

## Making the Temporary Permanent: Public Space in a Postpandemic World

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**ABSTRACT.** In response to the pandemic, many cities modified their streets, sidewalks, and open spaces. Though these interventions were often designed to be temporary, a number of cities have decided to make them permanent, or are discussing whether to do so. This Essay will argue that, while these public realm reclamation techniques have resulted in health and economic benefits—especially during the height of the pandemic—they also disproportionately harm already underrepresented members of the community and raise equity issues.

For example, when indoor dining was prohibited in many places early in the pandemic, sidewalk dining allowed restaurants to stay in business, and patrons to more safely enjoy socially distanced meals outside. Yet those economic benefits did not flow to many other types of businesses that also had to close their doors, and the health benefits did not aid those who could not afford to be restaurant patrons. Further, some neighbors view the noise and waste from sidewalk cafes as akin to a nuisance. These interventions have also caused harm to people with mobility differences. People who use wheelchairs are often stymied when trying to move down a sidewalk crowded with tables and patrons waiting for tables. Those without access to public transit, and without the ability to bike or walk to work, must take longer routes due to street closures that allow toddlers to ride tricycles without fear of being hit by a car. And the neighborhoods where most of these interventions have taken place tend to be whiter and wealthier than the surrounding community. These harms have not been sufficiently discussed or recognized. Thus, rather than just assuming that these changes to the built environment are a net positive and letting them remain postpandemic, as some cities seem inclined to do, this Essay weighs both their positive and negative effects. It considers how decisions on permanence should be made, and who should be making them, with the goal of enabling more informed decision-making and creating more equitable spaces.

## INTRODUCTION

The built environment has long been shaped by a variety of societal forces, including public-health and safety concerns.<sup>1</sup> Most recently, the COVID-19 pandemic has fundamentally changed the way that we interact with our public spaces. At the start of the pandemic, cities shut down parks, playgrounds, beaches, and recreation centers to discourage group gatherings based on uncertainty about the virus's modes of transmission.<sup>2</sup> As our knowledge evolved, we learned that being outside was relatively safe. Thus, restrictions swung in the other direction, with cities allowing private businesses to take over public spaces in ways they hadn't before. Many places also rethought the balance between cars, pedestrians, and cyclists with respect to the public space made up by streets.<sup>3</sup>

This Essay confronts the changes to the built environment that have taken place around the world in response to the pandemic. City decision makers currently stand at a critical inflection point as they move their responses to COVID from the pandemic stage to the endemic stage. Many have decided to make once-temporary changes permanent or are discussing whether to do so, while others have decided to take back some of the space that had been repurposed during the height of the pandemic. This Essay will argue that, while these public-realm reclamation and reconfiguration techniques have resulted in many benefits to many people, they have also disproportionately harmed already-underrepresented members of the community in ways that have not been sufficiently discussed or recognized. Thus, before simply assuming that these interventions are a net positive and letting them remain postpandemic, as many cities seem inclined to do, we must first more thoroughly interrogate both their harms and benefits.

Part I of the Essay is descriptive and catalogs a number of COVID-inspired modifications to outdoor public spaces and the built environment. Part II

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1. See Nicholas de Monchaux, Opinion, *The Spaces that Make Cities Fairer and More Resilient*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/opinion/sunday/cities-public-space-covid.html> [<https://perma.cc/5KAU-GXQZ>] (“The 19th century belief that malaria—literally, ‘bad air’—sprang from poor ventilation, inspired Frederick Law Olmsted’s designs for Central Park in New York and the Emerald Necklace in Boston . . . . In Paris, cholera epidemics in the 1830s led to the grandest sewer system in Europe—and not incidentally to the grand boulevards and public spaces on top of that sewer system. In Barcelona the same disease, rampant in cramped, lower-class neighborhoods, helped create the vast, open grid of the city’s extension . . .”).
  2. Jordi Honey-Rosés et al., *The Impact of COVID-19 on Public Space: An Early Review of the Emerging Questions—Design, Perceptions and Inequities*, 5 CITIES & HEALTH S263, S263 (Supp. 2021) (describing “striking images of empty city streets, parks, beaches, plazas and promenades”).
  3. See Michael Allan Wolf, *Zoning Reformed*, 70 KAN. L. REV. 171, 197-98 (2021) (discussing the need for “Pedestrian Oriented Development”).

engages in a normative analysis of these attempts to reclaim public space in cities. It discusses the benefits of public-space interventions that allowed people to interact outside more easily during the pandemic but also confronts the harm that these changes have wrought—especially upon underserved communities and people with mobility differences. Part III considers who should be making these decisions and how they should go about doing so. It discusses the legal implications of making pandemic-era changes permanent and presents questions to guide cities in moving forward with modifications.

## I. COVID-RELATED CHANGES TO THE BUILT ENVIRONMENT

Architects, city planners, and business owners have made significant changes to the built environment in order to adapt to life with COVID. These modifications have occurred outside—in public spaces like streets, sidewalks, and plazas—as well as inside—in office buildings, schools, libraries, and transit hubs. This Part catalogs some of the most salient and common changes cities have made to their outdoor environments.<sup>4</sup> Specifically, the majority of COVID-

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4. While a full discussion is beyond the scope of this Essay, the pandemic also prompted important changes to interior built environments. For example, many buildings installed upgraded HVAC systems that included air filtration, in an attempt to lower the risks of COVID transmission. *Heating, Ventilation and Air Conditioning (HVAC) Systems in Buildings and COVID-19*, PUB. HEALTH ONTARIO (Mar. 2021) <https://www.publichealthontario.ca/-/media/documents/ncov/ipac/2020/09/covid-19-hvac-systems-in-buildings.pdf> [https://perma.cc/5R93-HDQH]. Many public buildings that perform essential services had to stay open during the pandemic, including post offices, transit centers, and libraries. See, e.g., *Impact of COVID-19 on Public Libraries*, HUNT INST. (Apr. 30, 2021), <https://hunt-institute.org/resources/2021/04/impact-of-covid-19-on-public-libraries> [https://perma.cc/2SQV-PLX9] (“Though library doors were closed to the public, staff used creative methods to ensure students and families received necessary resources, specifically by increasing collections of digital books and video streams [and] offering curbside pickup for books . . .”). Many of these institutions installed plastic barriers to shield workers from patrons or limited access to a set number of people at a time. Rodrique Ngowi, *What’s in Store: Groceries Installing Barriers amid Outbreak*, AP NEWS (Mar. 26, 2020), <https://apnews.com/article/quincy-us-news-ar-state-wire-ri-state-wire-virus-outbreak-80c4ba51468c29530a7bef605ca748af> [https://perma.cc/2T3F-XVHV]. This, in turn, resulted in additional lines outside. Open-office floorplans, which have become increasingly popular in recent years, have also experienced issues resulting from the pandemic: a lack of walls and enclosed private spaces both facilitates viral transmission and makes it more difficult for workers to conduct simultaneous videocalls without distraction. To avoid these problems, many private office buildings closed at the start of the pandemic—and some remain closed still. Several companies have moved to permanent or more relaxed remote-work policies, which has resulted in changing needs for office space in some downtown areas: while some companies are breaking or failing to renew leases, others are looking for flexible or shared spaces. See *The Impact of COVID-19 on Flexible Space*, JONES LANG LASALLE IP (July 2020), <https://www.jll.de/content/dam/jll-com/documents/pdf/articles/covid-19-and-flexible-space-report.pdf> [https://

related changes to the exterior built environment of cities have been implemented on sidewalks – through expanded restaurant seating and sidewalk widening – and streets – through closures, expanded bicycle infrastructure, parklets, and pop-up plazas.

*A. Primary Sites of Reclamation: Sidewalks and Streets*

Sidewalks are public space. Although that seems like a simple concept, the question of what sidewalks are for, and who they are for, is actually quite complex.<sup>5</sup> At their most basic, sidewalks are conceived of as spaces where people walk to get from place to place.<sup>6</sup> But of course, they have long been more than this, even prior to COVID. They are also places of assembly and protest. They are “third places” where people encounter their neighbors.<sup>7</sup> They are sites of commerce where vendors sell food and goods from carts, stores showcase their wares, and restaurant patrons dine al fresco.<sup>8</sup> Sidewalks are also a place of respite for those who need to sit down somewhere. They are the site of encampments for those who need to sleep somewhere. They are traversed not just by abled pedestrians, but also by people with mobility differences, and by babies in strollers. These various users and uses are often in conflict.<sup>9</sup> And because of these diverse property uses—both legal and not—most cities have a number of

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perma.cc/ZzGN-KUVK]; Renuka Rayasam, *Policy Hackathon: Recreating America's Downtowns*, POLITICO (Oct. 21, 2021, 4:30 AM ET), <https://www.politico.com/news/2021/10/21/recreating-americas-downtowns-post-covid-515999> [<https://perma.cc/7C2Z-FC5Q>].

5. Questions about who is responsible for the maintenance of sidewalks are similarly complex. Adjacent property owners may be required by ordinance to provide for their repair and upkeep when they are covered with snow or have a broken slab. But the underlying land itself is often owned by the municipality, and most jurisdictions only impose penalties or bills for failing to fulfill these responsibilities rather than actual tort liability. See Michael C. Pollack, *Sidewalk Government* 25-29 (Aug. 23, 2021) (unpublished manuscript), <https://ssrn.com/abstract=4198355> [<https://perma.cc/T6QT-9QZ2>]; C.P. Jhong, Annotation, *Liability of Abutting Owner or Occupant for Condition of Sidewalk*, 88 A.L.R.2d 331, § 3, Westlaw (database updated May 2022) (collecting cases).
6. NICHOLAS BLOMLEY, *RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW* 3 (2011) (describing the concept of “pedestrianism” and a view of the “primary function of the sidewalk” as “the orderly movement of pedestrians from point a to point b”).
7. In social-science literature, “third places” are locations separate from the two typical loci of workplaces and homes that provide for community gathering and exchange. See RAY OLDENBURG, *THE GREAT GOOD PLACE* 16-17 (1999).
8. See Joseph Pileri, *Who Gets to Make a Living? Street Vending in America*, 36 GEO. IMMIGR. L.J. 215, 217-18 (2021) (discussing street-vendor commerce in Washington, D.C.).
9. BLOMLEY, *supra* note 6, at 11 (“A good sidewalk, for the activist for social justice, is inclusionary and tolerant. A successful sidewalk, for the engineer or judge, is one that facilitates flow.”). For a general discussion of the conflicting uses of sidewalks, see Pollack, *supra* note 5, at 16-23.

regulations pertaining to sidewalk construction, maintenance, and usage.<sup>10</sup> The pandemic has thrown sidewalks' role as public space with competing users into starker relief.

Streets, like sidewalks, are another example of contested public space. Streets make up a majority of publicly owned open space in many cities<sup>11</sup> and regularly account for around one-third of a city's land area.<sup>12</sup> And yet streets are often dangerous to members of the public: in 2020, more than 7,000 pedestrians were killed by vehicles, and approximately 104,000 pedestrians visited the emergency room for nonfatal injuries related to car crashes.<sup>13</sup> Streets in the United States, after all, are often designed first and foremost for cars, whether in motion or at rest in parking spaces.<sup>14</sup> But with safe outdoor public space at a premium during

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10. It is common to have a requirement that sidewalks must have four to six feet of unobstructed space so that people can easily pass by. See, e.g., DENVER PUB. WORKS RULES & REGULS. § 2.01.02 (1993), [https://www.denvergov.org/files/assets/public/doti/documents/regulations/pwrr-005.0-construction\\_of\\_curbs\\_gutters\\_sidewalks\\_driveways\\_street\\_paving\\_and\\_other\\_public\\_row\\_improvements.pdf](https://www.denvergov.org/files/assets/public/doti/documents/regulations/pwrr-005.0-construction_of_curbs_gutters_sidewalks_driveways_street_paving_and_other_public_row_improvements.pdf) [https://perma.cc/3Z3D-MUHK] (“Sidewalks set back away from curbs shall be five (5) feet in width unless otherwise approved by the Engineer.”). The 2010 Americans with Disabilities Act (ADA) Standards for Accessible Design dictate that all walking surfaces must have at minimum a clear walking surface width of thirty-six inches. U.S. DEP’T OF JUST., STANDARDS FOR ACCESSIBLE DESIGN § 403.5.1 (2010).
  11. Gregory Scruggs, *How Much Public Space Does a City Need?*, NEXT CITY (Jan. 7, 2015), <https://nextcity.org/urbanist-news/how-much-public-space-does-a-city-need-UN-Habitat-joan-clos-50-percent> [https://perma.cc/QZK5-3VL2] (describing streets as “the largest single public space asset in any city’s rolls”).
  12. Kathleen McCormick, *Room to Roam: The Pandemic Has Underscored the Need for More Urban Parks. So What Comes Next?*, LAND LINES 20, 22 (Oct. 2020), <https://www.lincolnst.edu/sites/default/files/pubfiles/land-lines-october-2020-full.pdf> [https://perma.cc/H2FS-B7T2] (“Across the country, up to 30 percent of urban land typically is occupied by paved streets and parking lots.”).
  13. *Pedestrian Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 13, 2022), [https://www.cdc.gov/transportationsafety/pedestrian\\_safety](https://www.cdc.gov/transportationsafety/pedestrian_safety) [https://perma.cc/H7VR-AMV5]; see also Simon Romero, *Pedestrian Deaths Spike in U.S. as Reckless Driving Surges*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/us/pedestrian-deaths-pandemic.html> [https://perma.cc/R2WA-JHRM] (“Going into the pandemic, some traffic specialists were optimistic that pedestrian deaths would decline. . . . The opposite happened.”).
  14. See David Zipper, *The High Cost of Bad Sidewalks*, BLOOMBERG: CITYLAB (June 16, 2020, 2:38 PM EDT), <https://www.bloomberg.com/news/articles/2020-06-16/it-s-time-to-fix-america-s-urban-sidewalk-gap> [https://perma.cc/D9B2-XCJN] (“In the first half of the 20th century . . . the federal government gave millions of dollars to older cities to accommodate automobiles by shrinking sidewalks, while newer cities deprioritized pedestrian infrastructure.”); John Frazer, *The Reshaping of City Cores That Were Designed for Cars*, FORBES (Aug. 6, 2019, 12:01 AM EDT), <https://www.forbes.com/sites/johnfrazer1/2019/08/06/the-reshaping-of-city-cores-that-were-designed-for-cars> [https://perma.cc/V2QT-AEDV] (“[A]s much as one half of a modern American city’s land area is dedicated to streets and roads, parking lots, service stations, driveways, signals and traffic signs, automobile-oriented

the pandemic, and with far fewer cars on the road in its early stages, many cities looked to their streets to gain additional space for people.

### B. *The Changes*

As evidence emerged that the virus was less likely to infect people gathering outside than inside, cities moved to expand public access to outdoor spaces and to encourage people to spend time outside. Signs reminded people to socially distance by staying six feet apart from others. In many places, however, sidewalks are not wide enough to allow two people to pass each other at sufficient distance without needing to step into the street.

In response, a number of cities opted to narrow their streets to allow for more space for pedestrians and cyclists.<sup>15</sup> This was often achieved by turning driving lanes or curbside parking spaces into additional sidewalk space or bike lanes.<sup>16</sup> These changes were typically informal,<sup>17</sup> using paint, tape, planters, cones, and signs to designate space that might be used by pedestrians or cyclists, or for other specific purposes. For example, Paris added over thirty miles of bike lanes and now has plans to remove over half of the city's on-street parking and instead commit the space to noncar public uses.<sup>18</sup> Berlin created temporary bike lanes by

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businesses, car dealerships, and more.” (quoting Dr. Marin Melosi, Director, Center for Public History at the University of Houston)).

15. *COVID-19: Progressive Urban Advocacy Means More than Wider Sidewalks*, AZURE (Apr. 24, 2020), <https://www.azuremagazine.com/article/covid-19-progressive-urban-advocacy-means-more-than-wider-sidewalks> [https://perma.cc/R5CG-AK5A] (“From Mexico City, Milan, Oakland, Berlin and Budapest to Minneapolis, Austin and Auckland, widened sidewalks, new temporary bike lanes and pedestrianized roads have opened up vital space for physical distancing.”).
16. For example, in Milan, “the City used paint and markings to widen sidewalks and add a parking-protected bike lane.” Glob. Designing Cities Initiative, *Streets for Pandemic Response & Recovery*, NAT’L ASS’N OF CITY TRANSP. OFFS. 23 (June 25, 2020), [https://nacto.org/wp-content/uploads/2020/09/Streets\\_for\\_Pandemic\\_Response\\_Recovery\\_Full\\_20-09-24.pdf](https://nacto.org/wp-content/uploads/2020/09/Streets_for_Pandemic_Response_Recovery_Full_20-09-24.pdf) [https://perma.cc/B8NT-JLDS]. Brookline, Massachusetts did the same, using temporary cones and signs to effectively widen the sidewalk, creating a shared use space for pedestrians and cyclists. *Id.*; see also Brian Planalp & Mike Schell, *Downtown/OTR Patio Seating to Become Permanent ‘Streeteries’*, FOX19 NOW (Dec. 4, 2020, 10:19 PM EST), <https://www.fox19.com/2020/12/04/downtownotr-patio-seating-become-permanent-streeteries> [https://perma.cc/3EDH-XN8J] (discussing Cincinnati’s “parklets, concrete bump-outs and sidewalk expansions”).
17. Glob. Designing Cities Initiative, *supra* note 16, at 22-25.
18. Katharine Lusk, Songhyun Park, Katherine Levine Einstein, David M. Glick, Maxwell Palmer & Stacy Fox, *Urban Parks and the Public Realm: Equity & Access in Post-COVID Cities*, BOS. U. INITIATIVE ON CITIES 9 (2020), [https://www.bu.edu/ioc/files/2021/03/2020MSOM\\_Parks-Report\\_highres.pdf](https://www.bu.edu/ioc/files/2021/03/2020MSOM_Parks-Report_highres.pdf) [https://perma.cc/Y9JN-6J6M]; Liz Alderman, ‘Corona Cycleways’ Become the New Post-Confinement Commute, N.Y. TIMES (June 12, 2020),

taping off parts of the road.<sup>19</sup> And Washington, D.C., focused on expanding sidewalks outside essential businesses, such as grocery stores, to provide more space for people to form lines when stores were limiting or prohibiting entry.<sup>20</sup>

Another way streets and sidewalks were repurposed during the pandemic was through cities' expansion of permitted outdoor dining. Although al fresco dining itself is not new, it has historically been limited in many urban areas. Some cities only permitted café seating in certain parts of town or only made it available via a costly permitting process.<sup>21</sup> But as many restaurants were forced to close indoor dining rooms during the early days of the pandemic, takeout and curbside dining became lifelines for restaurants and their staff (as well as many patrons who don't cook).<sup>22</sup> In response, many cities expanded where outdoor café seating was permitted, including allowing dining on larger areas of sidewalks, in closed-off streets, in former curbside parking spaces, and in parking lots.<sup>23</sup> These spaces, which are sometimes dubbed "streateries,"<sup>24</sup> often involved the placement of barriers, dividers, tents, sheds, heated plastic bubbles, and other structures to keep diners warm and protected from vehicular traffic. These

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<https://www.nytimes.com/2020/06/12/business/paris-bicycles-commute-coronavirus.html> [<https://perma.cc/E6GT-N4AZ>].

19. Jona Kallgren, *Pop-Up Bike Lanes in Berlin Are Here to Stay*, EURONEWS.NEXT (Sept. 13, 2021), <https://www.euronews.com/next/2021/09/02/berlin-s-pop-up-bike-lanes-made-permanent> [<https://perma.cc/Y95U-JBUR>] ("Pop-up bike lanes were one of the positive things to come out of the coronavirus pandemic. As commuters and travellers desperately looked to avoid busy public transport, these makeshift paths dedicated only to two wheels often marked by yellow tape were a quick and simple solution.").
20. David Alpert, *DC Will Temporarily Widen Some Sidewalks Near Grocery Stores and Other Businesses*, GREATER GREATER WASH. (Apr. 20, 2020), <https://ggwash.org/view/77199/dc-temporarily-widen-some-sidewalks-near-grocery-stores-businesses-coronavirus-open-streets> [<https://perma.cc/EWA4-DU74>]. These types of interventions are perhaps less critical now that indoor capacity restrictions have been eased, but they might easily become necessary again in the event of another pandemic.
21. See, e.g., Jane Margolies, *Dining in the Street? As Restaurants Reopen, Seating Moves Outdoors*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/business/coronavirus-restaurants-outdoor-seating.html> [<https://perma.cc/HZD7-GLCA>]; *How COVID Changed the Way City Governments Support Local Businesses*, PEW CHARITABLE TRS. (Mar. 29, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/03/how-covid-changed-the-way-city-governments-support-local-businesses> [<https://perma.cc/PL6A-6WNL>].
22. Heather Lalley, *Outdoor Dining Goes from Stop-Gap to Full-Time*, REST. BUS. ONLINE (May 21, 2021), <https://www.restaurantbusinessonline.com/operations/outdoor-dining-goes-stop-gap-full-time> [<https://perma.cc/EQB3-MWAN>].
23. In a recent survey of U.S. mayors, ninety-two percent responded that they had approved "streateries" during the pandemic, and thirty-four percent said they intended to make these changes permanent. Lusk et al., *supra* note 18, at 9.
24. *Id.*

structures—many of which were hastily constructed and poorly designed<sup>25</sup>—typically enclosed tables that were placed in former metered street-side parking spaces. For example, in New York, COVID-inspired outdoor-dining expansions are estimated to have taken over around 8,550 parking spaces (out of approximately three million) as of 2021.<sup>26</sup>

Cities also modified their streets by reducing parking requirements and expanding existing parklet programs. Parklets, which already existed in a number of cities prior to the pandemic, convert a former curbside parking space in front of a shop or restaurant to open space, filled with tables, benches, or green space rather than parked cars.<sup>27</sup> In some cities, these spaces were historically required to be open to all members of the public and could not be privatized by the restaurant or shop that paid for the parklet permit and conversion.<sup>28</sup> During the pandemic, some cities waived parklet fees and other permit requirements<sup>29</sup> to

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25. See *infra* notes 121-122 and accompanying text.
  26. David Meyer & Kevin Sheehan, *NYC Gave Up 8,550 Parking Spots for Al Fresco Dining amid COVID*, N.Y. POST (May 23, 2021, 6:41 PM), <https://nypost.com/2021/05/23/nyc-gave-up-8550-parking-spots-for-outdoor-dining-amid-covid> [<https://perma.cc/TW9M-WL6B>].
  27. See *Urban Street Design Guide: Parklets*, NAT'L ASS'N OF CITY TRANSP. OFFS., <https://nacto.org/publication/urban-street-design-guide/interim-design-strategies/parklets> [<https://perma.cc/C7KR-CNRN>].
  28. See, e.g., Joe Kukura, *Outdoor Dining Parklets Becoming Permanent, but New Permits and Costs are Looming*, SFIST (Mar. 8, 2022), <https://sfist.com/2022/03/08/outdoor-dining-parklets-becoming-permanent-but-new-permits-and-costs-are-looming> [<https://perma.cc/A47X-ZBVJ>] (“[A] parklet must have public benches that are ‘open to the public, indicated with a sign[.]’”); OLYMPIA MUN. CODE § 12.74.020(E) (2022), <https://www.codepublishing.com/WA/Olympia/html/Olympia12/Olympia1274.html#12.74.020> [<https://perma.cc/43TA-HXX3>] (defining a parklet as a “[c]ity parking space . . . that the City has authorized through a permit to be used to create small park-like settings which are *open to the general public* and can include features such as tables and chairs, benches, planters and landscaping” (emphasis added)); *Parklets Increase Outdoor Seating Options at Restaurants and Bars*, FORT WORTH (Feb. 24, 2022), <https://www.fortworthtexas.gov/news/2022/2/Parklets-Become-Official> [<https://perma.cc/92WS-JYAR>] (noting that parklets must “operate as spaces open for use by the public, not just adjacent business patrons,” and that they “cannot include advertising and must be ADA accessible”).
  29. See, e.g., *N.O. Welcomes More Parklets, Waives Fees for Outdoor Dining*, BIZ NEW ORLEANS (Dec. 18, 2020), <https://www.bizneworleans.com/n-o-welcomes-more-parklets-waives-fees-for-outdoor-dining> [<https://perma.cc/8CCH-VYLG>] (“The outdoor dining application fees for both sidewalk cafes and parklets have been waived until March 31, 2021.”); *Hoboken: Covid-19 Small Business Recovery Strategy*, HOBOKEN, <https://www.hobokennj.gov/resources/covid-19-small-business-recovery-strategy> [<https://perma.cc/7U9K-ZMSH>] (“Sidewalk café fees are waived for 2020, and those with existing 2020 licenses will be credited in 2021. The City is exploring various options with the Hoboken Business Alliance and other groups to help subsidize the cost of the streateries, parklets, and open streets.”); *Oregon City COVID-19 Recovery Assistance Program: March 17, 2021 – November 30, 2021*, OR. CITY 7 (2021), [https://www.orcity.org/sites/default/files/fileattachments/planning/page/18061/oregon\\_ci](https://www.orcity.org/sites/default/files/fileattachments/planning/page/18061/oregon_ci)

encourage outdoor dining and assist restaurants and bars that were struggling in the wake of closure requirements.<sup>30</sup> Some cities also liberalized their use requirements and began allowing parklets to be used exclusively by adjacent restaurants.<sup>31</sup>

Finally, another popular COVID-related open-space innovation was what cities referred to as open-streets or slow-streets programs.<sup>32</sup> These projects generally closed off streets to all or most vehicular traffic,<sup>33</sup> thus allowing space for people to walk, run, roll, ride bicycles, play, do yoga, have picnics, and otherwise inhabit the streets safely. For example, Oakland responded to crowding issues in public parks during the early pandemic by initiating a slow-streets program that eventually involved the closure of more than twenty miles of the city's streets.<sup>34</sup> Seattle's Department of Transportation similarly closed off twenty miles of streets to vehicles during the pandemic and recently announced that those changes would become permanent.<sup>35</sup> In addition to using closed-off road space

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ty\_covid-19\_recovery\_assistance\_program\_march\_17\_2021\_-\_november\_30\_2021.pdf [https://perma.cc/9FSB-9GME] (“During the initial pilot program, a \$25 parklet fee will be required per year, but the sidewalk fee will be waived.”).

30. For example, Oakland has provided that “businesses in areas of the City disproportionately impacted by or vulnerable to COVID-19 will be able to continue to use City-owned Property, such as parks and vacant parcels, with no application and permit fees until July 2023.” Press Release, City of Oakland, Flex Streets Initiative to Allow Business Use of Public Rights-of-Way Continues Unchanged into 2023 (Mar. 16, 2022), <https://cao-94612.s3.us-west-2.amazonaws.com/news/Flex-Streets-March-2022-Legislative-Extension-Release-Final-for-distribution.pdf> [https://perma.cc/WPQ2-65AK]. In the legislation, this is referred to as “an equity fee waiver.” Oakland, Cal. Ordinance No. 13682 (Mar. 17, 2022), [https://library.municode.com/ca/oakland/ordinances/planning\\_code?nodeId=1152952](https://library.municode.com/ca/oakland/ordinances/planning_code?nodeId=1152952) [https://perma.cc/W7WX-PSVU].
31. For example, although San Francisco has long allowed all members of the public to use parklets, local elected officials adopted a COVID-related amendment that allowed businesses to close parklets off to the public from midnight to 7 AM. Brock Keeling, *Welcome to the Parklet Era of San Francisco*, EATER S.F. (July 29, 2021, 9:55 AM PDT), <https://sf.eater.com/2021/7/29/22596225/parklets-permanent-san-francisco-bay-area> [https://perma.cc/J3ZF-VHVS].
32. See, e.g., Stephan Schmidt, *What the Pandemic's 'Open Streets' Really Revealed*, BLOOMBERG: CITYLAB (Jan. 3, 2022, 11:26 AM EST), <https://www.bloomberg.com/news/articles/2022-01-03/the-unequal-geography-of-covid-s-open-streets> [https://perma.cc/WM2G-PSCM] (“35 states ultimately closed off streets to vehicular traffic. Of these, the majority (84%) were designated as temporary . . . and the vast majority (94%) lasted less than six months.”).
33. Tabitha S. Combs & Carlos F. Pardo, *Shifting Streets COVID-19 Mobility Data: Findings from a Global Dataset and a Research Agenda for Transport Planning and Policy*, 9 TRANSP. RES. INTERDISC. PERSPS. art. no. 100322, at 1 (2021).
34. Lusk et al., *supra* note 18, at 11 (noting that local traffic was excepted from this restriction).
35. Michelle Baruchman, *Seattle will Permanently Close 20 Miles of Residential Streets to Most Vehicle Traffic*, SEATTLE TIMES (May 8, 2020, 7:09 PM), <https://www.seattletimes.com/seattle-news/transportation/seattle-will-permanently-close-20-miles-of-residential-streets-to-most-vehicle-traffic> [https://perma.cc/ZVC4-HR8L] (“The streets had been closed

for movement, travel, and exercise, some cities turned these streets into pop-up plazas or patios where people could sit and relax.

### C. Parks, Briefly

Another category of pandemic-era changes to the built environment involved our most classic of public open spaces: public parks. Decades of research have shown the health and wellness benefits that humans derive from spending time in nature and even small green spaces like local parks.<sup>36</sup> Yet early on, many parks were closed entirely – gates were locked, basketball hoops were removed, and people were cited or fined for using parks and playgrounds while they were closed.<sup>37</sup> These changes disproportionately burdened poor people and people of color (especially Black and Latinx families), many of whom live in apartments and thus do not have their own private green space or backyard.<sup>38</sup> Indeed, as one commentator noted,

Virtually all of the arrests and summonses related to social distancing and mask wearing . . . have targeted black and brown New Yorkers. [There is] a disparity in infrastructure that predated the racially motivated enforcement tactics of the crisis. Harlem’s concrete-walled parks remained gated and locked. Meanwhile, the grassy parks of the West Village piers were open.<sup>39</sup>

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temporarily to through traffic to provide more space for people to walk and bike at a safe distance apart during the coronavirus pandemic.”).

36. See Kristine Engemann, Carsten Bøcker Pedersen, Lars Arge, Constantinos Tsirogiannis, Preben Bo Mortensen & Jens-Christian Svenning, *Residential Green Space in Childhood is Associated with Lower Risk of Psychiatric Disorders from Adolescence into Adulthood*, 116 *PROCS. OF THE NAT’L ACAD. OF SCIS.* 5188, 5189 (2019). See generally Lorien Nesbitt, Michael J. Meitner, Cynthia Girling, Stephen R.J. Sheppard & Yuhao Lu, *Who Has Access to Urban Vegetation? A Spatial Analysis of Distributional Green Equity in 10 US Cities*, 181 *LANDSCAPE & URB. PLAN.* 51, 52 (2019) (describing numerous benefits of urban greenspace, including “reduc[ing] storm-water runoff,” “support[ing] a range of urban biodiversity,” “reduc[ing] stress and improv[ing] psychological well-being,” “improv[ing] air quality . . . [and] property values,” and “offer[ing] opportunities for recreation”).
37. See, e.g., AZURE, *supra* note 15 (“On April 22, Deputy Mayor Ana Bailão announced that fines for merely sitting on benches will no longer be issued – though penalties for using park amenities and gathering in groups remain in effect.”).
38. See Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 *U. PENN. L. REV.* (forthcoming 2023) (manuscript at 56), <https://ssrn.com/abstract=4068843> [<https://perma.cc/GSD7-Y7J3>] (noting that the majority of Black and Hispanic/Latinx families are renters).
39. Alissa Walker, *Coronavirus Is Not Fuel for Urbanist Fantasies*, CURBED (May 20, 2020, 3:45 PM EDT), <https://archive.curbed.com/2020/5/20/21263319/coronavirus-future-city-urban-covid-19> [<https://perma.cc/D8P7-5S4R>].

Once it became clear that outside was the safest place to be, parks reopened, and many saw more use than was typical.<sup>40</sup> In some locations, even typically “exclusive” open space was converted to use by the broader public, such as some golf courses in Australia.<sup>41</sup> That said, equity concerns surrounding park access preceded the pandemic. For example, parks in lower-income communities and communities of color tend to be smaller and more crowded than those in whiter areas.<sup>42</sup> These and other inequities related to park access and use have persisted beyond the early pandemic period.<sup>43</sup>

## II. EVALUATING PUBLIC-SPACE RECLAMATION PROJECTS

In many ways, these changes to the built environment in the wake of COVID are beneficial. They allowed restaurants and bars to stay open through the pandemic, serving customers outside when inside dining was prohibited. They allowed neighbors and friends to meet up safely, maintaining community ties. They created vibrancy amid sorrow and fear and instilled a sense of place that often felt missing during the pandemic. And they helped make more efficient use of urban space by repurposing underused parking spaces and lanes.

At the same time, these interventions raise important and underdiscussed equity issues. As I have previously written, the built environment has always been exclusionary – often by design.<sup>44</sup> Both our publicly owned spaces and our

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40. Zoe M. Volenec, Joel O. Abraham, Alexander D. Becker & Andy P. Dobson, *Public Parks and the Pandemic: How Park Usage Has Been Affected by COVID-19 Policies*, 16 PLOS ONE art. no. e0251799, at 11 (2021) (discussing park use).

41. Nicholas J. Stevens, Silvia G. Tavares & Paul M. Salmon, *The Adaptive Capacity of Public Space Under COVID-19: Exploring Urban Design Interventions Through a Sociotechnical Systems Approach*, 333 HUM. FACTORS MFG. & SERV. INDUS. 345-46 (2021) (“[G]olf courses in inner city locations in Australia [were] made available to the community as public open spaces (golf was a banned recreational activity [during COVID restrictions]).”).

42. See Schindler & Zale, *supra* note 38, at 10; Laura Wamsley, *Parks in Nonwhite Areas Are Half the Size of Ones in Majority-White Areas, Study Says*, NPR (Aug. 5, 2020, 4:36 PM), <https://www.npr.org/2020/08/05/899356445/parks-in-nonwhite-areas-are-half-the-size-of-ones-in-majority-white-areas-study> [<https://perma.cc/4WYJ-HLB2>].

43. See, e.g., Lincoln R. Larson et al., *Urban Park Use During the COVID-19 Pandemic: Are Socially Vulnerable Communities Disproportionately Impacted?*, 3 FRONTIERS IN SUSTAINABLE CITIES art. no. 710243, at 11 (2021) (“[P]ost-pandemic declines in park use were most significant in socially vulnerable communities . . . BIPOC (particularly African American) and low-SES neighborhoods . . . were more likely to experience decreasing park visitation during the pandemic.”).

44. See Sarah B. Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1973-88 (2015) [hereinafter Schindler, *Architectural Exclusion*]; Schindler, *The Publicization of Private Space*, 103 IOWA L. REV. 1093, 1095-138 (2018) [hereinafter Schindler, *Publicization*].

privately owned public open spaces are governed by exclusionary norms that make them inhospitable to certain members of the community – primarily poor people and people of color.<sup>45</sup> And in the pandemic’s wake, it has become increasingly clear that many COVID-inspired public-space interventions are subject to the same failings. This Part will discuss the benefits and harms of these interventions and make some suggestions for cities that are considering making them permanent.

### A. Benefits

To be sure, pandemic-era public-space interventions offer important public-health benefits. During early lockdowns, reclaimed streets and sidewalks provided additional space for people to interact safely outside. And as we move into an endemic phase of COVID, individuals at high risk or with unvaccinated family members will welcome the continuing opportunity for spaces to gather and eat with friends that are less likely to expose them to illness. Further, the provision of protected space for walking and cycling created new opportunities for physical exercise and made it easier to avoid driving.<sup>46</sup> A reduction in driving could, in turn, lead to decreased emissions,<sup>47</sup> better local air quality, and lower incidences of asthma.<sup>48</sup> There is also evidence that areas with open-streets programs experienced a decrease in pedestrian, bicycle, and vehicle crashes and

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45. See Schindler, *Publicization*, *supra* note 44, at 1132.

46. See Bradley Berentschaff & Daniel Scheller, *How Might the COVID-19 Pandemic Affect 21st Century Urban Design, Planning, and Development?*, 4 URB. SCI. art. no. 56, at 9 (2020) (“The expansion of walking and cycling routes . . . and the use of street calming or road-dieting tactics can help facilitate and encourage active transportation.”).

47. See Alison Sant, *Ditch Cars for Open – and Equal – Streets*, U.S. NEWS & WORLD REP. (Apr. 19, 2022, 12:07 PM), <https://www.usnews.com/news/health-news/articles/2022-04-19/ditch-cars-for-open-and-equal-streets> [<https://perma.cc/X5HX-FN2V>] (“With transportation responsible for 29% of greenhouse gas emissions in the U.S . . . limiting emissions from cars must be part of climate action. However, cars – electric or not – still can kill people on city streets and deny a truly equitable transportation system. The only way to make sure that cars do not waste lives is to get out of them.”).

48. See *Asthma*, HARV. SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/c-change/subtopics/climate-change-and-asthma> [<https://perma.cc/6EC4-6PPF>] (“Long-term exposure to air pollution can significantly increase the risk of a child developing asthma, especially in young children. Breathing polluted air can also cause asthma attacks in people who already have asthma.” (citing a study of 1,200 children in Boston linking black-carbon exposure to early childhood asthma)).

injuries.<sup>49</sup> Further, as discussed earlier, access to open space has been shown to benefit mental health.<sup>50</sup>

Beyond health, these changes to the built environment also helped local economies. In many places, restaurants were required to close their indoor-dining services during the early days of the pandemic. By moving their dining rooms onto streets, sidewalks, and parking spaces, restaurants were able to stay open and save jobs.<sup>51</sup> More generally, the activation of streets and sidewalks also increased business traffic.<sup>52</sup>

Finally, the idea of reclaiming public space for people instead of cars makes intuitive sense.<sup>53</sup> The pandemic offered a vision of a car-free, pedestrian-oriented city that may lead many residents to reconsider how much land *should* be dedicated to vehicles.<sup>54</sup> Many people enjoy eating al fresco on a breezy spring day. Parents rejoiced that they had a safe, large, closed street where their toddlers could safely ride a bike or a scooter. Car-free streets created space for community

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49. See *Open Streets Forever: The Case for Permanent 24/7 Open Streets*, TRANSP. ALTS. (Oct. 12, 2021), <https://www.transalt.org/open-streets-forever-nyc> [<https://perma.cc/6XX3-LU9R>] (noting that in New York City, “[w]hile cyclist injuries increased 20 percent citywide, cyclist injuries decreased 17 percent on Open Streets,” and “[w]hile motorist injuries fell by 25 percent citywide, motorist injuries fell by 50 percent on Open Streets”).
50. See Yijun Zhang, Suzanne Mavoa, Jinfeng Zhao, Deborah Raphael & Melody Smith, *The Association Between Green Space and Adolescents’ Mental Well Being*, 17 INT’L J. ENV’T RSCH. PUB. HEALTH art. no. 6640 (2020); *supra* note 36 and accompanying text.
51. TRANSP. ALTS., *supra* note 49 (“An estimated 100,000 jobs were saved when around 10,000 New York City dining establishments moved their business [outside] . . .”). Of course, these interventions were not enough to save every restaurant from the economic pressures of the pandemic. See Rachel King, *More than 110,000 Eating and Drinking Establishments Closed in 2020*, FORTUNE (Jan. 26, 2021, 8:00 AM EST), <https://fortune.com/2021/01/26/restaurants-bars-closed-2020-jobs-lost-how-many-have-closed-us-covid-pandemic-stimulus-unemployment> [<https://perma.cc/Y4VU-6RFH>]; see also Abby Vesoulis, ‘Profit Doesn’t Exist Anymore.’ Restaurants that Barely Survived COVID-19 Closures Now Face Labor, Inflation and Supply Chain Issues, TIME (Dec. 28, 2021, 10:25 AM EST), <https://time.com/6129713/restaurants-closing-covid-19> [<https://perma.cc/ZP76-4MF8>] (“Roughly 80,000 restaurants have temporarily or permanently closed since the start of the pandemic . . . down from 110,000 at the peak of the pandemic.”).
52. Vanessa Casado Pérez, *Reclaiming the Streets*, 106 IOWA L. REV. 2185, 2200 n.104 (2021).
53. *Id.* at 2201 (noting that “[t]aking space back from cars for pedestrians has other positive consequences . . . [including] increas[ing] business traffic”).
54. Anne-Marie Broudehous, *Post-Pandemic Cities Can Permanently Reclaim Public Spaces as Gathering Places*, CONVERSATION (Jan. 3, 2021, 12:56 AM), <https://theconversation.com/post-pandemic-cities-can-permanently-reclaim-public-spaces-as-gathering-places-150729> [<https://perma.cc/F4AT-D9NB>] (describing a “collective awareness of the excessive space devoted to the automobile”).

events and public programming.<sup>55</sup> As a bicycle-advocacy organization stated, “Open Streets are popular, beloved, effective, and lifesaving.”<sup>56</sup> When many public buildings were closed, and people were unable to interact with others inside, outdoor spaces became vibrant sites of “the everyday casual encounters that are the basis of social cohesion and community building.”<sup>57</sup>

With these benefits in mind,<sup>58</sup> many cities have permanently extended some of the public-space reclamation programs that began during COVID.<sup>59</sup> However, it is important to interrogate both the benefits and the harms associated with these programs before allowing them to continue indefinitely.

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55. For example, New York’s Public Space Programming works in conjunction with the Open Streets program and provides “arts, culture, fitness [events], and educational experiences to neighborhoods in need.” *Public Space Programming*, N.Y.C. DEP’T OF TRANSP., <https://www1.nyc.gov/html/dot/html/pedestrians/activations.shtml> [<https://perma.cc/WP6Y-4N8T>].
56. TRANSP. ALTS., *supra* note 49.
57. John Bela, *Pandemic-era Street Spaces: Parklets, Patios, and the Future of the Public Realm*, ARCH-DAILY (Sept. 29, 2021), <https://www.archdaily.com/968977/pandemic-era-street-spaces-parklets-patios-and-the-future-of-the-public-realm> [<https://perma.cc/A3E6-QKF6>].
58. According to one public advocate in New York, “Making Open Streets a permanent part of our city’s infrastructure is a way to make streets safer for pedestrians, support local businesses, and advance the goal of a more accessible New York for pedestrians.” Office of the Mayor, *Streets Week!: Mayor de Blasio Makes Open Streets Permanent Part of New York City’s Urban Landscape*, NYC.GOV (May 13, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/361-21/streets-week-mayor-de-blasio-makes-open-streets-permanent-of-new-york-city-s-urban-landscape> [<https://perma.cc/D98R-MD2Q>]; *see also* Planalp & Schell, *supra* note 16 (“Making these outdoor dining areas permanent will not only provide bars and restaurants with valuable expanded seating, but they will also generate added vibrancy in the urban core, provide important traffic-calming features to our streets, and will be much more aesthetically pleasing than the construction barriers currently in use; [Cincinnati Mayor John] Cranley said.”).
59. *See, e.g., Open Restaurants*, N.Y.C. DEP’T OF TRANSP. [hereinafter *N.Y.C. Open Restaurants Program*], <https://www1.nyc.gov/html/dot/html/pedestrians/openrestaurants.shtml> [<https://perma.cc/G4J6-EC7H>] (New York City, Open Restaurants program); *Open Streets*, N.Y.C. DEP’T OF TRANSP., <https://www1.nyc.gov/html/dot/html/pedestrians/openstreets.shtml> [<https://perma.cc/WX7G-A5PY>] (New York City, Open Streets program); Aaron Moselle, *Philly Council Passes Bill to Legalize ‘Streeteries’ Permanently in Some Areas*, WHYY PBS (Dec. 2, 2021), <https://whyy.org/articles/philly-council-passes-bill-to-legalize-streeteries-permanently-in-some-areas/> [<https://perma.cc/87R7-3C3E>] (Philadelphia); Oakland, Cal., Ordinance No. 13682 (Mar. 15, 2022), [https://library.municode.com/ca/oakland/ordinances/code\\_of\\_ordinances?nodeId=1145051](https://library.municode.com/ca/oakland/ordinances/code_of_ordinances?nodeId=1145051) [<https://perma.cc/8YEB-VXL5>] (Oakland); Becky Duffett, *It’s Official: Parklets Are Here to Stay in San Francisco*, EATER S.F. (July 14, 2021, 11:03 AM), <https://sf.eater.com/2021/7/14/22577370/restaurant-parklets-permanent-san-francisco> [<https://perma.cc/M6YD-M33R>] (San Francisco); Planalp & Schell, *supra* note 16 (Cincinnati).

## B. Harms

Despite their benefits, there are also harms associated with the implementation of many COVID-related open-space programs. This Section points out five such categories of harms: (1) nuisance-like and environmental harms; (2) privatization; (3) disability and accessibility; (4) exclusion; and (5) noninclusive decision-making.

### 1. Nuisance-Like and Environmental Harms

Although the idea of spending more time outside might sound nice, not all neighbors who live near open streets and streateries have found these changes worthwhile. For these individuals, the interventions may be more akin to nuisances than beneficial additions. For example, in 2021, New York City's Department of Transportation (DOT) sought to make the city's Open Restaurants program, which had been enacted on a temporary emergency basis, permanent.<sup>60</sup> In response, DOT "received thousands of complaints from residents related to noise, vermin, garbage accumulation, crowded sidewalks impeding residents access — all quality-of-life issues [constituting] a significant impact upon the environment."<sup>61</sup>

Although the permitting process for the open-restaurants program in New York was subject to environmental review under the State Environmental Quality Review Act (SEQRA),<sup>62</sup> DOT issued a negative declaration, finding that the program would have no significant impact on the environment.<sup>63</sup> This decision was challenged in court by neighbors and representatives of neighborhood associations, based on concerns over noise from outdoor dining, insufficient space for social distancing due to the large number of diners on the sidewalks, and problems with garbage and rats.<sup>64</sup> Specifically, the plaintiffs argued that the city

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60. Veronica Rose, *City Council Approves Zoning Text Amendment for Permanent Open Restaurants Program*, CITYLAND (Feb. 28, 2022), <https://www.citylandnyc.org/city-council-approves-zoning-text-amendment-for-permanent-open-restaurants-program> [https://perma.cc/SP6W-2AC6].

61. Priscilla DeGregory, *NYC Locals Sue to Block Permanent Expanded Outdoor Dining*, N.Y. POST (Oct. 19, 2021, 6:01 PM), <https://nypost.com/2021/10/19/nyc-locals-sue-to-block-permanent-expanded-outdoor-dining> [https://perma.cc/7U3F-76JT].

62. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(a) (2022).

63. See *id.* § 617.2(z) (defining negative declaration for purposes of SEQRA as "a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts"); *Arntzen v. City of New York*, No. 159502/2021, 2022 WL 861536, at \*2 (N.Y. Sup. Ct. Mar. 23, 2022).

64. *Arntzen*, 2022 WL 861536, at \*2.

should have completed a full-blown Environmental Impact Statement, rather than a negative declaration, under SEQRA.<sup>65</sup> The court agreed, finding that the sidewalk dining programs “have, at a minimum, impacted traffic and noise levels, and may have significantly impacted sanitation.”<sup>66</sup> Thus, the court found the issuance of the negative declaration arbitrary and capricious and ordered a full review under SEQRA.<sup>67</sup> It stated that making outdoor dining permanent “warrants nothing less than a comprehensive and earnest consideration and examination of the actual impacts of the already implemented program upon the daily functioning of the City’s sidewalks and streets, as well as the impact upon locally affected residents.”<sup>68</sup>

Similar nuisance-like complaints were made with respect to open-space programs’ impacts on parking. When San Francisco was planning to make its open-space changes permanent, many citizens voiced concern about the impact of these interventions on parking availability,<sup>69</sup> arguing that it was essential that the city take time to “discuss handicap accessibility, how public the spaces should really be, and transportation.”<sup>70</sup> Although street-side parking is provided by the government, and is ostensibly open to all, the use of that space (and decisions about its proper use) impacts the value and utility of an abutting private landowner’s property. Thus, those abutters might have complaints that sound like private-nuisance claims – perhaps arguing that if street-side parking is replaced by outdoor cafés, they will suffer because fewer people will be able to drive to their stores, and they will have to abide the noise and crowding on the sidewalks from the additional dining. But the use of street-side parking, whether for car storage, parklets, or outdoor dining, also impacts the experience of those using the streets and sidewalks for other purposes not related to any ownership claim; complaints on this basis sound more like public-nuisance claims.

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65. *Id.*

66. *Id.* at \*6-7.

67. *Id.* at \*7 (“Respondent’s bald assertion that no significant impact on noise or traffic is attributable to the program is arbitrary and capricious considering the plain evidence that noise complaints have increased in areas where the program has been implemented.”).

68. *Id.* at \*6. While the City was ultimately successful in getting the case dismissed on appeal on ripeness grounds, the lower court’s reasoning illustrates the sort of legal theory that could be used to challenge pandemic-era open-space programs elsewhere. See *Arntzen v. City of New York*, No. 2022-01524 (N.Y. App. Div. Oct. 4, 2022), [https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=WkTV1RSAnoVtwg\\_PLUS\\_sa4hJpQ==](https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=WkTV1RSAnoVtwg_PLUS_sa4hJpQ==) [https://perma.cc/LMN6-72J2].

69. *Permanent Outdoor Dining Parklets in SF? Why Not Everyone is On Board*, ABC7 NEWS (May 25, 2021), <https://abc7news.com/outdoor-dining-san-francisco-parklets-sf-coronavirus/10690715> [https://perma.cc/2V2K-N8DR].

70. *Id.*

The value of these sorts of complaints about parking, noise, and crowding is debatable. On one hand, they are similar to common “NIMBY”<sup>71</sup> arguments opposing new development of all sorts. Existing residents often want neighborhoods to remain static and unchanging; status-quo bias in the built environment is strong. Thus, it is unsurprising that these same types of complaints would be raised in the face of public-space reclamation projects that aim to make spaces open to new uses and users. On the other hand, public-space interventions are not always an unqualified benefit and do require difficult tradeoffs. Changes to the built environment might upset landowners’ settled expectations and thus might affect property values. Further, as the New York case discussed above suggests, these changes may risk creating genuine environmental harms without corresponding policies and systems—noise, waste management, pest control—to handle them.<sup>72</sup>

## 2. Privatization Concerns

Another line of concern related to public-space reclamation projects is that they tend to favor private businesses more than members of the public (or at least, more than *some* members of the public). Many of the open-streets and sidewalks programs allowed restaurants or businesses to take over ostensibly public space for free, or for a very low fee.<sup>73</sup> One commentator described the private use of public sidewalks as “a land grab that privatizes public space for one business industry, commercial landlords, and the customers who can afford the

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71. NIMBY stands for “Not In My Backyard,” a generalized complaint of neighbors who want to preserve the status quo and resist new development. *NIMBY*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/NIMBY> [<https://perma.cc/6MJK-VW9P>].

72. That said, these lawsuits are often used more as a delay tactic than because of actual concern about environmental impacts. See, e.g., M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, ATLANTIC (Mar. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264> [<https://perma.cc/8R8S-7MV2>] (“[California’s state environmental-review statute is] the preferred lever of California’s infamously litigious NIMBYs . . . . Anyone with a few hundred bucks can drag developers to court, forcing projects to undergo years of delays and to pay hundreds of thousands of dollars in legal fees.”).

73. In some cities that already had permitting fee programs for use of the sidewalk or for the creation of parklets, these fees were waived during the pandemic. See sources cited *supra* note 29; see also Eve Kessler, *Outdoor Dining Under Fire: Advocates Want Equity at the Curb, Not Parking*, STREETS BLOG NYC (Feb. 7, 2022), <https://nyc.streetsblog.org/2022/02/07/outdoor-dining-under-fire-advocates-want-equity-at-the-curb-not-parking> [<https://perma.cc/4C2Z-UF3C>] (describing outdoor dining as “free use of curbside space which easily could be generating revenue for the public good”).

\$20 burger and \$15 cocktail.”<sup>74</sup> The food-and-beverage industry is but one of many that suffered during the pandemic. Yet most other businesses did not get access to the same benefits or use of the public realm.<sup>75</sup>

In addition to concerns over which private entities benefit from these interventions, there are also broader concerns associated with the privatization of public space.<sup>76</sup> As I have noted previously,

[P]rivatized public space is problematic and a poor substitute for traditional public space. It is exclusionary. It segregates. It is sterile. It diminishes opportunities for free speech. It prevents people from different walks of life from interacting with one another. It also raises concerns from a local government perspective: There is a fear of loss of democratic process when corporations and other private entities control public spaces and the public realm more than citizens do.<sup>77</sup>

For example, San Francisco has long had a parklet program, where a business or neighborhood group could pay to convert a street-side parking space into a public space.<sup>78</sup> However, parklets were traditionally public space, required to be open to all members of the public – even those who were not patrons of the establishments that created them. But amendments passed in the wake of COVID now allow businesses to close parklets overnight, the idea being that this will help to preserve business owners’ investments into these outdoor-dining spaces.<sup>79</sup>

Of course, parking spaces themselves have always been subject to privatization by drivers who pay for their exclusive use.<sup>80</sup> And even privatized streateries

74. Diem Boyd, Editorial, *City Council, Vote No on the Open Restaurants Text Amendments!*, BOWERY BOOGIE (Feb. 24, 2022, 8:08 AM), <https://boweryboogie.com/2022/02/city-council-vote-no-on-the-open-restaurants-text-amendments-op-ed> [https://perma.cc/4SLM-NSXC].

75. Alicia Kelso, *91% of NYC Restaurants Say Permanent Outdoor Dining Is ‘Very Important’ to Future Survival*, REST. DIVE (Feb. 14, 2022), <https://www.restaurantdive.com/news/91-of-nyc-restaurants-say-permanent-outdoor-dining-is-very-important-to/618770> [https://perma.cc/K3HR-UQK7] (“Though many Big Apple restaurants and roughly 70% of local residents support extended outdoor dining, critics are frustrated that these rent-free and tax-free extensions haven’t been afforded to other businesses.”).

76. See Schindler, *Publicization*, *supra* note 44, at 1120-38.

77. *Id.* at 1097 (footnotes omitted).

78. *Case Study: San Francisco Parklet Program*, NAT’L ASS’N OF CITY TRANSP. OFFS., <https://nacto.org/case-study/san-francisco-parklet-program> [https://perma.cc/P6X4-FXCW].

79. Keeling, *supra* note 31.

80. See Vanessa Casado Pérez, *The Street View of Property*, 70 HASTINGS L.J. 367, 375 (2019) (“Curbside parking allocation is a great contemporary example of the rule of capture for wild animals. Curbside parking is normally open to everyone but, for obvious reasons, cannot be

in parking spaces allow more members of the public to access these spaces simultaneously than when they are reserved for use by individual cars. But the broader phenomenon of restaurants taking over these spaces for their patrons still raises concerns, especially if the price for doing so is low. This takeover evokes what some commentators have referred to as “café creep”: when private dining spaces begin to intrude into public sidewalks, streets, and parks, where should it stop?<sup>81</sup> How much of our public space should be dedicated to private, paying users versus to all members of the community? For example, café sidewalk expansion results in an ironic (if unsurprising) situation in some towns that have “move along” ordinances or other laws criminalizing homelessness. In these locations, an unhoused person or a person who is panhandling might be fined or even arrested for sitting, loitering, or resting on the sidewalk.<sup>82</sup> In contrast, a person paying for an expensive meal at a restaurant while sitting in a parklet or at a sidewalk café table is free to occupy that space as long as they like. These outcomes are unfair and alienate certain residents—especially those who cannot afford to eat at the streateries in their communities.<sup>83</sup> Here, perhaps cities might want to consider a hierarchy in order to balance these competing interests or set aside certain portions of space for each use. For example, use of publicly owned space by people is almost always preferable to use by cars (whether the people are paying to be there or not); thus, the percentage of space dedicated to cars should be much lower than that dedicated to people. But cities should also prioritize the use of public space, like sidewalks and streets, for use by all members of the public, not just those who can pay. Thus, cities should assure that a

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used by everyone at the same time. As a result, allocation rules are necessary. In general, the first to get into a vacant parking spot gets it.”).

81. JEROLD KAYDEN, *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* 57 (2000).
82. See, e.g., ATLANTA MUN. CODE § 106-85 (2022), [https://library.municode.com/ga/atlanta/codes/code\\_of\\_ordinances?nodeId=COORATGEVOII\\_CH106OFMIPR\\_ARTIIIIFAGPU\\_OR\\_S106-85MOSO](https://library.municode.com/ga/atlanta/codes/code_of_ordinances?nodeId=COORATGEVOII_CH106OFMIPR_ARTIIIIFAGPU_OR_S106-85MOSO) [<https://perma.cc/S23W-BERW>] (defining monetary solicitation and discussing where it is prohibited throughout the city); *id.* § 106-12, [https://library.municode.com/ga/atlanta/codes/code\\_of\\_ordinances?nodeId=COORATGEVOII\\_CH106OFMIPR\\_ARTIINGE\\_S106-12URCAIMUSPUPL](https://library.municode.com/ga/atlanta/codes/code_of_ordinances?nodeId=COORATGEVOII_CH106OFMIPR_ARTIINGE_S106-12URCAIMUSPUPL) [<https://perma.cc/P8GR-Y96B>] (defining camping as “the use of a street, sidewalk, other right-of-way, and/or any area underneath a bridge . . . for living accommodation purposes such as sleeping activities, or making preparations to sleep” and prohibiting camping in public spaces); see also *Housing Not Handcuffs 2019*, NAT’L L. CTR. ON HOMELESSNESS & POVERTY 37-46 (Dec. 2019) (describing laws and rules criminalizing homelessness).
83. *Many Pandemic ‘Fixes’ Had Unintended Consequences. Streateries Were One of Them*, WCPO CINCINNATI (June 17, 2021, 5:00 AM), <https://www.wcpo.com/news/transportation-development/move-up-cincinnati/many-pandemic-fixes-had-unintended-consequences-streateries-were-one-of-them> [<https://perma.cc/8WTY-5WPW>].

higher percentage of their public space is open to all than the percentage that is privatized.

### 3. *Disability and Accessibility*

One of the major concerns that commentators have raised about COVID-related open-space interventions is accessibility. And while some streeteries in New York have been removed for physical violations, including “blocking a fire hydrant, blocking a bus stop and blocking a bus lane,”<sup>84</sup> others that pose risks to disabled people remain. Sidewalk café seating can be especially bothersome, and even dangerous, for people using wheelchairs. Sidewalks and streets crowded with tables, chairs, and people waiting to be seated can make it difficult for those using wheelchairs or other mobility aids to fit past.<sup>85</sup> If the sidewalk is blocked in this way, a person using a wheelchair might need to “turn back and roll into the street[, which could put them] at high risk for death by traffic.”<sup>86</sup> Similarly, even if the sidewalk itself is not overcrowded, the placement of tables and chairs in streets and parking spaces can create the need for delivery vehicles or others to park in undesignated spots. Thus, if a van is blocking a curb cut, this might make it very difficult for a person using a wheelchair to leave the sidewalk in order to cross the street.<sup>87</sup>

As a result of these and other issues, lawsuits have been brought challenging various aspects of pandemic-era public-space changes. For example, there have been a small number of lawsuits brought against restaurants with sidewalk and

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84. DeGregory, *supra* note 61.

85. According to Lucy Trieshmann, who uses an electric wheelchair, “One of the really big problems is the tables are so close to the curb that there is often barely room for me to squeeze by . . . . Certainly not me and my dog. And certainly not me and a person walking towards me.” Eric Garcia, *Sidewalk Seating Is Good for Restaurants. It’s a Challenge for Disabled People*, WASH. POST (June 24, 2021, 10:31 AM EDT), [https://www.washingtonpost.com/outlook/sidewalk-restaurants-accessibility-disability-pandemic/2021/06/24/856508d4-d3ae-11eb-ae54-515e2f63d37d\\_story.html](https://www.washingtonpost.com/outlook/sidewalk-restaurants-accessibility-disability-pandemic/2021/06/24/856508d4-d3ae-11eb-ae54-515e2f63d37d_story.html) [<https://perma.cc/H2FJ-NU59>].

86. Keeling, *supra* note 31 (quoting Aubrie Lee, a power-wheelchair user); *see also* Garcia, *supra* note 85 (“Sometimes you might even have a piece of the sidewalk when it’s cracked . . . . And where you could normally avoid it, now you can’t, because you’re being pushed off, either towards the road or you’re being pushed off towards the building facade itself.” (quoting Dustin Jones, a manual-wheelchair user)).

87. *See* Fran Fulton & Michelle McCandless, Opinion, *Streeteries Put People with Disabilities at Risk*, PHILA. INQUIRER, Oct. 7, 2021, at A13; *see also* Garcia, *supra* note 85 (“[T]here’s this assumption that everyone drives everywhere . . . . Many disabled folks can’t drive. So sidewalks are how we get around.” (quoting Anna Zivarts, Director, Disability Mobility Initiative for Disability Rights Washington)).

street seating under the Americans with Disabilities Act (ADA).<sup>88</sup> In response, one court has held that the ADA applies not only to built-in street furniture, but also to tables that were temporarily placed on sidewalks and used for outdoor dining during COVID restrictions, though the issue is still novel.<sup>89</sup> Thus, litigants have claimed that some of this temporary outdoor seating was not accessible to wheelchair users.<sup>90</sup>

The merit of these claims is contested. Several of these cases appear to have been filed by serial ADA litigants; a recent court decision found that one of these litigants was not credible and thus lacked standing to sue.<sup>91</sup> Further, district attorneys in San Francisco and Los Angeles recently filed a lawsuit alleging unfair business practices by the California law firm behind many of these ADA lawsuits.<sup>92</sup> There is also evidence that these claims disproportionately impact small businesses that are owned by immigrants and non-English speakers.<sup>93</sup> While a full discussion of the ongoing debates over ADA litigation reform is beyond the scope of this Essay,<sup>94</sup> it is at least possible that postpandemic sidewalk policies may be a key battleground in this debate. At base, these conflicts are another illustration of the disputed nature of public space and the ways that changes to

88. See 42 U.S.C. § 12181(7)(B) (2018) (classifying restaurants and bars as public accommodations under the Act); *id.* § 12182 (prohibiting discrimination by public accommodations).

89. *Whitaker v. 2008 Shattuck Ave, LLC*, No. 21-cv-03083, 2021 U.S. Dist. LEXIS 157157, at \*1 n.1 (N.D. Cal. Aug. 19, 2021).

90. See, e.g., *Whitaker v. Gundogdu, Inc.*, No. 21-cv-03132, 2021 U.S. Dist. LEXIS 240623, at \*2 (N.D. Cal. Dec. 16, 2021); *Johnson v. Opa Campbell, LP*, No. 21-cv-01619, 2021 U.S. Dist. LEXIS 149211, at \*2 (N.D. Cal. Aug. 9, 2021).

91. The court questioned the plaintiff's credibility on the grounds that he did not have a genuine intent to return to at least one of the restaurants he had sued for violations. Joe Dworetzky, *Federal Judge Finds ADA Plaintiff's Testimony 'Not Credible,' Dismisses Suit Against Peninsula Restaurant*, PLEASANTON WKLY. (May 9, 2022, 2:52 AM) <https://www.pleasantonweekly.com/news/2022/05/09/federal-judge-finds-ada-plaintiffs-testimony-not-credible-dismisses-suit-against-peninsula-restaurant> [<https://perma.cc/U7D6-8MCF>].

92. Complaint for Restitution, Civil Penalties, Preliminary & Permanent Injunctions, & Other Equitable Relief, *People v. Potter Handy LLP*, No. CGC-22-599079 (Cal. Super. Ct. Apr. 11, 2022), <https://www.documentcloud.org/documents/21583011-people-v-potter-handly-llp-et-al-final-complaint> [<https://perma.cc/XPK5-7YYM>].

93. Bob Egelko, *Boudin, Gascón Accuse Law Firm of Targeting Immigrant-Run Businesses*, S.F. CHRON. (Apr. 11, 2022, 7:02 PM), <https://www.sfchronicle.com/bayarea/article/Boudin-Gasc-n-accuse-law-firm-of-targeting-17073120.php> [<https://perma.cc/Q88P-GJDM>].

94. See generally Hannah Albarazi, *COVID-19's Impact on Businesses Fuels ADA Reform Debate*, LAW360 (Nov. 14, 2021, 8:02 PM EST), <https://www.law360.com/articles/1439804/covid-19-s-impact-on-businesses-fuels-ada-reform-debate> [<https://perma.cc/3Y3T-XDTM>] (discussing "renewed calls for reforms to protect inadvertently noncompliant business owners from litigation"). *But see* Garcia, *supra* note 85 ("[G]overnment in general doesn't play an active role in enforcing the ADA. People have to put in complaints and wait for officials to review them. That puts an even bigger burden on the people affected by violations.").

the built environment involve trade-offs between competing needs of different urban populations.

Some cities have responded to these concerns by creating accessibility guidance for al fresco dining. For example, San Francisco now requires that restaurateurs “[a]void blocking anyone’s ability to pass safely, including avoiding blocking ADA-compliant sidewalk access.”<sup>95</sup> Of course, from a restaurant’s perspective, every additional table they can squeeze in outdoors provides another opportunity to remain afloat. This produces an inherent conflict between ADA compliance and the restaurant’s bottom line.<sup>96</sup> To address these concerns, the new “Shared Spaces” permits in San Francisco require restaurants to submit a site plan to show ADA compliance and post a public notice for the space.<sup>97</sup> The new legislation also imposes more extensive requirements for parklets located at intersections because of safety concerns.<sup>98</sup>

A related mobility concern involves people who cannot easily ride a bicycle or walk (or do not feel safe doing so – often for reasons related to race<sup>99</sup>), as well as those who are completely reliant on a car for their mobility needs. The closure of many city streets interrupted car commutes for some drivers, as well as delivery routes for essential workers.<sup>100</sup> For others, the loss of parking spaces to public space has made it more difficult to physically access different parts of the

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95. Erika Mailman, *As Restaurants Take Over Sidewalks to Provide Pandemic-Safe Dining, People with Disabilities Encounter Barriers*, WASH. POST (Aug. 23, 2020, 9:00 AM EDT), [https://www.washingtonpost.com/health/coronavirus-sidewalk-seating-disabilities-barriers/2020/08/21/02ede6b8-e24c-11ea-8181-606e603bb1c4\\_story.html](https://www.washingtonpost.com/health/coronavirus-sidewalk-seating-disabilities-barriers/2020/08/21/02ede6b8-e24c-11ea-8181-606e603bb1c4_story.html) [<https://perma.cc/NQ9T-5WD7>]; see also *Make Your Shared Space Accessible*, SF.GOV, <https://sf.gov/information/make-your-shared-space-accessible> [<https://perma.cc/L3N2-XA8L>] (outlining the city’s requirements for sidewalk use by businesses).
96. To this end, lawsuits have been brought against cities prior to COVID for sidewalk obstructions under the ADA. See, e.g., *Ochoa v. City of Long Beach*, No. 14-cv-4307, 2015 U.S. Dist. LEXIS 200631, at \*1-4 (C.D. Cal. Sept. 15, 2015).
97. Joe Kukura, *Outdoor Dining Parklets Becoming Permanent, but New Permits and Costs Are Looming*, SFIST (Mar. 8, 2022), <https://sfist.com/2022/03/08/outdoor-dining-parklets-becoming-permanent-but-new-permits-and-costs-are-looming> [<https://perma.cc/A47X-ZBVJ>].
98. *Id.*
99. See Bob Seay, *Racism Is Often the First Hurdle for Black Bicyclists*, GBH NEWS (Sept. 3, 2020), <https://www.wgbh.org/news/local-news/2020/09/03/racism-is-often-the-first-hurdle-for-black-bicyclists> [<https://perma.cc/2PAS-GNMT>]; Adam Mahoney, *In Chicago, Cyclists in Black Neighborhoods Are Over-Policed and Under-Protected*, GRIST (Oct. 21, 2021), <https://grist.org/cities/black-chicago-biking-disparities-infrastructure> [<https://perma.cc/2XV9-H7ZH>].
100. See, e.g., Mollie Cohen D’Agostino, Kelly Fleming & Austin Brown, *Open Streets: Quick Action vs. Community Buy-In*, UC DAVIS INST. TRANSP. STUD. (Aug. 10, 2020), <https://its.ucdavis.edu/blog-post/open-streets-quick-action-vs-community-buy-in> [<https://perma.cc/G4RN-9BAA>].

city.<sup>101</sup> These concerns were raised by mobility-justice advocates in response to some open-streets programs and must be considered by localities in the process of adopting new open-space rules.<sup>102</sup>

#### 4. *Exclusionary Environments*

As with concerns about physical accessibility, there are other ways spaces can be exclusionary – even when technically open to all.<sup>103</sup> As I have written about previously, the location of public space and the norms that govern its use and users often create exclusionary environments where people feel “othered,” or unwelcome.<sup>104</sup> The reclamation of space for people, rather than cars, in the wake of COVID has raised many of these issues. Even if parklets or streateries are technically open to all, if most of the people using them are well-dressed patrons of nearby restaurants, this creates a norm of exclusion for those who might not fit that mold. Indeed, research from Seattle suggests that members of the public there generally did *not* view streateries as public space.<sup>105</sup>

COVID-related open-space interventions invite questions not only about who feels most comfortable using them, but also about where these spaces are located. For example, many cities disproportionately implemented open-streets and sidewalk programs in wealthier neighborhoods, which were often composed of single-family homes with backyards and thus had less need for additional

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101. See, e.g., T.J.M., *Councils Face Calls to Re-Think COVID Streetscape Changes*, DISABILITY NEWS SERV. (Oct. 1, 2020), <https://www.disabilitynewsservice.com/councils-face-calls-to-re-think-covid-streetscape-changes> [<https://perma.cc/42YG-9GKK>].

102. See, e.g., Tab Combs & Krista Nordback, *COVID-19 Streets: Mobility Justice and the Rapid Rollout of Pedestrian and Bicyclist Improvements*, COLLABORATIVE SCIS. CTR. FOR ROAD SAFETY, <https://www.roadsafety.unc.edu/research/projects/2021r34> [<https://perma.cc/D2F6-YKQ3>]; *Mobility Justice and COVID-19*, UNTOKENING COLLECTIVE (Apr. 8, 2020), <http://www.untokening.org/updates/2020/4/8/mobility-justice-and-covid-19> [<https://perma.cc/Y4AA-MWNJ>]; Courtney Cobbs, *Ahmaud Arbery's Death, Mobility Justice, and the Open Streets Debate*, STREETS BLOG CHI. (May 11, 2020), <https://chi.streetsblog.org/2020/05/11/ahmaud-arberys-death-mobility-justice-and-the-open-streets-debate> [<https://perma.cc/U26P-VGCU>].

103. See generally Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1838, 1850-57 (2006) (discussing “exclusionary vibes”).

104. See Schindler, *Architectural Exclusion*, *supra* note 44, at 1939-40; Schindler, *Publicization*, *supra* note 44, at 1104 n.53.

105. See Bela, *supra* note 57 (describing the results of a survey of Seattle community residents).

public open space. In a number of cities, including New York,<sup>106</sup> Philadelphia,<sup>107</sup> Edmonton,<sup>108</sup> and Oakland,<sup>109</sup> the open-space programs that were initially put in place primarily benefited wealthy or white residents.<sup>110</sup> There are a number of potential reasons for this – including structural racism and a failure to include poorer neighborhoods or communities of color in the planning process.<sup>111</sup> Some commentators suggested that the demand for additional recreational open space was coming mainly from white people who were staying home due to COVID concerns.<sup>112</sup>

The City of San Francisco’s Board of Supervisors recently voted to permanently preserve the COVID-related closure of John F. Kennedy Drive in Golden

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106. As originally implemented, the New York Open Streets program was “centralized in the wealthiest neighborhoods.” *TRANSP. ALTS.*, *supra* note 49 (“Open Streets in predominantly white neighborhoods were significantly more likely to be car-free.”).

107. Philadelphia’s process for determining whether streeteries would be permitted as of right initially focused on wealthier and whiter neighborhoods. See Tyler Tran, *Streeteries for Me, but Not for Thee?*, HI, I’M TYLER (Nov. 9, 2021), [https://tylerjtran.github.io/data\\_blog/posts/2021-11-09-streeteries-for-me-but-not-for-thee](https://tylerjtran.github.io/data_blog/posts/2021-11-09-streeteries-for-me-but-not-for-thee) [<https://perma.cc/CCC5-VG55>] (“Without Jamie Gauthier’s ‘blanket approval’ in the 3rd Council District, the streeteries approval is limited almost exclusively to neighborhoods with higher median incomes with fewer Black residents.”).

108. *AZURE*, *supra* note 15 (“[T]he temporary street closures adopted on Edmonton’s Victoria Park Drive and Saskatchewan Road will mostly serve wealthy residents who already benefit from private green space and easy access to deliveries and essential services.”).

109. Ricky Rodas, *Parklets Forever? Oakland Could Make Flex Streets Permanent*, OAKLANDSIDE (Feb. 23, 2022), <https://oaklandside.org/2022/02/23/parklets-forever-oakland-could-make-flex-streets-permanent> [<https://perma.cc/46DA-MNAT>] (noting that East Oakland, which is predominantly Black, did not have nearly the same amount of participation in the program as other areas of the city, likely due to a lack of outreach regarding how to apply).

110. See Schmidt, *supra* note 32 (“The geography of these programs within cities is also telling . . . [N]early 60% of the cities [surveyed] had open streets projects that were located in tracts that were less equitable (i.e. in census tracts above the city’s median family income). In Alexandria, Virginia, for example, open streets appeared in tracts with an average median family income roughly 50% more than the city as a whole. By contrast, Durham, North Carolina, located their program in a tract with a median family income roughly 50% less than the city average . . .”).

111. See Destiny Thomas, *‘Safe Streets’ Are Not Safe for Black Lives*, BLOOMBERG (June 8, 2020, 11:44 AM), <https://www.bloomberg.com/news/articles/2020-06-08/-safe-streets-are-not-safe-for-black-lives> [<https://perma.cc/G3VM-L9PR>] (“Without a plan to include and protect Black, Brown, Indigenous, trans, and disabled people . . . these open streets are set up to fail.”); see also Alexandra Flynn & Amelia Thorpe, *Pandemic Pop-Ups and the Performance of Legality*, in *VOLUME 3: PUBLIC SPACE AND MOBILITY* 25, 26 (Rianne Van Melik, Pierre Filion & Brian Doucet eds., 2021) (“With an emphasis on speed over process, pop-ups have invariably been deployed without oversight or engagement, and rarely involving the voices of racialized or vulnerable people.”).

112. Walker, *supra* note 39.

Gate Park to car traffic.<sup>113</sup> One supervisor had argued that the closure was a “segregationist” policy.<sup>114</sup> He explained that his constituents, many of whom were Black, were left out of the conversation about closing this access route through the park<sup>115</sup> and that many lacked bikes or easy access to public transportation.<sup>116</sup> Yet the car closure meant only those with easy access to the park would be able to take advantage of its car-free streets.<sup>117</sup> This example illustrates how moving away from a car-centric model has the potential to disproportionately impact lower-income communities and communities of color. A long history of structural racism, federal policies, and wealth inequality has left neighborhoods across the United States divided by race.<sup>118</sup> Many racially minoritized people are thus unable to live in expensive, central urban areas, and instead must commute into the city for work and leisure from suburbs or other areas that are not easily accessible via public transportation. When streets are closed to cars or parking spaces are repurposed, those who rely on their cars for access often suffer.

The broader problem here is that local elected officials often respond only to constituents with power.<sup>119</sup> Thus, many of these policies may have been implemented without sufficiently considering who would be excluded as a result. And while the location piece of this concern is primarily an issue of siting, rather than of the content of the programs themselves (and thus can be fixed going forward), the deeper points about exclusionary norms are perhaps inherent in the interventions.

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113. J.D. Morris, *Golden Gate Park's JFK Drive Will Stay Permanently Car-Free After S.F. Supes Vote Following Marathon Meeting*, S.F. CHRON. (Apr. 27, 2022, 7:00 PM), <https://www.sfchronicle.com/sf/article/car-free-JFK-Drive-17126175.php> [<https://perma.cc/A5LL-BYX4>].

114. Meaghan Mitchell, *Supervisor Shamann Walton on Why He Believes Car-Free JFK Is 'Segregationist' Policy*, S.F. STANDARD (Mar. 20, 2021, 10:25 AM), <https://sfstandard.com/transportation/supervisor-walton-car-free-jfk-golden-gate-park-segregationist> [<https://perma.cc/5R5T-F8XZ>] (noting Board of Supervisors President Shamann Walton’s “concerns that a vehicle-free section makes the park less accessible to families that don’t have the privilege of using a bike or access to adequate public transportation”).

115. *Id.*

116. *Id.*

117. *Id.* (“[C]onsidering a policy that completely isolates communities of color from certain areas of the park . . . is basically saying, ‘We don’t want Black people, we don’t want low-income people in certain areas of San Francisco.’” (quoting Shamann Walton, President, San Francisco Board of Supervisors)).

118. See, e.g., Schindler, *Architectural Exclusion*, *supra* note 44, at 1973-88; RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at xii (2017).

119. Cf. WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 80-81 (2005) (advancing the thesis that homeowners dominate local politics).

5. *Quick Decision-Making and Lack of Public Participation*

Finally, another potential harm involves the process through which temporary programs were adopted. Because many open-streets programs were adopted on a temporary, emergency, or pilot-project basis, their implementation often involved less public comment or participation than a typical planning or zoning decision.<sup>120</sup> This also resulted in the rapid construction of, and use of subpar materials to construct, some of these features.<sup>121</sup> For example, urbanist John Bela noted “the proliferation of low-quality, poorly designed, and potentially dangerous commercial outdoor dining platforms” during the pandemic.<sup>122</sup> As he recognized, “[m]any of these spaces feel opaque and claustrophobic, blocking visual access to ground floor retail and obstructing city sidewalks.”<sup>123</sup> Instead, he suggests that cities adopt rules requiring streateries and patio dining structures to “adhere to basic good design principles like a 42-inch height maximum for surrounding enclosures; 50 percent transparent walls; and a direct, accessible connection to the adjacent sidewalk in order to generate the public benefit of vibrant, lively streets.”<sup>124</sup>

These quick decisions have also led to at least one lawsuit. A lower court in Berlin struck down some of the city’s COVID-inspired pop-up bike lanes.<sup>125</sup> Opponents of the lanes argued that they were being put up quickly, and that the city

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120. Combs & Pardo, *supra* note 33, at 2 (“[T]he transportation profession’s long history of eschewing public engagement has been further entrenched by the pandemic and the ‘emergency planning’ mentality it has engendered.”); Flynn & Thorpe, *supra* note 111, at 27–28. There is a large literature regarding emergency measures and path dependency; although emergency measures are often passed with fewer procedural protections, they tend to remain in place and become entrenched. See David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1769 (2004); Gilad Abiri & Sebastián Guidi, *The Pandemic Constitution*, 60 COLUM. J. TRANSNAT’L L. 68, 105–07 (2021) (“All emergencies have the potential to create detrimental path dependencies. . . . [T]he population may end up with a set of measures that does not accommodate their deliberate preferences and that was never given proper, democratic consideration in normal times.”).

121. See Olivera Lekic Glavan, Nenad Nikolic, Branislav Folic, Biljana Vitosevic, Aleksandra Mitrovic & Saja Kosanovic, *COVID-19 and City Space: Impact and Perspectives*, 14 SUSTAINABILITY art. no. 1885, at 4 (2022) (describing the “quick erection or installation, use of prefabricated and modular construction systems, and oftentimes, the deprivation of the quality of architectural form” in the construction of COVID testing and quarantine infrastructure).

122. Bela, *supra* note 57.

123. *Id.*

124. *Id.*

125. VG Sept. 4, 2020, 11 L 205/20, juris (Ger.) <https://gesetze.berlin.de/bsbe/document/JURE200012956> [<https://perma.cc/W8RU-ZXWK>].

was taking advantage of the pandemic to push an anti-car “agenda.”<sup>126</sup> In response, the city argued that the lanes had been put in place on dangerous roadways to make biking safer, but the court found that claim unsubstantiated.<sup>127</sup>

Some cities, recognizing that they failed to involve the full spectrum of the public in initial rounds of open-streets decision-making, have modified their approaches.<sup>128</sup> For example, Oakland now has a process for incorporating community input to determine where interventions are needed.<sup>129</sup> Seattle’s Department of Transportation recently conducted an “outdoor dining and retail survey” in pursuit of a permanent program.<sup>130</sup> Unlike some other cities that rushed to permanency, Seattle indicated it wanted to carefully craft its program and intentionally sought more community input.<sup>131</sup> Chicago is currently seeking proposals from community organizations for its outdoor-dining program.<sup>132</sup> Again, this

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126. Vishal Tiwari, *Berlin Cycle Lanes Installed amid COVID-19 To Be Dismantled After Court’s Ruling*, REPUBLICWORLD.COM (Sept. 9, 2020, 6:20 PM), <https://www.republicworld.com/world-news/rest-of-the-world-news/berlin-cycle-lanes-to-be-dismantled-after-courts-ruling.html> [https://perma.cc/8CXC-5NC4]; Aggi Cantrill, *Pop-Up Bike Lanes and the Fight over Berlin’s Streets*, BLOOMBERG (Oct. 13, 2020, 4:13 AM), <https://www.bloomberg.com/news/articles/2020-10-13/the-fight-over-berlin-s-temporary-bike-lanes> [https://perma.cc/5AJJ-SN5G].
127. Tiwari, *supra* note 126. Of note, some of these lanes are now being made permanent after a higher court overturned the lower court decision. See OVG, June 1, 2021, 1 S 115.20, juris (Ger.) <http://www.verkehrlexikon.de/UrteileB/Rspr10015.php> [https://perma.cc/FP5E-RDP6]; *Berlin Expands Bike Lanes as COVID Cycling Boom Continues*, REUTERS, June 22, 2021, 10:17 AM, <https://www.reuters.com/world/europe/berlin-expands-bike-lanes-covid-cycling-boom-continues-2021-06-22> [https://perma.cc/2CBP-X7VV].
128. As Ryan Russo, the director of Oakland’s Department of Transportation, noted, “It would be very easy for us to just say, ‘We did a survey and 75 percent of Oaklanders say they support Slow Streets,’ . . . [but] it’s disproportionately folks who are higher-income who really enjoy it, and people who are white who are saying that, that’s a very important thing for government to be listening to.” Emily Badger, *The Pandemic Has Pushed Aside City Planning Rules. But to Whose Benefit?*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/upshot/pandemic-city-planning-inequality.html> [https://perma.cc/FLK5-3RTX].
129. Oakland has “plans for creating pop-up, request-based local street closures to build on success realized during the initiative’s first year.” Lusk et al., *supra* note 18, at 11.
130. Ray Dubicki, *Café Streets: From Pandemic Response to Permanent Program*, URBANIST (Feb. 7, 2022), <https://www.theurbanist.org/2022/02/07/open-streets-feb2022> [https://perma.cc/EX7Q-XA7N]; see also Ethan Bancroft, *Thank You to the 10,000+ People Who Took Our Outdoor Dining and Retail Survey. Here’s What We Heard. Plus, the Program Is Extended Through January 31, 2023!*, SDOT BLOG (Feb. 23, 2022), <https://sdotblog.seattle.gov/2022/02/23/safe-start-permit-program-survey-results-and-extension> [https://perma.cc/5LBK-3RWM] (discussing community praise and concerns over the continuation of permanent outdoor dining).
131. Dubicki, *supra* note 130; Bancroft, *supra* note 130.
132. *Alfresco*, CHI. TRANSP., [https://www.chicago.gov/city/en/depts/cdot/supp\\_info/alfresco.html](https://www.chicago.gov/city/en/depts/cdot/supp_info/alfresco.html) [https://perma.cc/4L8A-YVV3] (“The City of Chicago Department of Transportation seeks proposals for its ‘Chicago Alfresco’ program . . .”).

should be a fairly easy problem to solve moving forward; rather than simply converting their programs from temporary to permanent, cities should take time to consider a broad range of voices regarding what has and has not worked. That said, cities should also recognize that public-comment processes have historically been weaponized by neighborhood residents seeking to block socially beneficial changes, preferring the status quo.<sup>133</sup> Thus, the value of mandating community input may depend significantly on which interests are being served, and who in the community ultimately benefits.

### III. MOVING FORWARD

Today, cities around the world are considering whether to convert once-temporary interventions into permanent public-space projects. In so doing, many have come down on the side of retaining the expanded public spaces created during the pandemic, often viewing this as a step toward healthier, more resilient, and more sustainable cities.<sup>134</sup> However, it is unclear to what extent decision makers have considered or balanced the competing concerns raised in this Essay. This final Part will consider how these decisions should best be made and who should be making them.

#### A. How Should Decisions Be Made

How should policymakers decide whether and to what extent changes to the built environment that were implemented in the wake of COVID should be retained? There is a real risk that cities will uncritically accept that programs like Open Streets are “popular, beloved, [and] effective,” and institutionalize them as is without considering the harms discussed above.<sup>135</sup> On the other hand, there

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<sup>133.</sup> See *infra* note 160 (discussing the demographics of typical public commenters).

<sup>134.</sup> See, e.g., N 210434 ZRY- Proposed Open Restaurants Text Amendment, N.Y.C. DEP’T OF CITY PLAN. 26 (June 30, 2021), [https://www1.nyc.gov/html/mancb3/downloads/calendar/2021/OR\\_Referral\\_Package\\_063021.pdf](https://www1.nyc.gov/html/mancb3/downloads/calendar/2021/OR_Referral_Package_063021.pdf) [<https://perma.cc/PEJ5-T7XH>] (noting that benefits of a permanent program include the removal of outdated prohibitions on sidewalk cafés, creating jobs, further activity in city streets, and simplifying rules and enforcement); see also Molly Martin, *Denver’s Outdoor Dining Program Will Become Permanent*, WESTWORD (Oct. 26, 2021, 3:18 PM), <https://www.westword.com/restaurants/denver-outdoor-dining-program-restaurants-permanent-12650566> [<https://perma.cc/D5BZ-DMYX>] (“We’re looking forward to making our outdoor dining program a permanent part of the Denver experience and supporting a sustainable economic recovery for our local restaurants, their employees and the communities they’re a part of” (quoting Michael Hancock, Mayor, City of Denver)).

<sup>135.</sup> *Open Streets Forever*, *supra* note 49; see also Casado Pérez, *supra* note 52, at 2201 (arguing that COVID-related open-space changes “should be made permanent”); *supra* note 120 (discussing path dependency following public emergencies).

is also a concern – which has already been borne out in some places – that cities will eliminate large parts of their temporary public-space programs as they remove other emergency pandemic measures.<sup>136</sup> A more measured approach would center mobility and accessibility justice alongside considerations of economic support for businesses, the health needs of the community, and the value of additional open space for neighbors to exercise and socialize.<sup>137</sup>

While many cities have become more intentional about considering diverse views in recent years,<sup>138</sup> this has traditionally been uncommon. Although the specific politics might vary across communities, local-government decision-making often favors parties with power. Two influential models for who has historically wielded power in cities and suburbs are William A. Fischel’s “homevoter hypothesis,” which centers homeowners,<sup>139</sup> and the “growth machine” model, which centers developers.<sup>140</sup> From an economic perspective, developers might prefer that COVID-related public-space interventions remain. Recent research

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136. See, e.g., *City Announces Next Phase of Shared Streets Initiative*, DENVER (Aug. 5, 2021), <https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Department-of-Transportation-and-Infrastructure/News-Outreach/News/Next-Phase-Shared-Streets> [<https://perma.cc/M4WE-8Q6D>] (stating that Denver “is ending its temporary shared streets initiative” in light of relaxed COVID restrictions, but noting that it would consider a separate permanent program in the future).

137. Cf. John F. Saylor, Comment, *The Road to Transportation Justice: Reframing Auto Safety in the SUV Age*, 170 U. PA. L. REV. 487, 517 (2022) (“[T]ransportation justice theorists generally subscribe to a distributive equity theory that allocates resources (either concrete resources like funding or abstract concepts like ‘accessibility’) in ways that reduce inequality, and are roundly critical of utilitarian principles such as those that seek only to maximize efficient movement.”).

138. See, e.g., *Portland’s Vision for Growth and Progress*, PORTLAND.GOV, <https://www.portland.gov/bps/comp-plan/vision-growth-and-progress> [<https://perma.cc/VK4K-P87L>] (listing priorities including “[i]ntentionally engag[ing] under-served and underrepresented populations in decisions that affect them . . . [and] [s]pecifically recogniz[ing], address[ing] and prevent[ing] repetition of the injustices suffered by communities of color throughout Portland’s history.”); *Seattle 2035 Comprehensive Plan: Managing Growth to Become an Equitable and Sustainable City*, CITY OF SEATTLE 7 (Nov. 2020), <https://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/ComprehensivePlanCouncilAdopted2021.pdf> [<https://perma.cc/A722-APHC>] (“This Plan encourages continued broad public participation in decisions that affect all aspects of the city.”); see also Darren Bates, *7 Citizen Engagement Tips to Help Build More Inclusive Smart Cities*, AUSTIN STARTUPS (July 31, 2018), <https://austinstartups.com/7-citizen-engagement-tips-to-help-build-sustainable-and-inclusive-smart-cities-c84a703d64c6> [<https://perma.cc/DW6Z-KCN2>] (“Instead, cities must support and engage the broader community, prioritize and practice human-centered urban design, and provide diverse, accessible, and inclusive pathways for robust citizen co-creation.”).

139. See FISCHEL, *supra* note 119, at 4-5.

140. See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 313-14 (1976).

suggests a correlation between proximity to outdoor dining and both commercial and residential property values.<sup>141</sup> And there certainly is such a correlation regarding proximity to open space more broadly.<sup>142</sup> The calculus for homeowners, however, is less straightforward. While many homeowners might appreciate the additional space they have gained to safely bike and walk,<sup>143</sup> communities of color have not generally received the same beneficial changes as whiter communities.<sup>144</sup> On the other hand, as the New York SEQRA lawsuit demonstrates, not all residents appreciate these interventions, and some may use legal processes to block public-space projects that would benefit the city more broadly.<sup>145</sup> Thus, the default outcome for many COVID-related public-space changes may be to retain those that are popular with powerful property owners and discard those that are unpopular. Knowing this, decision makers must be intentional when evaluating public-space reclamation projects, in order to counteract these trends when they result in clearly inequitable ends.

Some communities have taken steps towards this ideal. Examples include the expanded community-input processes from Oakland, Seattle, and Chicago mentioned above.<sup>146</sup> Further, San Francisco recently passed “Shared Spaces” legislation that “[p]rioritize[s] equity and inclusion by prioritizing City resources for communities most impacted by historical disparities with funding, materials and grants [and] [e]nsure[s] that the needs of the disabled community are

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141. See Shima Hamidi, Ahmad Bonakdar, Golnaz Keshavarzi & Reid Ewing, *Do Urban Design Qualities Add to Property Values? An Empirical Analysis of the Relationship Between Urban Design Qualities and Property Values*, 98 CITIES art no. 102546, at 5-7, 9 (2020) (considering outdoor dining as a feature of imageability and complexity in a locality as a factor that might increase property values); Anoshua Chaudhuri & Susan G. Zieff, *Do Open Streets Initiatives Impact Local Businesses? The Case of Sunday Streets in San Francisco, California*, 2 J. TRANSP. & HEALTH 529, 536 (2015) (“There are also potentially positive spillover impacts, for example, greater public safety, more transportation choices, higher property values, and enhanced community connection, from a program originally intended for improving health behaviors and fostering active lifestyles.”); John William Matthews, *The Effect of Proximity to Commercial Uses on Residential Prices* (May 2006) (Ph.D. dissertation, Georgia State University & Georgia Institute of Technology) (ProQuest), 138-39 (showing that in pedestrian-oriented neighborhoods, mixing land uses could increase property values). That said, as discussed above, many of the public-space interventions were placed in already wealthier neighborhoods, making their independent effect upon property values unclear. See *supra* notes 106-110 and accompanying text.

142. John L. Crompton & Sarah Nicholls, *Impact on Property Values of Distance to Parks and Open Spaces: An Update of U.S. Studies in the New Millennium*, 51 J. LEISURE RSCH. 127, 128-29 (2020).

143. See *supra* notes 46-50 and accompanying text.

144. See *supra* note 117 and accompanying text.

145. See *supra* notes 60-68 and accompanying text.

146. See sources cited *supra* notes 129-132 and accompanying text.

accommodated.”<sup>147</sup> In pursuit of this goal, the legislation not only focuses on participation, but requires the collection of data and user feedback.<sup>148</sup> It then requires the city to evaluate that data “in various areas, including racial equity, transportation, the environment, public access, economic impact, type of activities, and community engagement.”<sup>149</sup> The legislation also specifically seeks to balance the need for these spaces in the public realm to be open to the public, while also acknowledging that “time-specific commercial use of Curbside Shared Spaces by businesses in suitable locations” is appropriate for economic purposes.<sup>150</sup> San Francisco has sought to strike this balance by requiring streateries located in street-side parking spaces to be open and accessible to the public during daylight hours when the restaurant or bar is not open.<sup>151</sup> The city is also in the process of issuing “equity grants” to aid businesses in making Shared Spaces accessible, and is prioritizing those grants in communities hard hit by COVID, or in other underserved and vulnerable areas.<sup>152</sup> While the legislation is still new and relatively untested, San Francisco has long led in public-space projects, and other cities have historically followed its lead.<sup>153</sup>

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147. *Making the Shared Spaces Program Permanent*, SF.GOV, <https://sf.gov/information/making-shared-spaces-program-permanent> [<https://perma.cc/4SWV-XZQD>].
148. *Id.* Although city officials have not yet begun to collect or operationalize this data, they plan to use tested in-field data collection methods, such as those designed for public space or public life studies. See Planning Dep’t, *Public Life Study: Standards Manual*, S.F., CAL. (2019), [https://default.sfplanning.org/Citywide/publicspace/docs/SFDCP\\_PLS\\_StandardsManual.pdf](https://default.sfplanning.org/Citywide/publicspace/docs/SFDCP_PLS_StandardsManual.pdf) [<https://perma.cc/B8YY-6K4L>]; Interview with Robin Abad Ocubillo, Director, Shared Spaces Program, City of S.F., Cal. (Oct. 14, 2022).
149. S.F., CAL. ADMIN. CODE § 94A.3.(j) (2021), <https://sfgov.legistar.com/View.ashx?M=F&ID=9687611&GUID=6C2619DB-6F93-43BA-B8D8-F7543080A975> [<https://perma.cc/L28K-BZUA>].
150. *Id.* § 94A.3.(l).
151. *Making the Shared Spaces Program Permanent*, *supra* note 147 (defining a commercial parklet as “a fixed structure where an operator uses the parklet for commercial activity during business hours with a bench or other public seating facility, and is otherwise open to the public during non-commercial daytime hours.”).
152. *Is Your Shared Space Safe and Accessible?*, SF.GOV, <https://sf.gov/sites/default/files/2022-03/Shared%20Spaces%20Compliance%20Flyer%20ENGLISH.pdf> [<https://perma.cc/MHG4-SA4G>] (describing the equity-grants program); *Get Help Paying for Your Shared Space Improvements*, SF.GOV., <https://sf.gov/step-by-step/get-help-paying-your-shared-space-improvements> [<https://perma.cc/FA76-CK4Z>] (describing the process for applying to equity-grants program).
153. Consider, for example, the history of the parklet, an idea born in San Francisco that has since achieved worldwide popularity. See Brock Keeling, *An Oral History of the Parklet*, DWELL (May 11, 2021), <https://www.dwell.com/article/an-oral-history-of-the-parklet-fd29db5d> [<https://perma.cc/KL5K-DPDS>].

### B. Who Should Decide

Regardless of *how* a given city comes down on the question of whether to make COVID-related public-space changes permanent, another key question should be *which* institutional actors within a local government should be responsible for determining whether to retain and how to regulate these changes. Should these decisions be placed solely in the hands of political actors, like local mayors or city councils? Should the responsibility for their administration lie with planning departments, appointed planning boards, business-improvement districts, health departments, public-works departments, community and economic-development agencies, or transportation departments? A combination of these? At base, it might make sense to allocate these responsibilities to the city agency that already has jurisdiction over the pieces of the public realm that will be included in the programs. Yet in many cities, rights of way are fragmented and jurisdictions overlap. For example, municipal codes, which are revised and adopted by city councils and administered through city departments, have been the locus of permitting requirements for sidewalk-café seating; the permits themselves may be issued by any number of different agencies, including the local department of transportation, the planning department, the department of consumer affairs, the department of public works, and other development divisions.<sup>154</sup> The parklet program in San Francisco was originally headed by that city's Planning Department,<sup>155</sup> while Boston's parklets program was headed by its Transportation Department.<sup>156</sup> Many of the public-space reclamation projects discussed in this Essay have been spearheaded by local departments of

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154. See, e.g., *N.Y.C. Open Restaurants Program*, *supra* note 59 (administered by city Department of Transportation); *Application for Sidewalk Café*, CITY OF STOUGHTON, WIS., [https://www.ci.stoughton.wi.us/vertical/sites/%7B801AC7AB-1155-4D50-B8C6-60A370EC007F%7D/uploads/APPLICATION\\_FOR\\_SIDEWALK\\_CAFE.pdf](https://www.ci.stoughton.wi.us/vertical/sites/%7B801AC7AB-1155-4D50-B8C6-60A370EC007F%7D/uploads/APPLICATION_FOR_SIDEWALK_CAFE.pdf) [https://perma.cc/52EQ-6VFU] (Department of Planning and Development); D.C. MUN. REGS. § 24-303 (2017), <http://dcrules.elaws.us/dcmr/24-303> [https://perma.cc/6SRK-FEJ6] (Department of Consumer and Regulatory Affairs); *Get a Permit for Sidewalk Café, Pay Phone, News Rack*, CITY OF MIAMI, <https://www.miamigov.com/Services/Doing-Business/Get-a-Permit-for-Sidewalk-Cafe-Pay-Phone-or-News-Rack> [https://perma.cc/L6XJ-8JUG] (Department of Resilience and Public Works); see also Casado Pérez, *supra* note 52, at 2202 (discussing the “myriad of agencies” that exercise control over different aspects of sidewalks).

155. *Case Study: San Francisco Parklet Program*, *supra* note 78.

156. *Boston Parklets Program*, CITY OF BOS. (May 18, 2020), <https://www.boston.gov/transportation/boston-parklets-program> [https://perma.cc/4ZAE-57UD].

transportation<sup>157</sup>—especially those located in public rights of way—though some also incorporate partnerships with planning departments.<sup>158</sup>

In deciding which local entity or agency *should* handle the permitting and decision-making, it is important to recognize that some of these public bodies are subject to greater public input and interaction than others. Local politicians regularly hear from constituents, but their elected status creates the risk of capture by powerful local interests or influential property owners.<sup>159</sup> Planning boards and planning departments—which are at least ostensibly apolitical—are used to soliciting input from neighbors on development projects that will change the local built environment, and many citizens are familiar with those hearings processes.<sup>160</sup> In contrast, while some city health and transportation departments might hold public hearings and solicit public input, those processes might be less familiar avenues through which to seek change in one’s immediate neighborhood. Of course, the points raised earlier about the value of public comments—who typically attends public hearings, and who public bodies are responsive to—still hold true here.<sup>161</sup> Thus, housing public-space expansion programs within agencies that have fewer built-in processes for community input could lead to less NIMBYism, but also to fewer opportunities to hear from underrepresented segments of the community.

Another factor to consider is that the unelected professional employees who make up the workforce in these different departments may see the world differently through the eyes of their professions. Planners and traffic engineers often

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157. See, e.g., N.Y.C. Local Law No. 55 (May 13, 2021) (codified at N.Y.C., N.Y. ADMIN. CODE § 19-107.1 (2022)), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9611098&GUID=A2DBB532-0F1D-4D9C-A349-B75CB4486AC0> [<https://perma.cc/AM8C-DJBR>] (requiring New York City’s Department of Transportation to manage the city’s Open Streets Program); *Chicago Alfresco*, CHI. TRANSP., [https://www.chicago.gov/city/en/depts/cdot/supp\\_info/alfresco.html](https://www.chicago.gov/city/en/depts/cdot/supp_info/alfresco.html) [<https://perma.cc/4L8A-YVV3>] (“The City of Chicago Department of Transportation seeks proposals for its ‘Chicago Alfresco’ program . . .”).

158. See, e.g., Chris Wetterich, *Cincinnati City Council Approves \$2 Million for ‘Streeteries,’* CINCINNATI BUS. COURIER (Dec. 16, 2020), <https://www.bizjournals.com/cincinnati/news/2020/12/16/council-approves-2-million-for-streeteries.html> [<https://perma.cc/U7HD-XT9T>] (noting that additional approvals for the permanent program were needed from the City planning commission and council); *LA City Officials Seek to Make Outdoor Dining Program Permanent*, FOX11 L.A. (Mar. 22, 2022), <https://www.foxla.com/news/la-outdoor-dining-program-permanent> [<https://perma.cc/D587-U2XD>]; see also Pollack, *supra* note 5, at 35-40 (discussing potential agency jurisdiction over sidewalk projects).

159. See *supra* notes 139-140 and accompanying text.

160. But see KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS 101-06 (2020) (noting that participants in public-planning and zoning hearings tend to be older and whiter than the surrounding community).

161. *Id.*; see *supra* Section II.B.5.

approach problems differently: while planners tend to focus on physical features of the built environment and the interaction of people in those places, traffic engineers are often more focused on what Professor Nicholas Blomley has called “traffic logic” – a focus on efficiency and moving people through places, with an eye toward civil engineering rather than civil rights.<sup>162</sup> Similarly, transportation engineers might have a great deal of experience with roads and projects in the public way, but they might have less institutional knowledge when it comes to regulating built structures or places for people.

Cities considering where to place these responsibilities should consider not only who can best interact with a wide swath of the community to seek input, but also who will best be able to implement the actual requirements of the program. For example, from a legal perspective, permanent interventions often require different steps from temporary ones. While some restaurants might have been allowed to have tables on the sidewalks under an emergency public-health order when restaurants were closed to interior dining, making streateries permanent will require modifications to the zoning code in many cities. Take New York: prior to the pandemic, there were geographic limitations in the zoning code about where sidewalk cafés could be located.<sup>163</sup> The city is now proposing a zoning amendment that would allow this type of seating throughout the city.<sup>164</sup> Thus, the Department of City Planning, along with neighborhood planning boards and the City Council, will take the lead on these types of changes.

In contrast, when projects become permanent, more permanent infrastructure is frequently needed, and that infrastructure is often within the purview of the city’s department of transportation. For example, when bike lanes were added at the start of the pandemic, these were often done informally, with movable cones or tape. But making these changes permanent will involve infrastructure investment—road reconstruction, bollards, or painting. Placing café tables in a former parking space is fine for a temporary parklet or streatery, but permanent improvements might include things like wooden bases, planters, railings, and guards, as well as thoughtful design standards and enforcement of those

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162. Nicholas Blomley, *Civil Rights Meet Civil Engineering: Urban Public Space and Traffic Logic*, 22 *CAN. J.L. & SOC.* 55, 64-65 (2007); see also Schindler, *Architectural Exclusion*, *supra* note 44, at 1945-46 (making this point).

163. N.Y.C., N.Y. ZONING RESOL. art. 1, ch. 4, § 14-011 (2022), <https://zr.planning.nyc.gov/sites/default/files/article/Zoning%20Resolution%20Complete.pdf> [<https://perma.cc/6FYV-FTVY>].

164. See N.Y.C. DEP’T OF CITY PLAN., *supra* note 134, at 1 (discussing proposal from the New York City Department of City Planning and the New York City Department of Transportation); see also *Permanent Open Restaurants Text Amendment*, N.Y.C. DEP’T OF CITY PLAN., <https://www1.nyc.gov/site/planning/plans/open-restaurants/open-restaurants-overview.page> [<https://perma.cc/M5XU-PVZ5>] (describing the proposal and its benefits); N.Y.C. *Open Restaurants Program*, *supra* note 59 (same).

standards. Similarly, permanently expanded sidewalks might require pouring concrete or creating bump-outs into what was a parking space or a right of way.<sup>165</sup> Cities will also have to navigate where this funding will come from: are these true public spaces that should be funded by tax dollars, or are they private benefits that should be paid for through direct expenditures and permitting fees from those who will most directly benefit from the permanent infrastructure?

Although there is no one-size-fits-all solution that will make sense in every locality, cities should seek to house these responsibilities with the entity (or entities) that can most easily consider the needs of diverse stakeholders, but also envision the city as a whole in implementing shared spaces and open streets projects.<sup>166</sup> Further, even if a given city decides that different agencies are needed for different types or locations of public-space projects, they should still endeavor to create a central agency that can serve as a point of contact for all the diverse stakeholders who have an interest in the public realm – business owners, abutters, and community members. In many instances, the city’s planning department will be the most obvious choice for this outward-facing role, given its experience managing similar projects. The chosen entity could then have direct reports with other agencies or departments, like public works or transportation, for specific types of permitted projects, such as open streets or parklets.

## CONCLUSION

The COVID-19 pandemic has led to profound physical changes in the built environment that are, in many places, here to stay. Cities must therefore consider how to ensure these changes are useful, sustainable, and equitable. This will require decision makers to consider the benefits and harms of interventions, as well as the needs and desires of all members of the community. Indeed, many of the harms addressed in this Essay would not be that difficult to alleviate, although the tradeoffs must be recognized as well. For example, cities can consciously site these interventions in more diverse neighborhoods; they can adopt more inclusive outreach processes in deciding whether to make these spaces permanent; and they can require private owners or lessees who will be using public space to comply with thoughtful design, accessibility, and use requirements (and perhaps issue grants to make the process more palatable and financially feasible

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165. *City of Cincinnati Unveils First Round of Downtown Streateries*, 3CDC (May 21, 2021), <https://www.3cdc.org/city-of-cincinnati-unveils-first-round-of-downtown-streeteries> [<https://perma.cc/G6NK-E3G2>].

166. See Pollack, *supra* note 5, at 53-55 (proposing a Department of Sidewalks to manage the conflicting uses and users that interact on sidewalks).

## MAKING THE TEMPORARY PERMANENT

for small-business owners). Creating more public space for people in cities is a worthwhile goal, but the space needs to truly be for *all* people.

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