media outlets" and reaching out to "organizations" in an effort to reach "populations that are typically underrepresented in the planning process."[386] It required an explanation of "how these communications were designed to reach the broadest audience possible."[387] In addition, the tool required the agency to evaluate the success of its outreach efforts.[388]

One can imagine a similar tool—to be completed in the process of rendering zoning decisions—that would require substantial engagement with the actual impacts of planning and development, rather than the perceived risks of changing the status quo.[389] Just as existing regulatory processes typically require a fiscal impact analysis or a small business impact statement, in the planning and zoning context, a state statute might require agencies to conduct housing affordability and fair housing analyses.[390] The analysis ought to consider the impact of a proposed change, as well as the impact of doing nothing.

4. Reasoned Explanations

Under the Model State APA, following receipt of public comment, an agency must issue a final rule, accompanied by an explanatory statement that responds to "substantial arguments made in testimony and comments."[391] Only then is the regulation entitled to judicial deference. Similarly, the AFH rubric required agencies to "[i]nclude a summary of any comments or views not accepted and the reasons why."[392] The requirement that the agency explain its reasoning and respond to the arguments is key.

Narrowing the scope of testimony, as permitted by the Model State APA's evidentiary rules,[393] does not address the problem of veracity. Therefore,

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385. *Id.* at 1.

386. *Id.*

387. *Id.*

388. *See id.*

389. Consider, for example, the housing impact statement advocated for in Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RSRV. L. REV. 81, 127 (2011), or the requirement, proposed by South Central Los Angeles-based activist coalition UNIDAD, that cumulative development approvals result in no net loss of affordable units. *See* THE PEOPLE'S PLAN: EQUITABLE DEVELOPMENT FOR SOUTH LOS ANGELES 13 (2017), http://www.unidad-la.org/wp-content/uploads/2017/06/peoples-plan-report-FINAL.pdf [https://perma.cc/2B9N-LHTG].

390. *See* Iglesias, *supra* note 379, at 477 (discussing hypothetical state statutes that would require housing impact analyses).

391. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 313 (NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 2010). This requirement echoes the requirements of the federal Telecommunications Act of 1996, which requires "[a]ny state or local government that forbids the placement of a wireless service facility must state its reasons in writing and must support its reasoning with 'substantial evidence.'" MacLeod, *supra* note 210, at 84 (quoting 47 U.S.C. § 332(c)(7)(B)(iii)).

392. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 368, at 1.

393. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 404(2).

rather than allow an individual's testimony—whether or not true—to stand on its own, the process ought to require bureaucrats and commissioners to address in writing the substance of all comments made, thus limiting a comment's effect and impact if it is irrelevant or untrue or a resident overstates its importance.

Requiring planners and commissioners to issue reports elucidating the results of public participation and the planners' and commissioners' responses to those comments serves an important documentation role, as well. Urban planning and zoning are marred by over a century of segregationist approaches to city and town design.[394] Because our towns and cities are highly segregated, simply permitting local control to guide development decisions can perpetuate segregation. Planning and zoning laws should require planners and commissioners to explain their decisions rather than simply say that members of the public supported or did not support a particular choice. If an explanation is not required, there is no protection against the possibility that a proposal simply lost a public hearing popularity contest.

Unfortunately, judicial review of zoning decisions, in its current form, does not correct for the failures of the public participation process. Review is highly deferential and, in many cases, does not require that the decision-making body explain its decision.[395] Judges ought to defer only where the agency has demonstrable expertise and the agency's written explanation of its decision substantively engages with the comments received.[396] Professor Nestor M. Davidson, in his analysis of local administrative law, argues that judicial review ought to "bolster procedural regularity where appropriate, but recognize that informality may have a place to play in local administration."[397] In his estimation, "[c]ourts policing the somewhat more porous lines between local government and public involvement in the work of that level of government should, at a minimum, acknowledge that public involvement carries benefits as well as causes for concern, with appropriate procedural and ethical safeguards."[398] In the case of local land use administration, courts ought to formalize and limit public participation in recognition of the role that public participation plays in regressive wealth distribution, housing price inflation, and segregation.

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394. *See, e.g.*, ROTHSTEIN, *supra* note 283, at 53–54; TROUNSTINE, *supra* note 9, at 205.

395. *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 729–37 (2008) (collecting cases and explaining development of deferential judicial review standard vis-à-vis local zoning decisions); *see also* MacLeod, *supra* note 210, at 111–12 (proposing that "states should require regulatory authorities to state the reasons for their decisions contemporaneous with their decisions and might attach to any subsequently promulgated regulations without an accompanying statement a presumption of arbitrariness").

396. *See* Ostrow, *supra* note 395, at 729–37.

397. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 610 (2017).

398. *Id.* at 617.

C. *Applying the Rule: As-of-Right Development*

A robust plan accompanied by predictable zoning ought to lead to more as-of-right development.[399] If the planning process is robust, it cannot leave a door open for the law to be applied inconsistently by allowing deviations from the plan guided only by public participation. The exercise of discretion at the development approvals stage undermines the public participation, expertise, and data analysis that inform the underlying planning and zoning.

There are models for more state planning resulting in enhanced rights for developers at the local level. As I have discussed elsewhere, states have removed local discretion (and, therefore, local public participation) in connection with various land uses—from home-based child care to solar infrastructure—determined by state actors to be necessary uses that are too often subject to local vetoes unconcerned with broader societal welfare.[400] Similarly, "anti-snob zoning acts" cabin the considerations that can be taken into account when local zoning authorities refuse to permit the construction of affordable housing, effectively limiting the relevance and scope of public participation.[401]

There are nascent efforts to build and improve upon these models. Recognizing a statewide housing affordability crisis, Oregon recently made duplexes and four-family homes developable as-of-right throughout the state.[402] That is to say, if a proposed residential development meets the standard set out in state statute and regulations, the developer can secure a permit to build without undergoing a lengthy approvals process accompanied by public hearings. Similarly, fair housing advocates in Connecticut seek to require that approvals processes for multifamily housing look like those typically applicable to single family housing: as-of-right administrative approvals with no lengthy process and no public hearings.[403]

D. *Applying the Rule: Development Approvals as Contested Cases*

When discretionary approvals cannot be avoided, local zoning codes and state zoning enabling acts should set forth clear, objective criteria for the issuance of development approvals. These criteria should be implemented without lengthy process and untethered discretion.

Again, the Model State APA provides a prototype. Pursuant to the Model State APA, contested cases, like development approvals, ask an agency to apply existing rules or law to an individual party.[404] In contested cases, an evidentiary hearing is required if the applicable constitution or statute so

399. "As-of-right development" is sometimes referred to as "by-right development."

400. Lemar, *supra* note 163, at 350.

401. CONN. GEN. STAT. §§ 8-30(g)–8-30(j) (2021); MASS. GEN. LAWS ch. 40B, §§ 20–23 (2021).

402. OR. REV. STAT. § 197.758 (2019).

403. *See* LCO No. 3562, 2020 Gen. Assemb., Spec. Sess. (Conn. 2020) (working draft).

404. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT §§ 401, 403, 413 (NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS 2010).

provides.[405] Evidentiary hearings are public but not generally open to public participation.[406] One may seek to intervene if the applicable statute expressly permits or if one has an interest that may be adversely affected by the proceeding.[407] The same should be true of development approvals.

The Model State APA does not incorporate the Federal Rules of Evidence, but it does set minimum standards for the evidence presented in a contested case evidentiary hearing. The Model State APA requires that evidence be relevant and material: "The presiding officer may exclude evidence in the absence of an objection if the evidence is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state."[408] In the courtroom, evidentiary rules exist to ensure that adjudicators, whether judge or jury, are not swayed by irrelevant, inflammatory, or biased information. Consideration of a development approval application ought to be similarly rigorous. Land use public hearings, because they occur before laypeople, are more like jury trials than they are like bench trials. Commissioners are often elected and, even when appointed, are not typically experts in real estate development.[409] Excluding irrelevant inflammatory testimony is particularly important given that commissioners are more like juries than they are like specialized bureaucrats with significant technical expertise.

If an applicant demonstrates in an evidentiary hearing that a proposed development meets the requisite criteria, the local agency should grant the approvals, just as building permits are issued without lengthy unpredictable processes.[410] If the development approvals result from a process other than the clear application of law to facts established in an evidentiary hearing, the planning process, which itself is a statement of public policy informed by participation, is diluted. If developers can rely on the planning process to set standards, they can then design their project to meet those standards. If the planning process is not binding, developers are left, instead, to hazard guesses as to what project will receive the most positive reception at a public hearing, or worse, ignore the democratically adopted plan and purchase support from those constituencies most likely to organize and be well-received at a public hearing. Further, the ability to rely on the planning process reduces developers' information costs, increasing the likelihood of investment that meets the parameters of the plan and increasing the likelihood

405. *Id.* § 102(7).
406. *Id.* § 403(f).
407. *Id.* § 409(a).
408. *Id.* § 404(2).
409. Some states have, in recent years, established a training requirement for planning and zoning commissioners but most states require no such training, much less professional expertise. *See infra* notes 417–19 and accompanying text.
410. While building code and permit issuance processes vary across jurisdictions, generally the public is invited to participate when the government seeks to revise the building code but there is no opportunity for public input when an individual building permit application is submitted.

that smaller-scale developers will be able to participate in the development process.

E. Informality, Empowerment, and Expertise

I anticipate three primary critiques of my proposal to import the Model State APA into land use procedure. First, much of the perceived legitimacy of the current process relies on the degree to which "informality reflects community involvement."[411] My proposal to increase as-of-right development, some might argue, will dampen community engagement. Second, some will argue that my proposal disempowers the powerless, taking away a lever that marginalized people have used to secure accountability in redevelopment. Finally, the Model State APA is designed around the assumption that the decision-making agency is made up of experts, but planning and zoning commissioners are often laypeople with no expertise in real estate, development, environmental science, or planning.

1. Informality and Legitimacy

While informality facilitates involvement by some, it does not facilitate involvement by all. Informality aids current residents who have the time and privilege to attend local meetings and who are confident that commissioners will take their concerns seriously. Some constituencies may benefit from indirect representation. Processes that permit and give credence to social service agencies, housing activists, and economists might better serve the interests of people who cannot attend multiple evening meetings at a time of day when many towns and cities run infrequent—if any—public transit. In addition, informality disadvantages people who do not meet commissioners' preconceived notions of whose concerns matter in the planning and zoning process. Informality provides no mechanism for choosing between competing notions of "what the community wants."

Informality functions best as a substitute for direct referenda, in cases where "[local] agencies serve less as a repository of technical expertise and more as a mediating body to channel local input and knowledge."[412] As described above, however, local input is often one-sided, local knowledge is questionable, and many land use questions are technical ones that require informed assessment of a regulation's impact. In the case of many planning and zoning questions, local agencies do not channel local knowledge so much as they delegate decision-making authority to a private body, a homeowners' cartel. A formalized administrative process, one aspect of which is a functional public participation mechanism open to all, not just current homeowners, is much preferable.

411. Davidson, *supra* note 397, at 573.
412. *Id.* at 573–74.

2. Securing Accountability

Sometimes informal approvals processes work to the benefit of historically disempowered groups. Professor Scott Cummings describes powerful coalitions of environmental organizations, labor unions, and low-income communities of color uniting to contest development applications and secure community benefits agreements in Los Angeles. These coalitions, unlike the homeowners' cartels described above, are too often temporary. Alliances are not durable and, as Cummings himself describes, these groups' interests often do not align.[413] Further, in jurisdictions where, as a result of centuries of segregation, there are no low-income people and there are few people of color, public participation processes perpetuate segregation.

While public participation and comment can serve as one accountability measure, they are not sufficient to bring accountability to redevelopment processes. Informal processes often empower the already powerful. True accountability requires standards and rules, developed transparently and consistently applied throughout the process. Relying on the exercise of political pressure at the end of an informal process is not likely to serve progressive values. There is, in the land use context, a "need to reform democratic institutions in ways that better balance political power,"[414] but informal participation processes are unlikely to serve those ends.

Certainly, participants in the local land use process do not all share the same motivations, and some might deserve our sympathies more than others. The fact that a participant is more sympathetic, however, does not mean that the participant's testimony is factually accurate (recall Walter Logan's distinction between people's ability to describe problems versus their ability to solve them).[415] Instead, it is appropriate to include, in the purposes set out in the zoning enabling act, housing affordability, environmental justice, transportation equity, and involuntary displacement. And it is imperative that decision-makers rigorously evaluate the impact of their decisions. Relying on the public participation process to advance these goals is at odds with the empirical evidence on how these processes operate.

3. Expertise

The law applicable to administrative processes is designed to defer to reasoned decisions informed by expertise. Not only are planning and zoning officials generally not required to explain their reasoned decisions, planning and zoning officials are typically laypeople.[416] Indeed, recognizing that these officials are typically laypeople, sometimes elected rather than

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413. *See* SCOTT CUMMINGS, AN EQUAL PLACE: LAWYERS IN STRUGGLE FOR LOS ANGELES 257 (2021).

414. Rahman & Simonson, *supra* note 288, at 693.

415. *See* Holder, *supra* note 226.

416. *See* Ostrow, *supra* note 395, at 735–36 & n.78.

appointed, New Jersey,[417] South Carolina,[418] and New York[419] have, in recent years, mandated training for land use officials.

That land use officials lack expertise, however, is not a reason for a more informal process. Instead, it is a reason to set tighter standards through the planning process and to allow less discretion and fewer popularity contests at the development approvals level. Commissioners' lack of expertise otherwise empowers public participants whose public hearing testimony is not vetted by any expert agency.

CONCLUSION

The unmitigated desire for more and more public participation can tie scholars and advocates into knots. For example, one writer, in the same article, decries both variances, because they are at odds with community preference as expressed in zoning code, and as-of-right development, because it does not provide the opportunity for project-specific public input.[420] If you cannot build things permitted by the code and you cannot build things not permitted by the code, what's left? Nothing. While some may be well served by the status quo bias embedded in our land use planning laws, most are not. Fixing broken public participation processes is a small but necessary piece of fixing our broken zoning laws.

417. N.J. STAT. ANN. § 40:55D-8 (West 2021) (requirement adopted in 2005).
418. S.C. CODE ANN. § 6-29-1340 (2021) (requirement adopted in 2003).
419. N.Y. GEN. CITY LAW § 27(7-a) (McKinney 2021) (requirement adopted in 2007).
420. Foster, *supra* note 124, at 547.