

Transportation, Land Use, and the Sources of Hyper-Localism

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ABSTRACT: This Essay identifies the convergence of big-city land use and transportation politics on a shared form—marked by hyper-local control and the privileging of the most vocal opponents to change—despite remarkably different legal regimes. While land use law mandates that cities provide notice to the neighbors, hearings for them to speak at, and veto opportunities for local city council members, transportation law does none of these things. Yet there are still public meetings, the neighbors still turn out in opposition, and city council members still exercise an effective veto over projects in their districts. Based on this convergence, this Essay sounds a note of caution about recent arguments that legal reforms to land use procedure can improve land use outcomes. Hyperlocalism has deep roots, located outside the legal regimes governing land use’s public participation and decision-making processes. Legal procedural reform alone can only do so much, absent a more thoroughgoing political transformation of the land use process.

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I. INTRODUCTION

Go to a New York City community meeting, and you are likely to see one of two types of conversation. In the first, elected officials and community members swap helpful announcements: free flu shots on Sunday; the local precinct has reported a spike in robberies; such-and-such legislation is before the City Council, please lend it your support.¹ In the second, normally mild-mannered neighbors turn a public forum into a knock-down, drag-out civic brawl, as their three-minute remarks escalate into raised voices, bad-faith accusations, conspiracy theories, and every so often, actual blows.² If the second kind of conversation has broken out, it is a safe bet that the subject is one of two things: a proposal for a new real estate development in the neighborhood or for a redesign of the local streets.³

Though not identical, the politics of local transportation and land use follow a similar script. The surrounding community is given special control over a project’s fate, and almost any change to the status quo will be met with ferocious opposition by a project’s immediate neighbors.⁴ That opposition comes from residents who otherwise may be entirely disengaged from the nitty-gritty of local government and even where the change, once finished,

1. See generally, e.g., COMMUNITY BOARD 7/MANHATTAN: FULL BOARD MEETING MINUTES (2019), https://www1.nyc.gov/assets/manhattancb7/downloads/pdf/minutes/2019/min11_19.pdf [<https://perma.cc/E5EG-D9QP>] (documenting an average community meeting).

2. Jake Offenhartz, *Battle Over Park Slope Bike Lane Gets Physical: ‘You Wanna Clown Around With Me?’*, GOTHAMIST (Sept. 26, 2019, 11:16 AM), <https://gothamist.com/news/battle-over-park-slope-bike-lane-gets-physical-you-wanna-clown-around-me> [<https://perma.cc/LTW6-3F4B>].

3. The common thread here is parking, which may someday be shown to be the fundamental particle for a grand unified theory of urban conflict.

4. This is an example of what Nadav Shoked has deemed “The New Local,” in which sub-local governance operates through mechanisms that are “informal, fluid, task-specific, ad hoc, and geographically indeterminate.” Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1335 (2014). There is rarely any pre-existing definition of “the surrounding community” beyond what the politics of the moment creates.

quickly becomes popular or simply forgettable.⁵ Opposition can be high-minded, coldly self-interested, or un-self-consciously paranoid.⁶ Of course, many local discussions about land use and transportation changes are productive, generative acts of self-governance. But many are what Richard Babcock deemed “‘government by screaming’ and ‘trial by neighborism.’”⁷ Elected officials generally eschew their constituents’ more extravagant arguments, but still solicit and empower these forums as representative of the “community.” Elected officials further exercise an informal but usually ironclad veto over any project in their districts.

It should come as no surprise, then, that advocates for changing the built form of our cities have begun to chafe at this process. Government controlled by the angriest neighbors is not justified by either professional expertise or majority preferences, and arguably falls short in both technocratic and democratic legitimacy.⁸ Among legal scholars, calls to rethink the procedures governing changes to the built environment have most prominently come in the land use context, where many see the zoning process as empowering “Not in my Backyard” (“NIMBY”) opposition to new development.⁹ This argument is right, as far as it goes: land use procedures *do* empower opponents of

5. Once-controversial projects are routinely forgotten or embraced once complete. *See, e.g.*, Robert C. Ellickson, *The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. (forthcoming 2021) (manuscript at 39–44), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507803 [<https://perma.cc/HHK4-N99N>]; ALEXANDRA DEGENOVA, BRENDAN GOODWIN, SHANNON MORIARTY & JEREMY ROBITAILLE, ON THE GROUND: 40B DEVELOPMENTS BEFORE AND AFTER, at v–vi (2009), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-de_genova-et-al.pdf [<https://perma.cc/YFD6-T67E>].

6. These categories frequently overlap. Many homeowners, for example, mix self-interest with progressive rhetoric about environmentalism or preventing gentrification. Finding mechanisms to disentangle different motives for opposing development is an important enterprise. *See, e.g.*, Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 866–67 (2019) (proposing strategies for increasing voice in a way that is attentive to “substantive outcomes”). Of course, dismissing the more absurd rhetoric against neighborhood change—like the repeated suggestions by residents of Manhattan’s East Side that bike infrastructure would allow terrorists to attack the Israeli Embassy and the United Nations—is an easier task. Garth Johnston, *UN Neighbors Concerned About CitiBike Share Terrorists*, GOTHAMIST (June 18, 2012, 5:40 PM), <https://gothamist.com/news/un-neighbors-concerned-about-citibike-share-terrorists> [<https://perma.cc/Z82H-WUTV>].

7. RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 141 (1966).

8. At its best, hyper-local control is often justified as a form of deliberative and direct democracy. *See, e.g.*, Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 863–64 (2000). But the process is only rarely at its best. *See id.* at 864.

9. KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS 15 (2020) (“NIMBY attitudes without institutions that amplify them would have more muted effects than they currently do.”); Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 449 (“At times, the procedures governing land-use decisions can be equal to the impacts of the substance of land-use laws.”); *see also infra* Part II.

development. But by comparing land use planning procedures to transportation planning procedures, this Essay questions just how far that is.

The legal framework governing changes to urban streets has received almost no attention from legal scholars—partly because there is little law governing it.¹⁰ As this Essay demonstrates, this is an area of largely unconstrained executive discretion, with neighbors and legislators holding little formal power. Control is centralized and further delegated to the bureaucratic expertise of departments of transportation (“DOTs”) and especially to traffic engineers.¹¹ The most ambitious Progressive Era city planner could not ask for a more top-down, ostensibly apolitical allocation of powers.¹²

But only rarely does transportation planning operate in practice as it appears on paper. Starting from a profoundly different legal framework, transportation has converged on political institutions similar to land use: Public hearings that mobilize opposition, norms of aldermanic privilege that empower local legislators, and an attitude of hyper-local control. These institutions appear to have political roots independent from law. This suggests limits to the promise of purely procedural reform in land use. Reforms which merely attack the present dysfunctions of land use law, without reconstructing a new politics altogether, seem primed for failure—if not immediately, then eventually, as hyper-local politics reasserts itself.

The scope of this Essay is limited. First, it primarily discusses big-city politics. In suburbia, conflicts over transportation and land use take on a different tenor. Far fewer people take transit, ride bikes, or walk for transportation purposes, while large majorities of residents—the so-called “homevoters”—share common incentives to oppose new development.¹³ This is a different political problem, with majoritarian preferences playing a very

10. Gregory H. Shill, *Should Law Subsidize Driving?* 95 N.Y.U. L. REV. 498, 504 n.20 (2020). Gregory Shill’s important survey of the many ways law encourages driving has newly spotlighted the importance of transportation law, but even his article does not focus on the process for designing local streets. An important exception, which pays more attention to this question, is Daniel B. Rodriguez & Nadav Shoked, *Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities’ Bike Share Plans*, 42 FORDHAM URB. L.J. 123, 179–80 (2014).

11. The value of this expertise, as applied to city streets, is an important question; many have questioned the scientific validity of traffic engineering and its biases against alternative modes of transportation. DONALD SHOUP, *THE HIGH COST OF FREE PARKING* 75–117 (2017) (“The Pseudoscience of Planning for Parking”); David T. Hartgen, *Hubris or Humility? Accuracy Issues for the Next 50 Years of Travel Demand Modeling*, 40 TRANSP. 1133, 1135 (2013) (current transportation modeling methodology “produces results that are increasingly viewed as inaccurate, perhaps ‘just plain wrong’, significantly biased toward over-statement, and not accurate enough for use as the basis for decisions involving large expenditures”). Regardless of how accurate transportation planning is, though, engineering’s specialized professional standards can provide administrators with a shield against outside pressure.

12. Jeffrey Brown, *From Traffic Regulation to Limited Ways: The Effort to Build a Science of Transportation Planning*, 5 J. PLAN. HIST. 3, 4 (2006).

13. WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 8–10 (2001).

different role. Second, in discussing transportation, this Essay addresses only redesigns of existing streets, like adding a bus lane, or replacing parking spaces with pedestrian space. The construction of large new infrastructure projects like subways or highways is governed by a very different legal framework and exhibits very different political dynamics.¹⁴

Finally, this Essay also accepts, without recapitulating, the immense body of research documenting the merits of allowing more development in urban areas and of shifting street space away from the automobile. Allowing more housing to be built, in particular, can promote housing affordability, improve economic productivity nationwide, reduce income and racial inequalities, and protect the environment.¹⁵ Furthermore, cars are the leading greenhouse gas emitters in the United States and car crashes kill more than 40,000 Americans a year;¹⁶ reallocating street space can mitigate both those harms, while also speeding travel for those who rely on alternative forms of transport. While any particular project must be judged on its own merits,¹⁷ this Essay recognizes the policy imperative for changing the form of American cities.

This Essay proceeds in three parts. In Part II, it reviews the growing literature attributing anti-growth land use politics to legal procedures which empower neighborhood opposition to development. Part III turns to transportation, first laying out the legal regime governing street redesigns, which gives executives near unilateral control, and then showing how cities nevertheless invite local citizens and legislators to dominate transportation decision-making. Part IV brings land use and transportation together, offering alternative explanations for hyper-local control over the built environment and questioning how much land use law really drives land use politics. Finally, the Essay concludes with an exploration of transportation politics as a site of the conflicting claims of expertise and authority that characterize local government.

14. For example, such projects involve enormous sums of money, serious state and federal involvement, and may require taking private property for the right-of-way. ALAN ALTSHULER & DAVID LUBEROFF, *MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENT* 76–122 (2003). Important recent discussions of these larger infrastructure projects in the legal literature come from Leah Brooks & Zachary Liscow, *Infrastructure Costs* 2–4 (Mar. 2020) (unpublished manuscript), <https://ssrn.com/abstract=3428675> [<https://perma.cc/LW9K-9RRE>]; and Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 *VAND. L. REV.* 1259, 1298–304 (2020).

15. For a recent, particularly thorough review of the literature, see Vicki Been, *City NIMBYS*, 33 *J. LAND USE & ENV’T L.* 217, 227–35 (2018).

16. The many direct and indirect costs of driving are catalogued in Shill, *supra* note 10, at 500–01.

17. In doing so, there will be systematic differences across locations, with new housing or new transportation infrastructure having different effects in rich neighborhoods and poor neighborhoods or neighborhoods near and far from downtown. For one argument about how these neighborhood differences should affect the extent of local control, see generally John Infranca, *Differentiating Exclusionary Tendencies*, 72 *FLA. L. REV.* 1271 (2020).

II. LAND USE PROCEDURES AND OPPOSITION TO DEVELOPMENT

The power of neighbors to block development is on the rise.¹⁸ Whereas urban scholars once described city politics as a “growth machine” organized around real estate development, today, there is a growing consensus that cities are not building nearly enough.¹⁹ In the face of a housing crisis, scholars have turned their attention to understanding the origins of the country’s restrictive land use regulations and inadequate housing production. An increasingly prominent line of thinking connects housing supply shortfalls to hyper-local control over land use, which in turn connects back to the procedures mandated by land use law.²⁰

Contemporary scholarship connecting land use’s localism to land use’s procedures can be traced back at least to Carol Rose’s seminal article *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*.²¹ According to Rose, important features of land use law are designed to promote a form of mediation among directly-affected neighbors.²² Statutory requirements that notice be provided to adjacent property owners ensure that the most interested parties can weigh in, for example, while mandatory public hearings provide a forum for their objections.²³ For Rose, these procedural mandates set the stage for hyper-local negotiations, compromise, and even quid-pro-quo deals—good things, in her view, so long as they do not contribute to “extralocal” effects like the exclusion of low-income families or environmental degradation.²⁴ But as the accumulation of “piecemeal” zoning decisions have aggregated into substantial extralocal effects,²⁵ Rose’s descriptive analysis still holds. Land use law is structured to provide the most voice—and therefore the most power—to a small group of stakeholders: those who live nearest to a

18. Cf. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2022 (2007) (“Public hearings, advisory committees, and devolution of land use planning discussion and analysis to smaller units of the urban polis have characterized this era of increased participation in local government.”).

19. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 310 (1976).

20. See Stewart E. Sterk, *Exploring Taxation as a Substitute for Overregulation in the Development Process*, 78 BROOK. L. REV. 417, 417 (2013) (“The process of land use regulation has endured heavy criticism in recent years . . .”).

21. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983).

22. *Id.* at 896–97.

23. *Id.* at 895, 897.

24. *Id.* at 840 & n.4.

25. See, e.g., Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 85 (2017); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1, 2 (2019).

proposed development and bear the biggest potential burdens. Land use law, by design, activates a project's fiercest opponents.²⁶

Recent scholarship has expanded on Rose's basic insight, identifying even more mechanisms by which land use procedures—and the structure of local government itself—mobilize and empower opponents of new development. These generally fall into two categories: procedures governing the ultimate zoning decisions by legislative or administrative bodies and procedures governing the public participation process prior to decision.

At the administrative level, Stewart Sterk, among others, has pointed to the ever-proliferating number of review processes as a systemic obstacle for new development.²⁷ A project might need a variance from one board, site plan approval from a second, architectural review from a third, and environmental permits from a fourth.²⁸ By disaggregating these decisions, and requiring independent sets of officials to reach consensus, these processes dramatically increase the number of veto points.

Procedures at the legislative level also tilt local politics against new development. David Schleicher and Roderick Hills, the leading proponents of arguments about the land use effects of legislative procedures, point to the lack of partisan political competition at the local level and the serial review of individual rezonings as creating a systematic bias towards underdevelopment.²⁹ Without political parties, they argue, local legislatures adopt a norm of universal logrolling,³⁰ commonly called “aldermanic privilege,” which gives local representatives *de facto* veto power over projects.³¹ Meanwhile, the project-by-project review process leaves pro-development interest groups, like employers and developers, with little incentive to intervene in any particular zoning decision, even as the local opposition is fully engaged.³² And since legislators cannot strike deals across neighborhoods, legislators cannot coordinate to allow unpopular projects in

26. See Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 30 (1981) (arguing that land use law “unjustifiably accords substantial weight to self-selected samples of neighbors to the detriment of the landowner and the consumers he represents”).

27. Sterk, *supra* note 20, at 426–27.

28. *Id.*

29. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1676–78 (2013) [hereinafter Schleicher, *City Unplanning*]; Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RESV. L. REV. 81, 86–97 (2011) [hereinafter Hills & Schleicher, *Balancing*].

30. Schleicher, *City Unplanning, supra* note 29, at 1710.

31. *Id.* (quoting Sarah Harney, *Are City Councils a Relic of the Past?*, GOVERNING (Apr. 2003), <https://www.governing.com/archive/Are-City-Councils-Relic-Past.html> [<https://perma.cc/J4KD-593B>]).

32. *Id.* at 1713; see also Colin Parent, *City-Wide: A Strategy for Sustainable Growth*, 55 CAL. W. L. REV. 363, 374 (2019) (offering a case study of this argument in context of San Diego).

their respective districts.³³ Taken together, the law discourages the creation of citywide pro-development coalitions, while concentrating power among neighborhood-level NIMBYs.

Another set of scholars have described how the public hearing process, which has been a mandatory part of the zoning process since the creation of the Standard Zoning Enabling Act, empowers project opponents. In their magisterial study of public participation in the land use process, political scientists Katherine Einstein, David Glick, and Maxwell Palmer, showed, quantitatively, that those who speak at zoning hearings overwhelmingly live within a block or two of the proposed development and oppose it (speakers are also disproportionately white, male, and likely to own a home).³⁴ Einstein, Glick and Palmer also identified a number of structural elements of the hearing process that further empower these unrepresentative voices. Zoning hearings are generally overseen by part-time and volunteer boards who, in contrast to professional staffers, are more responsive to angry neighbors and less focused on data-driven, technocratic analysis.³⁵ To make matters worse, those volunteers rule on zoning applications immediately at that hearing, rather than at a remove, further privileging the neighbors who show up in person over technical submissions.³⁶

Einstein, Glick, and Palmer also highlighted another important asymmetry built into the land use process: the power of delay.³⁷ Even where a board cannot kill a development outright, it may have the procedural tools to request new information, new studies, or additional outreach.³⁸ Given the carrying costs of real estate development and the cyclical nature of the real estate market, delay alone proves fatal to many projects.³⁹ Indeed, Richard Babcock and Charles Siemon described “the administrative procedures which permit, if they do not deliberately encourage, delay” as a problem stretching back to the 1950s.⁴⁰

Legal scholars, too, see the public hearing process as a site for neighbors to oppose, delay, and defeat proposed changes to the built environment. Intervention in the hearing process allows residents “to delay the regulatory process in the hope that the developer will eventually back out or make

33. Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 113 (2015) [hereinafter Hills & Schleicher, *Planning an Affordable City*].

34. EINSTEIN ET AL., *supra* note 9 at 102–03.

35. *See id.* at 56.

36. *Id.* at 164.

37. *Id.* at 26–27.

38. *Id.*

39. *Approval Process (Entitlement)*, UCLA LEWIS CTR. FOR REG’L POL’Y STUD., <https://www.lewis.ucla.edu/housing/housing-supply/approval-process-entitlement> [<https://perma.cc/8XJG-4TNK>].

40. RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 264 (1985).

concessions.”⁴¹ Beyond delay, public hearings provide an organizing opportunity for project opponents,⁴² and a chance for neighbors to monitor each other and enforce a shared commitment to preventing growth.⁴³ There is extensive debate among legal academics as to whether these outcomes are desirable—i.e., whether they empower communities to fight back against powerful outside developers and unwanted change,⁴⁴ or whether, in Anika Singh Lemar’s words, “public participation is utterly dysfunctional and poor people bear the brunt of that dysfunction”⁴⁵—but few legal scholars today see the land use participation process as a site of administrative rationality. Even those most committed to “community control” recognize land use’s particular participatory framework to be marked by “pathologies” of fragmented, “hyperlocal” decision making.⁴⁶

To underscore the legal mandates for public participation and decentralized decision-making, procedurally-minded scholars often contrast the land use process with a hypothetical alternative of mayoral control.⁴⁷ As Hills and Schleicher explain, “[i]n theory, a city could delegate all of its land-use authority to the mayor or to some administrative agency full of housing experts and city planners. In both cases, the executive would represent the whole city”⁴⁸ Indeed, there is evidence that mayors (and other citywide officials) really do have more pro-development political leanings than the status quo.⁴⁹ So while in the land use context, mayors lack the unilateral power

41. Foster & Glick, *supra* note 18, at 2054; *see also* Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 59, 65 (2008) (describing use of “the threat of disruption implicit in [residents’] participation rights to bring the developer to the negotiating table”).

42. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 637 (2011) (“Largely as a result of the widespread citizen participation, the role of public hearings in land use decisions changed. Opponents of a project now viewed the hearing as a vehicle for building political opposition, such as by having many project opponents testify.”).

43. Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, FORDHAM L. REV. (forthcoming 2021) (manuscript at 51) (on file with author).

44. *See, e.g.*, Foster & Glick, *supra* note 18, at 2018–25; Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL’Y 135, 137–40 (2002); McFarlane, *supra* note 8, at 871–77.

45. Lemar, *supra* note 43 (manuscript at 3).

46. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 679, 726 (2020).

47. In cities with city managers, an additional level of institutional analysis would be required. *Cf.* Mark Lubell, Richard C. Feiock & Edgar E. Ramirez de la Cruz, *Local Institutions and the Politics of Urban Growth*, 53 AM. J. POL. SCI. 649, 653–54 (2009) (hypothesizing different levels of support for development in cities with mayors authority and city managers).

48. Hills & Schleicher, *Balancing*, *supra* note 29, at 103.

49. Survey data from Einstein, Glick and Palmer shows that big-city mayors are eager to shift their cities towards building more multi-family housing. EINSTEIN ET AL., *supra* note 9, at 7–8. This comports with the conventional wisdom that mayors are more pro-development than other local politicians. *See* James C. Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RSCH. Q. 969, 978 (1994) (“[S]trong mayors are inclined to be very pro-

to translate those relatively pro-growth preferences into new construction—and have no realistic path to that kind of unilateral power—scholars like Schleicher and Hills suggest mayoral control would lead to substantially different land use outcomes.⁵⁰ While mayoral control cannot change individual neighbors’ anti-development attitudes, it can avoid the procedural and legal structures that disproportionately empower those neighbors.

Likewise, those concerned with the anti-development effects of public participation contrast the land use status quo with more technocratic administrative models. Lemar, for example, calls for replacing open public hearings with narrow evidentiary hearings for site-specific approvals, while better using data to provide information about local needs.⁵¹ These suggestions would be paired with other hallmarks of state and federal administrative procedure, like written findings and judicial review, that place far less emphasis on direct democracy as a source of legitimacy.⁵² More modestly, Erin Ryan has proposed the appointment of an independent third party to represent absent interests in the land use process.⁵³ Changing, or even eliminating, the mandatory hearing process, it is argued, would allow for a more accurate reflection of public opinion and a more reasoned decision-making process.

In all of these accounts, law plays a central role in shaping land use practice and driving land use outcomes.⁵⁴ Whether it is requirements for notice and public hearings or legislative control over land use and aldermanic privilege, legally-mandated procedures discourage new development. And if law empowers NIMBYism, legal change—empowering technocratic experts and citywide elected officials—can mitigate it. But what if NIMBYism doesn’t need law at all?

development, and the fact that mayors are generally elected at-large might reinforce that tendency.”); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 135 (2019) (“Mayors, to a first approximation, are likely to be more supportive of liberal housing policies than city councilpersons elected from territorial districts.”).

50. Hills & Schleicher, *Balancing*, *supra* note 29, at 103–04.

51. Lemar, *supra* note 43 (manuscript at 58–64).

52. *Id.*

53. Erin Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 386–88 (2002).

54. Litigation after the fact also shapes land use outcomes, and certain procedural rules in litigation can empower or disempower neighbors. See Shoked, *supra* note 4, at 1335 (describing how liberal standing rules allowed for “micro-local” intervention into a New York City bike lane dispute); Noah M. Kazis, *Public Actors, Private Law: Local Governments’ Use of Covenants to Regulate Land Use*, 124 YALE L.J. 1790, 1794–1806–14 (2015) (describing how cities use covenants in addition to zoning to limit neighbors’ power to litigate).

III. TRANSPORTATION PROCEDURES AS A CONTRAST

While the procedures governing land use have attracted substantial scholarly attention, the procedures cities must follow in transportation planning have not.⁵⁵ This Part shows how control over urban streets is centralized in the mayoralty and in DOTs, with little formal legislative involvement and few procedural prerequisites for notice or hearings.⁵⁶ Yet in practice, the procedures governing street redesigns look remarkably similar to land use procedures, with extensive public outreach and local council members wielding veto power. In transportation planning, public officials deliberately and voluntarily empower hyper-local voices.

A. THE LAW OF STREET REDESIGNS

The legal regime governing street redesigns has two important features which distinguish it from land use law: the streets fall under mayoral, rather than legislative, control and there are no mandates for notice to neighbors or hearings. In other words, two features of the land use process identified as contributing to anti-development outcomes are conspicuously absent in transportation planning.

1. Mayoral Control

Local legislatures typically play a minimal formal role in managing streets; rather, mayorally-controlled DOTs usually have the sole authority to redesign streets. In Chicago, for example, the Municipal Code grants the city DOT (along with the local office of emergency management) the blanket authority to regulate traffic flow, whether through signs, signals, markings, or other devices.⁵⁷ The DOT is under the mayor's control and its commissioner serves at the mayor's pleasure.⁵⁸ While Chicago has required City Council approval for a few particular kinds of street redesign, the legislature lacks a formal role in many of the most important choices about city streets, like the marking of traffic lanes.⁵⁹

55. See *supra* text accompanying notes 10–13.

56. This divergence should not be surprising. Zoning laws regulate private property, whereas city streets are usually public property (whether the city owns the street outright or merely holds an easement). Their legal histories are quite distinct. Cf. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, (1983) (describing historical development of local government law and changing role of city property).

57. CHI., ILL., MUNICIPAL CODE §§ 9-4-010, 9-8-010(a)(1) (2020).

58. *Id.* §§ 2-4-020, 2-102-020.

59. See *id.* §§ 9-12-040, 9-20-010 (City Council approval required for designating “play streets” and one-way-streets). But see *id.* §§ 9-12-050, 9-12-060 (not providing for Council role in marking traffic lanes or designating bus lanes).

Likewise, in Los Angeles (a city with a weaker mayor than Chicago⁶⁰), local law vests the DOT with the power to design streets—including a broad residual power to regulate traffic as it deems necessary.⁶¹ As in Chicago, City Council approval is required only for a few designated actions.⁶² Further, the Los Angeles code instructs the DOT to carry out its duties “only upon the basis of traffic engineering principles and traffic investigations” unless otherwise required by law.⁶³ Thus, Los Angeles, like many other cities,⁶⁴ seems both to create the structural conditions for technocratic transportation planning, by placing authority in a centralized, bureaucratic institution, but also to expressly demand technocratic decision-making. Los Angeles law appears to foreclose a role for a project’s popularity or local support where traffic engineering demands a given outcome.

Like any question of local law, practice is not uniform, and the legislature always retains some role. There are cities where the city council retains primary decision-making authority over the use of the streets,⁶⁵ and most cities provide for council approval of particular types of projects.⁶⁶ In some states, even where the executive branch controls the streets, legislative approval can provide additional advantages, like support for claims of municipal tort immunity.⁶⁷ Even so, the norm is for city DOTs—not the city council—to exercise primary control over street design, particularly in big cities.⁶⁸

60. See Hunter Schwarz, *Mayor Eric Garcetti Wants You to Think Los Angeles Is a Big F-Ing Deal*, BUZZFEED NEWS (June 20, 2014, 7:06 PM), <https://www.buzzfeednews.com/article/hunterschwarz/los-angeles-eric-garcetti> [<https://perma.cc/VE64-GBED>] (“Los Angeles has an institutionally weak mayor.”).

61. L.A., CAL., MUNICIPAL CODE § 80.07 (2021).

62. See *id.* §§ 80.36.8, 80.36. Under California law (like many states), City Council approval is required for the city’s General Plan, which must include a transportation element. Transportation decisions must be consistent with the general plan, but the general plan is not binding in its particulars and does not strip the city of discretion over street-by-street design decisions. See *E. Sacramento P’ship for a Livable City v. City of Sacramento*, 209 Cal. Rptr. 3d 774, 795 (Cal. Ct. App. 2016) (rejecting conformity challenge over elimination of bike lane, where other bicycle improvements provided).

63. L.A., CAL., MUNICIPAL CODE § 80.07(a).

64. See, e.g., CHARLOTTE, N.C., CODE OF ORDINANCES § 14-36 (2020) (authorizing official to control traffic “in accordance with accepted traffic engineering principles and standards”).

65. See, e.g., *Anderson v. Wilson*, Nos. C8-99-387, C8-99-388, 1999 WL 711050, at *3 (Minn. Ct. App. Sept. 14, 1999) (showing that, in Brainerd, Minnesota, the city council is responsible for final street signage decisions).

66. See Schwarz, *supra* note 60; L.A., CAL., MUNICIPAL CODE § 80.07(a); see also ATLANTA, GA., CODE OF ORDINANCES § 150-65 (2021) (requiring council resolution to remove, but not install, bike lanes).

67. See, e.g., *Castro v. City of Thousand Oaks*, 192 Cal. Rptr. 3d 376, 381 (Cal. Ct. App. 2015) (finding city engineer had authority to install traffic control device but not discretionary authority sufficient to create “design immunity”). *But see Hampton v. Cnty. of San Diego*, 362 P.3d 417, 428 (Cal. 2015) (making clear that traffic engineers can have discretionary authority for purposes of determining design immunity).

68. See, e.g., HOUS., TEX., CODE OF ORDINANCES §§ 45-5, 45-72 to 45-74 (2021) (empowering Houston Director of Public Works and city traffic engineer to control traffic signs,

2. Notice and Hearing Requirements

Generally, neither local ordinances nor state statutes require notice to abutting residents or public hearings before street redesigns.⁶⁹ Courts have also rejected attempts by property owners to locate notice or hearing requirements in the Due Process Clause or other broad principles of law.⁷⁰ As one New York court held, after the Plaza Hotel sued over the installation of a bike-share station on the street in front of the hotel, “notice [to landlords] is merely a courtesy and is not required by law.”⁷¹ The rare circumstances where neighbors are owed notice often involve the transfer of a street’s jurisdiction between the government and abutting property owners.⁷²

Even formal representative institutions are rarely owed any notice of street redesigns within their districts: DOTs are not charged with any affirmative outreach to legislators or neighborhood associations. In Los Angeles, for example, Neighborhood Councils are entitled to advance notice of decisions before the City Council and City boards and commissions.⁷³ However, because most street redesigns need not go before the Council or a board, but rather are implemented by the City DOT, Neighborhood Councils are not entitled to provide input. Los Angeles formally treats the layout of a street as a matter for routine administration or technical control, not a policy choice meriting neighborhood voice. Similarly, in Hillsborough County, Florida (home to Tampa), a “Neighborhood Bill of Rights” provides organized neighborhood associations a right to participate in the planning process, including a right to formal notice.⁷⁴ That Bill of Rights, however, covers only the land use process, not transportation projects.⁷⁵

signals, and markings as they deem necessary); §§ 45-361 to 45-396 (2021) (requiring hearings and notice to council members for “neighborhood traffic management programs”).

69. 7A MCQUILLIN MUN. CORP. § 24:633 (3d ed. 2020) (“A municipal corporation ordinarily has full power and authority to regulate and control traffic on its streets.”). A separate issue concerns notice to motorists and other street users—i.e., street signs—which may be required before individuals can be sanctioned. *See, e.g.*, *Homes on Wheels v. City of Santa Barbara*, 15 Cal. Rptr. 3d 132, 133 (Cal. Ct. App. 2004).

70. *475 Ninth Ave. Assocs. LLC v. Bloomberg*, 773 N.Y.S.2d 790, 798–99 (N.Y. Sup. Ct. 2003) (rejecting due process claim that neighbors had right to notice or public hearings before city installed pedestrian barricades). Given the paucity of reported litigation over this issue, cases involving state DOTs are also relevant. *See Ristvey v. Dep’t of Transp.*, 52 A.3d 425, 428 (Pa. Commw. Ct. 2012) (“[T]here was no formal requirement that DOT issue notice of the issuance of a [permit to reconfigure a state highway] to adjoining property owners.”); *Iron Gate Partners, L.L.C. v. Dep’t of Transp.*, 27 P.3d 1259, 1260 (Wash. Ct. App. 2001) (abutting property owner not entitled to notice or hearing before installation of concrete median).

71. *Bd. of Managers of the Plaza Condo. v. N.Y.C. Dep’t of Transp.*, No. 101392/13, 2014 WL 1717993, at *7 (N.Y. Sup. Ct. Apr. 28, 2014), *aff’d*, 14 N.Y.S.3d 375 (N.Y. App. Div. 2015).

72. *See, e.g.*, DEL. CODE ANN. tit. 21, § 4101(a)(4) (West 2021); DES MOINES, IOWA, CODE OF ORDINANCES § 114-340.04 (2021).

73. L.A., CAL., CHARTER § 907 (2020).

74. HILLSBOROUGH COUNTY, FLA., LAND DEVELOPMENT CODE § 10.03.02(F) (2021).

75. *Id.*

Perhaps the clearest illustration of the baseline absence of public participation requirements for street redesigns comes from New York City. Beginning in 2009, and continuing through 2019, the City Council has required the City's DOT to notify the local council member and community board before commencing construction on an ever-expanding set of projects. First, such notice was required for "major" projects—those that add or remove an entire vehicular lane for four or more blocks.⁷⁶ Subsequently, the Council added analogous requirements for the installation of bike lanes,⁷⁷ pedestrian plazas,⁷⁸ centralized parking meters,⁷⁹ and for changes to parking meter rates.⁸⁰ For these projects, the community board can also request a presentation from the DOT explaining the project. Most meaningful changes to New York City's streetscape now provide a formal, if advisory, role for both the local council member and the local community board. But these laws also show that until their enactment, the DOT was under no obligation to seek legislative or community input.

The environmental review process can also impose hearing requirements for certain projects. Where projects are sufficiently federal to trigger the application of the National Environmental Protection Act ("NEPA"), federal law requires the solicitation of information from the public, including through public hearings for controversial projects.⁸¹ Only the largest urban transportation projects, like the creation of a new bus program, generally trigger this requirement. In 15 states, plus Washington, D.C., state analogues of NEPA impose their own requirements, but even in that minority of states, these will rarely impose additional procedural requirements on urban street redesigns.⁸² Most of these "little NEPAs" do not apply to local actions.⁸³ Of those that do, many expressly exclude street redesigns from the environmental review process.⁸⁴ Even in California, where the California

76. N.Y.C., N.Y., ADMINISTRATIVE CODE § 19-101.2 (2021).

77. *Id.* § 19-187.

78. *Id.* § 19-157.

79. *Id.* § 19-167.4.

80. *Id.* § 19-175.3.

81. 40 C.F.R. § 1506.6 (2019); *see also* *Rattlesnake Coal. v. U.S. Env't Prot. Agency*, 509 F.3d 1095, 1101 (9th Cir. 2007) (discussing when a state or local project is treated as "federal"). Notably, some federal transportation funding programs trigger NEPA coverage. *See* U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., *Interim Program Guidance Under MAP-21: The Congestion Mitigation and Air Quality Improvement (CMAQ) Program Under the Moving Ahead for Progress in the 21st Century Act* (Nov. 12, 2013), https://www.fhwa.dot.gov/environment/air_quality/cmaq/policy_and_guidance/2013_guidance/index.cfm [<https://perma.cc/KM86-YNHN>].

82. DANIEL R. MANDELKER, ROBERT L. GLICKSMAN, ARIANNE M. AUGHEY, DONALD MCGILLIVARY & MEINHARD DOELLE, *NEPA LAW AND LITIG.* § 12:1 (2d ed. 2020).

83. *Id.* § 12:2.

84. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5 (2020) (classifying "installation of traffic control devices on existing streets" as not subject to environmental review in New York); N.Y. VEH. & TRAF. L. § 153 (McKinney 2021) (defining "[t]raffic control devices"); *see also* DIST. DEP'T OF TRANSP., ENVIRONMENTAL MANUAL 88 (2d ed. 2012), <http://ddotsites.com/documents/>

Environmental Quality Act (“CEQA”), the state’s strict environmental review law, has been held to cover redesigns of the existing right-of-way,⁸⁵ CEQA only encourages, but does not require, any formal public hearing⁸⁶—and has recently been revised to exempt essentially all bike, bus and pedestrian projects from most CEQA requirements.⁸⁷ Overall, environmental review mandates public participation in the transportation process for only a small subset of projects, and even for those, sets a very low floor for the amount of participation required.⁸⁸

In general, then, the procedures governing local street design appear to be a YIMBY’s (“Yes in My Backyard”) dream. For most projects, DOTs, staffed by trained engineers and directly accountable only to the mayor, have the sole authority to reallocate street space. They need not consult with local neighborhood organizations, nor hold public hearings. The details of legislative design and procedure are irrelevant, as the local legislature plays no role in project approvals. Centralization and technocracy rule the day—at least on paper.

B. *TRANSPORTATION PLANNING IN PRACTICE: NIMBYISM AND
ALDERMANIC CONTROL*

1. NIMBYism in Transportation

In practice, city administrators’ immense formal powers over the streets do not translate into unilateral mayoral control, as efforts to redesign city streets run headlong into the same political dysfunction as efforts to build housing. Proposals are debated in endless public hearings, each dominated by furious neighbors raising paranoid claims of ruin from any change to the status quo. Local elected officials stand in the way of citywide goals. The wealthiest and whitest residents leverage their social capital to dominate

environment/DDOT_EnvironmentalManual_2012.pdf [https://perma.cc/NF43-AJGC] (exempting all DOT projects “except new large construction projects” from environmental review).

85. Liam Dillon, *Want a Bike Lane in Your Neighborhood? It’s Not So Simple in California*, L.A. TIMES (Apr. 7, 2016, 12:05 AM), <https://www.latimes.com/politics/la-pol-sac-enviro-bike-lanes-20160407-story.html> [https://perma.cc/Z86J-J59Q].

86. CAL. CODE REGS. tit. 14, §§ 15201, 15202(a) (2021).

87. Reforms enacted in 2013 and implemented in subsequent years redefined transportation impact analysis from measuring impacts on congestion to measuring impacts on the amount of motor vehicle miles traveled. Dillon, *supra* note 85; Ernesto Hernandez-Lopez, *Bike Lanes, Not Cars: Mobility and the Legal Fight for Future Los Angeles*, 42 WM. & MARY ENV’T L. & POL’Y REV. 553, 581 (2018). This will inherently define most bus, bike, and pedestrian projects (which rarely increase VMT) as having no negative environmental impact.

88. Other state and federal statutes sometimes impose additional procedural requirements on transportation planning, but these are usually inapplicable to the local projects at issue here. *See, e.g.*, 23 U.S.C. § 128 (2018) (requiring hearings or opportunity for hearings for federal-aid highway projects).

debate, while technical expertise and data are sharply discounted.⁸⁹ In short, the public process surrounding street redesigns looks in practice much like the public process for land use approvals.

The story of Chicago's Stony Island Avenue illustrates these dynamics archetypically (the example is chosen for being so ordinary, even dull).⁹⁰ Stony Island Avenue, located on the city's South Side, is a known safety hazard: Its eight travel lanes invite speeding and as a result, in 2015 alone, two pedestrians and two cyclists were killed along the road.⁹¹ As early as the mid-2000s, the Chicago DOT first proposed installing protected bike lanes, both to protect cyclists and to narrow the roadway for pedestrian safety.⁹² The plan received \$3 million in federal funding, making it all the more attractive.⁹³ But the plan languished, and at a series of public meetings convened by the DOT in 2016 (and notably, organized by aldermanic ward), local residents complained that the project would slow traffic.⁹⁴ Consequently, the local aldermen came out in opposition to the bike lanes.⁹⁵ After a decade of process, the project went nowhere, and people continue to be killed along Stony Island Avenue.⁹⁶ As one local journalist reported, "the political will [was] not there" for the bike lane: it would have "take[n] a coalition of the [many] aldermen" whose districts contained part of the road for any change to take place.⁹⁷

This story repeats itself in cities across the country, and for transit, bike, and pedestrian projects alike. In New York City, to give two brief examples of many, plans for rapid bus service along Harlem's 125th Street were scrapped

89. Though this has been quantitatively demonstrated for land use decisions, see EINSTEIN ET AL., *supra* note 9, at 95, the dynamic appears to be universal across issue areas. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGICAL Q.* 619, 646 (1992) (describing and theorizing the same dynamics in environmental law).

90. This story illustrates the general pattern in Chicago. See Rodriguez & Shoked, *supra* note 10, at 163 (stating that Chicago aldermen generally can veto projects in their neighborhood, but often defer to informal neighborhood associations).

91. John Greenfield, *South-Siders Spar over Proposed Stony Island Bike Lanes*, CHI. READER (Jan. 21, 2016), <https://www.chicagoreader.com/chicago/stony-island-avenue-bike-lanes-traffic-safety/Content?oid=20954559> [<https://perma.cc/5MUK-CKH2>].

92. *Id.*

93. Sam Cholke, *Stony Island Could Lose Traffic Lanes to Make Way for Bike Lanes*, DNAINFO (Mar. 27, 2014, 7:12 AM), <https://www.dnainfo.com/chicago/20140327/south-shore-above-79th/stony-island-could-lose-traffic-lanes-make-way-for-bike-lanes> [<https://perma.cc/gLSN-88J7>].

94. Greenfield, *supra* note 91.

95. Lee Edwards, *South Side Cyclists Say They Want Stony Island Bike Lanes, but the Political Will Isn't There*, BLOCK CLUB CHI. (Aug. 10, 2018, 9:00 AM), <https://blockclubchicago.org/2018/08/10/south-side-cyclists-say-they-want-stony-island-bike-lanes-but-the-political-will-isnt-there> [<https://perma.cc/6W48-G3TK>].

96. Maxwell Evans, *A 'Lack Of Hope' Permeates Chicago's Cyclist Community After Another Fatal Bike Crash On Stony Island*, BLOCK CLUB CHI. (Nov. 19, 2019, 7:35 AM), <https://blockclubchicago.org/2019/11/19/a-lack-of-hope-permeates-chicagos-cyclist-community-after-another-fatal-bike-crash-on-stony-island> [<https://perma.cc/MVV8-XX5K>].

97. Edwards, *supra* note 95.

after discontent from local community boards and elected officials,⁹⁸ while the city worked for five years to win community support for fixing two unsafe intersections in Brooklyn's Bay Ridge neighborhood.⁹⁹ As one council member has complained, "[i]t's a self-imposed obstacle. . . . [B]ike lanes literally get delayed for years over community board opposition, and the DOT puts aside safety for anecdotes and personal experiences"¹⁰⁰ These obstacles stymied the New York City DOT even when it was run by Janette Sadik-Khan, a transportation reform champion whose boldness earned her (facetious) comparisons to urban renewal czar Robert Moses; during her tenure, advocates for bicycle and pedestrian improvements, having won an ally in City Hall, found community boards such an obstacle that they launched campaigns to recruit friendly members to those boards.¹⁰¹ Likewise, in Boston, a 2009 plan to build bus rapid transit along the city's highest-ridership bus route—a plan projected to save riders 20 minutes daily, on average—was shelved in the face of community opposition.¹⁰² "[A]fter months of community meetings," the death knell for the bus improvements was a letter of opposition from local elected officials, both city and state.¹⁰³

Indeed, Steven Higashide, a leading bus advocate, has identified transit planners' excessive public outreach as a prime culprit for bad bus service.¹⁰⁴ According to his analysis, "multiple phases of design and outreach . . . stack the politics against" transit improvements: Potential beneficiaries are unexcited about hypothetical improvements a half-decade from completion,

98. The DOT held 12 public meetings about the proposal over the course of a year, and 50 meetings when including presentations to elected officials. Kate Hinds, *NYC Kills Fast Bus to LGA*, WNYC (July 16, 2013), <https://www.wnyc.org/story/307060-nyc-kills-fast-bus-laguardia-airport> [<https://perma.cc/KG96-8JK3>].

99. Toby Hyde, *Bay Ridge Workshop Shows Why DOT Can't Seem to Get Anything Done*, STREETS BLOG NYC (Jan. 21, 2020), <https://nyc.streetsblog.org/2020/01/21/bay-ridge-workshop-shows-why-dot-cant-seem-to-get-anything-done> [<https://perma.cc/BG5D-BUGF>].

100. Dave Colon, *Want a Bigger Bike Network? Reduce Community Board's Role, Says One Local Pol*, BROOKLYN EAGLE (Apr. 11, 2019), <https://brooklyneagle.com/articles/2019/04/11/want-a-bigger-bike-network-reduce-community-boards-role-says-one-local-pol> [<https://perma.cc/N5RF-JT9B>].

101. Michael Crowley, *Honk, Honk, Aaah*, N.Y. MAG. (May 15, 2009), <https://nymag.com/news/features/56794> [<https://perma.cc/AH6J-GAJW>]; *This Week: Columbus Bike Lane Vote, Community Board Join-Ups*, STREETS BLOG NYC (Jan. 7, 2013), <https://nyc.streetsblog.org/2013/01/07/this-week-columbus-bike-lane-vote-community-board-join-ups> [<https://perma.cc/QV3V-UJ3D>].

102. Christian MilNeil, *The Transit Line That Got Away: Learning from the 28X*, STREETS BLOG MASS (Aug. 26, 2019), <https://mass.streetsblog.org/2019/08/26/the-transit-line-that-got-away-learning-from-the-28x> [<https://perma.cc/KD3N-GM6H>].

103. *Id.*; Gintautas Dumcius, *Lawmakers Ask State to Withdraw 28X Proposal*, DORCHESTER REP. (Nov. 12, 2009), <https://www.dotnews.com/2009/lawmakers-ask-state-withdraw-28x-proposal> [<https://perma.cc/SK68-2CE4>].

104. STEVEN HIGASHIDE, *BETTER BUSES, BETTER CITIES: HOW TO PLAN, RUN, AND WIN THE FIGHT FOR EFFECTIVE TRANSIT* 47 (2019).

while “the hardest-core opponents stay involved and continue to complain and raise fears throughout the process.”¹⁰⁵

This hyper-local focus can result in immense political power for very small groups. Even though transit projects improve travel across multiple neighborhoods, public outreach processes often solicit and elevate complaints from individual residents and merchants who live directly along the route.¹⁰⁶ Regardless of whether it actually represents broad public opinion, the appearance of community opposition is frequently determinative. Where either public testimony or the local legislator opposes a street redesign, it usually doesn’t happen.

2. Transportation NIMBYism as Voluntary and Intentional

These forms of sublocal control are, as Section II.A explained, not mandated by law— cities invite the public, and their elected representatives, in. This Section underscores how transportation planning agencies are intentionally and consciously empowering oppositional voices, not merely assuaging them, and emphasizes that they have the power to do otherwise.

Even cities that have formalized their own guidelines for neighborhood outreach leave themselves the legal discretion to skip that outreach when they want to. Memphis, for example, committed itself to holding stakeholder meetings for any bike project that will remove on-street parking spaces, with notice to all adjacent landowners, tenants, and neighborhood associations.¹⁰⁷ But for projects with “mobility or safety concerns,” Memphis reserved the right to act more quickly.¹⁰⁸ The breadth of that loophole illustrates the essentially voluntary nature of Memphis’s public outreach—and therefore the City’s discretion to act unilaterally.

In fact, cities are so willing to empower legislators and community members that even where legally mandatory procedural requirements have been imposed, those mandates are not practically binding: cities go above and beyond. In New York City, for example, where the City Council enacted bill after bill mandating that community boards and council members receive notice and a chance to comment on transportation projects in their districts, that legislation had no actual effect on the street redesign process because these laws merely codified existing practice.¹⁰⁹ City council members and local

105. *Id.*

106. In one case in New York City, Jumaane Williams—a council member, and now the City’s Public Advocate—held up a major cross-Brooklyn bus project in response to complaints from a homeowner who did not want a bus stop and ticket machine in front of his building. *Id.* at 67.

107. CITY OF MEMPHIS ON-STREET PARKING MODIFICATION GUIDELINES 1 (2013), <https://bikepedmemphis.files.wordpress.com/2015/01/parking-modification-guidelines-deco12013.pdf> [<https://perma.cc/2YXT-ACW9>].

108. *Id.* at 5.

109. *Proposed Local Laws Directed Toward DOT’s Bike Projects*, CITYLAND (Oct. 15, 2011), <https://www.citylandnyc.org/proposed-local-laws-directed-toward-dot%E2%80%99s-bike-projects>

community boards were already receiving presentations about transportation projects—even minor ones.¹¹⁰ One community board member, commenting on the Council’s new notice requirements, announced that, “I can say categorically that DOT has not installed a single bicycle infrastructure project without the input of [his board].”¹¹¹ New York City sought approval from its community boards and council members long before it was required. The new legislation was superfluous.

The participation requirements embedded in federal law and environmental review likewise do not bind, and do not dictate, practice and politics. For example, Chicago’s planning process for bus rapid transit along Ashland Avenue—another plan which was scrapped in the face of neighborhood opposition—included multiple community meetings from the project’s very inception, well before the project’s environmental review and “official public comment period” ever commenced.¹¹² The project died before any legally mandated procedures were ever triggered.

Moreover, DOT outreach over transportation projects is not just for show. Cities’ empowerment of legislators and neighbors is meant to be a real delegation of control. Local governments are experienced at providing opportunities for sham participation: outlets for aggrieved parties to vent and feel heard, or box-checking exercises to maintain technical compliance with state and federal participation mandates.¹¹³ The classic typology of forms of public participation classify such hearings as “manipulation,” “therapy,” and “tokenism.”¹¹⁴ These forms of participation are the norm in certain settings, such as hearings before legislative bodies.¹¹⁵ And for transportation mega-

[<https://perma.cc/TUW6-J9NU>]; Noah Kazis, *Gerson Bill Mandating Review of Transpo Projects Is Now Law*, STREETS BLOG NYC (Jan. 7, 2010), <https://nyc.streetsblog.org/2010/01/07/gerson-bill-mandating-review-of-transpo-projects-is-now-law> [<https://perma.cc/46AJ-6D26>]; Noah Kazis, *City Council Singles Out Bike Lanes in Bills to Codify DOT Outreach*, STREETS BLOG NYC (Sept. 26, 2011), <https://nyc.streetsblog.org/2011/09/26/city-council-singles-out-bike-lanes-in-bills-to-codify-dot-outreach> [<https://perma.cc/U4W2-UMJH>] [hereinafter Kazis, *City Council Singles Out*].

110. See, e.g., N.Y.C. DEP’T OF TRANSP., LONGWOOD PEDESTRIAN IMPROVEMENT WORKSHOP (2009), http://www.nyc.gov/html/dot/downloads/pdf/longwood_bx_nov09.pdf [<https://perma.cc/4223-ELP6>]; N.Y.C. DEP’T OF TRANSP., SOUTHERN BOULEVARD: CRAMES SQUARE (2010), http://www.nyc.gov/html/dot/downloads/pdf/20100502_crames-sq_cb2.pdf [<https://perma.cc/KU5V-QGWS>].

111. Kazis, *City Council Singles Out*, *supra* note 109.

112. Jon Hilkevitch, *Getting Around: Bus Rapid Transit for Ashland Avenue Hits Road Bump in Chicago*, CHI. TRIB. (Sept. 30, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-09-30-ct-met-cta-ashland-bus-rapid-transit-20130930-story.html> [<https://perma.cc/H5W2-WEX3>].

113. See Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASSOC. 216, 216–17 (1969).

114. *Id.* at 217.

115. After a judge forced the Chicago City Council to open its meetings to public comment, members spent the comment period meeting with each other and walking in and out of the room. John Byrne & Hal Dardick, *Chicagoans Speak at City Council Meeting, but Did Alderman Listen?*, CHI. TRIB. (July 26, 2017, 7:47 PM), <https://www.chicagotribune.com/politics/ct-chicago-city-council-public-comment-met-20170726-story.html> [<https://perma.cc/7QJV-ZRH3>].

projects—new highways or transit lines—the government pays far less heed to individual public comments.¹¹⁶ The public participation process for street redesigns, in contrast, is a real site of hyper-local control: Officials defer to the input provided, and accordingly, savvy activists on both sides pack the meetings. City officials have not just created empty exercises of public participation; they have created forums with real power.

Transportation agencies have alternative planning processes available to them, and know how to make use of them. Recent innovations in bus planning in Boston provide one illustration of a promising alternative. Although Boston's Blue Hill Avenue still lacks bus lanes—the city has re-started a brand-new public planning process for that roadway¹¹⁷—elsewhere, the Boston area has pioneered a different approach to bus planning that makes full use of cities' broad powers to redesign their own streets. Rather than front-load public outreach and mobilize opposition, Boston and many of its neighboring cities have instead created “pop-up” bus lanes as pilot projects, with public outreach *following* implementation.¹¹⁸ Boston, for example, placed orange traffic cones and movable electronic street signs to create a bus lane for a day, then measured the results.¹¹⁹ The one-day pilot was followed by a four-week trial period, and only at that point did the city seek out extensive public comment.¹²⁰ By then, the results were established, the fears were proven to be overblown, and a constituency of riders who had seen meaningful benefits had been activated.¹²¹ “The pilot was the process,” reported one city planner.¹²² Cities could employ this “tactical” approach more broadly—and in many cases, even without the pilot phase—but they choose not to.

116. See Connor Harris, *Cuomo's La Guardia AirTrain is Already Off the Rails*, N.Y. POST (Jan. 21, 2020, 8:51 PM), <https://nypost.com/2020/01/21/cuomos-la-guardia-airtrain-is-already-off-the-rails/> [<https://perma.cc/A3VZ-YSS4>] (describing public meeting for new train to LaGuardia airport as a fait accompli).

117. See Tom Acitelli, *Blue Hill Avenue Redesign to Focus on Bus Service, Safety, Public Space*, CURBED BOS. (Aug. 19, 2019, 5:35 AM), <https://boston.curbed.com/2019/8/19/20810871/blue-hill-avenue-redesign-boston> [<https://perma.cc/HU64-AKZA>].

118. See HIGASHIDE, *supra* note 104, at 47–50.

119. Angie Schmitt, *Boston Tests Faster Bus Service Simply By Laying Out Orange Cones*, STREETS BLOG USA (Dec. 12, 2017), <https://usa.streetsblog.org/2017/12/12/boston-tests-faster-bus-service-simply-by-laying-out-orange-cones> [<https://perma.cc/GJ7U-LEVW>]; Adam Vaccaro, *Boston Will Test a Bus-Only Lane in Roslindale on Tuesday*, BOS. GLOBE (Dec. 8, 2017, 7:41 PM), <https://www.bostonglobe.com/metro/2017/12/08/boston-will-test-bus-only-lane-roslindale-tuesday/dTTD6rqpjVrFw4hrhBf6M/story.html> [<https://perma.cc/TBP6-KMU7>].

120. Bob Seay, *Bus-Only Lane Experiment in Roslindale Ends*, GBH (June 3, 2018), <https://www.wgbh.org/news/local-news/2018/06/03/bus-only-lane-experiment-in-roslindale-ends> [<https://perma.cc/QY44-VJFF>].

121. HIGASHIDE, *supra* note 104, at 48; Seay, *supra* note 120 (noting that many motorists and business owners found the bus lane worked for them).

122. Laura Bliss, *To Build a Better Bus Lane, Just Paint It*, BLOOMBERG CITYLAB (Mar. 1, 2019, 9:42 AM), <https://www.citylab.com/transportation/2019/03/bus-commute-tactical-transit-lanes-traffic-congestion/583798> [<https://perma.cc/6MDQ-RNQD>].

The law is not *irrelevant* in the transportation planning process, of course. The formal allocation of power matters enormously: There is a world of difference between cities voluntarily deferring to local neighborhood associations and local legislators and being forced to do so. In Philadelphia, for example, the City Council recently reclaimed power over the streetscape, unanimously passing an ordinance¹²³ requiring legislative approval for any bike lane that would remove a vehicle or parking lane.¹²⁴ As a result, “bike lane implementation ground to a screeching halt.”¹²⁵ Conversely, even as New York City officials generally defer to community boards and local elected officials, the city is willing to overrule each at times.¹²⁶

Still, there is a floor of public outreach and legislative control, not provided for by law, below which cities rarely fall. Cities almost always hold public hearings for the neighborhood and will usually give both neighbors and local elected officials a quasi-veto over projects. Legal structures can raise that floor by doing things like turning a presumptive veto into a binding one, but only rarely do transportation planning agencies allow themselves to go below that floor. The immense authority that city administrations can wield over local streets tends to evaporate in the face of political realities.

What makes this particularly remarkable is that big city DOTs are not themselves neutral. DOTs are often proudly committed to improving safety and promoting non-automotive modes of transportation. They sign on, for example, to the “Vision Zero” goal of entirely eliminating traffic fatalities and adopt ambitious climate goals.¹²⁷ When they present to local communities, they bring slideshows full of glossy images and data modeling the expected effect of the street redesign on injuries and travel times.¹²⁸

123. Jared Brey, *Council Approves New Parking Regulations, Gives Itself Bike-Lane Veto Power*, WHY? PLAN PHILLY (June 7, 2017), <https://why.org/articles/council-approves-new-parking-regulations-gives-itself-bike-lane-veto-power> [<https://perma.cc/J67E-UFMZ>].

124. PHILADELPHIA, PA., CODE § 12-701 (2021).

125. Dena Ferrara Driscoll, *City Council’s Bike Lane Bill Won’t Make Philadelphia’s Streets Safer*, PHILA. INQUIRER (Feb. 27, 2018, 5:00 AM), <https://www.inquirer.com/philly/opinion/commentaryphiladelphia-council-jannie-blackwell-bike-lanes-commuting-philadelphia-opinion-20180227.html> [<https://perma.cc/ZYN6-7KRZ>].

126. Allie Griffin, *DOT to Begin Fresh Pond Road Bus Lane Construction This Month*, RIDGEWOOD POST (Aug. 19, 2019), <https://ridgewoodpost.com/dot-to-begin-fresh-pond-road-bus-lane-construction-this-month> [<https://perma.cc/9WPP-J7N3>]; Gersh Kuntzman, *Safety First! De Blasio Overrules Manhattan Community Board for Amsterdam Ave. Fix*, STREETS BLOG NYC (Apr. 25, 2019), <https://nyc.streetsblog.org/2019/04/25/safety-first-de-blasio-overrules-manhattan-community-board-for-amsterdam-ave-fix> [<https://perma.cc/4EYF-D3SU>].

127. *Vision Zero Communities*, VISION ZERO NETWORK, <https://visionzeronetwork.org/resources/vision-zero-cities> [<https://perma.cc/56GR-AW4Y>]. See generally *Climate Action Compendium*, CLIMATE MAYORS, <http://climatemayors.org/actions/climate-action-compendium> [<https://perma.cc/R6UR-GQRL>] (outlining climate goals and actions of various cities nationwide).

128. See generally N.Y.C. DEP’T OF TRANSP., FORT HAMILTON PARKWAY PROTECTED BIKE LANE (2019), <https://www1.nyc.gov/html/dot/downloads/pdf/fort-hamilton-pkwy-may2019.pdf> [<https://perma.cc/VHN3-KFW8>] (providing an illustrative example of a city DOT presentation to a community board); L.A. DEP’T OF TRANSP., HISTORY OF THE GREAT STREETS INITIATIVE ON

In the end, the transportation planning process represents a voluntary ceding of power from the city's bureaucracy to its residents. City planners come in the stance of an advocate, passionately presenting their plans before sometimes-hostile crowds, yet voluntarily eschew the immense powers granted to them by law. The DOT comes equipped with engineering studies and hard data, yet allow residents' subjective experience to trump those data. Cities routinely, willingly, and apart from any legal mandate allow the public to question their own expert recommendations and hand the public the tools to defeat their own plans.

IV. RETURNING TO LAND USE: HOW MUCH DOES LAW MATTER?

In the land use process, well-established legal rules empower hyper-local voices, strengthening opponents of new development. In the transportation planning process, absent similar legal mandates, those same neighbors wind up nearly as empowered. Indeed, there is some evidence that the politics of street design is even more parochial, and less subject to mass democratic control, than land use politics. In Einstein, Glick and Palmer's survey of mayors, they found that 59 percent of mayors deemed housing politics to be dominated by small minority groups with loud voices—a fact they found highly indicative of neighbors' outsized control over zoning.¹²⁹ But that same study showed one issue to be even more dominated by small interest groups: the installation of bike lanes.¹³⁰ Only 12 percent of mayors believed that majority opinion drove the politics of bike lanes.¹³¹ If land use politics has become captured by the neighbors, transportation politics may be even worse.¹³²

The persistent power of neighbors and legislators in the transportation context should throw a splash of cold water on the promise of procedural land use reforms. The comparison is not entirely apples-to-apples—in particular, mayors have relatively consistent fiscal and political incentives to support upzoning, while the push for local transportation reforms is politically contingent and as likely to come from the agency level as the mayoralty—and insights from the transportation context apply to land use only in translation. But even so, viewing land use's NIMBYism problem in light of transportation NIMBYism suggests that procedural explanations only go so far. Substantive politics, and non-legal forms of power, seem to play a far greater role. This

MAR VISTA'S VENICE BLVD, https://static1.squarespace.com/static/595fd8fa5016e119d794e4b1/t/5973ec6c5016e132fff7f362/1500769451901/LADOT+Boards_Final.pdf [<https://perma.cc/P295-MFMK>] (same).

129. EINSTEIN ET AL., *supra* note 9, at 111–12.

130. *Id.*

131. *Id.* at 112.

132. The figures are not precisely comparable, because cyclists are themselves a small, well-organized minority with a loud voice in local politics. Still, it seems safe to say that the mayors surveyed do not see transportation politics as *more* majoritarian than land use politics.

Part offers a few hypotheses for what, if not law, gives transportation and land use procedures common forms, and what might be necessary for lasting reform.

A. *ALTERNATIVE EXPLANATIONS FOR HYPER-LOCAL CONTROL
OF THE BUILT ENVIRONMENT*

There are many plausible and overlapping explanations for the resilience of hyper-local control over transportation planning, even where it is not legally required. Most simply, the voluntary granting of hyper-local control reflects nothing more than accumulated bad habits. Even the most data-driven governments need to conduct some amount of outreach for successful transportation planning. For instance, to plan a bike lane, they may need information on local businesses' loading practices. In conducting that outreach, it can be easy to fall back on familiar forms of public participation, rather than come up with something different. Moreover, it can be politically costly to withdraw forms of local power, even if administrators easily could have avoided granting them in the first place. The success of "pop-up" bus lane pilots provides some evidence for this inertia theory. Once successful, the innovation spread quickly through the Boston area; in other words, once presented with a new option, cities took it. Still, this explanation only goes so far. Big-city DOTs have the bureaucratic capacity and the motivation to modify their public outreach practices, and many transportation officials are patently frustrated with the resistance they face from local opposition.¹³³ There are cities that would like an alternative to hyper-local planning, and could create one, but for some external barrier.

Another piece of the story points to the legislature's latent power over the executive. City council members may wield project-by-project vetoes, despite mayoral control over the streetscape, because the council retains the power to rescind that mayoral control. The various carveouts to mayoral control littered through municipal codes demonstrate the legislature's ultimate power.¹³⁴ In past moments of controversy, city councils have reinserted themselves into the transportation planning process for particular categories of project, and they could do so again. This explanation is again only partial, however. A council member's threat will, in most cases, be an empty one: The full council will rarely risk a power struggle over a single local controversy. Operating in the shadow of legislative supremacy may limit the executive's boldness, but it hardly eliminates the executive's power entirely. Moreover, in some cities the council lacks this power; rather, executives are

133. See generally JANETTE SADIK-KHAN & SETH SOLOMONOW, *STREETFIGHT: HANDBOOK FOR AN URBAN REVOLUTION* (2017) (recounting how a small group of opponents nearly derailed efforts to reform New York City's transportation network).

134. See *supra* notes 60, 63, 67 and accompanying text.

empowered or protected by charters or by state law that the local legislature cannot supersede.¹³⁵

A more bottom-up explanation for hyper-local control is that neighbors are so strongly incentivized to participate in the planning process for their streets that they do not need any procedural encouragement. Consistent with William Fischel's homevoter hypothesis, a risk-averse homeowner desperate to preserve the value of her undiversified investment in her home will find a way to assert her voice.¹³⁶ She will monitor changes to her neighborhood even where notice is not provided, establish neighborhood organizations to make that monitoring more feasible, and lobby hard for public forums if they are not provided. Under this theory, there is no meaningful difference between a homeowner's vigilance against changes to the abutting lot on one side of her property and against changes to the roadway in front of her property. The streetscape, in this telling, is part of Lee Fennell's "unbounded home," in which the meaning of the home spills beyond property lines.¹³⁷ All the same powerful ideological and emotional commitments to residential property compel neighbors to exert control over "their" roadways. Legislators wisely pay heed to these powerful constituencies.

Similarly, cities may involve the public and local elected officials in order to insure against political risk. As political scientist J. Eric Oliver has shown, incumbent local officials generally win reelection, but controversy can strike suddenly: "It is very hard to foretell when a problematic issue becomes incendiary [I]t is difficult to anticipate when or why [voters] will strike."¹³⁸ Politically cautious officials may run projects through extensive public processes not because local groups would demand it *ex ante*, but to air out all controversy in a controlled setting before it is too late. Even if providing a focal point for opposition means more of a mayor's projects are fought and more are defeated, it also means there will not be any surprises. Involving local legislators also helps prevent surprises, bringing the most obvious sources of opposition inside the tent before a project begins.

At the same time, many actors within local government are substantively and sincerely committed to local control. In response to the disasters of urban

135. Cf. *Giuliani v. Council of City of N.Y.*, 688 N.Y.S.2d 413, 417 (N.Y. Sup. Ct. 1999) (holding that under state statute, City Council could not regulate commuter vans without infringing upon powers of mayor).

136. See FISCHEL, *supra* note 13 at 1.

137. See LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 2–3 (2009).

138. J. ERIC OLIVER WITH SHANG E. HA & ZACHARY CALLEN, *LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY* 185 (2012). Oliver's analysis concerns smaller cities, but the many big-city mayors who have lost reelection after bungling a snowstorm testify to the similarities in big-city politics: a single issue, mishandled, can easily oust an incumbent. David Dudley, *Snowstorm Mayors: Don't Blow This*, BLOOMBERG CITYLAB (Mar. 14, 2017, 9:30 AM), <https://www.citylab.com/transportation/2017/03/snowstorm-mayors-dont-blow-this/519477> [<https://perma.cc/Y3PT-7827>].

renewal, the urban planning profession has widely embraced participatory planning, and to some extent, become skeptical of its own expertise.¹³⁹ This turn towards bottom-up planning represents both an instrumental appreciation of the need for fine-grained local information about project specifications and a normative commitment to participation and neighborhood control for their own sakes. Many planners who staff transportation and city planning departments have little interest in imposing their preferred outcomes on communities, even if they genuinely believe their recommendations are superior. In such cases, neither procedure nor politics is forcing administrators to empower local voices; the administrators would do so entirely on their own.

Pressures to empower local legislators and neighbors come from every angle of local politics. Hyper-localism has roots in high-minded norms of public service and the basic self-interest of politicians seeking reelection. It comes from the bottom up and the top down. Fully uncovering and weighing the various causes of hyper-local control over street design is beyond the scope of this Essay; these explanations are just hypotheses. But whatever the reasons, the persistence of hyper-localism in transportation planning suggests that excising hyper-localism from the land use process will not be easy. Each of the explanations offered here (and surely many that could be added to this list) apply with equal force to land use as they do to transportation. Political dynamics and ideological commitments external to the law undergird the law's procedural support for hyper-local control, and appear to do so consistently and recurrently.

B. PROCEDURE AND LAND USE REFORM

The resilience of hyper-localism in transportation suggests that the promise of purely procedural land use reforms may be overly optimistic. Schleicher, for example, sees procedural reforms as able to “change the terms of land use politics,” locking in momentary political gains.¹⁴⁰ John Mangin has suggested that procedural reforms to land use law are “smaller scale” and sufficiently “subtl[e]” that achieving them does not require “wish[ing] away difficult politics.”¹⁴¹ But if the politics of the built environment are insensitive to what procedures are legally mandated, changing the politics of zoning

139. Susan S. Fainstein, *Spatial Justice and Planning*, in READINGS IN PLANNING THEORY 258, 259 (Susan S. Fainstein & James DeFilippis eds., 4th ed. 2016); Jacob Anbinder, *The Post-Planning Pandemic*, DEMOCRACY: A JOURNAL OF IDEAS (July 2, 2020, 2:50 PM), <https://democracyjournal.org/magazine/the-post-planning-pandemic> [<https://perma.cc/9FGH-PPHH>] (describing planners' “crisis of confidence” and calling for planners to “reassert their profession's essential role in a vibrant social democracy, not as facilitators of pseudo-democratic input processes but as civil servants entrusted with improving urban life”).

140. Roderick M. Hills Jr. & David Schleicher, *Building Coalitions Out of Thin Air: Transferable Development Rights and “Constituency Effects” in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 114 (2020); see also Schleicher, *City Unplanning*, *supra* note 29 at 1718.

141. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 118 (2014).

procedure may be nearly as difficult as changing the politics of zoning substance.

This is not to say that procedure and structure are immaterial to land use outcomes. At least on the margin, they matter. Indeed, there is hard, empirical evidence that the design of electoral districts affects land use outcomes: Switching from districted elections to at-large elections leads to more housing production.¹⁴² That kind of structural redesign can be a part of the land use reform toolkit.¹⁴³ My point is not to suggest that law is inconsequential. But we should question how much—and when—land use law can be used to reshape dysfunctional land use politics, rather than the other way around.

Transportation's extra-legal hyper-localism should raise serious doubts about the efficacy of reforms that would merely remove the structures that encourage hyper-local land use politics, without replacing them with something new. The demand for today's land use politics may be strong enough that even absent any legal encouragement, they would reassert themselves. Thus, a proposal like Ryan's—to require representation of absent third party interests at land use hearings—may have little effect and little durability if both politics and ideology demand the privileging of the neighbors' voices; the absentee's representative will simply be ignored and his statements heavily discounted.¹⁴⁴ Likewise, Hills and Schleicher's call for mayors and mayoral-controlled planning agencies to bundle land use changes together through comprehensive planning may prove more vulnerable to future defections and revisions than they hope; mayoral control over transportation, after all, has proven to be a paper tiger.¹⁴⁵ Outside academia, statutes which limit the number of public hearings to which a land use proposal can be subjected may encourage informal public meetings convened by neighborhood associations or local legislators and treated just as

142. See Michael Hankinson & Asya Magazinnik, *The Supply–Equity Trade-off: The Effect of Spatial Representation on the Local Housing Supply* 2–3 (Feb. 20, 2021) (unpublished manuscript), http://mhankinson.com/assets/hankinson_magazinnik.pdf [<https://perma.cc/MTV6-JUAN>]; Evan Mast, *Warding Off Development: Local Control, Housing Supply, and NIMBYs* 1–3 (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 20-330, 2020), https://research.upjohn.org/cgi/viewcontent.cgi?article=1349&context=up_workingpapers [<https://perma.cc/JMQ4-YFgK>].

143. But note that these reforms were externally imposed and enforced, for reasons exogenous to land use. See Hankinson & Magazinnik, *supra* note 142 at 14; Mast, *supra* note 142 at 4–5.

144. In some contexts, even the testimony of actual residents is ignored or demeaned when it conflicts with the sentiments of more powerful and numerous interests. Lemar, *supra* note 43 (manuscript at 28) (describing low-income resident of wealthy suburb being jeered and physically accosted at zoning hearing).

145. Hills & Schleicher, *Planning an Affordable City*, *supra* note 33, at 96. To the extent that external entities, like the state or the courts, can enforce that planning process, the risk of defections is greatly reduced. See, e.g., Elmendorf, *supra* note 49, at 128–29 (offering proposal for how to increase state oversight of plans); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 972 (1976) (offering classic articulation of the judicial role in enforcing a planning regime).

deferentially.¹⁴⁶ All these reforms seem likely to help promote land use reform—but perhaps not as much, and not for as long, as hoped.

Instead, the more promising reforms seem to be those which create new political frameworks that can supplant today's political dysfunctions (and indeed, this is the direction that this same scholarship is already moving; this Essay's intervention is meant as a friendly amendment).¹⁴⁷ Certainly, proposals to change the basic pecuniary incentives of neighbors—by allowing them to more directly claim revenues from new development, for example—could have this effect where sufficient sums are at stake.¹⁴⁸ Many procedural reforms can also do this: if enforced by the state or the courts—as opposed to locally—Hills' and Schleicher's idea of "zoning budgets" could pull new interest groups (like tenants' organizations and developers) off of the political sidelines.¹⁴⁹

Most fundamentally, efforts to shift land use authority to the state level allow for the substitution of an entirely new politics, one that has recently been friendlier to housing production.¹⁵⁰ States have their own partisan politics, their own ecosystem of interest groups, and their own ideological battle lines—and because land use will always constitute a smaller share of the state's agenda than it does for local governments, those state politics are likely robust enough to withstand the introduction of land use as a new issue.

Of course, the most difficult, but most lasting, path to creating a new politics is also the simplest: changing hearts and minds. If hyper-local control over the built environment persists regardless of legal structure, the way

146. See, e.g., S.B. 330, Housing Crisis Act of 2019 (Cal. 2019). For one example of informal neighborhood organizing where the state has limited the allowable extent of official public participation (Massachusetts' "anti-snob zoning" statute), see Ethan Forman, *Neighbors Urged to Fight Affordable Housing Project*, SALEM NEWS (Feb. 17, 2020), https://www.salemnews.com/news/local_news/neighbors-urged-to-fight-affordable-housing-project/article_0880448d-f50a-5826-b028-aa450d359d16.html [<https://perma.cc/5DCZ-JA8A>].

147. Hills and Schleicher, for example, have recently described the importance to land use reform of "constituency effects," in which by creating new beneficiaries, laws create new interest groups. Hills & Schleicher, *supra* note 140 at 84. Likewise, Lemar's proposals aim to create a new, judicially-enforceable, technocratic politics around land use. Lemar, *supra* note 43.

148. See, e.g., Schleicher, *City Unplanning*, *supra* note 29, at 1725–32 (proposing creation of Tax Incremental Local Transfers to compensate neighbors); Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U.L. REV. 1047, 1049–50 (2008) (proposing property law mechanisms for unbundling risks associated with homeownership, and reviewing literature on other such mechanisms). *But see* CITIZENS' HOUS. & PLAN. ASS'N, INC., THE USE OF CHAPTER 40R IN MASSACHUSETTS: 2018 UPDATE 23 tbl. 8 (2018), https://www.chapa.org/sites/default/files/TheUseofCh40R_2018.pdf [<https://perma.cc/A3DR-HBQZ>] (finding that state-created incentive system to promote denser development is overwhelmingly ignored in high-income suburbs).

149. Hills & Schleicher, *Balancing*, *supra* note 29, at 124–27.

150. See generally John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019) (analyzing state intervention into local control of land use); cf. CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 179–84 (2011) (describing structural features of state and local government which lead to systematically different politics).

forward may ultimately depend on persuading the locals—or at least the politicians.¹⁵¹ By structuring our political communities and assigning them power over particular issue areas, the law can shape the formation of individuals' substantive political positions¹⁵²—but only so much. At the end of the day, there may be no path around hyper-local politics, only through it.

V. CONCLUSION

This Essay has described the divergent law and politics of street redesigns—the former granting control over the streetscape to mayors and technocrats, the latter providing it to locals and legislators—and it has used that divergence to inform ongoing policy debates about procedural reforms in land use law. But this divergence offers a perspective into more than just land use: it is a window into local government.

Local governments are often praised for their ability to act quickly and forcefully, and to develop innovative responses to social problems well before the national government can reach consensus.¹⁵³ They are praised for fostering deliberative democracy, political participation, and for training Americans in the skills of citizenship.¹⁵⁴ And they are praised for allowing property owners to easily coordinate among themselves for mutual gain, particularly in the management of collective resources.¹⁵⁵

The law and politics of urban transportation reveal the tensions between these roles. DOTs—authorized by law to act unilaterally to promote a technocratic vision of the public good—develop and advocate for innovative projects meant to save lives, speed commutes and reduce carbon emissions. But simultaneously, DOTs defer to an active citizenry which treats the streets in front of their homes and businesses as extensions of their property and their daily use of those streets as a source of expertise—just as local governments allow and encourage. In deciding whether to build a bike or a bus lane, cities are simultaneously trying to lead on pressing social issues,

151. The increasingly anti-development politics among urban renters sharply illustrates the necessity of persuasion. Renters lack the most direct financial incentives to oppose development and the legal framework governing redevelopment in urban neighborhoods has not significantly changed in recent decades, yet ideological shifts have made tenants an increasingly potent force against development. *See* Been, *supra* note 15, at 227–36. *See generally* Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473 (2018) (showing that renters in high-rent cities have become more anti-development).

152. *See generally* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999) (highlighting how delimiting territorial jurisdiction structures political community and conflict).

153. *See, e.g.*, Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1222 (2014).

154. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393–99 (1990).

155. *See* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 29–34 (1977); Rose, *supra* note 21 at 889–91.

empower local communities to control their own streets, and mediate conflicts between the many private parties laying special claim to that roadway. The paradoxical result is that officials fight hard for their proposals even as they yield their legal authority to the opponents of those proposals.

Cities are—with some success and a great deal of frustration—trying to honor incommensurate forms of authority and of expertise. How local governments recognize those distinctive sources of authority is an important question for future scholarship. For urban transportation reformers, though, disentangling the technocratic, majoritarian, participatory, and proprietary sources of authority being claimed in every public meeting is the daily work of advocacy. It may be wise, in transportation and land use policy, to more clearly define the spheres of decision-making where claims based in participation and property can—and cannot—take precedence.