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Amy Widman

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REPLACING POLITICS WITH DEMOCRACY: A PROPOSAL FOR COMMUNITY PLANNING IN NEW YORK CITY AND BEYOND

*Amy Widman**

INTRODUCTION

Once an active port providing jobs for many New Yorkers, Brooklyn's waterfront fell into disuse during the second half of the twentieth century as the city's economy came to rely more heavily on roads for shipping. Miles of shoreline fell into neglect, leaving disrepair and environmental hazards. Revitalization of the waterfront entered the city's agenda in the 1990s, but the resulting plans lacked vision and varied widely from one neighborhood to another. Some of the largest swaths of waterfront were completely left out of the revitalization process by city leaders and private developers who lacked political and financial incentive to work with certain local communities. This selective approach to revitalization placed an unequal burden on those communities and denied them a voice in important decisions regarding the delicate balance of environmental clean-up, cultivation of green space and protection of active industry and jobs.

* Law clerk to the Hon. Theodore H. Katz, U.S. Magistrate Judge, in the Southern District of New York. J.D., *cum laude*, New York University, 2002; B.A., Northwestern University, 1996. The author would like to thank Professor Vicki Been, the editorial staff of the *Journal of Law and Policy* and all those involved in community planning in Brooklyn who took the time to speak with the author about the practices and procedures of an informal process. She also would like to thank her friends and family, especially Dan, for their love and support.

This article tells two stories of community planning in Brooklyn to illustrate possible reasons for the divergent development of the waterfront and suggests ways in which local communities can be involved. It offers public participation as a solution to disparate treatment and examines whether the comprehensive planning process lives up to its ideal as a method of public participation. Part I provides a background to the debate and theoretical discussions underlying community planning. Part II explores the value of public participation in land use decision making. Part III chronicles the history of community-sponsored planning in New York City. Part IV sets forth two case studies of recent attempts to rezone neighborhoods through community-sponsored plans. The two communities studied, Vinegar Hill and Greenpoint, are located within a few miles of each other along the East River in Brooklyn. They share a common industrial past, and many manufacturing buildings still dot their waterfronts. The neighborhoods differ greatly in size, demographics and, most significantly for this analysis, experience with the land use decision-making process. Part V applies the two case studies to identify which factors help or hinder a community in its efforts to draft a comprehensive plan. Part VI explores policies that equalize the necessary resources and negotiating power among communities, encouraging more diverse public participation in land use decision making. Part VII proposes a legislative change that would reward communities for their planning efforts and encourage inclusive processes. Finally, this article concludes with a call to reevaluate the current land use decision-making process with the objective of including residents and workers in the process in a meaningful way.

The focus on New York City both grounds and restricts this article. The case studies are local in nature, and a comparison of only two experiences has inherent limitations. The diversity and density of Brooklyn, however, makes it a prime subject for examining how the land use process actually affects residents, and how failures of public participation occurs. Brooklyn's diverse population requires consensus-building strategies, and its population density is integrally related to its problem of scarce resources. While the local government structure of New York

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City may not mirror other jurisdictions, the purpose of this analysis is to explore how land use regulation can incorporate a real commitment to public participation by allowing and encouraging all communities to play an active role in the development strategies of their neighborhoods.

I. BACKGROUND

A controversy exists among planners, lawyers, policy makers and community leaders about how to formulate land use decisions. This dispute pits urban economics and democracy against one another as, at best, incompatible. Urban economists favoring a cost-benefit approach to land use decision making argue that this methodology is more efficient than focusing on public interest concerns because, at bottom, the primary social good is economic efficiency, not subjective notions of values.¹ These scholars contend that public participation itself is inefficient.²

¹ See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-53 (1977-78) (comparing the economic or public choice model with the opposed public interest model of local government legitimacy); see also Shi-Ling Hsu & John Loomis, *A Defense of Cost-Benefit Analysis for Natural Resource Policy*, 32 ENVTL. L. REP. 10239 (2002) (asserting that cost-benefit analysis is a better tool for decision making than the alternatives); David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545 (1997) (providing background for cost-benefit analysis and questioning whether cost-benefit criteria has a coherent and compelling rationale); Courtney Harrington, *Penn Central to Palazzolo: Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation*, 15 TUL. ENVTL. L.J. 383, 401 (2002) (discussing the trend towards public policy to deal with conflicting social and legal interests associated with urban development).

² See NELSON M. ROSENBAUM, *Citizen Participation and Democratic Theory*, in CITIZEN PARTICIPATION IN AMERICA 43 (Stuart Langton, ed., 1978) (noting that public participation is costly and can result in lackluster solutions in order to accommodate all views); see also Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 777 (1999) (arguing that public interests should not be followed to “protect members of our local communities from various forms of abuse”); Lior Jacob Strahilevitz, *The Uneasy Case for*

Public interest advocates respond that economic equations do not encourage democracy, and restricting policy guidance to economic factors limits the options available to decision makers. These theorists argue that land use decisions are ethical in nature, and economics should not play any role.³ This argument is commonly based on recognition of the deleterious and undemocratic effects that asymmetrical market forces have on land use.⁴

Direct democracy is sometimes touted as a tool for public participation in land use decision making. Advocates of direct democracy argue that participation through initiative and referenda encourages accountability and government responsiveness.⁵ Critics claim that this so-called ballot box

Devolution of the Individual Income Tax, 85 IOWA L. REV. 907, 939 (2000) (discussing Nelson M. Rosenbaum's perspective that public participation "itself is neither rewarding nor conducive to the growth of strong community bonds"); Adam N. Bram, *Public Participation Provisions Need Not Contribute to Environmental Injustice*, 5 TEMP. POL. & CIV. RTS. L. REV. 145, 158 (1996) (discussing skeptics' views that public participation is inefficient because it is expensive, hinders implementation of decisions, and relies on decision making by the public, whose ability to make complex decisions is questionable).

³ See Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 294-95 (1999); see also John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 UMKC L. REV. 1, 16 n.78 (2001) (stating that "the thought that economics should determine land use undermines the ethical and scientific principles of ecological rationality"); John Arntz, *Prairie Wetlands: A Reflection of Why We Need a Land Ethic*, 1 GREAT PLAINS NAT. RES. J. 193, 204 (1996) (noting that "[c]ost-benefit analysis has acquired a negative reputation regarding land uses and our ecosystems because ecological processes are difficult to evaluate monetarily").

⁴ See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 142-43, n.104 (1998) (noting that "in the absence of extensive planning in a liberal economy, the asymmetrical market forces which shape the city are hardly democratic.").

⁵ See, e.g., THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 10-11 (1989) (stating that if voters become frustrated with the decisions of politicians and administrative agencies, a populist democracy will allow the people to make the desired law and this,

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zoning suffers from too much majoritarian public participation. Other scholars worry that direct democracy has no safeguards for capture by special interest groups.⁶ Other critics of direct democracy argue that lack of information and expertise causes citizens to make poor planning decisions.⁷ Both capture by special interest groups and lack of information can increase the prevalence of discriminatory measures that disadvantage the under-represented.⁸

in turn, will encourage officials to extend greater deference to the voice of the people); *see also* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds.) (1998) (examining whether the goals of direct democracy, providing voting mechanisms that allow citizens to get around legislators biased in favor of the wealthy and making politicians more responsive to the public will have been achieved); M. DANE WATERS, THE BATTLE OVER CITIZEN LAWMAKING (2001) (discussing the initiative process as a mechanism for influencing public policy at all levels of government).

⁶ *See, e.g.*, DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 145-51, 182, 198-99 (1984) (stating that special interest groups may frequently veto initiatives and that they are heavily involved in the referendum process since there is a direct correlation between greater expenditures and ballot proposition victories); CRONIN, *supra* note 5, at 198-99 (noting that large, organized groups and those groups that can raise vast sums of money are better situated to win, and even more so, to block, any ballot box measures); WATERS, *supra* note 5, at 59 (discussing the historical role of special interest groups in referendum and initiative ballot contests and analyzing the impact these well-funded groups have on campaign wins).

⁷ *See generally* MAGLEBY, *supra* note 6, at 127-44.

⁸ *See, e.g.*, David L. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53, 94-95 (1991) (stating that “one of the most potentially troublesome problems with initiative and referendum is their tendency to dilute minority rights whether or not direct discrimination is intended”); John F. Niblock, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 189 (1993) (noting that initiatives and referendums can be a means to direct “bigotry, discrimination and prejudice” especially when they deal with the rights minority groups); Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (explaining that racial minorities, fueled by frustration with their elected representatives, turned to “do-it-yourself” government using referenda to reject existing laws and enact new laws).

Nonetheless, New York City and its communities can use public participation as a planning tool to reconcile land use decisions with the democratic process. Advocates of public participation cite to the virtues of accountability, community and consensus building and the social efficiency engendered by informal debates and discussions that take place throughout the planning process.⁹ This article draws on that model of public participation, and argues that the public should have a more prominent voice in land use decisions. The city should reward public participation by adopting community-sponsored plans that evince concern for achieving harmony between environmental, economic and social factors—a balance that can be achieved only through an inclusive process.

II. PUBLIC PARTICIPATION

Public participation means many things; for purposes of this article the term refers to a change in process that improves democracy by fostering inclusiveness. If decision makers yield to public desires after an inclusive process, redistribution of power back into the hands of the people is possible.¹⁰ Effective participation can be achieved through education, access to useful information, meaningful interaction with government officials

⁹ See, e.g., Carol Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. REV. 74, 96-97 (1989) (citing the virtues of "possibilities for constituent contact and civic participation" in local government as "structural restraints" on political power); Peter W. Salsich, Jr., *Grassroots Consensus Building and Collaborative Planning*, 3 WASH. U. J. L. & POL'Y 709, 712 (2000) (commenting that collaborative planning allows for residents to have a stake in the outcome of decisions and is an effective technique for information transfer).

¹⁰ See MARY GRISEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 31 (1981); see also Tom Angotti, *Race, Place and Waste: Community Planning in New York City*, NEW VILLAGE, available at <http://www.newvillage.net/angotti.pdf> (1999) (noting that public participation in planning goes back to the 1930s, when tenant actions in New York City created rent control).

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and open dialogue.¹¹ Although the passage of the Administrative Procedure Act drafted a form of public participation into administrative decision making,¹² this codification focuses exclusively on public hearings to insure that individual opinions are heard and merely brings views into the open at the decision-making stage.¹³ This inherently lacks focus on consensus building, and tends to polarize viewpoints at a juncture when only one view can ultimately prevail.

Meaningful public participation focuses on the process, rather than the ultimate decision. This article applies a process-oriented model to the case studies described herein and suggests legislative change that would reward consensus-building

¹¹ See generally Paul Wilkinson, *Public Participation in Environmental Management: A Case Study*, 16 NAT. RESOURCES J. 117, 119 (1976) (explaining open planning's use of education, review, and dialogue as an integral part of the planning and decision-making process).

¹² See 5 U.S.C. §§ 551-559 (2002). The Federal Administrative Procedure Act provides, generally, for public participation in administrative decision-making process through the use of a public hearing. *Id.*

¹³ See generally Spyke, *supra* note 3, at 269 (noting that public participation in governmental decision making emerged after passage of the Administrative Procedures Act, which formalized public participation at the federal level). In time, governmental agencies offered educational programs to the public, published news releases about their activities, and hired experts to develop participation programs, all in an effort to open the decision-making process to the public. *Id.* See also Marco Verweij, *Why is the River Rhine Cleaner than the Great Lakes (Despite Looser Regulation)?*, 34 LAW & SOC'Y REV. 1007 (2000) (discussing the Administrative Procedures Act and its role in requiring federal agencies to seek public participation before enacting new water protection policies); Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture*, 19 ARIZ. J. INT'L & COMP. L. 643, 649 (2002) (discussing the Administrative Procedures Act's expansion of public notice and opportunity to obtain access to agency policies and decisions for inspection, participate in adjudication, and comment in national environmental rulemaking); Jim Rossi, *Thirty-First Annual Administrative Law Issue: Politics and Policy: Presidential Administrations and Administrative Law: Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1020-21 (2001) (comparing the inadequacies of the notice and comment rulemaking process underlying the Administrative Procedures Act with a consensus-based negotiated regulation).

participatory procedures. Inclusion of all community residents provides exposure to a healthy mix of perspectives, improving the decision-making process.¹⁴ This benefits the city by insuring fully informed decisions, and greater legitimacy and acceptance of decisions by the local population.¹⁵ The process itself also benefits communities by empowering residents and creating leaders.¹⁶

Critics of extensive participation at the policy stage cite the deleterious result to administrative goals of efficiency, expertise and control.¹⁷ Agencies such as the City Planning Commission may criticize extensive public participation because it drains city resources. Indeed, public participation can be inefficient in economic terms.¹⁸ The challenge, then, is to devise a process that

¹⁴ See Spyke, *supra* note 3, at 267-68. Spyke notes that “[b]ecause government is derived from the people, all citizens have a right to influence governmental decisions, and the government should respond to them. Widespread participation exposes decisionmakers to a healthy mix of perspectives, which is believed to improve the decisionmaking process.” (citations omitted). *Id.*

¹⁵ *Id.* at 271. (noting that agencies that engage in participation programs “strive to exchange information with the public, deal with diverse groups within the community, demonstrate a responsiveness to public concerns, and ultimately gain public acceptance of their decisions.”)

¹⁶ *Id.* at 301. Spyke notes that “[t]oday, public participation increasingly is viewed not merely as a method by which well-informed decisions can be reached, but also a way to empower communities and create community leaders.” *Id.* She further posits that “[t]he sense of efficacy that accompanies this empowerment, that arises when involved citizens see their participation activities as part of a ‘larger whole,’ is a secondary end-product that is taking on greater significance.” *Id.* (citations omitted).

¹⁷ *Id.* at 273. (noting that public participation’s “emphasis on the individual and direct access to decisionmakers conflicts with collectivist theory and republicanism. It also undermines the administrative goals of efficiency expertise, and control”).

¹⁸ See *id.* (“On a more practical level, public participation is inefficient in terms of cost and time”). Admittedly, the money required for education, outreach, and meetings may seem burdensome for a process that is not guaranteed to produce results. See *infra* Part IV.B (discussing the fact that access to resources is both a costly and necessary element of informed planning decisions). See also Interview with Eva Handhart, Director of Municipal Art Society’s Planning Center, in New York, N.Y. (Oct. 19, 2000)

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is consistent in its reliance on public participation without stripping agencies of all their resources.

Encouraging vulnerable communities to take an active role in the planning and zoning decisions affecting their neighborhoods may seem elementary, but the case studies below reveal myriad organizational stumbling blocks and political process failures that result from subtle forms of discrimination. These studies also reveal a potential downfall of community planning: it is not successful unless the city has independent reasons to assist communities with planning. Whether due to economic, political or social concerns, the Department of City Planning does not give enough respect to the process of community planning.¹⁹ Where a low-income community has undergone years of organizational struggle to transform an inclusive consensus-building process into a community plan, the department no longer has an excuse to favor communities that are more politically influential.²⁰ Lack of respect for such plans may, therefore,

[hereinafter *Handhart Interview*] [transcript on file with author] (stating that prior to receiving technical assistance from the Pratt Institute, Greenpoint's planning efforts were hindered by communication breakdowns, financial constraints and rifts between renters, homeowners and various ethnic groups).

¹⁹ See *infra* Part III (noting that the Commission weakened the potential impact of amendments to the City Charter by officially interpreting community plans as nonbinding policy guidelines). Relegating community-sponsored plans to nonbinding policy guides arguably illustrates lack of respect for the plans.

²⁰ See generally Adam D. Schwartz, *The Law of Environmental Justice: A Research Pathfinder*, 25 ENVTL. L. REP. 10543 (1995) (noting that potentially harmful hazardous waste facilities often attract local opposition, so builders of such facilities prefer to locate them in communities that are politically weak and cataloguing recent state and federal legislation and case law on environmental justice issues); Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 398 (1991) (explaining that "minority communities are target[ed] for hazardous waste facilities and other environmental hazards because their residents are poor and politically powerless. Waste management firms find it politically expedient to site these facilities in minority communities who tend to be vulnerable to offers of compensation made in exchange for accepting hazardous environmental conditions"); Gregory H. Meyers, *Developing a Cohesive Front Against Environmental Injustice*, 8 U. BALT. J. ENVTL. L. 27, 30 (2000) (quoting environmental justice advocate Luke Cole, Staff Attorney at the California

reflect a bias for communities with a higher income base.

III. A BRIEF HISTORY OF COMMUNITY PLANNING IN NEW YORK CITY

In New York City, the City Planning Commission and the City Council are responsible for deciding rezoning requests.²¹ Elected officials appoint the Commissioners.²² Community Boards can make recommendations to the City Planning Commission, but otherwise have no real authority when it comes to planning decisions.²³ Indeed, the Commission's processes seem designed to discourage public participation—public hearings take place at ten o'clock on Wednesday mornings, making the hearings inaccessible to those with daytime obligations such as work or family, and calendar notices and subscriptions are available at a large fee.²⁴

In 1963, at the beginning of a long trend toward decentralized planning, the City Council established Community Boards as advisory bodies.²⁵ Borough Presidents appoint their Community

Rural Legal Assistance Foundation, that “poor people are . . . more likely than others to have multiple exposures to environmental dangers, facing more severe hazards on the job, in the home, in the air they breathe, in the water they drink, and in the food they eat”).

²¹ See NEW YORK CITY DEPARTMENT OF CITY PLANNING, 197-A PLAN TECHNICAL GUIDE 1 (1997) (discussing the responsibilities and duties of the City Planning Commission and City Council).

²² For a full explanation of the composition and tasks of the Commission, see New York City Planning Commission Website, available at <http://www.nyc.gov/html/dcp/home.html> (last visited Jan. 6, 2003) [hereinafter *N.Y.C. Dep't of City Planning Website*]. The Mayor appoints seven Commissioners; the five Borough Presidents and the Public Advocate each appoint one. *Id.*

²³ See generally N.Y.C. CHARTER § 2800(d)(1)-(21) (2001) (setting forth the duties of community boards as largely advisory and bodies that assist city agencies in disseminating information to local residents).

²⁴ See *N.Y.C. Dep't of City Planning Website*, *supra* note 22. Individuals wishing to be placed on the calendar mailing list are advised to send a certified check of \$100 to the Department of City Planning for a one year subscription. *Id.*

²⁵ See N.Y.C. CHARTER § 1152(a) (2001) (“This charter shall take effect

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Board members.²⁶ Community Board membership is on a volunteer basis.²⁷ A New York City Charter revision in 1977 created the Uniform Land Use Review Procedure (“ULURP”).²⁸ ULURP mandates that Community Boards review and vote on all land use applications in their jurisdictions.²⁹ The creation of Community Boards and ULURP signified the growing interest in bringing citizen involvement to planning decisions. Although ULURP introduced the possibility of Community Board sponsored plans under Section 197-a, it did not clarify the details of any such plans.³⁰

on the first day of January, nineteen hundred sixty-three.”). *See also* Thomas Angotti, *New York City’s “197-a” Community Planning Experience: Power to the People or Less Work for Planners?*, Pratt Institute Center for Community and Environmental Development, available at www.picced.org/advocacy/197a.htm (Oct. 19, 1995) (“Community Planning Boards were established as advisory bodies in 1963.”). Agnotti’s report on New York City community planning experience was presented to the 37th annual Conference of the Association of Collegiate Schools of Planning, October 19-21, 1995 in Detroit. *Id.* Agnotti’s research was conducted in conjunction with individuals receiving grants from the Municipal Arts Society of New York City. *Id.*

²⁶ *See* N.Y.C. CHARTER § 2800(a) (2001) (“For each community district created pursuant to chapter sixty-nine there shall be a community board which shall consist of (1) not more than fifty persons appointed by the borough president for staggered terms of two years”); *see also* The Municipal Art Society of New York, *The State of 197-a Planning in New York City* 3 (1998) [hereinafter MAS, STATE OF 197-A PLANNING].

²⁷ *See* N.Y.C. CHARTER § 2800(c) (2001). (“Members of community boards shall serve as such without compensation but shall be reimbursed for actual and necessary out-of-pocket expenses in connection with attendance at regularly scheduled meetings of the community board.”).

²⁸ *See generally* N.Y.C. CHARTER § 197-c (2001). The New York City Charter created the Uniform Land Use Review Procedure in 1977, establishing community boards as advisory bodies in zoning and land use areas. *Id.*

²⁹ *See* N.Y.C. CHARTER § 197-c(c) (2001) (“The department of city planning shall be responsible for certifying that applications pursuant to subdivision (a) of this section are complete and ready to proceed through the uniform land use review procedure provided for in this section.”)

³⁰ *See* N.Y.C. CHARTER § 197-c(h) (2002) (“Not later than sixty days after expiration of time allowed for the filing of a recommendation or waiver

Demands from communities for greater control over land use decisions led to a revision of the Charter in 1989. These revisions encouraged community planning and active participation by the community in rezoning requests, and strengthened Section 197-a by providing a process by which communities could sponsor their own land use plans.³¹ The revised Section 197-a offered hope for community-sponsored plans by clarifying the steps to put together such a plan:³²

Plans for the development, growth, and improvement of the city and of its boroughs and community districts may be proposed by (1) the mayor, (2) the city planning commission, (3) the department of city planning, (4) a borough president, (5) a borough board with respect to land located within its borough, or (6) a community board with respect to land located within its community district.³³

The revised Section 197-a took an important step towards facilitating meaningful public participation by making planning

with the city planning commission by a borough president, the commission shall approve, approve with modifications, or disapprove the application”). The ULURP mandates, generally, that Community Boards review all land use applications, and allows for a Community Board to sponsor its own land use application. *Id.*

³¹ See generally N.Y.C. CHARTER § 197-a(a) (2001). See also Agnotti, *supra* note 25 (“Indeed, the establishment of community boards and a process for community planning are responses to decades of intense community opposition to official plans, many of which were stopped cold by neighborhood protests.”).

³² See N.Y.C. CHARTER § 197-a(a) (2001). The guidelines provide that [a] community board, borough board or borough president that proposes any such plan shall submit the plan together with a written recommendation to the city planning commission for determinations pursuant to subdivision b of this section. Any such submission may be made by a community board, borough board or borough president only after the board or borough president proposing such a plan has held a public hearing on the plan.

Id. See also N.Y.C. CHARTER § 197-a(c) (2001) (setting forth the documents required to accompany any such plans).

³³ N.Y.C. CHARTER § 197-a(a) (2001).

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available to communities through their Community Boards and Borough Presidents.³⁴ It also removed the burden of environmental reviews from the Community Boards and gave this responsibility to the Department of City Planning.³⁵

Section 197-a mandated, however, that the City Planning Commission set its own standards for reviewing community proposals.³⁶ The Commission proceeded to weaken the potential impact of the amendments by officially interpreting community plans as nonbinding policy guides.³⁷ Now, the finished plans merely impose a requirement that future land use decisions be reviewed against them.³⁸ The community bears the onerous burden of scrutinizing the Commission and exposing action that does not conform to the goals of the plan.³⁹ Although the Commission encourages monitoring, this arguably creates an adversarial, defensive climate that may create conflict between communities and the agency.⁴⁰

These rules have not been subjected to legal or judicial scrutiny, though they would likely be deemed reasonable given

³⁴ See Agnotti, *supra* note 25. Agnotti notes that, “prior to 1990, there was no explicit authorization in the City Charter for Community Boards to propose their own plans.” *Id.*

³⁵ *Id.* (“After the Charter revision, the Department of City Planning took responsibility for the environmental review of community plans.”). This was significant because environmental review is both costly and highly technical, two factors that previously foreclosed involvement at the community level. *Id.*

³⁶ See N.Y.C. CHARTER § 197-a(b) (2001). The amendments require that “[t]he city planning commission shall adopt rules establishing minimum standards for the form and content of the plans.” *Id.*

³⁷ See 62 R.C.N.Y. § 6-01(b) (2001). The official interpretation states that “[a]n adopted plan shall serve as a policy to guide subsequent actions by city agencies. . . [t]he existence of an adopted 197-a plan shall not preclude the sponsor or any other city agency from developing other plans or taking actions not contemplated by the 197-a plan.” *Id.*

³⁸ *Id.*

³⁹ See generally MAS, STATE OF 197-A PLANNING, *supra* note 26, at 14. Currently, the City Charter has no provision setting forth internal review or monitoring methods. *Id.*

⁴⁰ See Spyke, *supra* note 3, at 274 (noting that “[i]mplementing regulations may generate conflicts from the outset by providing only scant provisions cast in adversarial terms”).

that many community proposals lack necessary technical specificity and detail.⁴¹ The provisions, however, create a disincentive for communities to initiate the planning process and invest resources in a plan that ultimately has no authority.⁴² Moreover, 197-a plans have not proved entirely successful even as policy guides due to the lack of technical assistance, scarce financial resources and informational obstacles, resulting in plans that are piecemeal.⁴³ These problems are exacerbated in low-income or politically marginalized neighborhoods, and may render the 197-a process inaccessible to some communities.⁴⁴

Another oft-scrutinized section of the 1989 amendments states that the Department of City Planning will “[p]rovide community boards with such staff assistance and other professional and technical assistance as may be necessary to permit such boards to perform their planning duties and responsibilities under this

⁴¹ See Angotti, *supra* note 25 (recognizing that, ultimately, many plans have these limitations whether or not they are formally stated because there is never guaranteed implementation of a plan).

⁴² See *id.* Angotti notes that, “some communities were quick to recognize the limitations of the 197-a process and chose not to invest their energy and resources.” *Id.* He further asks, “[w]hy should a community board spend at least two years to develop a plan, and another two years to get it approved, to end up with a document that may not have much legal effect on future land use?” See also Spyke, *supra* note 3, at 274. Spyke notes that, even when participation does take place, “[w]hoever is likely to participate is likely to experience a drain in terms of time and personal cost. Not only does it take time to become comfortable with the technical nature of many issues, but personal costs tend to come up-front and results can be a long time coming.” *Id.*

⁴³ *Id.*; see also MAS, STATE OF 197-A PLANNING, *supra* note 26, at 8-10 (noting that plans received by the City Planning Commission are not always properly formatted or complete in substance).

⁴⁴ This aspect of the Commission’s interpretation unnecessarily aggravates the problems of economic disparity and public action inherent in public participation programs. See, e.g., Spyke, *supra* note 3, at 274 (noting that “[w]hen participation does take place, studies have shown that participants tend to be from upper socioeconomic classes, leading to common charges of elitism”). See also *infra* Part V (discussing the demographic differences between Vinegar Hill and Greenpoint and the impact of those differences on the success of each community’s proposed plan).

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chapter.”⁴⁵ In fact, such assistance is rarely given.⁴⁶ Only a few planners who work with communities are on staff at the Department of City Planning, and they focus primarily on reviewing the plans rather than assisting with development.⁴⁷ Nor does the City provide consistent training programs for Community Board members who want to take on difficult or technical planning tasks.⁴⁸ Scarcity of technical assistance hinders low-income communities more than higher-income, because a higher-income community may have more access to professional planners and developers.⁴⁹ As the following narratives highlight,

⁴⁵ N.Y.C. CHARTER § 191(5) (2001); *see also* MAS, STATE OF 197-A PLANNING, *supra* note 26, at 10 (reiterating this element of the City Charter).

⁴⁶ Angotti, *supra* note 25. Angotti notes that “[i]f resources were available to community boards, perhaps more would consider the potential benefits of planning. The City Planning Department is the most likely agency to provide resources, and has provided very few.” *Id.* Further, he notes that staffing in borough offices has been “progressively cut since 1990.” *Id.* One commentator has noted that failure to provide assistance may also be a product of a “philosophical objection to loss of control, something that is inherent in public participation programs.” Spyke, *supra* note 3, at 274.

As recently as 2001, Community Board 1 continued to ask the city to allocate funds to develop 197-a plans and “urge the City to implement the Charter mandate of providing additional funding for each Community Board to have a planner on staff.” *See* DEPARTMENT OF CITY PLANNING, CITY OF NEW YORK, COMMUNITY DISTRICT NEEDS 22 (2001) [hereinafter COMMUNITY DISTRICT NEEDS].

⁴⁷ Angotti, *supra* note 25 (noting that the Department has one planner city-wide to work part-time in reviewing and processing of 197-a plans and planners in Borough offices generally function as reviewers, not advocates).

⁴⁸ *Id.* (noting that “[t]he City does not provide any consistent training in planning for community board staff or members”); *see also* Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771, 782 (1994) (noting that responsibility to help residents take an active role in planning “also rests in the hands of state and local city planners, zoning officials, housing experts, and environmental officers who must provide more responsible protection for all communities”).

⁴⁹ Angotti, *supra* note 25 (noting that higher-income communities can draw on local professionals to volunteer their time). Additionally, communities with little access or appeal to public interest groups are likely to suffer inordinately from this scarcity of resources. *See* Spyke, *supra* note 3, at 275 (examining the role of public interest groups in public participation

the city may be inclined to provide assistance to certain communities, while ignoring others.⁵⁰ The City Planning Commission's discretion in deciding which communities receive assistance strips the 197-a process of any real chance to encourage meaningful dialogue between the city and communities, especially if that discretion is abused.

The 197-a planning process suffers from an overall lack of emphasis on inclusive public participation. Of the pages of rules promulgated by the Commission, only a single sentence is devoted to public participation, requiring that “[p]lans shall be accompanied by documentation of the public participation in their formulation and preparation, such as workshops, hearings, or technical advisory committees.”⁵¹ This suggests merely that hearings or forums be held, but does not require inclusiveness. The rules do not mandate, for instance, that all members of the community are informed of the public forum or that all languages spoken in the community are employed at the meetings or in the announcements.⁵²

IV. TWO CASE STUDIES

The following case studies provide chronological narratives of two communities' efforts to formulate and present workable zoning plans.⁵³ The case study method has obvious shortcomings:

programs).

⁵⁰ See *infra* Part IV (illustrating that Vinegar Hill received more support from the city in its planning process than Greenpoint and arguing that this was due to the relative, differing appeal of the communities).

⁵¹ 62 R.C.N.Y. § 6-04(a)(7) (2002).

⁵² The case studies examined in this article demonstrate the importance of meaningful public participation requirements that evince consensus building and inclusion to insure a democratic land use decision-making scheme and highlight that language barriers and dissemination of planning information can impact community efforts. See *infra* Parts IV.A-B (discussing population diversity).

⁵³ The narratives set forth are based on planning documents, records from community meetings, area demographics, city decision-making standards, neighborhood histories, newspaper accounts of neighborhood transformations, and numerous interviews conducted by the author and other investigators with

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it is by definition narrow in focus and largely anecdotal.⁵⁴ Additionally, these are only two of the sixteen 197-a plans in various stages of planning in New York City since the Charter amendment.⁵⁵ Thus, these narratives do not purport to reflect the general outcome of 197-a plans. They do, however, point out weaknesses in the current 197-a process and the public participation mechanisms currently in place. If nothing else, these narratives illustrate that the current process has failed to live up to its goal of encouraging and fostering community-sponsored planning.

A. Vinegar Hill, Brooklyn

The community of Vinegar Hill is a relatively small neighborhood and part of Brooklyn's Community Board 2.⁵⁶ The

community activists, city employees, planners and residents. The narratives are not exhaustive, but attempt to re-create the sequence of events from each community's initial decision to actively plan neighborhood development to the official land use decisions that resulted from the community's involvement.

⁵⁴ See generally Carrie Menkel-Meadow, *Case Studies in Legal Ethics: Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787 (2000) (discussing the benefits of the use of the case study to enhance the examination of ethical and moral issues in the practice of law). Professor Menkel-Meadow describes the tension that exists between stories and rules, narratives and principles. *Id.* She questions, for example, the purpose of rules and principles if they can always be argued against in a particular instance. *Id.* at 794. She also acknowledges that the case study method raises the problem of choice of story and voice. *Id.* See also Kathryn Hendley, *Economic, Legal and Political Dilemmas of Privatization in Russia: The Spillover Effects of Privatization on Russian Legal Culture*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 39, 51 (1995) (acknowledging that the case study approach yields limited data from which it is problematic to draw any general conclusions).

⁵⁵ MAS, STATE OF 197-A PLANNING, *supra* note 26, at 24; see also NYC Dep't of City Planning Website, *supra* note 22 (listing seven 197-a plans that have been adopted as of October 18, 2002: Bronx Community District 3, Chelsea, Red Hook, Stuyvesant Cove, Comprehensive Manhattan Waterfront, Greenpoint, and Williamsburg).

⁵⁶ See NEW YORK CITY DEPARTMENT OF CITY PLANNING, VINEGAR HILL ZONING STUDY 2 (May 1996) [hereinafter NYC ZONING STUDY, VINEGAR HILL]. The Department of City Planning undertook and completed a zoning

area is just east of the Manhattan Bridge, and bordered by Bridge Street on the south, Plymouth Street on the west, the Brooklyn Navy Yard on the north and York Street on the east.⁵⁷ Although close in proximity to downtown Manhattan and downtown Brooklyn, it is not well serviced by public transportation.⁵⁸ The history of the neighborhood is a familiar one along Brooklyn's waterfront—the neighborhood was predominantly an enclave for Irish workers in the 1800s, resulting in residential wood-frame houses and some brownstones lining the cobblestone streets next to light industrial warehouses along the East River.⁵⁹ The general

study of Vinegar Hill in 1996 to determine if it was appropriate to rezone areas within the neighborhood to a residential district with commercial overlays, in order to complement efforts of the Landmarks Preservation Commission. *Id.* at 1. The Department articulated that Vinegar Hill spans fifteen acres, or eight city blocks. *Id.* at 2. Community Board 2 is an area that contains many neighborhoods, including the Downtown Brooklyn Business District, Atlantic Center and six Historic Landmark Districts such as Brooklyn Heights, Boerum Hill and Fort Greene. *See* COMMUNITY DISTRICT NEEDS, *supra* note 46, at 47.

⁵⁷ *See* NYC ZONING STUDY, VINEGAR HILL, *supra* note 56, at 1.

⁵⁸ *See id.* at 4 (noting that “mass transit access to the area is very limited. There is only one subway and three bus lines which directly serve the study area.”).

⁵⁹ *Id.* at 2; *see also* MARCIA REISS, FULTON FERRY LANDING, DUMBO, VINEGAR HILL NEIGHBORHOOD HISTORY GUIDE (2001). Vinegar Hill's origins date back to the early 1800s. By naming the neighborhood after Vinegar Hill in Ireland, the site of the 1798 Irish Rebellion against the British, the developer hoped to attract the large number of Irish immigrants flowing into the country. For an enlightening description of Vinegar Hill's history, *see* New York Street Scenes, at <http://www.forgotten-ny.com/STREET%20SCENES/Vinegar%20Hill%20Page/vinegar.html> (last visited Jan. 1, 2003); *see also* Names of New York, Vinegar Hill, at <http://www.newsday.com/features/custom/names/ny-namesofny-vinegarhill,0,1560754.htmlstory> (last visited Nov. 11, 2002). In the twentieth century, the neighborhood enjoyed residual revenue from the nearby Naval yard. *Id.* But when the Navy decommissioned the yard in 1966, the neighborhood declined into poverty. *Id.* Today Vinegar Hill occupies only a small strip of land consisting of mainly nineteenth century row houses, located next to the DUMBO district of Brooklyn. *Id.* However, the neighborhood is thought to be on the rise again, as the area is now considered an enclave for artists. *Id.* A recent census shows that currently over 4,000 people live in the

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decline of waterfront industry after World War II led to abandonment of the area, as was occurring in other waterfront sections of Brooklyn.⁶⁰ In the early 1970s, a burgeoning artists' movement set up residential and working studios in the vacant industrial lofts and refurbished the nineteenth century row houses.⁶¹ This resulted in a small, politically active group of inhabitants.⁶² In 1998, the population of Vinegar Hill was estimated at around 225 residents.⁶³ The neighborhood has 12 businesses employing over 650 people.⁶⁴ Real estate advertisements in a recent *New York Times* listed two-bedroom cooperative apartments in the area as selling for over \$1

Vinegar Hill area. *See Enclave Links Its Political Fate to Its Rich History*, N.Y. TIMES, Apr. 12, 2002, at B1; *see also Real Estate Scene Vinegar Hill Aging Well, Downtown's a Tiny Outpost of the Past*, DAILY NEWS, Aug. 17, 2000, at 14.

⁶⁰ *See* NYC ZONING STUDY, VINEGAR HILL, *supra* note 56, at 2 (discussing the Navy's abandonment of the Brooklyn waterfront as leading to "the gradual deterioration of the surrounding area").

⁶¹ *See* Mary Miuccio, *Vinegar Hill is Like a Small Town in New England, Its Residents Say*, BROOKLYN PAPER, Oct. 3-15, 1979, at 12. Writing in 1979, Miuccio noted "approximately eight years ago, some artsy, speculative and gutsy people moved into [Vinegar Hill] and started purchasing abandoned buildings and warehouses." *Id.*

⁶² *See id.* (noting that "besides investing manual labor and money, the new immigrants to the area joined with the few remaining original neighbors to fight industrial legal battle"); *see also* Peter Haley, *They Put the Vinegar Back in the Hill, and Fought City Hall*, PHOENIX, Nov. 30, 1978, at 11. Haley commented, "through the combined efforts of newcomers and longtime residents, this urban village of industrial lofts and three- and four-story brick buildings is making a comeback." *Id.* He also noted that "[a]rtists seeking low rents and space turned out to be the secret weapon" in Vinegar Hill's struggle, and his interviews with local residents "related how residents banded together" to protect local homeowners. *Id.* at 13

⁶³ *See* Amy Waldman, *The 2nd Battle of Vinegar Hill*, N.Y. TIMES, Feb. 1, 1998 at CY8. "Vinegar Hill is roughly nine square blocks, with perhaps 225 residents and about 19 commercial or manufacturing buildings, a well as a sprinkling of mom-and-pop stores." *Id.*

⁶⁴ Jonathan Bowles, *Zones of Contention*, CITY LIMITS, Nov. 2000, at 21. Bowles noted that, at most recent count, "there were about 52 homes and 12 businesses employing roughly 650 people in this tiny neighborhood." *Id.* at 24.

million.⁶⁵

The 2000 demographics for the surrounding areas of Community Board 2 revealed a primarily black and white nonhispanic total population of 98,620.⁶⁶ Approximately 7,692 residents are not citizens.⁶⁷ Seventy-four percent of the occupied housing units are rentals.⁶⁸ Less than a quarter of the total Community Board speaks a language other than English at home, and fewer reported that they do not speak English “very well.”⁶⁹ A small percentage of the population is assisted by government income support.⁷⁰ Community Board 2 also includes some of Brooklyn’s most affluent communities, and the median household income is \$44,180,⁷¹ compared to a city-wide median of \$39,293.⁷²

Prior to 1998, Vinegar Hill was zoned primarily for industrial use with residential buildings existing as nonconforming uses.⁷³

⁶⁵ Real Estate Classifieds, N.Y. TIMES, Dec. 8, 2002.

⁶⁶ The black population is estimated at 40.5%, with white nonhispanic residents averaging 34.4%. See NYC Department of City Planning, Community District Profile, Brooklyn Community District 2 Website, available at <http://www.nyc.gov/html/dcp/html/lucds/bk2lu.html> (last visited Dec. 31, 2002).

⁶⁷ See New York City Department of City Planning, Socioeconomic Profiles 1980/1990 Census, Population and Housing 132-37 (Mar. 1993). [hereinafter NYC PROFILE, COMM. BD. 2]. Statistics were not available for 2000 as of the date of publication.

⁶⁸ *Id.* at 131.

⁶⁹ A reported 23% speak a language other than English at home and 9.4% of the Community Board population reported that they do not speak English “very well.” *Id.* at 126.

⁷⁰ 17.4% reported receiving government income support. *Id.*

⁷¹ See HOUSEHOLD INCOME IN 1999 NEW YORK CITY COMMUNITY DISTRICTS, TABLE SF3 INC P-301 (2000), available at <http://www.nyc.gov/html/dcp/pdf/census/sf3incp301.pdf> (last visited Jan. 6, 2003).

⁷² *Id.*

⁷³ See NEW YORK CITY PLANNING COMMISSION, Calendar no. 14, C980067 ZMK at 1 (Jan. 21, 1998) [hereinafter “CITY PLANNING COMMISSION FINAL REPORT”]. On January 21, 1998, the Department of City Planning issued a final report on the application for an amendment of the zoning map and regulations of Vinegar Hill as filed by the Department on July 31, 1997. *Id.* See also Bowles, *supra* note 64, at 24 (noting that “[r]esidents

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Two blocks were zoned for heavy manufacturing, M3-1, which allows for heavy industrial uses, more objectionable hazards and lower performance standards.⁷⁴ The remainder of the neighborhood was zoned for light manufacturing, M1-2, which allows for a wide range of manufacturing but with higher performance standards.⁷⁵ In addition to the nonconforming row houses,⁷⁶ other zoning discrepancies exist, due largely to conversions of warehouses into live-work loft space.⁷⁷

This pattern persists in many areas along urban waterfronts, where zoning regulations are remnants of the era of industry on the rivers.⁷⁸ Loft conversions are representative of today's urban

and manufacturers managed to coexist for decades; while the area was long zoned M-3, clusters of 19th century rowhouses were allowed to stand amid the industry as a 'nonconforming use.'").

⁷⁴ See generally CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73, at 1. New York City is divided into three basic zoning district: residential (R), commercial (C), and manufacturing (M). The three basic categories are further subdivided by the intensity of use, whether for retail or manufacturing categories, parking, building bulk or residential density. Manufacturing uses and certain intense commercial uses are subject to performance standards that limit noise, air pollution and other nuisance-creating activity. These zoning controls provide minimum acceptable standards and are designed to provide building occupants and the general public with light, air and ventilation and a safer, more livable environment. For a full description of zoning regulations and standards in New York City, see NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY ZONING, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (Sept. 25, 2002) (setting forth the Web version of the Zoning Resolution of the City of New York including all text amendments approved by the City Council).

⁷⁵ See *id.* This zoning classification is often a buffer between residential and heavier manufacturing zones. *Id.*

⁷⁶ NYC ZONING STUDY, VINEGAR HILL, *supra* note 56, at 2-3.

⁷⁷ *Id.* at 3 ("The predominant landuse in the area is industrial with a scattering of residential uses. However, over the years there have been residential conversions in the loft buildings."). See also Haley, *supra* note 62, at 13 (pointing out that "[a]rtists seeking low rents and space turned out to be the secret weapon in the struggle for real estate" in Vinegar Hill).

⁷⁸ See, e.g., Lisa Haarlander, *Lofty Living: Eight Buildings in Downtown Area Being Converted Into New Apartments*, BUFF. NEWS, Apr. 15, 2002, at C1 (noting the rise in the trend and frequency in conversion of industrial and warehouse space into residential lofts in urban areas); Benjamin Forgey,

society, where commercial shipping is more road-based and industrial installations along urban waterfronts are no longer necessary for industrial shipping.⁷⁹ This is not to suggest that the manufacturing zones are obsolete; they do, and must continue to, house small manufacturers and essential noxious operations, but the importance of waterfront access is lessened. Vinegar Hill is also home to a waste treatment equipment storage facility, Con Edison property and various distribution and small manufacturing centers.⁸⁰

Discussion of changes in the area began appearing in the media in the late 1970s; one commentator characterized it as a neighborhood comeback generated by “the combined efforts of newcomers and longtime residents.”⁸¹ To orchestrate the comeback, area residents lobbied then City Councilman Abe Gerges and State Assemblyman Harvey Strelzin to include Vinegar Hill in Mayor Koch’s list of areas marked for low-interest federal renovation loans.⁸² This allowed many residents to buy and repair row houses in the area and establish a residential core.⁸³

Vinegar Hill residents faded from activism until the mid-1990s, when a waste treatment company bought the property of a

Uncovering the Waterfront, WASH. POST, Jan. 15, 1994, at G01 (commenting on the rise in conversion of Naval and industrial installations and stating that “[t]he urban waterfront is being transformed worldwide—and, in large part, for the better”); Robert Marchant, *Housing Planned in Former Electric Plant: Developer Plans Waterfront Apartments in Vacant Structure*, J. NEWS, Mar. 25, 2002, at B (noting urban trends towards “converting [] old industrial infrastructure on the waterfront to new uses—such as a new park, and a library and apartments converted from [] old factor[ies]”).

⁷⁹ See generally *supra* note 78 (noting the rise in conversion of urban waterfront industrial fixtures into new uses).

⁸⁰ NYC ZONING STUDY, VINEGAR HILL, *supra* note 56, at 2-3.

⁸¹ Haley, *supra* note 62, at 13.

⁸² *Id.* at 1-3 (noting that lobbying efforts convinced the mayor’s office to grant renovation loans to Vinegar Hill).

⁸³ See generally *id.* at 1. Haley commented that the “most obvious sign of comeback has been Mayor Ed Koch’s announcement that Vinegar Hill will be among 22 neighborhoods in the city designated for a new federal housing loan program aimed at small homeowners.” *Id.*

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135-year-old neighborhood church and demolished it to use the space for equipment storage.⁸⁴ Though the church was defunct, the action generated neighborhood uproar that encouraged Community Board 2 to establish a special task force to explore possible 197-a plans for the area.⁸⁵ The neighborhood began a 197-a planning process in 1995.⁸⁶ Although the 197-a plan was never completed, the area won landmark status in 1997, when the Landmarks Preservation Commission (“LPC”) proposed historic designation for the area’s row houses.⁸⁷ The Department of City Planning undertook a zoning study of the area “to determine if it is appropriate to rezone areas within Vinegar Hill to a residential district with commercial overlays, in order to compliment the efforts of the LPC.”⁸⁸ This study was similar to a 197-a plan, but was sponsored by the Department of City Planning itself, rather than a community board. After formally studying the land use of the area at the residents’ request, the City Planning Commission proposed rezoning the area to residential.⁸⁹ According to media

⁸⁴ Waldman, *supra* note 63, at CY8 (noting that the demolition generated public outcry and local rallying towards rezoning efforts); *see also* Merle English, *A Sweet Little Place Called Home; Vinegar Hill Is Little Known But Well Loved By Residents*, NEWSDAY, Sept. 20, 1992, at 2 (noting that “Vinegar Hill came into the limelight recently when residents expressed concern that St. Anne’s, a 132-year-old Catholic Church and the borough’s oldest parish, was to be demolished to make way, some had heard, for a garbage transfer plant”).

⁸⁵ *See* Dennis Holt, *Vinegar Hill and DUMBO are Subjects of CB2 Task Force*, PHOENIX, Jan. 29, 1996. According to Holt, there was “no dispute as to why the study [was] under way,” and his articulation of the Task Force’s purpose statement reveals that razing of “historic buildings and streets” along with the desire to revise “outmoded zoning” for increased residential space prompted the organized effort. *Id.*

⁸⁶ *See* MAS, STATE OF 197-A PLANNING, *supra* note 26, at 24.

⁸⁷ *See* Bowles, *supra* note 64, at 23-24 (noting that city council members sought and achieved landmark status for Vinegar Hill architecture and that these efforts played a role in gaining official neighborhood recognition by the city); *see also* CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73, at 2.

⁸⁸ NYC ZONING STUDY, VINEGAR HILL, *supra* note 56, at 1.

⁸⁹ *See generally* CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73, for a full review of the rezoning proposals adopted by the City Planning

reports, the City Planning Commission's proposal was intended to block the possibility of subsequent sitings of waste treatment stations in the area, a major concern of the residents.⁹⁰

Public debates and hearings on the rezoning included vocal groups representing various viewpoints.⁹¹ Area businesses vigorously opposed the rezoning proposal because they feared forcible relocation, loss of the right to expand and limitations on the resale value of their property.⁹² The rezoning was also controversial because of perceived ties to a separate plan to

Commission.

⁹⁰ Philip Lentz, *Vinegar Hill Zoning Plan Puts Businesses in a Pickle*, CRAIN'S N.Y. BUS., Dec. 15, 1997, at 16 (noting that "City Planning Commissioner Joseph Rose says the administration was motivated by the concern over greater transfer station activity in the neighborhood."); *see also* Waldman, *supra* note 63, at CY8 (stating that "city officials said the rezoning was motivated in large part by the fear that Tocci Brothers would start treating waste on the lot, across the street from a row of historic houses.").

⁹¹ *See, e.g.*, Bill Farrell, *Vinegar Hill Eyes Future Decisions on Zoning*, N.Y. DAILY NEWS, Nov. 24, 1997. Farrell notes that "[b]uilders, residents and city planners all with separate visions [were] joining the debate about the area's future." *Id.* He quotes and articulates the varying concerns of each constituency, noting, ultimately, that "two proposed zoning changes being debated would spur dramatic changes, if approved, along a stretch of Brooklyn waterfront." *Id.*

⁹² *See* Lentz, *supra* note 90 (noting fears of existing businesses that "rezoning would make it harder for them to obtain financing and grow, which could eventually force them to move."); Bowles, *supra* note 64, at 24. According to Bowles, local manufacturers were "backed into a corner" by the rezoning and would "need special permits to expand." *Id.* He cites comments by several industrial leaders as fearing growth limitations due to the rezoning, despite the fact that the businesses were "grandfathered in under the old zoning." *Id.*

Such disputes between residents and businesses are common around plans that rezone from manufacturing to residential. *See, e.g.*, Daniel Lee, *Bi-Mart Project Faces New Challenges*, COLUMBIAN, May 2, 2000 at b1 (noting that the building project "has followed a long road filled with council debate and challenges by rivals"); Martha Ezzard, *Woman's Touch Could be Just Right to Handle Growth*, ATL. JOURNAL AND CONST., Dec. 13, 1998 at 1C (stating that plans envisioning mixed use zoning are being abused by developers who take advantage of mixed use zoning by developing the commercial and not the residential areas).

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develop the waterfront area, thus worrying some newer residents that excessive revitalization would drive them out.⁹³ Dissension came to a head at the Community Board meeting on October 8, 1997.⁹⁴ The meeting ended without a vote.⁹⁵ At a November 20, 1997 public hearing, held by then-Brooklyn Borough President Howard Golden, eighteen speakers testified in opposition to the proposed zoning amendment, twenty-four speakers testified in favor, and the Chairperson of Community Board 2 took no position.⁹⁶ The City Planning Commission's account of the final public hearing on December 3, 1997 reveals that the residents' position was somewhat better represented, but a substantial amount of opposition from community businesses remained.⁹⁷ The Commission adopted the rezoning on January 21, 1998.⁹⁸

The Commission's report summed up the residents' concerns such as "the need to preserve the fragile but historic housing stock of Vinegar Hill, the friction between heavy truck traffic, related industrial uses, and the narrow residential-scale streets and street furniture, as well as the threat of expansion of waste transfer industry."⁹⁹ The report described the opposition's concern that rezoning would have "a detrimental effect on the jobs in the area, and create hardships for the businesses that might want to expand or sell their property to other businesses in

⁹³ See generally Lentz, *supra* note 90 (noting the varying, ultimately irreconcilable, visions and hopes of Vinegar Hill entrepreneurs and residents).

⁹⁴ See Dennis Holt, *Board 2 Unable to Resolve Condo Vinegar Hill Issues at Meeting*, PHOENIX, Oct. 10, 1997 (noting the "futility and confusion" that haunted past meetings was present at the "stormy" October 8th meeting discussing the two controversial zoning issues).

⁹⁵ *Id.* The board could not conduct any business at the meeting because it lacked a quorum. *Id.*

⁹⁶ See CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73, at 7-9.

⁹⁷ See *id.* at 8-9. Specifically, speakers in favor included 14 residents of Vinegar Hill and the surrounding area, an owner of a business in the rezoning area, a representative of the Historic Council, and state senate and assembly members representatives. *Id.* There were 10 speakers in opposition. *Id.*

⁹⁸ See *id.* at 13.

⁹⁹ *Id.* at 8-9.

the future.”¹⁰⁰ The Commission’s report stressed the historic designation of the area, claiming that the zoning amendments “would bring existing nonconforming residences into conformance; allow for the development of vacant property in keeping with the existing bulk and character of the area; and reinforce the historic character of predominantly residential buildings.”¹⁰¹ The final rezoning reflected some consideration of the businesses’ concerns as well, reducing the area to be down-zoned from light manufacturing to residential use.¹⁰² This reduction allowed four “light industrial/commercial” uses of twelve to remain active, including a toy manufacturing and import company, a moving company, an equipment storage business and a restaurant supply manufacturer.¹⁰³ The report did not explain why these particular revisions were made, other than the Commission’s desire to retain “viable manufacturing jobs in the City.”¹⁰⁴

The community of Vinegar Hill never submitted a 197-a plan.¹⁰⁵ The present zoning in Vinegar Hill is a direct result of

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.* at 10.

¹⁰² CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73, at 12-13. The area was down-zoned from M1-2 to R6A and R6B. *Id.* Code designations are numbered levels within each zoning. *Id.* These numbers correspond to height, space, and other infrastructure-based requirements necessary for the zoning code. *Id.*

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *See* COMMUNITY DISTRICT NEEDS, *supra* note 46, at 55. Community Board 2 is currently discussing a comprehensive plan for the entire waterfront, encompassing the Navy Yard, Empire State Park, Fulton Ferry Landing and Piers 1-5. *Id.* Moreover, there is much talk in the media of developing residential cooperative apartments and high-end retail and entertainment complexes in the areas immediately adjacent to Vinegar Hill. *See* Nadine Brozan, *One a Rental, the Other Condo and Commercial*, N.Y. TIMES, Mar. 4, 2001 (discussing real estate plans by developer David C. Walentas, who has owned large chunks of land in the area and worked to revitalize the community); *see also* Lore Croghan, *Real Estate Watch: Secret’s Out About Move to Brooklyn*, CRAIN’S N.Y. BUSINESS, Jan. 21, 2002, at 1 (identifying large industrial and business tenants moving to northern Brooklyn neighborhoods).

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the alliance between residents and politicians, as well as a development trend that began in the mid-1990s.¹⁰⁶ By 1995, most of the area was zoned for residential use, with a light manufacturing zone buffer occupying the former heavy manufacturing zoning designation.¹⁰⁷ There remains a one-block commercial overlay.¹⁰⁸

B. Greenpoint, Brooklyn

Greenpoint is another Brooklyn community with a long history of planning activism, albeit with many more hurdles to overcome than Vinegar Hill. Set in Community Board 1, Greenpoint is bound by the East River on the west, Newton Creek on the north, the Brooklyn-Queen's Expressway on the east and southeast, and McCarren Park on the south.¹⁰⁹ The area is primarily comprised of three enclaves: the Polish community, the Latino community and a newer community of young artists attracted by low rents.¹¹⁰ Public transportation in and out of

¹⁰⁶ See Bowles, *supra* note 64, at 24 (noting that efforts to protect waterfront neighborhoods from industrial development by residential and mixed-use rezoning has locked out businesses helpful to the Brooklyn economy); see also Penny Lee, *East River Information Session, East River Project*, Van Alen Institute, available at http://www.vanalen.org/forums/er_info.htm (highlighting several projects on the Queens waterfront that successfully incorporated both business and community interests).

¹⁰⁷ NEW YORK CITY DEP'T OF CITY PLANNING, ZONING MAP 12c (1995) (showing M3-1 zoning replaced by M1-2).

¹⁰⁸ *Id.* This commercial section is zoned C2-4. *Id.*

¹⁰⁹ See New York City Department of City Planning Website, Comm. Dist. Profile: Brooklyn, available at <http://www.nyc.gov/html/dcp/html/lucds/bk1lu.html#data> (last visited Nov. 12, 2002). Community Board 1 consists of Greenpoint and Williamsburg. See GREENPOINT 197-A COMMITTEE, GREENPOINT 197-A PLAN 39 (June 1998) [hereinafter PROPOSED GREENPOINT 197-A].

¹¹⁰ See generally Tom Gilbert, *Greetings from Greenpoint*, BROOKLYN BRIDGE, Sept./Oct. 1999, at 90. Gilbert's article describes the rich, vibrant Polish community of Greenpoint, including many Polish shops and restaurants, as well as the "significant" Hispanic community with "just under 20 percent" of the area's residents identifying themselves as such in the 1990 census. *Id.* at 90-95, 90. According to Gilbert "[n]ew settlers" in Greenpoint

Greenpoint is limited to two stops on the “G” train, one farther stop on the Manhattan bound “L” train and three bus lines.¹¹¹

Greenpoint has a strong infrastructure—many neighborhood businesses, a thriving main street and multi-generational families.¹¹² Greenpoint has roughly 36,700 residents, and its population is predominantly white, nonhispanic.¹¹³ Greenpoint’s workforce participation makes up a larger percentage of its total population than that of Brooklyn or New York City as a whole.¹¹⁴ It is considered a “working neighborhood,” and local residents staff many of Greenpoint’s manufacturing plants, mostly in the

are “often artists” that were ousted from Manhattan by high rents and there is a “burgeoning artist community” in the neighborhood. *Id.* at 96. *See also* PROPOSED GREENPOINT 197-A, *supra* note 109, at 18 (discussing the change in Greenpoint’s ethnic composition due to immigration in the 1990s); COMMUNITY DISTRICT NEEDS, *supra* note 46, at 17 (noting that “Greenpoint and Williamsburg contain within them an almost unparalleled variety of cultural, religious, racial and ethnic groups, who reside in several distinct communities”).

¹¹¹ PROPOSED GREENPOINT 197-A, *supra* note 109, at 58.

¹¹² *See id.* at 3. It has been noted that “Greenpoint has many families that have lived there for three or more generations. Those families sustain Greenpoint’s tradition and folklore.” *Id.*; *See also* Gilbert, *supra* note 110, at 90 (noting that although Greenpoint has experienced recent variations and shifts in demographics, these shifts are “merely variations on economic and cultural experiences familiar to both fourth-generation families and newcomers”).

¹¹³ *See* NEW YORK CITY DEP’T OF CITY PLANNING, SOCIOECONOMIC PROFILES - 1980 / 1990 CENSUS, POPULATION AND HOUSING 126-31 (Mar. 1993) [hereinafter NYC PROFILE, COMM. BD. 1]. Greenpoint’s population was listed as approximately 73.2% white, nonhispanic in 1990. *Id.* “Although the percentage of Blacks and Asians in Greenpoint rose in the 1980s, their share of Greenpoint’s population “remains modest” and the number of Asians increased from 2.2% of the population in 1980 to 3.5% in 1990, and the Black population doubled its numbers in the same time, though it still remains small (only 1.2% and 3.5% of the total population respectively in 1990).” PROPOSED GREENPOINT 197-A, *supra* note 109, at 17. As of the date of publication, the 2000 Census reports broken down by neighborhood had not been released.

¹¹⁴ *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 35. Greenpoint’s workforce is 65% of its total population, whereas that of Brooklyn is 58.9% and New York City as a whole is listed at 61.7%. *Id.*

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woodworking and textile industries.¹¹⁵

According to the 2000 Census, Community Board 1 has a total population of 160,338, with a majority white, nonhispanic (48%) or Hispanic (37.7%) in origin.¹¹⁶ Of the residents of Community Board 1, 17% are not citizens.¹¹⁷ Roughly two-thirds speak a language other than English at home, and 38.5% report that they do not speak English “very well.”¹¹⁸ The average median household income in 2000 was \$26,325.¹¹⁹ Roughly one-third of the population receives government income assistance.¹²⁰ A majority of the community’s housing units are rentals.¹²¹

Historically, the zoning designations along Greenpoint’s waterfront were similar to Vinegar Hill, with properties along the water zoned for industry, and residential properties located just inland from the industrial area.¹²² The entire stretch of

¹¹⁵ *Id.* The “businesses and jobs” profile of Greenpoint’s proposed 197-a plan stated that “among the many small-scale industries, it appears that craft-related manufacturing, in particular wood-working, thrives in Greenpoint.” *Id.* Additionally, “other industries that currently prosper in Greenpoint include furniture manufacturers, lumber wholesalers, precision machinery makers, the textile industry, and others. Many of the jobs in these industries are filled by Greenpoint residents.” *Id.*

¹¹⁶ See N.Y.C. Dep’t of City Planning, Comm. Dist. Profile: Brooklyn CD 1: Greenpoint, Williamsburg, available at <http://www.nyc.gov/html/dcp/html/lucds/bk11u.html#data> (last visited Nov. 12, 2002).

¹¹⁷ NYC PROFILE, COMM. BD. 1, *supra* note 113, at 126.

¹¹⁸ *Id.* Specifically, 69.7% speak a language other than English in the home. *Id.*

¹¹⁹ See NYC Dep’t. of City Planning Website, *supra* note 22. This figure is relatively low, compared to the city-wide median household income of \$39,293.

¹²⁰ *Id.* The percentage of the population receiving government assistance was reported as 32.9%.

¹²¹ See NYC PROFILE, COMM. BD. 1, *supra* note 113, at 131. Approximately 86% of the housing units are rentals.

¹²² See generally PROPOSED GREENPOINT 197-A, *supra* note 109, at 20-24 (reviewing the existing zoning and land use standards in Greenpoint). Such a mixed-use plan is typical of old New York, where industry depended on rivers for shipping and workers lived near their jobs. *Id.* Greenpoint’s proposed plan specifically points out that “a number of factors have left the waterfront underutilized, including the shift away from manufacturing towards a service-

Greenpoint's waterways is zoned M3-1 for heavy manufacturing with a lighter manufacturing M1-1 buffer zone immediately inland.¹²³ There is an R-6 residential zone approximately three blocks from all water access.¹²⁴ As in Vinegar Hill, there are nonconforming residential structures in Greenpoint's manufacturing zones.¹²⁵ Ad hoc zoning decisions and illegal conversions have created environmentally unsafe and inefficient conditions.¹²⁶ Many of the heavy manufacturing M-3 zones are vacant or illegal residential conversions, while the M1 "buffer" zones contain both light manufacturing and residential uses.¹²⁷ There are also some pre-existing nonconforming uses of light manufacturing in residential zones.¹²⁸ Compared to the rest of New York City neighborhoods, Greenpoint houses an inordinate amount of essential, yet locally undesirable, land uses.¹²⁹ These

based economy, containerization of the shipbuilding industry, and trucking as a means of shipping." *Id.* at 20.

¹²³ *See id.* The buffer zone is occupied by both residential and light manufacturing uses. *Id.*

¹²⁴ *Id.* at 22. (noting that "[a]t the core of the Greenpoint neighborhood lies the R-6 medium density residential zone").

¹²⁵ *Id.* at 20. The proposed plan notes that "an increasing amount of conversion from manufacturing to residential has taken place, in particular in the loft buildings near the East River." *Id.* As noted, this pattern is consistent with that in Vinegar Hill and many urban waterfront installations. *See supra* note 78 (reviewing recent trends in development along urban waterfronts).

¹²⁶ *Id.* at 32. According to the proposed plan, "recent conversion—illegal and legal—of manufacturing lofts to live and work lofts has increased the level of residential non-compliant uses." *Id.* Rezoning these areas to mixed-use zones "would limit industrial expansion to those business[es] that enter into good neighbor agreements and that can demonstrate that they can meet strict environmental performance standards" and foster "a healthier and more desirable community." *Id.*

¹²⁷ *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 20. The occupied buffer zones are a distinct contrast to the largely vacant parcels of land along the East River waterfront and 20 vacant acres of land including piers and the Greenpoint Terminal Market site. *Id.*

¹²⁸ *Id.* at 20. The proposed plan notes that "some light manufacturing still occurs in pre-existing non-conforming uses within residential zones." *Id.*

¹²⁹ *See generally id.* at 26-32. The proposed plan describes and catalogues a number of businesses that moved into the spaces abandoned by ship builders

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include the city's largest wastewater treatment facility, nine waste transfer stations, and numerous petroleum and natural gas storage facilities.¹³⁰

Greenpoint won some historic designation status in 1982, but that designation did not seem to affect the community's ability to rezone.¹³¹ At that point, the area was known as Greenpoint/Williamsburg.¹³² Community Board 1 began a planning process with local residents and Columbia University's Urban Planning Studio in 1985.¹³³ The results of this process were eventually compiled in a "Policy and Resource Handbook" which, despite providing residents with a helpful introduction to the idea of community planning, rendered no concrete results.¹³⁴

Community involvement in the Greenpoint/Williamsburg plan began in earnest in 1989 with open meetings facilitated by Community Board 1.¹³⁵ Community involvement initially revolved around environmental issues, and the New York City Department of Environmental Protection initiated the

and lumberyards that "once crowded Greenpoint's shores." *Id.* at 26. These include, for example, "a growing number of public and private facilities such as waste transfer stations, a sewage treatment plant, the former municipal incinerator, the marine transfer station, and a range of facilities suspected of storing hazardous substances." *Id.*

¹³⁰ *See id.* at 28.

¹³¹ *See Policy and Resource Handbook for Waterfront Development*, 1 COLUMBIA URBAN PLANNING STUDIO 24 (1987) [hereinafter COLUMBIA HANDBOOK] (noting that "[t]he Landmarks Preservation Commission report on Greenpoint emphasizes the historical significance of the surviving 19th-century workers' housing and original commercial buildings along Franklin Street").

¹³² Williamsburg is the neighborhood just south of Greenpoint, also bordering the East River. *See* New York City Department of City Planning, Zoning Map 12d, 13b.

¹³³ *See generally* COLUMBIA HANDBOOK, *supra* note 131. The completed handbook sets forth the planning goals and visions of Greenpoint's residents and the desire to implement renovation efforts within the neighborhood. *Id.*

¹³⁴ As noted, the handbook was a student project and, as such, had no binding authority on city agencies. *Id.*

¹³⁵ *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 8. Five open meetings were held, "facilitated by a planning firm hired by the Community Board." *Id.*

Environmental Benefits Program (“EBP”) to assess the environmental health of Greenpoint/Williamsburg.¹³⁶ The EBP was funded by a settlement with the Newton Creek Sewage Treatment Plant.¹³⁷ This program was originally touted by all as a

¹³⁶ See Nancy E. Anderson, *Notes from the Front Line*, 21 FORDHAM URB. L.J. 757, 768-69 (1994) (noting that this program was designed to address urban environmental issues in a community-based manner); see also Hillary Gross et al., *Environmental Justice: A Review of State Responses*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 41, 62 (2001) (noting that the Environmental Benefits Program was a program that operated between 1991 and 1994, focusing exclusively on the Greenpoint/Williamsburg neighborhood). The EBP dealt with environmental justice concerns by attempting to engage area residents to help define, develop, and implement solutions to their environmental problems and by allowing them to participate in the city’s decision-making process. *Id.*; see also Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 ENVTL. L. & LITIG. 37, 79-80 (1998) (explaining that the EBP operated from the office of a Community Watchperson and included resident-based monitoring and research using residents to collect information to supplement an epidemiological study of pollution, disease, and mortality in the neighborhood); Nancy E. Anderson, *The Visible Spectrum*, 21 FORDHAM URB. L.J. 723, 727-28 (1994) (describing that the EBP was undertaken by the New York City Department of Environmental Protection in order to address some of the inequities caused by local sources of pollution in New York City and that “[t]his program may serve as a model for other communities in the effort to address environmental inequities”).

¹³⁷ See Anderson, *supra* note 136, at 769; see also *In re City of N.Y. Dep’t Env’tl. Prot.*, No. R2-3183-90-08, slip. op. at 3. *In re City* addressed overcapacity problems at the STP. *Id.* The STP’s sewage flow exceeded its permitted limit of 310 million gallons per day, and did not perform required “secondary” levels of sewage treatment. *Id.* The Consent Order was designed to solve these problems. *Id.* The North River case involved the problem of noxious odors emanating from the plant and the need to control them. *Id.*; see also Samara Swanson, *Environmental Social Movements Since Love Canal*, 8 BUFF. ENVTL. L. J. 283, 283-89 (2001). According to Swanson, the Watchperson Project was formed as a result of a community initiative to use an \$850,000 fine imposed by the DEC on the Department of Environmental Protection for New York City’s operation of the Newtown Creek Sewage Treatment Plant in violation of the Clean Water Act. *Id.* Ultimately, the DEC imposed a fine as a result of communities’ vigorous complaints about the odors and other problems at the New York Creek sewage treatment plant. *Id.* The Project also intervened when the Department of Sanitation did not require

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partnership effort between the city and the community, “the environmental version of government by the people and for the people.”¹³⁸ It focused on information gathering and policy making, with efforts to document the environmental problems and enforce pollution prevention methods.¹³⁹ Soon, however, residents, environmental experts and planning experts criticized the EBP as favoring evaluation over remediation.¹⁴⁰ The residents wrote a letter to the Department of Environmental Protection expressing concern that the program was not working as a partnership and that community issues were not being addressed.¹⁴¹

While the EBP continued to amass data and develop a cumulative risk methodology, residents concerned about immediate effects formed coalitions to fight for enforcement and remediation.¹⁴² Around this time, the Greenpoint/Williamsburg

environmental impact statements and the Department of Environmental Conservation did not enforce the stipulation of settlement. *Id.*

¹³⁸ See NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENPOINT/WILLIAMSBURG ENVIRONMENTAL BENEFITS PROGRAM, at 2. See also Gross et al., *supra* note 136, at 62 (discussing the EBP’s goal to involve residents of the Greenpoint/Williamsburg neighborhood in responding to environmental problems); see also *Federal Funding Available for Environmental Justice Issues in the Bronx*, 39 NEW YORK VOICE, INC./HARLEM USA 19 (August 16, 1995), available at 1995 WL 1544343 (describing the environmental benefits program as a “community-led initiative” to become involved in environmental issues).

¹³⁹ *Id.*

¹⁴⁰ See, e.g., Manuel Perez-Rivas, *Pollution Study is Muddy Issue*, N. Y. NEWSDAY, Feb. 23, 1992 (discussing criticism of the EBP plan to conduct a \$850,000 survey to assess the environmental damage instead of working on prevention methodology); see also Anderson, *supra* note 136, at 728, 736 (discussing the debatable success of the EBP’s community mobilization effort and skepticism expressed by residents of the community).

¹⁴¹ Letter from Steering Committee, to New York City Department of Environmental Protection (May 7, 1993) (on file with author).

¹⁴² See PROPOSED GREENPOINT 197-a, *supra* note 109, at 3. Since the late 1950s Greenpoint residents have responded to the adverse effects of certain public policies by filing petitions, testifying at hearings, and establishing working groups and advisory committees. *Id.* at 3. Their efforts resulted in the creation of the Greenpoint Plan, which provides a means for residents and city

alliance split into two separate groups, precipitated in part by the Department of City Planning's identification of 22 subareas within Community District 1 to be studied for possible rezoning of manufacturing zones to permit residential development.¹⁴³ One of these subareas was in Williamsburg and became the first area studied in detail by the Department of City Planning in 1996.¹⁴⁴ With the help of a professional planner, Williamsburg residents created a 197-a plan focusing on the waterfront area.¹⁴⁵ This plan, and the Department of City Planning's study, led to the rezoning of a subarea in Williamsburg in 1998 from an M3-1 heavy manufacturing zone to a C4-3 high commercial area.¹⁴⁶

agencies to discuss Greenpoint's development and revival. *See also* Elizabeth Hays, *Power Plant Plan Jeered Greenpoint, Williamsburg Activists Berate Developer*, N.Y. DAILY NEWS, June 25, 2001 (providing a contemporaneous account of critiques leveled by Brooklyn residents upon development plans to place a power plant in Greenpoint/Williamsburg); Elizabeth Hays, *Greenpoint Backs Burner Board 1 Fights Dismantling of Shutdown Incinerator*, N.Y. DAILY NEWS, Apr. 4, 2001 (indicating community support for efforts to decrease industrial waste in Greenpoint); Elizabeth Hays, *Greenpoint Fears Power Ploy*, N.Y. DAILY NEWS, Feb. 28, 2001 (expressing general suspicion by residents of political and economic motives of siting decisions).

¹⁴³ *See* N. Y. CITY DEP'T OF CITY PLANNING, WILLIAMSBURG BRIDGE AREA ZONING STUDY, Sub-area 12, Phase II Report, May 1996, at 1 (describing the Department of City Planning's identification of areas to be studied to determine if manufacturing areas should be down-zoned to permit residential development).

¹⁴⁴ *Id.*

¹⁴⁵ *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 14. Specifically, "[t]he Williamsburg 197-a Plan focuses on a linear stretch of three interconnected neighborhoods along the East River waterfront." *Id.*

¹⁴⁶ *See* NEW YORK CITY DEP'T OF CITY PLANNING, ZONING MAP 12d, 13b (indicating the zoning classifications for each section of Williamsburg). Greenpoint was not addressed in Williamsburg's 197-a plan. *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 14. Community Board One and local community groups from Greenpoint and Williamsburg began to create a 197-a plan to synthesize views and ideas in response to the pressures of increasing demand for housing, decline of heavy manufacturing and increasing rents to do illegal conversions to residential lofts. *Id.* Eventually, however, "[g]iven the diversity of interests, issues, and the structural differences between the two communities, it was determined that two 197-a Plans covering the two geographically distinct areas of Williamsburg and Greenpoint should be

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At the same time, Greenpoint's residents were vigorously pursuing their own 197-a process with technical assistance and resources from the Pratt Institute Center for Community and Environmental Development.¹⁴⁷ Earlier attempts at community planning in Greenpoint were undermined by breakdowns in communication between different groups—ethnic divisions deepened, homeowners distanced themselves from renters, residents quarreled with industry and environmentalists were at odds with the labor force.¹⁴⁸ As a result, prior proposals lost momentum before reaching fruition.¹⁴⁹

Because of the history of dissension among residents, the 197-a Steering Committee expanded its efforts to include all members of the community throughout the 197-a process.¹⁵⁰ The

prepared.” *Id.*

¹⁴⁷ See PROPOSED GREENPOINT 197-A, *supra* note 109, at 8-13 (discussing the planning process undertaken by Greenpoint residents and community groups). Greenpoint's 197-a plan “was refined and completed [] with technical assistance and resources from the Pratt Institute Center for Community and Environmental Development (“PICCED”) and with the energy, commitment and sustained participation of members of Greenpoint's 197-a Committee.” *Id.* at 8. Both the Pratt Institute and the Columbia Planning Studio have helped New York City neighborhoods compile data and prepare community-based plans that emphasize localized interests and strengths. See generally THE MUNICIPAL ARTS SOCIETY OF NEW YORK, THE WILL TO PLAN: COMMUNITY INITIATED PLANNING IN NEW YORK CITY (Winter 1989-90), at 20-28 (noting assistance given by these institutes to local residents, committees and advisory groups) (on file with author).

¹⁴⁸ See generally *Handhart Interview*, *supra* note 18 (commenting that efforts prior to contributions of technical assistance from the Pratt Institute were hindered by communication breakdowns).

¹⁴⁹ *Id.* (noting that no tangible results were reached by prior efforts); see also PROPOSED GREENPOINT 197-A, *supra* note 109, at 8 (noting the history of Greenpoint's planning process, including public forums and workshops, to explore options and opinions as to what participants wanted to see develop along Brooklyn's waterfront but acknowledging that these efforts did not result in a formal 197-a plan for Greenpoint).

¹⁵⁰ The Steering Committee, formed with volunteer assistance from the Pratt Institute, held numerous meetings, three major public forums, two meetings with the business community and made presentations at open meetings of Community Board One. *Id.* at 8-13. These events were advertised via local newspapers and fliers printed in English, Spanish and Polish. *Id.* at

Committee circulated a copy of the proposed plan door-to-door, and a public forum was held to debate it.¹⁵¹ The forum attracted about 150 participants and, in general, “the group expressed a great deal of support” for the plan.¹⁵² In addition, two meetings with the business community and two presentations at Community Board meetings evinced virtually unanimous support for the plan.¹⁵³ Greenpoint’s final proposed plan innovatively relies on mixed-use zoning and, rather than polarizing commercial and environmental concerns, the community created a plan that retains industry while monitoring and enforcing environmental standards.¹⁵⁴ Community Board One voted to approve Greenpoint’s 197-a plan in 1998.¹⁵⁵ The Department of

12. Follow-up workshops were also conducted with Hispanic and Polish groups in their native languages. *Id.* For a full chronology and description of these events, *see id.* at 8-13.

¹⁵¹ *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 8, 12. Over 9,000 copies of the “newspaper edition of the plan” were distributed throughout the neighborhood. *Id.* at 12. In essence this distributed “almost one copy per household to Greenpoint residents and businesses.” *Id.* at 8. The forum was held on June 24, 1998. *Id.*

¹⁵² *See id.* at 12 (describing meetings with business leaders, public forums and the support expressed for the plan).

¹⁵³ *Id.* at 8; *see also* Telephone Interview with Ron Schiffman, Director, Pratt Institute of Community and Environmental Development, (Nov. 22, 2000) [hereinafter *Schiffman Interview*] (explaining that the two dissenters to the plan were Williamsburg residents who felt that Greenpoint’s boundary should be extended to include them).

¹⁵⁴ *See generally* PROPOSED GREENPOINT 197-A, *supra* note 109, at 40-60. The recommendations included in the proposed 197-a plan were intended to “dramatically enhance Greenpoint’s environment by providing ecological benefits to the neighborhood and by mitigating the impact of existing pollution in accordance with the spirit and intent of the New York Charter [which] calls for *Fair Share* Siting Criteria.” *Id.* at 40. The “Detailed Recommendations” of the plan “are meant to encourage public access to the waterfront, low-rise housing and commercial development while protecting Greenpoint’s environment and quality of life.” *Id.* at 43. The proposed plan calls for reduction of pollutants within the Charter’s criteria levels, decontamination of hazardous sites, improvements of water quality as well as rezoning for future commercial development. *Id.* at 43.

¹⁵⁵ *See* DEPARTMENT OF CITY PLANNING, GREENPOINT 197-A PLAN Part I, i (as modified and adopted by the City Planning Commission and the City

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City Planning received the final plan on February 3, 1999.¹⁵⁶ Greenpoint's 197-a Committee first met with city agencies on February 22, 1999.¹⁵⁷

At an August 23, 2000 public hearing on the Greenpoint plan, there were sixteen speakers in favor of the plan and none opposed.¹⁵⁸ The plan was adopted on January 30, 2002, after considerable modification by the Department of City Planning.¹⁵⁹ Among the city's positive modifications were the sections calling for "halting expansion of the Greenpoint marine transfer station beyond 2,215 tons per day, and reuse of the adjacent incinerator site for public events and environmentally friendly purposes."¹⁶⁰ However, the city settled on terms that leave Greenpoint residents vulnerable to new industrial uses. While the Greenpoint community was lauded by the Department of City Planning for its "collaborative approach in developing a 197-a plan responsive to the concerns of Greenpoint's residents and businesses and to

Council) (Spring 2002) [hereinafter ADOPTED GREENPOINT 197-A]. According to the background summary of the City Planning Commission's final, adopted plan, the Board voted to approve the plan for agency review on October 14, 1998. *Id.*

¹⁵⁶ *Id.* at Part I, 3 (noting that the plan was originally submitted on October 21, 1998 and, after revisions for formatting and "other deficiencies" were corrected, was submitted in revised format on February 3, 1999); *See also* PROPOSED GREENPOINT 197-A, *supra* note 109, at i (indicating date received by Central Intake Department of City Planning as February 3, 1999).

¹⁵⁷ For a comprehensive list of meetings with government agencies, *see* PROPOSED GREENPOINT 197-A, *supra* note 109, at 13.

¹⁵⁸ *See* ADOPTED GREENPOINT 197-A, *supra* note 155, at Part I, 6. This is a striking comparison to Vinegar Hill's final public hearing, which evinced considerable opposition. *See supra* note 92 (noting the various dissenting speakers and viewpoints offered at public meetings pertaining to Vinegar Hill's proposed rezoning).

¹⁵⁹ *See generally* ADOPTED GREENPOINT 197-A, *supra* note 155, at Part I, 7-11. The adopted plan commends "the Board and its Waterfront Committee for their collaborative approach in developing a 197-a plan" but specifically declines to adopt provisions pertaining to the siting of waste management facilities and substantially modifies the proposed plan as it pertains to lessening adverse effects of industry and waste management due to the "citywide implications" of these provisions. *Id.* at Part I, 7-9.

¹⁶⁰ *Id.* at Part I, 9.

the issues raised by city agencies affected by the plan,” the city nonetheless took many opportunities to weaken the outcome of such a process.¹⁶¹ For example, it extended a moratorium on sitings of waste transfer stations in Brooklyn’s Community District 1 only until the adoption of the Department of Sanitation’s (“DOS”) study of the city’s commercial waste stream.¹⁶² The city also delayed re-zoning until comprehensive city needs evaluations can be performed, leaving the waterfront zoned M3-1 for heavy manufacturing in the interim.¹⁶³

The present situation is chaotic as the community continues to organize against new industrial and commercial development.¹⁶⁴ New York City, while subject to a “fair share” requirement dictating that publicly owned works be evenly distributed, does not have guidelines in place for privately owned facilities.¹⁶⁵

¹⁶¹ *Id.* at Part I, 9.

¹⁶² *Id.* at Part I, 3. The adopted plan notes that “City Council approval of the NYC Solid Waste Management Plan Modification Plan on November 29, 2000 was contingent upon DOS undertaking a comprehensive study of the city’s commercial waste stream. *Id.* at Part I, 9. In a separate agreement the administration placed a moratorium on permitting any new putrescible or nonputrescible waste transfer facilities in Brooklyn Community District One. *Id.* at Part I, 8. It is unclear how long this moratorium will remain in effect.

¹⁶³ *Id.* at Part I, 10. (recognizing rezoning requests in the proposed plan but specifically declining to adopt these provisions and opting to establish and “interagency task force to study the principle of high performance zoning on a citywide basis”).

¹⁶⁴ *See* Bowles, *supra* note 64, at 22. Bowles notes that “city planners have been conspicuous in their absence” in Greenpoint and “so far, city planning officials have resisted Greenpoint’s pleas for saner coexistence with industry.” *Id.* He further points out that “residents in industrial neighborhoods continue to stew amid a sea of M-3s—and increasingly, they are targeting manufacturing itself as the enemy.” *Id.*

¹⁶⁵ *See* 62 R.C.N.Y. App. A, Art. 3(a) (asserting that the “fair share” requirement mandates the city to consider neighborhood compatibility and character, cost-effectiveness, and compatibility with the mayor’s location criteria when making decisions); *see also* Ferrer v. Dinkins, 218 A.D.2d 89 (N.Y. App. Div. 1996) (arguing that exclusion of privately run facilities from the “fair share” provision “foster[s] neighborhood stability and revitalization by furthering the fair distribution among communities of City facilities”); Silver v. Dinkins, 601 N.Y.S.2d 366 (N.Y. Sup. Ct. 1993), *aff’d* 602 N.Y.S.2d 540 (N.Y. App. Div. 1993) (holding that a proposed parking garage

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Currently, Greenpoint faces the development of a private power plant.¹⁶⁶ Thus, residents continue to organize and strategize, with little tangible reward for their hard-earned, inclusive land use decision-making process.

V. COMPARATIVE ANALYSIS OF NEIGHBORHOOD PLANNING EFFORTS

An examination of the planning strategies and efforts of Vinegar Hill and Greenpoint points out certain factors that may influence the success of public participation. These can be broken down into three categories: community demographics, community access to resources, and the goals of proposed plans. To encourage more public participation and comprehensive planning, these factors should be addressed in a way that equalizes each community's ability to influence land use decisions. Equal access to resources and, ideally, equal consideration by the City Planning Commission could provide fairer outcomes. Closer analysis of how each community proceeded helps to suggest how such a solution might be structured legislatively.

on Manhattan's Lower East Side violated the "fair share" provision of the City Charter); Cmty. Planning Bd. No. 4 v. Homes for the Homeless, 600 N.Y.S.2d 619 (N.Y. Sup. Ct. 1993) (holding that conversion of a dormitory into a shelter for the homeless pursuant to city financing did not violate the "fair share" provision of the City Charter because the provision does not apply to private facilities).

¹⁶⁶ Further details about the proposed 1,100 megawatt power plant on the Greenpoint/Williamsburg East River waterfront are available on the Greenport Waterfront Association for Parks & Planning (GWAPP) website, *available at* <http://www.gwapp.org> (last visited Oct. 25, 2002) (describing the proposal of the power plant as a "project [that] will have 300 foot smokestacks, spew well over a thousand tons per year of toxic emissions into our local environment, increase the area's already heightened [sic] asthma levels and ruin New York City's and New York State's plans for parks and residential and commercial development on the Greenpoint/Williamsburg waterfront"); *but see* TransGas Energy Systems website, *available at* <http://www.transgasenergy.com> (last visited Nov. 12, 2002) (describing the proposal as "an environmentally responsible [project]. . . which meets all applicable regulatory standards").

A. Demographics

A community's characteristics—size, homogeneity¹⁶⁷ and location—play a large role in the probability of marshalling a community-sponsored plan through the proper administrative channels.¹⁶⁸ As the above case studies illustrate, the smaller, more demographically homogenous community achieved rezoning rather easily, whereas the larger, more diverse community had greater difficulty. One possible explanation is that smaller, more homogenous groups may encounter fewer obstacles in organizing, identifying leadership and agreeing on the most beneficial use of its land because of its shared beliefs and values.¹⁶⁹

It is important to note, however, that the demographic homogeneity in Vinegar Hill does not end the inquiry because there was a sharp division between residents and businesses throughout the planning process.¹⁷⁰ Although demographic

¹⁶⁷ Homogeneity can refer to many socioeconomic indicators. Although the term may to refer to race or class, this paper points out that the term can be misleading because it does not adequately include different segments of a community. For example, a person can interact within the community as a resident, a business owner, a worker, or some other combination of these categories.

¹⁶⁸ This phenomenon is due, generally, to the acknowledged difficulties in collective action and organization of groups with varying interests as well as language barriers within a community. *See, e.g., supra* Part IV (comparing the barriers to collective action confronted by Vinegar Hill and Greenpoint in the planning process).

¹⁶⁹ *See, e.g.,* M.P. BAUMGARTNER, *THE MORAL ORDER OF A SUBURB* (1988) (noting that sociological studies in dispute resolution have considered homogeneity a beneficial factor to consensus); *see also* Claus S. Fischer & Michael Hout, *Differences Among Americans in Living Standards Across the Twentieth Century*, The Survey Research Center, University of California, Berkeley (Aug. 2000) (unpublished manuscript available at http://216.239.37.100/search?q=cache:i6zkKTnDTlC:ucdata.berkeley.edu/rsfcens us/papers/livingstandards.pdf+consensus+and+homogeniety&hl=en&ie=UTF_8).

¹⁷⁰ Holt, *supra* note 85 (covering a community board meeting where “futility and confusion” was present as rezoning arguments continued, with the business community in opposition to any zoning changes). *See also supra*

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statistics portray a small, affluent group of residents, workers and business owners whose interests may differ from residents brought conflicting visions of the neighborhood to land use decisions. It is exactly this tension that was not adequately addressed throughout Vinegar Hill's rezoning process. In contrast, Greenpoint, a demographically diverse community, actually emerged as a cohesive voice.¹⁷¹ Its cooperative process resulted in a unanimously supported plan.¹⁷² The discrepancy between demographics and cohesion clouds the simple conclusion that Vinegar Hill had an easier time merely because its residents were more demographically homogeneous and Greenpoint encountered greater difficulty due to demographic diversity.

Ironically, the results of these two case studies could be interpreted to discourage comprehensive community-sponsored planning and consensus building and instead encourage planning by small, elite groups of people without regard for their neighbors.¹⁷³ The opposite needs to be true if New York City is

Part IV.A (illustrating the lack of unanimous support for proposed rezoning plans).

¹⁷¹ Although ethnically diverse, Greenpoint has a larger percentage of residents within its workforce, thus lessening the tension between residents and businesses seen in Vinegar Hill. *See supra* Part IV (setting forth the demographics and respective workforce percentages of Greenpoint and Vinegar Hill).

¹⁷² *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 12-13.

In general, the group [at a public forum advertised with door-to-door copies of the plan] expressed a great deal of support for the document with the major issue being expansion of the boundaries of Greenpoint. This was resolved in part by including the remainder of the area in the Greenpoint postal zip-code.

Id.; *see also Schiffman Interview*, *supra* note 153 (offering first-hand account of unanimous support at the later meetings); Telephone Interview with Said Ahmed, Brooklyn Office of the Department of City Planning, Nov. 8, 2000 [hereinafter *Ahmed Interview*] [transcript on file with author] (offering opinion that the Greenpoint plan was strongly supported throughout the community).

¹⁷³ This conclusion could be drawn from the fact that Vinegar Hill's relatively small group of residents effectively achieved rezoning without arriving at a unanimously approved plan whereas Greenpoint's plan, which sought to incorporate input from all concerned constituents, was not adopted by the City Planning Commission. *See, generally, supra* Part IV (setting forth

to reinforce neighborhood pride, foster a communal sense of control and increase accountability in planning policies. In short, an equitable planning process respects all people affected by it. As difficult as such agreements may be to reach, consensus building should be the focal point of successful planning, regardless of the demographic homogeneity of the residents.

Instead, it is important to ask what role demographics play in community planning. Demographically homogenous groups may organize more easily and thus have more time to devote to political lobbying.¹⁷⁴ If this is the case, the community with more effective organization and leadership could be perceived by city agencies as more likely to take issues to the ballot box, thus subtly (and perhaps wrongly) convincing political representatives that the goals of the politically savvy group reflect those of the community as a whole. Even though there were diverse viewpoints in Vinegar Hill, the homogeneity of the residential community provided a unified base to pressure politicians and create an appearance of cohesion. More organizational power enables a group to devote time and energy to lobbying and negotiating with city government. It may be that, although a consensus was finally reached in Greenpoint, the decade-long process of consensus building actually detracted from its potential political impact.¹⁷⁵ In this way, Greenpoint's diverse population may have been an obstacle to effective political power.

One way for the city to equalize communities' abilities to successfully rezone is to address the organizational obstacles confronting New York's neighborhoods. The Department of City Planning should assist diverse communities by encouraging

the processes of each community's rezoning).

¹⁷⁴ It is self-evident that groups with few barriers to communication and collective action will not be required to devote substantial resources to ensuring inclusion of varying interests, whereas those composed of multiple enclaves will necessarily devote greater resources to communication between and amongst themselves, thus leaving fewer resources for garnering political support. See *supra* Part IV (comparing Vinegar Hill's efforts with Greenpoint's efforts to inform all concerned facets of the community).

¹⁷⁵ See *Handhart Interview*, *supra* note 18 (suggested that the potential impact of Greenpoint's plan may have been hindered by the necessarily lengthy process of consensus building).

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organization and cooperation. One possible solution is to strengthen the 197-a process by offering leadership assistance grants and consensus-building workshops sponsored by the city. This would bolster the organizational power of a diverse community like Greenpoint, freeing up time for developing the necessary political strategies and, eventually, increasing its chance of successfully rezoning.

Location is another factor that may influence the city's determination of where to expend its resources. The city could perceive that assisting Vinegar Hill by down-zoning the area might encourage high-end residential development and, in turn, increase the city's tax base.¹⁷⁶ Although it is only served by one subway stop, Vinegar Hill is close to Manhattan and downtown Brooklyn, and surrounded by neighborhoods that are becoming tourist destinations.¹⁷⁷ Greenpoint, on the other hand, suffers from a lack of convenient transportation to Manhattan and Brooklyn's commercial core, as well as a perception of isolation because of two waterway boundaries, one highway boundary, and a southern stretch of vacant warehouses.¹⁷⁸

¹⁷⁶ See Cindy Mindell-Wong, *Zoning to Market, to Market: The Northeast Quadrant*, ROCHESTER CITY NEWS, May 8, 2002, available at http://www.rochester_citynews.com/gbase/Gyrosite/Content?oid=oid%3A1203 (noting that down-zoning, which reduces the density or intensity of use of a property would lead to small streets of owner-occupied single family houses and higher property values).

¹⁷⁷ See *supra* Part IV.A (noting Vinegar Hill's proximity to historical neighborhoods and other tourist attractions).

¹⁷⁸ See Gilbert, *supra* note 110, at 90. Land use and circulation may be mismatched if development overwhelms the available transportation systems or if the configuration and location of transportation facilities do not correspond with the needs of that area. See EDWARD J. KAISER, DAVID R. GODSCHALK, F. STUART CHAPIN JR., *URBAN LAND USE PLANNING* 230 (1995). Modern urban planners promote public transit and walking in an effort to reduce reliance on transportation by automobiles. See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* at 151 (noting the importance of public transportation in "compact, walkable, multiuse neighborhoods [which are] built around transit stops"). Convenient and accessible transportation centers may even encourage residents to reside in a particular area. See Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357 (2000) (describing a San

Finally, the housing stock and average income of a neighborhood may determine the city's perception of it as a good investment of planning resources.¹⁷⁹ In Vinegar Hill, the rapid response of the Department of City Planning and the area's development since the zoning change suggest that goals other than the stated desire to preserve the area's residential streets may have played a large role in the successful rezoning.¹⁸⁰ The

Francisco/Bay Area community where many residents "self-select to reside near transit nodes for the very purpose of economizing on commuting"). Considerations in community planning, however, must also be given to other forms of transit that promote efficient circulation. *See* KAISER, *supra*, at 376 (describing a "multimodal" public transportation system that also incorporates taxicabs, bicycles, pedestrians, carpools and parking); *see also* Oliver A. Pollard III, *Smart Growth and Sustainable Transportation: Can We Get There From Here?*, 29 FORDHAM URB. L. J. 1529 (2002) (asserting that community growth will be difficult to achieve without more sustainable transportation approaches and, likewise, significant transportation improvements will be difficult to achieve without more sensible development practices).

¹⁷⁹ Scholars argue that municipality residents that do not live in exclusively residential districts, but in mixed-use districts are usually less affluent apartment dwellers whereas municipality residents in exclusively residential districts are usually owners of detached dwellings. *See, e.g.*, Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59 (1993). Hence, the "desirable citizen" in purely residential districts is one that can afford his own home, and those who cannot are forced to live in mixed use districts. *Id.* at 84. Others argue that land use development in the absence of zoning is usually orderly and many uses will locate in the same place whether zoning is in effect or not. *See, e.g.*, Bernard H. Siegan, *Non-zoning is the Best Zoning*, 31 CAL. W. L. REV. 127 (1994). Siegan argues that, "[f]or those who are economically better off, zoning is a luxury. In its absence, reasonable protection of their urban environment can be accomplished by imposing and enforcing restrictive covenants and a limited number of laws." *Id.* at 139. Siegan delivered a series of speeches urging voters to reject zoning and a proposed zoning ordinance in Houston, Texas and suggested that instead of forced zoning, the "city should make every effort to preserve and enforce deed restrictions." *Id.*

¹⁸⁰ *See* Brozan, *supra* note 105 (discussing real estate plans by developer David C. Walentas, who has owned large chunks of land in the area and has worked to revitalize the community); *See generally*, Patrick J. Skelley, *Public Participation in Brownfield Remediation Systems: Putting the Community Back on the (Zoning) Map*, 8 FORDHAM ENVTL. L. J. 389, 406-12 (1997). Skelley notes that "governmental bodies are presumably equipped to determine not

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city was likely interested in encouraging high-end residential development and the retail-entertainment facilities that usually follow such development in this section of Brooklyn.¹⁸¹ This sort of development benefits both the city and the borough by drawing tourism and upper-middle class residents to the area. Neighborhood revitalization is attractive to Vinegar Hill residents as well because of the services that follow such as more transportation, stores, theaters and restaurants.¹⁸² Because organized residents of Vinegar Hill are predominantly homeowners, the increase in services could outweigh fears of increased rents.¹⁸³ In real estate lingo, location is everything—

only whether a property owner's use of land is appropriate in reference to neighboring uses, but whether such a use accords with regional needs and concerns, given a zoning entity's familiarity with master plans and other comprehensive planning techniques." *Id.* at 411. According to Skelley, zoning can also "be carried out to best promote the public health, safety, and general welfare." *Id.*

¹⁸¹ See Bowles, *supra* note 64, at 23. Bowles explains that the city's housing crisis brought many young professionals to the borough of Brooklyn, and these newer residents "favor[ed] new housing, shops and amenities." *Id.* Furthermore, residents living in or near areas that had been zoned for heavy manufacturing "have been aggressively pushing city officials to rezone large swaths of those areas for residential use, usually with local political support. [Additionally,] [m]ounting political pressure from votes . . . is likely to keep the political momentum going." *Id.*

¹⁸² See Brozan, *supra* note 105 (quoting local developer David Walentas as saying of the area, "[a] year ago, there was no retail in the neighborhood. Now we have a Korean market, a chocolatier, antiques shops, art galleries.").

¹⁸³ Homeowners with steady incomes will only be removed from their homes through eminent domain, which requires just compensation, or if property values increase so much as to make property taxes unaffordable to them. In contrast, renters can be forced to move due to rent increases. See David B. Fein, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64 (1985). Fein notes that renters are more vulnerable residents because "[l]andlords may evict their tenants directly or may sell their buildings to people who will convert them to single-family use. Additionally, rehabilitation may lead to steep rent increases, which in turn may force low-income tenants to leave their homes." *Id.* at 85. He further states that "[l]ow-income homeowners . . . may also be displaced by gentrification." *Id.*; Ray Telles, Comment: *Forgotten Voices: Gentrification and Its Victims*, 3 SCHOLAR 115 (2000). Telles notes that "when the upper-

Vinegar Hill was in the right place at the right time, and in economic terms, its plan was efficient.

B. Access to Resources

While the city may look to a community's income as a factor related to development incentives and overall economic promise, a community's financial status is also a tool to gain access to resources including time, money and technical assistance. This is essential to a successful planning process.¹⁸⁴ Without adequate resources, there is little chance that public participation will affect decisions in a meaningful way. As these two studies reveal, the fact that Vinegar Hill had an easier time rezoning than Greenpoint was due in part to the city's direct assistance.

The City Planning Commission donated time and energy to Vinegar Hill by conducting a zoning study of the area and

income inhabitants, instead of building new homes, relocate to the older neighborhoods previously lived in by lower income groups . . . new money is spent in renovation and repair." *Id.* at 131. Once large scale renovation begins, with "more and more money being pumped into these older neighborhoods, property taxes increase. With increased property taxes, landowners find justification for increased rents. Accordingly, the few remaining low-income residents are displaced by skyrocketing rents, which are paid by incoming upper-income tenants." *Id.*

¹⁸⁴ See MAS, STATE OF 197-A PLANNING, *supra* note 26, at 9 (noting the amounts of funding and time required to develop a successful community zoning plan). Access to financial resources is required for towns undertaking any significant new construction. See NEW TOWNS SYMPOSIUM in JAMES A. LYONS JR. ET AL., NEW TOWNS AND PLANNED COMMUNITIES 243 (1971) (noting that constructing a town within the span of a few years raises financial problems not ordinarily faced by other towns which develop more slowly); JANE JACOBS, THE ECONOMY OF CITIES 122 (1969) (asserting that the problems of growing cities are only solved by new goods and services that increase economic abundance). Because zoning and environmental clean-up also involves scientific research and technological prowess, access to resources is also necessary to facilitate community understanding of the process and available information. See generally Spyke, *supra* note 3, at 293-95 (noting that environmental clean-up and rezoning "necessitates the compilation of enormous amounts of data" and that "participation programs demand large amounts of time, are difficult to manage").

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proposing the zoning changes itself at the community's request.¹⁸⁵ This assistance eliminated many potential pitfalls for the Vinegar Hill community, including financial and technical hindrances. In contrast, Greenpoint did its planning work without assistance from the city.¹⁸⁶ Financial constraints played a role in working through the different viewpoints because everyone participated on a volunteer basis and, for most people, this meant after a long day of work.¹⁸⁷ Such constraints slowed Greenpoint's progress and detracted from the amount of time available for political lobbying and dialogue.¹⁸⁸ Although it is admittedly unfeasible for the Department of City Planning to conduct zoning studies of every area requested, the city could provide grants or allow communities to apply for extra financial assistance.¹⁸⁹ Financial aid could remedy the disparity between communities with access

¹⁸⁵ See generally CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73 (indicating that city agencies conducted a zoning study and submitted proposals on behalf of the Vinegar Hill community); see also Bowles, *supra* note 64, at 21, 24 (surmising that Council member Ken Fisher's help in gaining historic landmark status for the Vinegar Hill district was instrumental in rezoning the district as residential).

¹⁸⁶ See generally *Schiffman Interview*, *supra* note 153 (noting the lack of municipal contribution to Greenpoint's planning process); *Handhart Interview*, *supra* note 18 (noting that Greenpoint residents and volunteer workers staffed many of the committees). Some commentators suggest that the city does not do enough to help industrial and commercial land users as well. See generally Jonathan Bowles, *The Big Squeeze*, CENTER FOR AN URBAN FUTURE, available at http://www.nycfuture.org/content/reports/report_view.cfm?repkey=54&area=realpol (May 1, 1999) (noting that a problem faced by industrial and commercial landusers is "the failure to develop the large supply of unused city-owned land" and that although the city possesses a substantial amount of land, "little has been done to encourage its redevelopment for industrial use."). *Id.*

¹⁸⁷ See *Handhart Interview*, *supra* note 18. According to Handhart, even though all public participation is voluntary, there is an advantage to having one or two people take on full-time coordination and organization rather than requiring people to devote time to the process after they may have already completed a day of work at a full-time job. *Id.*

¹⁸⁸ See generally *id.*

¹⁸⁹ Funding could be made available to individual communities in the event that the city is unable to provide staffing for the actual work.

to funding and communities without such resources. This would also remove some of the city's discretion as to which communities were economically desirable for rezoning, and lessen the impact of economic considerations and disparity in land use decision making.

Vinegar Hill also benefited from the city's technical assistance.¹⁹⁰ The fact that the Department of City Planning used its expertise to study the area and propose zoning changes relieved residents from struggling with the complications of environmental impact studies, statistical analysis and complex legal issues.¹⁹¹ Greenpoint, on the other hand, had to locate its own assistance. Over the years, local universities offered aid for Greenpoint's planning efforts but, because of the temporary nature of student research projects, this assistance was often incremental.¹⁹² Lack of technical assistance exacerbated

¹⁹⁰ See NYC ZONING STUDY, VINEGAR HILL, *supra* note 56 (noting that the city conducted zoning studies of the area, and such work was not undertaken at the community's expense). See also Angotti, *supra* note 25 (discussing the difficulty of obtaining approval of a district's 197-a plan without technical assistance from the City Planning Commission); Bowles, *supra* note 64 (suggesting that Vinegar Hill's plan was approved over proposals from other districts because "they had the politicians' ear"); Bill Farrell, *Vinegar Hill Eyes Future Decisions on Zoning*, N.Y. DAILY NEWS, Nov. 24, 1997, at 1997 WL 16053356 (describing certain rezoning proposals by the City Planning Commission).

¹⁹¹ See generally NYC ZONING STUDY, VINEGAR HILL, *supra* note 56 (including background information about existing land use and zoning of the area, recommendations for rezoning parts of Vinegar Hill, and statistical data and charts analyzing and highlighting the findings of the study). See also Angotti, *supra* note 25 (noting that developing a 197-a proposal is often prohibitively time-consuming and costly to the district if it does not receive at least some technical assistance from the City Planning Commission); Bowles, *supra* note 64 (suggesting that a community must gain the support of the City Planning Commission before developing a proposal because the assistance of the City Planning Commission increases the probability of a plan being approved).

¹⁹² See *supra* note 147 (noting the study completed by the Pratt Institute, which included an historical analysis, industrial and demographic profiles, a pilot real estate study, a telephone survey, an examination of zoning regulations and the impact of potential land use scenarios as well as a description of government programs affecting the neighborhood but pointing

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organizational struggles, and the lack of consensus among Greenpoint residents frequently frustrated those trying to help in the early stages of the planning process.¹⁹³ Greenpoint's current 197-a plan was drafted with the support and expertise of the Pratt Institute's Center for Community and Economic Development, which provided the organizational and consensus building techniques necessary to synthesize competing visions.¹⁹⁴

The burdens of community planning are great, and the Department of City Planning has acknowledged the importance of such assistance in the past.¹⁹⁵ Revisions to the City Charter in 1989 attempted to lessen this burden by removing environmental impact assessments from the 197-a process and allowing community boards the freedom to hire planning consultants to assist with 197-a plans.¹⁹⁶ Community Board requests to the

out that the plan did not achieve tangible results or effective re-zoning). *See also supra* note 150 (noting that Columbia University and the Pratt Institute have both offered volunteer services to communities seeking to re-zone or establish proposed 197-a plans).

¹⁹³ *See Handhart Interview, supra* note 18 (noting that, despite generous offers of assistance from institutes and community-based organizations, difficulties in communication and coalition building ultimately frustrated efforts and resulted in abandonment of start-up projects).

¹⁹⁴ *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 8 ("Greenpoint's 197-a plan was refined and completed over the past year with the technical assistance and resources from the Pratt Institute Center for Community and Environmental Development."); *see also* Bowles, *supra* note 64, at 25 (citing Ron Shiffman, director of the Pratt Institute Center for Community and Environmental Development, as the author of the Greenpoint 197-a plan).

¹⁹⁵ *See* MAS, STATE OF 197-A PLANNING, *supra* note 26, at 9 (acknowledging the difficulties of coalescing multiple viewpoints and formulating community rezoning plans and noting the importance of government assistance in doing so).

¹⁹⁶ *See supra* note 30; *see generally supra* Part III (discussing amendments to the City Charter and the role of the ULURP in undertaking environmental review studies). Some commentators have suggested, however, that this effort has been ineffective or even detrimental to community planning and municipal intervention in the process of environmental review and compliance. *See, e.g.,* Alan Breznick, *Building in N.Y. Getting Even Harder*, CRAIN'S N.Y. BUS., Jan. 1, 1990, at 11 (noting that provisions in the City Charter attempt to impose some limits on environmental reviews, but arguing

Department of City Planning for financial assistance to pay consultants, however, have been ignored.¹⁹⁷

Comparing the case studies, Vinegar Hill received substantial assistance from the Department of City Planning while Greenpoint received little. Without equal access to assistance, communities like Greenpoint will remain at a disadvantage when it comes to community-sponsored planning. Equitable sponsorship of communities is necessary to foster community-based 197-a plans from all communities, not just those that are effectively organized and politically savvy.

C. Each Community's Stated Goals

The success of the Vinegar Hill plan may also have stemmed from the limited goals of its efforts. The Vinegar Hill study encompassed a few blocks that the plan proposed to preserve as a residential area.¹⁹⁸ The destruction of the 135-year-old Roman

that complex state and federal environmental mandates beyond the city's control will hinder the charter's effectiveness); Alan Breznick, *Effort to Speed Environmental Reviews*, CRAIN'S N.Y. BUS., May 27, 1991, at 55 (citing real estate officials' concerns that the role and authority of the Office of Environmental Coordination, established under the 1989 City Charter revisions, has not been defined clearly enough to allow the office to accomplish its goal of hastening environmental review); Thomas J. Lueck, *Assessing New York's Charter Change*, N.Y. TIMES, Sept. 3, 1989, at § 10, 1 (quoting Kent Barwick, executive director of the Municipal Art Society, as stating the revisions to the City Charter "won't make things worse" but noting that "[t]hey simply fail to make things better.").

¹⁹⁷ See MAS, STATE OF 197-A PLANNING, *supra* note 26, at 10 (noting that requests to city agencies for financing and funding have gone unanswered). Community Boards continue to request funding from city agencies to review existing utilization and zoning requirements. See COMMUNITY DISTRICT NEEDS, *supra* note 46, at 21-22 (indicating that Community Board 1 "support[s] the use of city funds to develop 197-a plans and urge[s] the City to implement the Charter mandate of providing additional funding for each Community Board to have a planner on staff.").

¹⁹⁸ See CITY PLANNING COMMISSION FINAL REPORT, *supra* note 73, at 1 (noting that "Vinegar Hill is an approximately eight block area" and that "the Department of City Planning is undertaking this zoning study to determine if it is appropriate to rezone areas within Vinegar Hill to a residential district").

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Catholic Church in the early 1990s by a waste treatment company was the main catalyst behind neighborhood organizing.¹⁹⁹ That visible change made the residents fear that “the big and profitable business of garbage [would] rapidly destroy a small but beautiful area with great history.”²⁰⁰ The Department of City Planning

¹⁹⁹ Waldman, *supra* note 63, at CY8 (explaining that the destruction of this church created fear among residents that the owners of the property would begin treating waste on the site, which was directly across the street from a row of historic houses); *Choices Cover*, VILLAGE VOICE, Sept. 8, 1998, at 64 (noting that “with the destruction of the church, Vinegar Hill dug its heels into the ground and refused to budge”).

A strong reaction by one homogenous group to a particular action or siting decision, in this case the residents’ response to a waste treatment company moving in, is reminiscent of behavior known by the acronym NIMBY — “not in my backyard.” NIMBYism is a response seen when communities rally against a possible change in land use that is viewed as detrimental in some way. See generally Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047 (1994). Gerrard argues that “[a]lthough facility opposition is often trivialized with acronyms like NIMBY (“Not In My Backyard”), LULU (“Locally Undesirable Land Use”), or BANANA (“Build Absolutely Nothing Anywhere Near Anything”), even new, ‘state-of-the-art’ facilities pose real environmental hazards.” *Id.* at 1054. NIMBYism is often invoked to prevent sitings of LULUs in particular neighborhoods. *Id.*

The race and class ramifications of NIMBY actions are noted in the response acronym, PIBBY—“put in black’s backyard.” For an enlightening review of these and other environmental concerns in contemporary society, see ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990). The siting of an undesirable facility in a minority neighborhood is seen as an example of inequity in environmental protection. See also Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U.L. REV. 221 (1997) (noting that environmental laws may reveal that a site was selected despite its failure to meet the necessary qualifications and citing that the role of environmental justice in pursuing political justice ought to be explored in connection with environmental justice disputes involving the siting of undesirable land uses). The appearance of NIMBYism in Vinegar Hill’s process warrants concern because the community is not being represented in its entirety.

²⁰⁰ See Lentz, *supra* note 90, at 16 (detailing the nature of the dispute between local residents and business owners).

found those fears legitimate, and Commissioner Joseph Rose stated that the Department would “not do anything that has an adverse impact on the economic activity in the area, [b]ut [] [would] take action to prevent the area from being turned into a waste transfer focus.”²⁰¹

Greenpoint’s plan was also “a response to a series of ill-considered public and private actions. From the late fifties to today public policies have led Greenpoint’s eastern sector to become a ‘dumping ground’ for burdensome facilities.”²⁰² However, Greenpoint’s plan differs from Vinegar Hill’s in many respects. Greenpoint’s plan encompasses a much larger area.²⁰³ and calls for a re-evaluation of environmental standards, planned open space and more pedestrian-friendly streets.²⁰⁴ In contrast to

²⁰¹ *Id.*

²⁰² See PROPOSED GREENPOINT 197-A, *supra* note 109, at 3. *Cf.*, Michael Burger, *NYC Issues 2001: The Environment*, GOTHAM GAZETTE, at <http://www.gothamgazette.com/searchlight2001> (stating that New York City’s short-term solutions for its environmental problems “saddles” low income neighborhoods like Greenpoint with power plants and waste transfer stations and as a result these neighborhoods shoulder the city’s pollution burdens); JANE SWEENEY ET AL., ENVIRONMENTAL BENEFITS PROGRAM, The Mega-Cities Project Publication MCP-018G, (1998) (asserting that Greenpoint suffers from severe environmental degradation as a result of its high concentration of industrial activity and the community’s position at the center of New York City’s waste disposal network).

The community is host to: a large, antiquated incinerator burning garbage (including medical waste) from the entire city; numerous garbage “transfer stations,” often resulting in illegal dumping; and a massive waste water treatment plant, the Newtown Creek Water Pollution Control Plant (WPCP), which handles about 20% of the city’s waste water and has not been in compliance with state environmental regulations for years.

Id.

²⁰³ As noted, Vinegar Hill’s plan encompassed merely eight blocks. See NYC ZONING STUDY, VINEGAR HILL, *supra* note 56, at 1. Greenpoint’s plan, however, initially included fourteen census tracts and was later expanded to include an additional seventeen block area. See PROPOSED GREENPOINT 197-A, *supra* note 109, at 8.

²⁰⁴ See *id.* at 38 (recommending economic, social, environmental, as well as quality of life improvements for Greenpoint). Recommendations included

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Vinegar Hill's call for down-zoning, Greenpoint seeks to remain a viable mixed-use district with a diverse residential population and cleaner industry.²⁰⁵ Greenpoint's 197-a plan states that "[i]t is a plan to address the future of this community, to build upon its strengths, and to eliminate the impediments to the growth of a healthy and viable community."²⁰⁶ The larger scope and the emphasis on mixed-use districts should be lauded as an innovative approach toward accepting and promoting responsible industry.²⁰⁷ Instead, the scope of Greenpoint's plan may have

initiating a charter calling "for *Fair Share* Siting Criteria to be used as a guideline in locating city facilities" so as to prevent the community from expanding burdensome facilities, and developing "an aggressive and sustained greening program for Greenpoint." *Id.*

²⁰⁵ *Id.* at 20-22. The Greenpoint 197-a plan notes that planning involves providing job training for new young immigrants and developing community facilities such as schools and other educational institutions that respond to Greenpoint's diverse population. *Id.* at 56, 57. It also includes building a new library that incorporates an expanded collection of books in foreign languages to meet the needs of Greenpoint's diverse ethnic groups. *Id.* at 57. The plan also involves creating a centrally located space for local community groups, which would allow and further encourage the development of a cooperative spirit among diverse groups. *Id.* This space would also accommodate a harvest festival every summer to celebrate Greenpoint's diversity. *Id.*

²⁰⁶ *Id.* at 3.

²⁰⁷ See PROPOSED GREENPOINT 197-A, *supra* note 109, at 20-22. The Greenpoint plan proposes mixed-use zones that would limit industrial expansion to businesses that enter into good neighbor agreements and demonstrate that they can meet strict environmental performance standards. *Id.* at 32. Performance-based standards are ceilings on the amount of pollution a given manufacturer can emit and permit manufacturers to choose how to meet the applicable standard. For a thorough explanation of this and other regulatory controls, see generally Jonathan Remy Nash, *Too Much Market? Conflict between Tradable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465 (2000). Nash proposes that "[m]odern environmental regulations grow out of the understanding that, in their absence, manufacturers will externalize their costs and push them down the line to government or society-at-large." *Id.* at 480. He states that "[r]egulations seek to avoid this undesirable result by forcing prospective polluters to take measures, at their cost, to reduce their pollution emissions to an acceptable level and pay for damages caused by residual pollution emissions that occur despite these measures." *Id.*

stalled its progress. According to the Brooklyn Office of City Planning, the plan's breadth most likely resulted in the City Planning Commission striking down many parts of the plan.²⁰⁸ Others suggest however, that plain economic efficiency prevented implementation of the plan.²⁰⁹

Arguably, the city has little economic incentive to approve a plan like Greenpoint's. A pure cost-benefit analysis might reveal that such a plan is economically inefficient due to the administrative costs of restructuring the environmental standards, the costs of monitoring compliance, and the economic burden placed on industries' production levels as a result of stricter standards.²¹⁰ Others, however, might suggest that the plan is efficient in the long-term because it reduces environmental harm and may bring new residents and businesses to the area; thus the up-front costs of restructuring and monitoring are balanced by the

²⁰⁸ See *Ahmed Interview*, *supra* note 172 (suggesting that the scope of Greenpoint's proposed re-zoning areas and overall sweep of the plan had deleterious effects on the agency's acceptance of the provision as a whole); see also Bowles, *supra* note 64, at 24. According to those that have worked on the plan, the Office of City Planning has not embraced many of the community's recommendations. *Id.* at 25. Officials have informed the community that the changes they are calling for are not in accordance with city regulations. *Id.* Planners have theorized "that the Commission is motivated by a desire to reserve potential sites for essential services that can't be located outside the city." *Id.*

²⁰⁹ See Bowles, *supra* note 64, at 24. According to Bowles, some observers attributed the plan's failure to "the agency's coziness with real estate industry, which they say results in a bias toward zoning land for the most profitable uses possible." *Id.*

²¹⁰ See, e.g., Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 793 (1992) (noting that "environmental protection requires governmental expenditures, the source of which varies from general personal and corporate income taxes to special environmental taxes. These expenditures necessarily decrease public monies available for other social welfare programs"); see also Wallace E. Oates, Symposium, *Innovations in Environmental Policy: From Research to Policy: The Case of Environmental Economics*, 2000 U. ILL. L. REV. 135, 149 (2000) (noting the difficulty of placing monetary values on benefits, such as improved health and extended longevity, that result from reduced air pollution).

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future benefit.²¹¹ Participation theory advocates would support Greenpoint's plan because of the value of the consensus-building process itself in empowering communities and encouraging leadership.²¹² Thus, whether decision makers should be guided by an economic model or public participation model becomes an important question.

D. Conclusions Drawn from the Case Studies

Community demographics; access to technical, financial and political resources; and the development and economic needs of the city are all at play when a community seeks to organize and influence land use decisions. The case studies present two narratives that illustrate the disparate effects of the current decision-making scheme. While it is fair to allow the city a degree of input into community-sponsored plans to ensure that citywide agendas are not undermined, something more than economic analysis must guide the decisions of the Department of City Planning. Without an emphasis on public participation and inclusive decision making, there are no mechanisms in place to ensure that the Department of City Planning is accountable to disadvantaged communities whose interests may differ from those

²¹¹ Cf. NICK HANLEY ET AL., ENVIRONMENTAL ECONOMICS IN THEORY AND PRACTICE 29 (1997). Other overlapping rationales that explain environmental problems include the Coase theorem (arguing that the failure or inability of institutions to establish well-defined property rights results in lack of economic incentives to prevent environmental degradation); "tragedy of the common" (arguing that when it is impossible or costly to deny access to an environmental resource, the preservation/conservation of the common resource is likely to be ignored); and Samuelson's public goods theory (arguing that since everyone benefits from the services provided by a pure public good such as clean air, it is easy for a "free rider" to enjoy the benefits without paying for them). See generally *id.* at 22-57.

²¹² See, e.g., Spyke, *supra* note 3, at 271. Spyke notes that "although it may be true that the primary goal of some individuals is to convince decisionmakers to accept their solution to a problem, a secondary goal is to create feelings of self-confidence and shared control of government." *Id.* Thus, the participation in the process is itself empowering and affords "a sense of control over one's life and a feeling of political efficacy can also lead individuals to perceive the decisionmaking process as more democratic." *Id.*

of the city at large.

VI. TOWARD A NEW SOLUTION

The first step towards infusing land use decision-making processes with meaningful and inclusive public participation is to favor comprehensive plans, like the two examined above, over ad hoc zoning.²¹³ The idea of comprehensive planning has long been considered integral to the idea of zoning and, within the province of state and local governments, as responsive to community needs.²¹⁴ The Department of Commerce's Standard Zoning Enabling Act ("SZEА") of 1922 required that land use decisions be made "in accordance with a general plan."²¹⁵ Soon after the

²¹³ See NEW YORK CITY DEPARTMENT OF CITY PLANNING, 197-A PLAN TECHNICAL GUIDE 7 (1997). The Technical Guide suggests that the 197-a process will work and be effective over time if the community offers its consensus on the principles that should guide future land use. *Id.* Those principles will in turn serve as a guide for the agencies and individuals in decision-making positions about the neighborhood. *Id.* Furthermore, the strong community support will convince those decision makers that the actions proposed by the community are necessary. *Id.* at 8.

²¹⁴ See, e.g., *Euclid v. Ambler Realty*, 272 U.S. 365 (1926). *Euclid* involved a challenge to the comprehensive plan for the Village of Euclid, Ohio that regulated and restricted the location, size, and height of the companies, industries, apartment buildings, two-family houses, and single-family houses. *Id.* at 380. An owner of unimproved land within the corporate limits of the village, sought the relief upon the ground that, because of the building restrictions imposed, the ordinance operated to reduce the normal value of his property, and to deprive him of liberty and property without due process of law. *Id.* at 383-84. The Court noted that:

[i]f the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.

Id. at 393, quoting *State v. City of New Orleans*, 97 So. 440 (La. 1923).

²¹⁵ See Standard State Zoning Enabling Act (U.S. Dep't of Commerce rev. ed. 1926), reprinted in Model Land Dev. Code app. A at 210-21 (Ten. Draft No. 1, 1968); see also Carol M. Rose, *Planning and Dealing:*

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SZEA was enacted, general plans were deemed inflexible and disruptive to growth.²¹⁶ “Wait and see” zoning developed as a reaction to the limits of comprehensive plans.²¹⁷ Courts have not consistently expressed a preference for one form over the other. Indeed, at least one state court went so far as to practically endorse “wait and see zoning,”²¹⁸ while other courts have tended to treat individual rezoning requests with less deference, instead upholding the primacy of the general plan.²¹⁹ Nevertheless, a lack

Piecemeal Land Controls as Problem of Local Legitimacy, 71 CALIF. L. REV. 839 (1983) [hereinafter Rose, *Planning and Dealing*]. Rose notes that:

[t]he planning idea is not new, although it has only recently been taken seriously. In fact, the preference for ‘structured’ land decisions harks back to one of the oldest methods of assuring both fairness and due consideration in local land use regulation. The Department of Commerce’s Standard Zoning Enabling Act (SZEA), first published in 1922 and adopted by most states over the next few years, required that local land use controls be “in accordance with” a general plan.

Id. at 848. A general plan developed by each community considers its own locally defined goals and is then utilized to direct and guide future decisions affecting land use within that community. *Id.*

²¹⁶ See, e.g., Lon L. Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305 (1955). Fuller offers narratives that explain the inflexibility inherent in the government planning of economic activity. *Id.* at 1325. One example is the planning of a road. *Id.* He claims that, while planning the road in advance would be beneficial in some respects, such as the ability to bring in experts to devise the best route, it would also have drawbacks because the planning would not take into account future utilization of the road. *Id.*

²¹⁷ See, e.g., Edward J. Sullivan & Thomas G. Pelham, *The Evolving Role of the Comprehensive Plan*, 29 URB. LAW 363 (1997) (noting that ad hoc zoning, “affect[s] the land of the few without proper regard to the needs or design of the community as a whole”). The essential purpose of the requirement that rezoning be in accordance with a comprehensive plan is to guard against ad hoc zoning, or “wait and see” zoning, which allows for small parcels to be rezoned one at a time. *Id.*

²¹⁸ See *Snyder v. Bd. of County Comm’rs*, 595 So.2d 65 (Fla. Dist. Ct. App. 1991) (finding individual rezoning requests, essentially ad hoc piecemeal re-zoning, legislative in nature and thus subject to deferential review by the courts).

²¹⁹ See *Bd. of County Comm’rs v. Snyder*, 627 So. 2d 469 (Fla. 1993) (quashing a lower court finding that ad hoc zoning request should be given deferential review by courts). The problem with deferring to ad hoc zoning

of a comprehensive plan remains the norm.²²⁰ Such plans, especially when they result from an inclusive process, do more to foster public participation and simultaneously decrease the potential for corruption because of the diversity of opinions shaping the decisions.²²¹ Some argue that ad hoc zoning, in contrast, is vulnerable to domination by factions.²²²

Ad hoc zoning does include a degree of public participation, but this participation is more likely to be at the decision-making stage when developers are attempting to obtain variances or special use permits.²²³ At this point, public opposition to the

lies in the difficulty in determining what qualifies as an individual rezoning request as opposed to a comprehensive zoning plan. *Id.* at 471. The Florida Supreme Court overruled the deferential standard as it applied to individual rezoning, noting that “comprehensive rezonings affecting a large portion of the public are legislative in nature.” *Id.* at 474. The court emphasized that zoning decisions should be consistent with a legislatively sponsored comprehensive plan. *Id.*

²²⁰ See Rose, *Planning and Dealing*, *supra* note 215, at 841 (noting that the variance, conditional use permit, and small-scale rezoning ordinance are “the everyday fare of local land regulations”); see also Daniel R. Mandelker, *American Planning Association Growing Smart Project: The Growing Smart Legislative Guidebook*, SH018 ALI-ABA 757 (2002) (describing the “wait and see” approach to zoning and stating “the process for obtaining [a] zone change and the discretionary permits is often a sequential, rather than a concurrent, one, and considerable negotiation and uncertainty [especially with neighboring property owners] occur at each step of the process”).

²²¹ See NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY: DOUGLAS COMMISSION REPORT, H.R. DOC. NO. 91-34, at 220 (1968) [hereinafter DOUGLAS]; see also Rose, *Ancient Constitution*, *supra* note 9, at 96-97 (citing the virtues of “possibilities for constituent contact and civic participation” in local government as “structural restraints” on political power); Fred P. Bosselman, *The Impact of the Douglas Commission of Local Planning*, C85 ALI-ABA 433, 471 (1993) (describing the “wait and see” technique as a promising device toward achieving harmony without monotony in small-scale relationships between blocks and neighborhoods).

²²² See, e.g., DOUGLAS, *supra* note 221, at 206-08 (discussing why the wait-and-see approach has replaced more self-executing regulations); see Rose, *Ancient Constitution*, *supra* note 9, at 855 (discussing the propensity for faction domination when a legislative body is drawn from too small or homogenous constituency).

²²³ See Eric Bergman & Arthur Jacobson, *Environmental Performance*

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rezoning is not economically efficient because it can result in delay or abandonment of a project in which developers and businesses are already invested.²²⁴ The form of inclusive participation that results in building consensus and empowering citizens directs attention to the process itself. Although Vinegar Hill's process may seem like an example of successful public participation, it qualifies only insofar as residents are concerned.²²⁵ To be sure, public hearings are a form of public participation. It is troublesome, however, that the public hearings did not generate meaningful dialogue or affect the decision-making process, because the strong opposition by area business was virtually ignored.²²⁶ Vinegar Hill's process, though

Review: Self Regulation in Environmental Law, 16 CARDOZO L. REV. 465 (1994). In the course of an "environmental review process," the lead agency initially determines whether the specific project sought to be pursued will have a substantial environmental impact. *Id.* The findings are presented to the agency and rigorous debate ensues among the related entities. *Id.* This phase of the process is not open to the public. *Id.* at 489. However, agency rules often require public participation with zoning variances and condemnation, in the course of which relevant environmental factors are often raised. *Id.* For further analysis of regulation of the zoning process, see Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 845 (1994) (discussing how both urban and rural areas have rules to regulate the balancing of exchange and use values of land, but cities have many more rules that factor into weighing these values, including public participation in variances to them).

²²⁴ See JOHN VRANICAR, STREAMLINING LAND USE REGULATION: A GUIDEBOOK FOR LOCAL GOVERNMENTS 4-7 (1980) (considering problems with zoning systems, including that of "wait and see zoning," zoning used to discourage homebuilding, delays and complicated rules for applications, and the turning of land use into a "lawyers' game").

²²⁵ See *supra* Part IV.A (indicating that Vinegar Hill's zoning process was largely a product of residential participation, at the exclusion and expense of commercial and industrial interests).

²²⁶ See Lentz, *supra* note 90. Lentz notes that the plan to rezone Vinegar Hill has been met with displeasure by many of the industrial inhabitants of the area, because it overtly favors local homeowners. *Id.* The proposed zoning plan was initiated to protect residents from further industrial and commercial expansion. *Id.* The city's plan seeks to prevent more waste treatment stations from occupying Vinegar Hill to ameliorate some of the concerns of its residents. *Id.* Conversely, local commercial entities fear this plan will hinder

successful in some respects, is reminiscent of a more individualized rezoning request and not a model for consensus building.

In contrast, consensus building was one of the main visions of Greenpoint's plan:

The Greenpoint 197-a Plan identifies planning and development strategies that respond to the needs of the Greenpoint community and build on its assets. The Greenpoint Waterfront Committee, working together with local community groups and organizations, prepared the plan which reflects a consensus of different neighborhood interests. Through public forums, workshops, discussions, petitions, and local newspapers, collaboration between community-based groups, merchants, residents, manufacturers, new and old immigrants, and the young and the old began to revitalize the community by means of this local planning process.²²⁷

Evidence of an inclusive process is found in the unanimous consent for the plan from all groups: industry, businesses, homeowners and renters.²²⁸ The ultimate unanimity does not indicate that the process was easy. Rather, it highlights the important work that is done when all affected groups come together to determine the optimal usage for land in their neighborhoods.²²⁹ Such consensus building is much more likely to

future business growth and eventually force them out of the community. *Id.* Currently, Vinegar Hill is zoned for manufacturing, with a majority of the homes listed as nonconforming uses. *Id.* The proposal would effectively rezone the area to make it predominately residential. *Id.*

²²⁷ PROPOSED GREENPOINT 197-A, *supra* note 109, at 6.

²²⁸ See *supra* note 172 (quoting the plan's assertions, as well as first-hand accounts, of unanimity); see also Dennis Hamill, *Writer's a Fighter for Greenpoint*, DAILY NEWS, Mar. 26, 2000, at 8 (detailing the activism of members of the Greenpoint community in forming the Greenpoint 197-a Waterfront Committee and suggesting reasons why these groups approved the Greenpoint Plan).

²²⁹ See, e.g., Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996). A more inclusive process for land use decisions is recommended if a community's process for comparing risks and benefits fails to capture all of the considerations believed to be relevant to its residents. *Id.*

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occur when the entire neighborhood is at issue rather than through piecemeal “wait and see” zoning.²³⁰

The result of Greenpoint’s consensus building was an innovation proposal for mixed-use zoning which holds industry to performance-based standards.²³¹ The plan rejects the notion that industry is categorically inconsistent with environmental health.²³² Instead of exacerbating the divide between jobs and the environment or residents and industry, the Greenpoint community took responsibility for its industrial sites, recognized the large portion of residents whose livelihood depended on that industry, and incorporated industry’s needs into the plan.²³³

The mixed-use zones proposed by the Greenpoint plan are to be preceded by performance-based standards that are meant to “guarantee that any enterprise that locates or functions in Greenpoint meets the highest environmental standards and

at 104.

²³⁰ See Rose, *Planning and Dealing*, *supra* note 215, at 841-42 (noting that piecemeal changes appear to have little effect outside the individual developer and the property’s neighbors, but that the effects have a significant “cumulative effect”). See also Spyke, *supra* note 3, at 296 (noting that “piecemeal enactment of federal laws has left the nation with a patchwork quilt of legislation.”).

²³¹ See PROPOSED GREENPOINT 197-A, *supra* note 109 (discussing how collaboration between community-based groups, merchants, residents, manufacturers, and people of different demographic groups, relying upon public forums, workshops, petitions, and advertisements in local newspapers, resulted in a decade of planning and developing strategies to respond to the needs of the entire Greenpoint community through communication, negotiation, and eventually consensus).

²³² *Id.* at 32. The plan promotes industrial development while simultaneously initiating conservationist and other environmental programs that work in conjunction with the new development. *Id.* The plan advocates “sustainable development,” defined as development that “maintains or enhances economic opportunity and community well-being while protecting and restoring the resource base and the life support systems upon which people and economies depend.” *Id.* This sustainability plan includes “integration of conservation and development efforts” and “maintaining ecological integrity.” *Id.* One example proposed in the plan is the promotion of tree planting, park creation, and the greening of industrial zones. *Id.*

²³³ *Id.* at 35.

contributes to improving the area's quality of life."²³⁴ The community would use tools like mandatory demonstration of ability to comply and good-neighbor agreements to implement such standards.²³⁵ Under this model, mixed-use zones become opportunities for both business and residential expansion, while at the same time bringing conversions and nonconforming uses into conformance.

Greenpoint's process provides an excellent example of an innovative plan that reflects the needs of all members of the community. Reliance on mixed-use districts breathes new life into abandoned manufacturing zones along Brooklyn's waterfront, and simultaneously retains the businesses and industry that are vital to many of the working class residents. The plan also encourages future compromise between residents and industry by performance standards developed in conjunction with good neighbor agreements.²³⁶ Instead of forcing out less desirable industry, it creates innovative monitoring stations in conjunction with the New York City Department of Environmental Protection.²³⁷ The monitoring stations would educate the public about environmental effects of the industry while measuring air and water quality to ensure compliance with existing regulations.²³⁸ Additionally, the plan provides for commercial

²³⁴ *Id.* at 32.

²³⁵ *Id.* Mandatory demonstration of ability and the Good Neighbor Agreements Program would guarantee community oversight of local industries in order to increase the performance standards at which local industries operate. *Id.*

²³⁶ These standards would of course have to allow for reasonable industry, so that the compromise does not disappear into the details. *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 56 (noting that the plan seeks to promote residential and economic development while protecting Greenpoint's ecological balance).

²³⁷ PROPOSED GREENPOINT 197-A, *supra* note 109, at 42. In order to protect the residents and workers from environmental hazards, the Greenpoint plan proposes the use of environmental monitoring and education stations. These stations will be accessible to the public and located throughout the Greenpoint community. *Id.* Moreover, these stations will monitor air, water, and noise pollution in Greenpoint. *Id.*

²³⁸ *Id.* at 42. Monitoring systems would be in place to enforce the cleanup

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development while retaining a mix of both market rate and affordable housing units in an effort to satisfy both landlords and renters worried about gentrification.²³⁹

Nevertheless, the City Planning Commission's response to Greenpoint's plan focused inordinately on economic repercussions for the city and what the city's role and expenses would be in implementing aspects of the plan.²⁴⁰ The Commission seemed most concerned about the aspects of the plan that could inhibit future industrial sitings in the neighborhood.²⁴¹ This response reflects an economic approach to decision making and indicates reliance on a short-term cost-benefit analysis rather than a long-term approach that would recognize the benefits inherent in a participatory process.²⁴² Such a response undermines the importance of the planning process, and instead removes the

of the Mobil Oil Spill, develop an aggressive and sustained greening program, enforce existing air pollution controls, and enforce existing regulatory rules for currently polluting industries. *Id.*

²³⁹ *Id.* at 33; *Handhart Interview, supra* note 18 (discussing the need to account for the demands and fiscal realities of landlords as well as renters).

²⁴⁰ *Handhart Interview, supra* note 18. Other questions included where the waste would be deposited and to what extent the city policy would alter concerning the effective zoning regulations. *Id.*

²⁴¹ *Id.* The commission's concerns about the inhibition of industrial development in the neighborhood appears unwarranted. Greenpoint's manufacturing zones lie in close proximity to its residential core. *Id.* Greenpoint desires to limit industrial expansion to those businesses that enter into "good neighbor agreements," demonstrating that they can meet strict environmental performance standards. *Id.* An improved quality of life and healthy environment can generate future jobs. *Id.* The commission may also be concerned that the restrictions and regulations on traffic could deter development. *Id.*

²⁴² It should be noted that the Commission could have been concerned about the possibility of Greenpoint's plan being rooted in NIMBYism, but this explanation is unlikely, given the presence of industrial sites included in the plan. *See* PROPOSED GREENPOINT 197-A, *supra* note 109, at 38 (recommending, for example, that a plan "retain New town Creek as a 'Significant Maritime and Industrial Zone' and an Industrial Sanctuary"). Also, the Commission made reference to no such concerns with respect to Vinegar Hill, which tends to show that something else is driving the Commission. *See* NYC ZONING STUDY, VINEGAR HILL, *supra* note 56 (making no reference to NIMBYism).

people from their government.

VII. PROPOSED LEGISLATIVE CHANGE

Some planners and scholars have begun to think beyond short-term economics when it comes to planning decisions, providing models that can serve as guides to encourage development of neighborhood plans.²⁴³ One such example proposes creating community-building initiatives by combining public, private and community resources.²⁴⁴ For example, in Richmond, Virginia the Department of Community Development created a Division of Neighborhood Planning that “collaborates with residents, property owners, businesses, institutions and other city agencies to develop revitalization plans for specific neighborhoods that will serve as amendments to the City of Richmond Master Plan.”²⁴⁵ The City of Milwaukee, Wisconsin

²⁴³ One example uses private foundations as sponsors for comprehensive community planning initiatives. *See, e.g.*, MUNICIPAL ART SOCIETY, THE WILL TO PLAN: COMMUNITY-INITIATED PLANNING IN NEW YORK CITY at 21 (noting that in addition to the contributions of private organizations, individual experts often “helped the board prepare the plan for less by donating a great deal of their time”). A second model creates federally funded partnerships between universities and communities. *See e.g. Federal Funding Available for Environmental Justice Issues in The Bronx*, N.Y. VOICE, Aug. 16, 1995. The Community/University Environmental Justice Grant awarded \$299,939. *Id.* The Hostos Community College provided matching funds, making the total grant \$328,939. *Id.*

²⁴⁴ *See, e.g.*, MAS, STATE OF 197-A PLANNING, *supra* note 26, at 5 (reviewing and outlining this proposed method for encouraging community participation). Examples of this method can be found in Richmond, Virginia, Milwaukee, Wisconsin, and Portland, Oregon.

²⁴⁵ *Id.* at 7. There are several goals for housing and neighborhood development in Richmond, including: developing commercial and retail projects in designated areas to prevent encroachment into residential communities; building “cooperative relationships with city schools, community-based organizations, public facilities, and city government” to improve education, city image, and neighborhood vitality; and eliminating substandard housing while preserving architectural, historic, and cultural heritage. For a full review of Richmond’s city plan, including background information, goals and methods to include community input for housing and

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uses Community Development Block Grant money to finance its Neighborhood Strategic Planning initiative that “serves as the mechanism for the development of comprehensive, community-based, long-term strategic plans for 17 planning areas in the City of Milwaukee.”²⁴⁶ Drawing leadership from the communities, the Milwaukee initiative utilizes the city’s technical and financial resources in its inclusive planning process.²⁴⁷ Portland, Oregon uses a “Community and Neighborhood Planning Program” to update its comprehensive plan.²⁴⁸ This program divides the city

neighborhood development *see* City of Richmond’s Master Plan 2000-2020, *available at* <http://www.richmondgov.com/ecitizen/documents/masterplan/masterplan2001.asp> (last visited Jan. 6, 2003).

²⁴⁶ For a full review of Milwaukee’s efforts and goals in implementing this program, *see generally* City of Milwaukee Community Development Block Grant Program, *available at* <http://www.ci.mil.wi.us/citygov/doa/admin/cbga.htm> (last visited Jan. 6, 2003) [hereinafter *City of Milwaukee Website*]. The Community Block Grant Administration “is responsible for applying for recommending the allocation of, and overseeing the effective use of approximately \$30 million of federal funds or programs in targeted central city neighborhoods.” *Id.* “It is used for housing rehab programs, special economic development related to job and business development, and public service programs such as crime prevention, job training, housing for homeless, youth recreation programs and community organization programs.” *Id.* “The CDBG office works collaboratively with nonprofit groups, government agencies, and public/private coalitions to coordinate activity that increases home ownership and property values, reduces crime, and promotes greater employment and business activity.” *Id.* *See also* MAS, STATE OF 197-A PLANNING, *supra* note 26, at 7 (acknowledging the existence of this method of planning).

²⁴⁷ *See generally* *City of Milwaukee Website*, *supra* note 246, for a discussion of the inclusive nature of Milwaukee’s procedures. Milwaukee’s Community Block Grant Administration “is responsible for applying for, recommending the allocation of, and overseeing the effective use of approximately \$30 million of federal funds or programs in targeted central city neighborhoods.” *Id.* The office “works collaboratively with nonprofit groups, government agencies, and public/private coalitions to coordinate activity that increases home ownership and property values, reduces crime, and promotes greater employment and business activity.” *Id.* To date, the office has worked with community leaders to develop neighborhood strategic plans in seventeen neighborhood planning areas. *Id.*

²⁴⁸ *See generally* City of Portland, Oregon, Bureau of Planning, *available*

into districts and encourages a participatory process in designing each district's comprehensive community plan, focusing on both the neighborhood's immediate and long-term goals as well as on-going regional and citywide efforts.²⁴⁹ All of these programs encourage community involvement and help forge respectful relationships between city agencies and community groups. Although these programs are all relatively new, they indicate an interest in regulation directed toward encouraging, and sponsoring, comprehensive community planning.

This article draws on administrative law doctrines to propose legislative reforms that would place public participation at the forefront of the land use decision-making process.²⁵⁰ This

at <http://www.planning.ci.portland.or.us> (last visited Jan. 6, 2003), for a comprehensive review of Portland's planning process. The City Council adopted the Community and Neighborhood Planning Program in May, 1984 "as the city's approach to updating its Comprehensive Plan/Zoning Map." *Id.* The goal of the program was to "create the opportunity for a more focused examination of Portland's neighborhoods, business areas, industrial sanctuaries, and open space." *Id.* Each community plan would address all Comprehensive Plan goals as well as other issues of significance to each of the plan areas. *Id.* To date, the city has adopted four community plans to update the city's Comprehensive Plan. *Id.*

²⁴⁹ See generally COMPREHENSIVE PLAN GOALS AND POLICIES, City of Portland, Oregon, Bureau of Planning, 12-16 (1999), available at <http://www.planning.ci.portland.or.us/pdf/ComprehensivePlan.pdf> (last visited Jan. 6, 2003) (describing how Portland's Bureau of Planning staff held meetings with neighborhood associations, civic groups, and trade organizations to discuss their concerns, and revised the planning process to incorporate their concerns). Citizen involvement in land use planning is mandated in Oregon state. See also OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES: GOAL 1, OREGON DEP'T OF LAND CONSERVATION AND DEVELOPMENT 1, available at <http://www.lcd.state.or.us/goalpdfs/goal01.pdf> (last modified Nov. 1, 2002).

²⁵⁰ See generally Federal Administrative Procedure Act, 5 U.S.C. §§ 551-552 (2003) (mandating that government agencies make available to the public information regarding organization, function, and overall activities). The purpose of Section 552, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to disclose certain agency information for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose.

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legislation should take the form of a modified deference rule.²⁵¹ The City Planning Commission would be required to defer to comprehensive community plans that demonstrate the inclusive nature of its process.²⁵² This legislation would thus reward comprehensive plans formed by all members of a community through consensus-building techniques.

A properly structured deference rule requires standards by which to gauge the amount of consensus building in a community planning process. This can be measured by efforts such as door-to-door canvassing and distribution of planning materials, but also by examining the resulting proposed plan. For example, a mixed-use plan proposed by a community with substantial industrial and residential bases may be indicative of attempts at consensus building. The same could be said for a plan that retains a percentage of existing housing stock or requires multiple types of residential zoning to curb gentrification. All of these elements could be deemed evidence that a dialogue took place, and that the community's voices were heard and accounted for.

This reform would equalize the ability of all communities to influence decisions and temper the City Planning Commission's discretion to decide such matters based solely on what is most efficient for the Commission and the city. It would also prevent administrative corruption and arbitrary decision making by creating an enforceable standard of review for 197-a plans.²⁵³

Id.

²⁵¹ The deference rule is commonly applied in the courts to administrative agency decisions. *See, e.g.*, *Consolation Nursing Home, Inc. v. Comm'r of N.Y. State Dep't of Health*, 648 N.E.2d 1326, 1328 (N.Y. 1995) ("An administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise"); *N.Y. State Ass'n of Counties v. Axelrod*, 577 N.E.2d 16, 30 (N.Y. 1991) (stating that under the usual deference rule, the "challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary").

²⁵² An independent, preferably elected, body could conduct a review of each plan's process to determine its inclusiveness.

²⁵³ 197-a plans are currently relegated to mere "policy guidelines" and no official standard of review is in place. *See supra* Part III (noting that amendments to the City Charter weakened the impact of community-sponsored

Legislative ratification of inclusive participation would create respectful working relationships between local governments and their constituents, encourage accountability and restore integrity to a democratic system. It would discourage exclusionary actions by rewarding communities that accept and integrate their fair share of essential industrial uses. This, in turn, improves community acceptance of essential, yet undesirable, land use by fostering self-determination in siting decisions, thereby reducing negative reactions to industrial land use. This article also advocates for provision of funding for community planning. Distribution of funds and resources remedies disparity in community attempts at planning by removing obstacles faced by low-income communities.²⁵⁴ Moreover, the city should be involved, financially and technically, with the community from the outset to encourage such consensus building.

The 197-a process set forth in the City Charter should be amended to include this deference rule and funding allowance.²⁵⁵ Although such participation may be less efficient in the short-term, the long-term effects of community consensus and empowerment will benefit the city by restoring legitimacy to its process.²⁵⁶ The reform's emphasis on the process rather than the

197-a plans).

²⁵⁴ See *supra* Part IV (discussing the adverse effects that disparity in access to financial and technical resources has had upon the relative success of the case study plans).

²⁵⁵ See generally N.Y.C. Charter § 197-a (setting forth the current procedure for community-sponsored plans).

²⁵⁶ This legislative amendment could counter some of the criticisms of the current 197-a process. For example, one weakness of 197-a plans is that they are not legally binding, and therefore can serve as nothing more than "references for decision making in a particular area." See Jocelyn Chait, *Community-based Planning: Moving Beyond the Rhetoric*, at <http://www.plannersnetwork.org/htm/pub/archives/147/Chait.html> (May/June 2001) (noting that "[d]espite the fact that '197-a plans' must go through exhaustive public review and scrutiny prior to their adoption by the City Council, they are not legally binding. At best, they serve as references for decision making in a particular area."). Another criticism is that inadequate funding for plans leads to "inefficiencies and delays, strains the energy and resources of community residents, and ultimately leads to burnout and disillusionment." *Id.* See also New York League of Conservation Voters, 197-

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result would provide an immediate reward for all communities that approach the planning process inclusively and openly. These reforms would most likely withstand judicial scrutiny.²⁵⁷ It would be difficult to challenge a policy of deference as arbitrary and capricious, in light of case law and statutes supporting land use decisions made “in accordance with a general plan.”²⁵⁸

a Needs Some 911, ECO POLITICS, available at <http://www.nylcv.org/ecopolitics/nyc.htm> (Winter 2001-2002) (commenting on lack of funding or support for the plans and the inaction of agencies based on their view of the plans as impediments to Mayoral directives).

²⁵⁷ The proposed amendment could draw on judicial standards of review applicable in cases examining compliance with public participation requirements under the Federal Administrative Procedure Act. *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The Supreme Court set forth the standard of review in such cases as follows:

The generally applicable standards of § 706 [of the Administrative Procedure Act] require the reviewing court to engage in a substantial inquiry. Certainly, the [agency’s] decision is entitled to a presumption of regularity. But that presumption is not to shield [the agency’s] action from a thorough, probing, in-depth review. The court is first required to decide whether the [agency] acted within the scope of [its] authority Scrutiny of the facts does not end, however, with the determination that the [agency] acted within the scope of [its] statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The final inquiry is whether the [agency’s] action followed the necessary procedural requirements. Such a requirement would make it more likely that the amendment would be enforceable, and not merely another vague nod to public participation.

Id. at 415-17.

²⁵⁸ *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (validating a zoning ordinance based upon its comprehensive plan for the community); *City of Renton v. Playtime Theatre, Inc.*, 475 U.S. 41 (1985) (holding a zoning ordinance to be valid since it was designed to promote the interests of the city); *Wulfsohn v. Burden*, 150 N.E. 120 (N.Y. 1925) (upholding a zoning regulation that promoted the general needs and values of

Furthermore, laws that encourage public participation in land use advance a legitimate governmental interest by restoring democracy and consistency to the decision-making process.²⁵⁹

Because an adopted plan would remain a policy guide, the city would not be bound to the plan if implementation would have undue detrimental effects on neighboring communities or on the city as a whole.²⁶⁰ In the event that the city were to adopt neighboring 197-a plans that conflict at some future point, the city could retain authority to mediate and decide the best course of action after conducting public meetings to discuss mediation. Finally, if a community-sponsored plan were deemed exclusionary, it could be stricken. In short, a deference rule is just that—deferential. The city would remain in a position to rebut a presumption of deference to enforce equal protection considerations.

CONCLUSION

The 197-a process is a good starting point for democratizing land use decision making in New York City. However, as the case studies set forth above highlight, more effort must be expended to reward and encourage public participation. The City Planning Commission's inconsistent review of 197-a plans indicates that some degree of reform is necessary. Public

the community).

²⁵⁹ Many statutes evince a government interest in public participation. *See, e.g.*, N.Y. TOWN LAW § 272-a(1) (McKinney 2003) (stating that public participation in the planning process promotes the most “optimum town comprehensive plan” for development); *see also* N.Y. ENVTL. CONSERV. LAW § 27-0101 (McKinney 2003) (stating that the legislative purpose is best met when the public has knowledge and provides consent).

²⁶⁰ *See e.g.*, Stanley D. Abrams, *Flexible Zoning Techniques to Meet State and Local Growth Policies*, 930 A.L.I. 537 (1994) (finding that flexible techniques in development plans are a more efficient way to meet the goals of community plans); Richard T. LeGates, *The Emergence of Flexible Growth Management Systems in the San Francisco Bay Area*, 24 LOY. L.A. L. REV. 1035 (1991) (discussing the effect rapid community growth has on development plans and concluding the “tempo control” allows planning goals to be met most effectively).

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participation and inclusive, consensus-building processes must be recognized as important elements of community planning. One way to recognize the importance of public participation in land use matters is for the city to make such participation more accessible by providing financial grants and planning workshops. Ultimately, however, an amendment to Section 197-a is the optimal method to mandate deference to plans developed through an inclusive community process. Such reform is the most effective means to encourage public participation and remove a degree of the City Planning Commission's power to permit purely political or economic factors to control land use decision making.