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The Road to Affordable Housing: How to Replace Highways with Homes in New York City

Chad Hughes

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THE ROAD TO AFFORDABLE HOUSING: HOW TO REPLACE HIGHWAYS WITH HOMES IN NEW YORK CITY

Chad Hughes*

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Abstract

Urban highways cause significant air, water, and soil pollution that disproportionately harm low-income and nonwhite residents. Many urban highways are reaching the end of their useful life and would be extremely expensive to repair or replace. Cities around the world have removed urban highways to improve environmental outcomes and to avoid wasteful spending.

While these teardowns have improved local and regional environmental quality and local traffic congestion, they have also led to increased land values near the retired rights of way. Without anti-displacement efforts, there is a risk that the very people who have been most harmed by urban highways will not be able to afford to remain in their neighborhoods once the highways have been removed. One potential anti-displacement measure would be to build a significant supply of affordable housing on any retired highway right of way. Cities and states already own this land, so local or state policymakers would be able to build more affordable and deeply affordable housing than is typically possible given high land costs in American cities. Removing a portion of a city's highway system represents a unique opportunity to simultaneously improve environmental outcomes and counter the affordable housing crisis.

This paper reviews the thicket of local, state, and federal laws that would be implicated if New York City and/or New York State undertook a project to replace a highway with affordable housing. City actors would be highly dependent on state and federal approval and would have to navigate the city's arduous and politically charged land use review process. The governor of New York, however, has remarkable powers over state highways. The governor could unilaterally decommission any state-owned state highway, turn the right of way over to a state development authority, and then redevelop the right of way with affordable housing without going through the city's land use review process or even adhering to local zoning.

I. INTRODUCTION: THE UNIQUE OPPORTUNITY OF NEW YORK CITY'S URBAN HIGHWAY RIGHTS OF WAY

There are 235 miles of state and Interstate highways in New York City.¹ The construction of this system displaced tens of thousands of primarily low-income and nonwhite residents.² These highways disproportionately serve white and relatively affluent drivers³ and cause significant air, water, soil, and noise pollution, disproportionately harming low-income and nonwhite New Yorkers.⁴ Highways are also crucial fossil fuel infrastructures that enable urban sprawl and contribute to climate change.⁵

Many of the highways built over the last sixty-five years are starting to reach the end of their useful life.⁶ Replacing them will be expensive. New York City, for example, is considering spending \$3–11 billion to replace or bury only 1.5 miles of the Bronx-Queens Expressway (BQE).⁷ Given the heavy environmental damage of urban highways, the looming climate crisis, the inefficiency of urban highways as a means of transportation, the high value of urban land, and the high repair and replacement costs of highways, some cities decided to simply remove portions of their urban highways and use the space for

1. See *Region 11 at a Glance*, N.Y. STATE DEPT. OF TRANSP., <https://www.dot.ny.gov/regional-offices/region11/general-info> (last visited Nov. 16, 2021).

2. See *Repeal Robert Moses*, TRANSALT (July 30, 2020), <https://transalt.medium.com/repeal-robert-moses-fc9318cfefb4>.

3. See discussion *infra* Section I.B; see also Joseph Stromberg, *The Utter Dominance of the Car in American Commuting*, VOX (Apr. 29, 2015), <https://www.vox.com/2015/4/29/8505097/car-commuting> (reviewing research finding white and wealthy Americans are more likely to commute by car than nonwhite and low-income Americans).

4. See discussion *infra* Section I.B.

5. See Kristina Costa, Christy Goldfuss & Kevin DeGood, *Reducing Carbon Pollution Through Infrastructure*, CTR. FOR AM. PROGRESS (Sept. 3, 2019, 5:00 AM), <https://www.americanprogress.org/issues/green/reports/2019/09/03/473980/reducing-carbon-pollution-infrastructure/>.

6. See, e.g., Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1298 (2020).

7. See Emma G. Fitzsimmons & Winnie Hu, *Fix for a Hated N.Y.C. Highway: How About an \$11 Billion Tunnel?*, N.Y. TIMES (Feb. 24, 2020), <https://www.nytimes.com/2020/02/24/nyregion/bqe-tunnel.html>.

public transit, parks, and real estate development.⁸

There is a risk, however, that the people who have long been harmed by their proximity to urban highways will not benefit from the removal of such highways.⁹ Twenty-first century highway teardown initiatives could—like twentieth century highway construction projects—cause significant displacement.¹⁰ Urban highway teardowns tend to increase property values in adjacent neighborhoods.¹¹ Traditionally, residents who live near urban highways are of lower income.¹² As urban highways are removed, these residents could be priced out of their neighborhoods.¹³ Thus, the environmental justice goals of highway teardowns could be severely undermined as the individuals who have disproportionately borne the social and environmental cost of highways will not be able to benefit from their removal.

Because highway teardowns can relatively cheaply create new developable space in high-demand urban areas, they present a unique opportunity to simultaneously improve local environmental quality while protecting against “green gentrification” displacement pressures.¹⁴ One of the greatest barriers to affordable housing construction in high-demand cities like New York is the high cost of developable land.¹⁵

8. See Jessica Kraft-Klehm, *21st Century Futurama: Contemplating Removal of Urban Freeways in the World of Tomorrow*, 49 WASH. UNIV. J. L. & POL'Y 205, 220–27 (2015).

9. See Archer, *supra* note 6, at 1299–1304.

10. See *id.*

11. See discussion *infra* Section II.C.

12. See discussion *infra* Section I.B.

13. See discussion *infra* Section II.C.

14. See Anthony Flint, *Backyard Brouhaha: Could Inclusionary Housing Break the YIMBY Deadlock?*, LINCOLN INST. OF LAND POL'Y (Feb. 26, 2019), <https://www.lincolnst.edu/publications/articles/backyard-brouhaha>. For a discussion on the displacement risks of cities cleaning up and improving quality of life in environmental justice communities without putting in place anti-displacement measures, see generally Isabelle Anguelovski, *From Toxic Sites to Parks As (Green) Lulus? New Challenges of Inequity, Privilege, Gentrification, and Exclusion for Urban Environmental Justice*, 31 J. PLAN. LITERATURE 23 (2015). On the link between housing supply and local rents, see generally Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, NYU FURMAN CTR. (2018).

15. See Rahul Jain & Michael Dardia, *The Cost of Affordable Housing*, CITIZENS BUDGET COMM'N (Dec. 15, 2015), <https://cbcny.org/research/cost-affordable-housing>.

Conservatively, over two square miles of the city¹⁶—an area about one-tenth of the size of Manhattan—are currently covered by urban highways. City or state actors could create a meaningful supply of new developable urban land for low cost by decommissioning a portion of the existing highway system and then using that land to build more affordable housing units than typically possible.¹⁷

This paper proceeds in three parts. Part I evaluates the high environmental cost of urban highways and the disproportionate harm urban highways inflict on lower income, nonwhite residents. Part II surveys the approaches cities have taken to replace aging urban highways and evaluates the traffic congestion, economic development, environmental, and displacement impact of teardown projects. Part III reviews the complex thicket of local, state, and federal laws that would be implicated by any efforts to decommission, tear down, and develop highway rights of way with affordable housing in New York City.

In short, the city is highly dependent on federal and state actors to decommission highways and would face meaningful risks that any highway teardown and affordable housing development scheme may not survive the city's exacting land use review process. The governor of New York, however, could decommission state-owned highways without any city or federal approval, or any further legislative authorization. The state unilaterally controls *at least* 1.1 square miles worth of state highways in the city—an area of land equivalent to 2.5 Financial Districts.¹⁸ Somewhat remarkably, state law grants the governor the power to develop this land without going through the city's land use review process and without adhering to local zoning.¹⁹

16. The real figure is likely much larger. I make the conservative assumption that the average New York City highway is only four lanes across and has no median or shoulder.

17. See discussion *infra* Section III.C.

18. Conservatively assuming only four lanes wide, no median, and no shoulder. This figure does not include federal Interstates, city owned state highways, or *any* elevated highways because the area underneath the elevated often remains city owned.

19. See discussion *infra* Section III.C.

II. THE HIGH ENVIRONMENTAL COST OF URBAN HIGHWAYS

Urban highways increase vehicle miles traveled in cities²⁰ which leads to more pollution, noise, injuries, death, and congestion.²¹ Urban highways also contribute meaningfully to climate change through automobile emissions and by enabling energy-intensive sprawl.²² Most of these environmental harms are disproportionately felt by low-income individuals and by Asian, Hispanic, and especially Black residents.

A. Urban Highways and Environmental Degradation

By increasing vehicle miles traveled and concentrating traffic, urban highways degrade both local and regional ambient air quality.²³ Emissions from cars, trucks, and buses are an important source of particulate matter pollution in New York City.²⁴ Recent research has shown that particulate matter pollution—especially particulate matter that is less than 2.5 micrometers in diameter (PM2.5)—damages “every organ in the human body.”²⁵ Studies have linked PM2.5 exposure to increased incidents of heart disease, lung disease, various

20. See, e.g., Alan Ehrenhalt, *Asphalt, Gridlock and Common Sense*, GOVERNING (May 4, 2021), <https://www.governing.com/assessments/asphalt-gridlock-and-common-sense>.

21. See INST. FOR TRANSP. & DEV. POL’Y, FINAL REPORT: HIGH VOLUME TRANSPORT: URBAN TRANSPORT THEME 2, 18, 105 (2018).

22. See Adam A. Millsap, *Is It Time to Take Highways Out of Cities?*, FORBES (Nov. 21, 2019, 9:43 AM), <https://www.forbes.com/sites/adammillsap/2019/11/21/is-it-time-to-take-highways-out-of-cities/?sh=11af0c301a04>; see also Nathaniel Baum-Snow, *Did Highways Cause Suburbanization?*, 122 Q.J. ECON. 775 (2007).

23. See Ehrenhalt, *supra* note 20, at 6.

24. See Maria Cecilia Pinto de Moura, David Reichmuth & Daniel Gatti, *Inequitable Exposure to Air Pollution from Vehicles in New York State*, UNION OF CONCERNED SCIENTISTS (2019), <https://www.ucsusa.org/sites/default/files/attach/2019/06/Inequitable-Exposure-to-Vehicle-Pollution-NY.pdf>; see N.Y.C. DEP’T OF HEALTH AND MENTAL HYGIENE, THE N.Y. COMM. AIR SURVEY: NEIGHBORHOOD AIR QUALITY 2008-2018 (2020), <https://nyc-ehs.net/nycas2020/web/report>.

25. Damian Carrington, *Revealed: Air Pollution May Be Damaging ‘Every Organ in the Body’*, GUARDIAN (May 17, 2019, 11:00 AM), <https://www.theguardian.com/environment/ng-interactive/2019/may/17/air-pollution-may-be-damaging-every-organ-and-cell-in-the-body-finds-global-review>.

cancers, depression, strokes, and dementia.²⁶ PM2.5 is the largest environmental risk factor in the United States, responsible for an estimated sixty-three percent of deaths from environmental causes.²⁷ In New York City, PM2.5 is estimated to cause 2,300 deaths and 6,300 hospitalizations each year.²⁸

Children pay a particularly steep price for poor air quality. Studies have linked PM2.5 exposure to stunted lung growth and stunted brain development in children.²⁹ Children living near highways are fifty percent more likely to develop asthma than those who do not.³⁰ There is also evidence that air pollution from highways negatively impacts academic performance at nearby schools.³¹

While air quality has improved in New York City over the last forty years, New York City continues to have the highest PM2.5 concentrations on the east coast.³² The largest source of particulate matter pollution in New York—about fifty percent of overall emissions—is produced by boilers used to provide hot water and heat in many of the city’s buildings.³³ The city has significantly reduced particulate pollution over the last decade

26. See *id.* (a general overview of body of research about head-to-toe impact of air pollution on the human body); see also Amedeo D’Angiulli, *Air Pollution in Global Megacities Linked to Children’s Cognitive Decline, Alzheimer’s and Death*, THE CONVERSATION (Sept. 25, 2019, 6:14 PM), <https://theconversation.com/air-pollution-in-global-megacities-linked-to-childrens-cognitive-decline-alzheimers-and-death-105722> (discussing impact of brain development and cognitive performance in children).

27. See Pinto de Moura et al., *supra* note 24, at 2.

28. See *The Public Health Impacts of PM2.5 from Traffic Air Pollution*, N.Y.C. DEP’T OF HEALTH, <https://a816-dohbsep.nyc.gov/IndicatorPublic/Traffic/index.html> (last visited Nov. 16, 2021).

29. See Damian Carrington & Lily Kuo, *Air Pollution Causes ‘Huge’ Reduction in Intelligence, Study Reveals*, GUARDIAN (Aug. 27, 2018, 3:10 PM), <https://www.theguardian.com/environment/2018/aug/27/air-pollution-causes-huge-reduction-in-intelligence-study-reveals>.

30. See *Urban Highways vs. Complete Streets* (illustration), in INST. FOR TRANSP. & DEV. POL’Y, <https://www.itdp.org/multimedia/urban-highways-vs-complete-streets/>.

31. See Millsap, *supra* note 22, at 6; see also Jennifer Heissel, Claudia Persico & David Simon, *Does Pollution Drive Achievement? The Effect of Traffic Pollution on Academic Performance* (Nat’l Bureau of Econ. Rsch., Working Paper No. 25489, 2019), <https://www.nber.org/papers/w25489>.

32. See Pinto de Moura et al., *supra* note 24, at 3.

33. See N.Y.C. DEP’T OF HEALTH, *supra* note 28.

by banning the dirtiest boiler fuel sources.³⁴ The city has struggled, however, to reduce air pollution related to road traffic, the second most significant source of PM2.5.³⁵ Air pollution near heavily trafficked corridors remains stubbornly high. Impervious roads and traffic density are key predictors of poor air quality.³⁶ Portions of the city's highway system are clearly visible in maps that simply show concentrations of black carbon, nitric oxide, nitrogen dioxide, and PM2.5.³⁷

Urban highways also contribute to water pollution. Automobile tires are a major source of microplastic pollution.³⁸ Tires wear down and discard small pieces of plastic while in use.³⁹ This plastic is then washed off roads by rainfall and ends up in rivers, lakes, and oceans.⁴⁰ Research suggests that anywhere from ten to twenty-eight percent of microplastic pollution in the world's oceans is from automobile tires.⁴¹

Rain runoff also washes heavy metals, oil, grease, road salts, trash, and other toxic pollutants from urban highways into

34. See *New York Air Quality Programs Reduce Harmful Air Pollutants*, HEALTHYPEOPLE.GOV (Nov. 17, 2016), <https://www.healthypeople.gov/2020/healthy-people-in-action/story/new-york-city-air-quality-programs-reduce-harmful-air-pollutants>.

35. On persistently high automobile-related emissions, see, e.g., Nadja Popovich & Denise Lu, *The Most Detailed Map of Auto Emissions in America*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/interactive/2019/10/10/climate/driving-emissions-map.html> (showing emissions in the New York City region have grown by thirty percent over the last thirty years and by nine percent on a per capita basis). On road traffic being the second most significant source of PM2.5, see N.Y.C. DEP'T OF HEALTH, *supra* note 28 (finding road traffic is the second most significant source of PM2.5 pollution in New York City when you consider both emissions that come directly from cars and from road dust that is unrelated to construction).

36. See Pinto de Moura et al., *supra* note 24, at 7; see also N.Y.C. DEP'T HEALTH, *supra* note 28.

37. *But see* sources cited *supra* note 36.

38. See Damian Carrington, *Car Tyres Are Major Source of Ocean Microplastics – Study*, GUARDIAN (July 14, 2020, 11:00 AM), <https://www.theguardian.com/environment/2020/jul/14/car-tyres-are-major-source-of-ocean-microplastics-study>.

39. *See id.*

40. *See id.*

41. See Tik Root, *Tires: The Plastic Polluter You Never Thought About*, NAT'L GEOGRAPHIC (Sept. 20, 2019), <https://www.nationalgeographic.com/environment/article/tires-unseen-plastic-polluter>.

surrounding neighborhoods and eventually waterways.⁴² Every inch of rainfall on one mile of a typical road produces 55,000 gallons of polluted stormwater.⁴³ Due to this runoff, soil and water near highways are contaminated with elevated levels of zinc, lead, chromium, cadmium, copper, sodium ion, potassium, chloride ion, and nitrate.⁴⁴ These pollutants are persistent and nondegradable.⁴⁵

Urban highways are a major source of noise pollution.⁴⁶ The World Health Organization believes noise pollution, behind air pollution, is the second-most significant environmental problem in the European Union.⁴⁷ Noise pollution contributes to stress-related health problems like stroke and heart disease⁴⁸ and has been linked with cognitive impairment in children.⁴⁹ Road noise is typically the greatest source of noise pollution.⁵⁰ Researchers established correlations between traffic noise that can be heard from within a home to both heart disease and diabetes.⁵¹ There is also “consistent evidence” that road traffic noise exposure increases the risk of heart failure.⁵²

42. See Becky Hammer, *New Senate Bill Aims to Prevent Polluted Stormwater Runoff from Roads and Highways*, NAT'L RES. DEF. COUNCIL (May 6, 2011), <https://www.nrdc.org/experts/becky-hammer/new-senate-bill-aims-prevent-polluted-stormwater-runoff-roads-and-highways>.

43. See *id.*

44. See Hong Wang et al., *Effects of Highway-Related Pollutant on the Groundwater Quality of Turfy Swamps in the Changbai Mountain Area*, 15 INT'L J. ENV'T. RSCH. AND PUB. HEALTH 1652, 1653 (2018); see also Kálmán Buzás & László Somlyódy, *Impacts of Road Traffic on Water Quality*, 41 PERIODICA POLYTECHNICA SER. CIVIL ENG. 95, 97 (1997) (on connection between highways and heavy metal contamination).

45. But see sources cited *supra* note 44.

46. See Richard Godwin, *Sonic Doom: How Noise Pollution Kills Thousands Each Year*, GUARDIAN (July 3, 2018, 1:00 AM), <https://www.theguardian.com/lifeandstyle/2018/jul/03/sonic-doom-noise-pollution-kills-heart-disease-diabetes>.

47. See CHALMERS UNIV OF TECH., *Traffic Noise Is Dangerous for Your Health: Solutions Exist for Dense Cities*, SCIENCEDAILY (July 1, 2014), <https://www.sciencedaily.com/releases/2014/07/140701085328.htm>.

48. See *id.*

49. See Godwin, *supra* note 46.

50. See Per Finne & Torben Holm Petersen, *Traffic Noise Is Dangerous to Our Health - But What Do We Do About It?*, FORCE TECH. <https://forcetechnology.com/en/articles/traffic-noise-dangerous-health-what-to-do-about-it> (last visited Nov. 16, 2021).

51. See *id.*

52. Godwin, *supra* note 46.

Urban highways are also an important contributor to climate change. “The transportation sector is one of the largest contributors to anthropogenic U.S. greenhouse gas (GHG) emissions,”⁵³ and passenger vehicles are the largest source of transportation emissions.⁵⁴ Urban highways encourage driving, undermine transit and walking, and promote sprawl.⁵⁵ One economist estimates that the construction of an urban highway caused an average of an eighteen percent drop in a city’s population between 1950 and 1990 because highways made it easier to commute from suburban communities.⁵⁶

B. Urban Highways and Environmental Justice

Across America, Black, Hispanic, Asian, and low-income residents are the least likely to own cars and most likely to live near highways.⁵⁷ As a result, these demographics are least likely to benefit from urban highways and most likely to suffer from their deleterious health impacts. In America as a whole, nineteen percent of Black, eleven percent of Latino, and eleven percent of Asian residents do not own cars, compared to just six percent of white residents.⁵⁸

People of color are disproportionately affected by both noise and air pollution, in part because of their disproportionate likelihood to live near a highway.⁵⁹ Studies consistently find that harmful traffic noise pollution is concentrated in nonwhite

53. EPA, *Fast Facts on Transportation Greenhouse Gas Emissions*, <https://www.epa.gov/greenvehicles/fast-facts-transportation-greenhouse-gas-emissions> (last visited Nov. 16, 2021).

54. *See id.*

55. *See* Kent Hymel, *If You Build It, They Will Drive: Measuring Induced Demand for Vehicle Travel in Urban Areas*, 76 *TRANSP. POLY* 57, 60–61 (2018); *see also* discussion *infra* Section II.B.

56. *See* Baum-Snow, *supra* note 22, at 776; *see also* Millsap, *supra* note 22.

57. *See* Tegan K. Boehmer et al., *Residential Proximity to Major Highways – United States, 2010*, CDC MORBIDITY & MORTALITY WKLY. REP. (Nov. 22, 2013), <https://www.cdc.gov/mmwr/preview/mmwrhtml/su6203a8.htm>.

58. *See* *Car Access: Everyone Needs Reliable Transportation Access and in Most American Communities that Means a Car*, NAT’L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Car_access#/?breakdown=2 (last visited Nov. 17, 2021).

59. On highway siting and air pollution, *see* Pinto de Moura et al., *supra* note 24, at 2.

and low-income neighborhoods.⁶⁰ Seventy-four percent of Black residents and eighty percent of Asian residents of New York State live in areas where PM2.5 concentrations from vehicles are higher than the state average.⁶¹ Asian, Latino, and Black New York State residents are exposed, respectively, to one hundred percent, eighty-one percent, and seventy-two percent more vehicle pollution than white residents.⁶² Black, Hispanic, and Asian Americans are also exposed to twenty percent more truck emissions than the average American.⁶³

Nonwhite, poor, disabled, and elderly Americans are also disproportionately likely to be injured and killed by drivers while walking in their neighborhoods.⁶⁴ Pedestrians in low-income neighborhoods are twice as likely to be killed by drivers than pedestrians in middle-income neighborhoods, and three times as likely to be killed by drivers than pedestrians in high-income neighborhoods.⁶⁵ Black Americans are twice as likely to be run over and killed while walking than white Americans.⁶⁶ Native Americans are *five times* more likely to be killed as

60. For a literature review on noise pollution's disproportionate impact on low-income and nonwhite communities, see Joan A. Casey et al., *Race/Ethnicity, Socioeconomic Status, Residential Segregation, and Spatial Variation in Noise Exposure in the Contiguous United States*, 125 J. ENV'T. HEALTH PERSPS. 077017-6-8 (2017).

61. See Pinto de Moura et al., *supra* note 24, at 1.

62. See *id.*

63. See Hiroko Tabuchi & Nadja Popovich, *People of Color Breathe More Hazardous Air. The Sources Are Everywhere*, N.Y. TIMES (Apr. 28, 2021), <https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>.

On the relationship between highway siting and the disproportionate impact of noise pollution on people of color and lower income individuals, see Joan Casey, Peter James & Rachel Morello-Forsyth, *Urban Noise Pollution Is Worst in Poor and Minority Neighborhoods and Segregated Cities*, PBS (Oct. 7, 2017, 3:43 PM), <https://www.pbs.org/newshour/nation/urban-noise-pollution-worst-poor-minority-neighborhoods-segregated-cities>.

64. See SMART GROWTH AMERICA, DANGEROUS BY DESIGN 1, 26 (2021), <https://smartgrowthamerica.org/wp-content/uploads/2021/03/Dangerous-By-Design-2021-update.pdf>.

65. See Adam Mahoney, *Car Culture Disproportionately Kills Black Americans. The Pandemic Made Things Worse*, GRIST (July 7, 2021), https://grist.org/transportation/racial-disparities-traffic-accidents-black-americans-covid/?utm_campaign=sprout&utm_source=twitter&utm_medium=social&utm_content=1625670542.

66. See Angie Schmitt, *The Unequal Toll of Pedestrian Deaths*, STREETS BLOG USA (Jan. 10, 2017), <https://usa.streetsblog.org/2017/01/10/the-unequal-toll-of-pedestrian-deaths/>.

pedestrians than white Americans.⁶⁷ Researchers believe this is because the roads around tribal lands are designed like highways to move vehicles quickly and therefore have little space for pedestrians.⁶⁸ Similarly, many neighborhoods near urban highways have streets that are designed to move cars quickly through the neighborhood and to the highway.⁶⁹

III. URBAN HIGHWAY REMOVAL AND REMEDIATION

Urban highway teardown projects have successfully mitigated or reversed many of these environmental harms. Highway removals consistently reduce traffic, improve environmental quality near the old right of way, and improve environmental outcomes throughout the whole region as individuals shift to public transportation, or otherwise drive less.⁷⁰ Urban highway teardowns, however, also increase land values in the neighborhoods adjacent to the removed right of way.⁷¹ Thus, while urban highway teardowns may improve traffic and environmental quality in adjacent neighborhoods, they may also cause displacement as poorer residents are priced out.

A. Survey of Modern Approaches to Rebuilding, Replacing, and Removing Urban Highways

Broadly speaking, cities have taken three approaches to dealing with their deteriorating urban highways. The first group of cities opted to rebuild and/or expand urban highways. The second group of cities opted to hide urban highways by replacing elevated structures with tunnels or by capping over trench highways. This approach allows cities to reintegrate neighborhoods and make use of the right of way at the surface level without reducing highway capacity. Finally, the third group of cities opted to tear down and replace urban highways

67. See Angie Schmitt, *Native American Pedestrians Have Highest Death Rate*, STREETS BLOG USA (FEB. 20, 2019), <https://usa.streetsblog.org/2019/02/20/native-american-pedestrians-have-highest-death-rate/>.

68. See *id.*

69. See SMART GROWTH AMERICA, *supra* note 64, at 5, 14–16.

70. See discussion *infra* Section II.B.

71. See discussion *infra* Section II.B.

with a mixture of other land uses, including surface boulevards, parks, public transportation, and real estate development. Some cities have pursued a combination of these approaches at various times.⁷²

Replacing and expanding urban highways is expensive. Not accounting for environmental review and planning costs, it costs an average of \$8–12 million per-lane-mile to rebuild or expand urban highways.⁷³ Denver recently expanded ten miles of I-70 at the cost of \$1.2 billion, fifty-six demolished homes, seventeen demolished businesses, and a portion of an elementary school.⁷⁴ Beyond this direct steep fiscal and physical cost, replaced or expanded urban highways continue to exact an environmental toll. While urban highways can be remediated to mitigate some runoff and noise pollution, replaced highways will help to lock in decades of inefficient transportation and land use patterns at a time when countries need to rapidly reduce greenhouse gas emissions to avoid the worst outcomes of climate change.⁷⁵

Some cities—including Boston,⁷⁶ Columbus,⁷⁷ Seattle,⁷⁸ and Washington, D.C.⁷⁹—have decided to take an intermediate approach between replacement and removal by decking over or burying their highways to reintegrate divided neighborhoods

72. Columbus, Ohio has pursued two of these approaches at the same time, both widening and capping over a highway. See URB. LAND INS., THE CAP AT UNION STATION, (2005), <https://casestudies.uli.org/wp-content/uploads/2015/12/C035010.pdf>.

73. See *How Much Does a Mile of Road Actually Cost?*, STRONG TOWNS, (Jan. 27, 2020), <https://www.strongtowns.org/journal/2020/1/27/how-much-does-a-mile-of-road-actually-cost>.

74. See Claire Tran, *Here Are the Urban Highways That Deserve to Die*, BLOOMBERG CITYLAB (Apr. 3, 2019, 10:01 AM), <https://www.bloomberg.com/news/articles/2019-04-03/these-urban-highways-in-north-america-need-to-die>.

75. See Pierre Friedlingstein et al., *Global Carbon Budget 2020*, 12 EARTH SYS. SCI. DATA (2020).

76. See Alana Semuels, *The Role of Highways in American Poverty*, ATLANTIC (Mar. 18, 2016), <https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/>.

77. See URB. LAND INS., *supra* note 72.

78. See Raymond A. Mohl, *The Expressway Teardown Movement in American Cities: Rethinking Postwar Highway Policy in the Post-Interstate Era*, 11 J. PLAN. HIST. 89, 93 (2012).

79. See Michelle Basch, *Capitol Crossing Project Reaches Milestone*, WTOP (June 16, 2016, 5:06 AM), <https://wtop.com/dc-transit/2016/06/capitol-crossing-project-underway-elevated-deck-finished-photos/>.

without reducing vehicle capacity. While such projects may improve local ambient air quality,⁸⁰ and allow for parks, transit improvements, and real estate development atop the highway infrastructure, they are extremely expensive and continue to underwrite inefficient, carbon-intensive modes of transportation. For example, Seattle spent \$3.35 billion to build a 1.75-mile tunnel to replace a downtown elevated highway.⁸¹ Decking over a not-quite-half-mile section of the I-395 trench in Washington, D.C. cost \$270 million.⁸² In comparison, for just \$22 million, Rochester filled in three-quarters of a mile of a similar downtown trench highway with mud from the bottom of Lake Ontario.⁸³ The great expense of cap or tunnel projects influences what can be built atop the buried right-of-way and crowds out investments in affordable housing and more sustainable forms of transportation.⁸⁴

Finally, some cities—including Milwaukee, New York, San Francisco, Seoul, Paris, Portland, and Rochester⁸⁵—have decided to simply tear down, fill in, or otherwise remove urban highways and replace the old rights of way with some mixture

80. It is possible they could make air pollution worse for certain neighborhoods by concentrating pollution. See Lynne Powers, *Modeling Air Pollution in Boston*, TUFTS SCH. OF ENG'G. (Oct. 3, 2016), <https://engineering.tufts.edu/news/2017/04/modeling-air-pollution-boston>.

81. See *Alaskan Way Viaduct Replacement Program*, WASH. STATE DEP'T. OF TRANSP., <https://wsdot.wa.gov/construction-planning/major-projects/alaskan-way-viaduct-replacement-program> (last visited Nov. 17, 2021).

82. See *Project Profile: Capitol Crossing/Third Street Tunnel*, FHWA, https://www.fhwa.dot.gov/ipd/project_profiles/dc_capitol_crossing.aspx#:~:text=The%20development%20site%20is%20made,between%202nd%20and%203rd%20Streets (last visited Nov. 17, 2021).

83. See Norman Garrick, *Burying a 1950s Planning Disaster*, BLOOMBERG CITYLAB (Sept. 2, 2016, 8:00 AM), <https://www.bloomberg.com/news/articles/2016-09-01/burying-rochester-s-inner-loop-a-1950s-era-planning-disaster>.

84. D.C., for example, relied on private investment to cap I-395. While there is an inclusionary component to the development on the capped right of way, developers have tried to shift their affordable housing requirements to other neighborhoods so they can recuperate the steep costs of capping over the highway and building atop the cap. See Daniel J. Sernovitz, *Capitol Crossing Developer Wants to Scrap On-Site Residential*, WASH. BUS. J. (Jan. 23, 2018, 12:46 PM), <https://www.bizjournals.com/washington/news/2018/01/23/capitol-crossing-developer-wants-to-scrap-on-site.html>.

85. See *Leapfrogging Past the Urban Highway*, INST. TRANSP. & DEV. POL'Y (Apr. 2, 2021), <https://www.itdp.org/2021/04/02/leapfrogging-past-the-urban-highway/>.

of parks, surface-level boulevards, transit improvements, and real estate development. Such teardowns are far cheaper than replacement projects, reduce congestion, improve environmental quality, help to reduce greenhouse gas emissions, and generate private investments and tax revenues.⁸⁶

B. Effectiveness of Highway Teardowns

Given the continued reliance on personal automobiles—even within relatively dense American cities—policymakers are reasonably nervous about the congestion implications of highway teardowns. Opponents of highway teardowns consistently warn that removing an urban highway will cause congestion, worsen environmental outcomes, and degrade the quality of life on local streets near the old highway right of way.⁸⁷ At best, such opponents fear highway teardowns will merely shift the burden of traffic to other corridors and other neighborhoods.⁸⁸

Evidence from previous urban highway teardowns does not support these gridlock concerns. When highways are narrowed, or even removed entirely, public transit usage increases, and car traffic decreases.⁸⁹ This is a result of what traffic engineers refer to as “induced demand.”⁹⁰ When car infrastructure capacity is increased, demand for driving increases, often overwhelming any capacity expansion.⁹¹ Cities have spent billions of dollars to widen highways only to see travel times and congestion worsen as soon as the projects are completed.⁹² Evidence from highway teardowns suggests the reverse is also true: when automobile capacity is reduced, congestion often *improves* as drivers switch to other modes of travel or decide not to drive.⁹³

Seattle’s recent experience is instructive. A series of Seattle mayors supported removing a downtown elevated highway and replacing it with a surface boulevard. The state Department of

86. See discussion *infra* Section II.B.

87. See Kraft-Klehm, *supra* note 8, at 219–21.

88. See *id.*

89. See *Reimagining the BQE*, REG’L PLAN. ASS’N, (APR. 2019), <https://rpa.org/work/reports/reimagining-the-bqe>.

90. See, e.g., Ehrenhalt, *supra* note 20, at 4.

91. See *id.*

92. See *id.*

93. See *id.*

Transportation, however, insisted that the highway be replaced with an over \$3 billion tunnel to accommodate the 90,000 daily vehicles that relied on the elevated structure.⁹⁴ The highway was torn down before the tunnel was completed and the traffic “disappeared.”⁹⁵ The tunnel project, however, moved ahead and ultimately cost hundreds of millions of dollars more than anticipated.⁹⁶ After the tunnel opened, the traffic that “disappeared” gradually returned.⁹⁷

There are many other examples of highway teardowns or closures that did not lead to anticipated gridlock. New York’s Westside Highway carried 140,000 vehicles per day when it had to be shut down after a portion of it collapsed in the 1970s.⁹⁸ Fifty-three percent of the traffic simply disappeared, while the rest was rerouted without causing additional congestion.⁹⁹ The removal of a Portland highway that served 90,000 cars daily did not lead to anticipated local traffic problems.¹⁰⁰ San Francisco’s Embarcadero Freeway was used by 100,000 vehicles daily when it was closed.¹⁰¹ The anticipated gridlock nightmare from the Embarcadero closure never materialized.¹⁰² Instead, transit ridership near the highway increased by seventy-five percent.¹⁰³

In Seoul, the Cheonggyecheon highway went through the

94. See Mohl, *supra* note 78, at 93.

95. David Gutman, *‘The Cars Just Disappeared’: What Happened to the 90,000 Cars a Day the Viaduct Carried Before?*, SEATTLE TIMES (Feb. 20, 2019, 4:14 PM), <https://www.seattletimes.com/seattle-news/transportation/the-cars-just-disappeared-what-happened-to-the-90000-cars-a-day-the-viaduct-carried-before-it-closed/>.

96. See Chris Grygiel, *Seattle Tunnel Project \$223 Million over Budget, Open in 2019*, ASSOCIATED PRESS (July 21, 2016), <https://komonews.com/news/local/seattle-tunnel-project-223-million-over-budget>.

97. Mike Lindblom, *Traffic in New Highway 99 Tunnel Nearly Matches Last Year’s Viaduct Use*, SEATTLE TIMES (May 14, 2019, 4:10 PM), <https://www.seattletimes.com/seattle-news/transportation/traffic-in-new-highway-99-tunnel-nearly-matches-last-years-viaduct-use/>.

98. See REG’L PLAN. ASS’N, *supra* note 89.

99. See *id.*

100. See Mohl, *supra* note 78, at 92.

101. See REG’L PLAN. ASS’N, *supra* note 89.

102. See Carl Nolte, *PAGE ONE -- Traffic Planners Baffled by Success/No Central Freeway, No gridlock -- and No Explanation*, SF GATE (Sept. 13, 1996), <https://www.sfgate.com/news/article/PAGE-ONE-Traffic-Planners-Baffled-by-Success-2966258.php>.

103. See REG’L PLAN. ASS’N, *supra* note 89.

center of the city and carried 170,000 vehicles per day.¹⁰⁴ The city invested heavily in bus transit, tore out the highway, and turned the right of way into a park. Once again, opponents' anticipated traffic and economic nightmare never materialized. In fact, travel times in the core *improved* because so much of the traffic shifted to public transportation.¹⁰⁵ The park has become one of Seoul's most popular attractions.¹⁰⁶

Beyond congestion impacts, removing urban highways reduces pollution and improves local and regional health outcomes. After the 3.6 mile Cheonggyecheon highway was removed from central Seoul, coarse particulate matter levels decreased twenty-one percent near the highway, compared to a three percent decline in a nearby neighborhood used as a study control.¹⁰⁷ The area around the Cheonggyecheon right of way also experienced significant decreases in ambient levels of various heavy metals, some decreasing by as much as sixty-five percent, and a significant decline in nitrogen dioxide levels.¹⁰⁸ By replacing the Cheonggyecheon with a park, the city was also able to reduce the urban heat island effect by as much as eight degrees centigrade difference between the park and surrounding roadways in the summer.¹⁰⁹ Finally, car collisions and injuries in the surrounding area declined by a third.¹¹⁰

It is generally far cheaper to tear down rather than to repair, rebuild, or bury a deteriorating urban highway. Instead of spending \$75–125 million¹¹¹ to repair a one-mile segment of the Park East Freeway, for example, Milwaukee and Wisconsin spent just \$40 million to tear it down and build a surface

104. *See id.*

105. *See id.*

106. *See* Kamala Rao, *Seoul Tears Down an Urban Highway and the City Can Breathe Again*, GRIST (Apr. 5, 2011), <https://grist.org/infrastructure/2011-04-04-seoul-korea-tears-down-an-urban-highway-life-goes-on/?ref=se>.

107. *See* Ben Welle, *Freeway Removal Creates Opportunity for Improved Health, Quality of Life*, CITY FIX (Apr. 9, 2012), <https://thecityfix.com/blog/freeway-removal-creates-opportunity-for-improved-health-quality-of-life/>.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See* Abigail Gardner, *Five Cities Argue the Economic Case to Tear Down a Highway*, SMART GROWTH AM. (Mar. 24, 2011), <https://smartgrowthamerica.org/five-cities-argue-the-economic-case-to-tear-down-a-highway/>.

boulevard.¹¹² The project generated significant tax revenues, opening both the right of way and adjacent lots to housing, retail, and commercial development. A Fortune 500 firm has moved its headquarters to the right of way.¹¹³ Altogether, the former Park East right of way attracted over \$880 million in private investment between the early 2000s and 2020.¹¹⁴

C. Highway Teardowns and Displacement

While many who live near urban highways have long fought for their removal and want to see the highways torn down, there is also anxiety among residents that gentrification could follow.¹¹⁵ Unfortunately, this anxiety is justified. Land values have appreciated along many of the corridors where highways have been hidden or removed.¹¹⁶ Further, there is evidence that such land-value appreciation has, in fact, led to displacement.

A study of Oakland found that a project that rerouted a highway out of West Oakland led to significant air quality improvements and displacement.¹¹⁷ Property values adjacent to the old right of way increased more rapidly than property values in West Oakland as a whole.¹¹⁸ There were also larger decreases

112. See Robert Steuteville, *Freeway Teardown Restores the Grid*, CONGR. FOR THE NEW URBANISM (Jan. 23, 2020), <https://www.cnu.org/publicsquare/2020/01/22/park-east-transformative>. Both figures adjusted for inflation using the U.S. Inflation Calculator, available at <https://www.usinflationcalculator.com/>.

113. See Steuteville, *supra* note 112.

114. See *id.*

115. See Maggie Hicks, *‘Reliving history’: Residents Fear I-81 Project Could Displace Communities*, THE DAILY ORANGE (Feb. 24, 2021, 10:29 PM), <http://dailyorange.com/2021/02/reliving-history-residents-fear-81-project-displace-communities/>.

116. See Alana Semuels, *Highways Destroyed America’s Cities*, ATLANTIC (Nov. 25, 2015), <https://www.theatlantic.com/business/archive/2015/11/highways-destroyed-americas-cities/417789/> (land value increased after teardown in San Francisco); see also *Conversion of Park East Freeway Sparks Economic Revitalization*, PROJECT FOR PUB. SPACES (APR. 28, 2013), <https://www.pps.org/article/conversion-of-park-east-freeway-sparks-economic-revitalization> (land value increases after teardown in Milwaukee).

117. See Regan F. Patterson & Robert A. Harley, *Effects of Freeway Rerouting and Boulevard Replacement on Air Pollution Exposure and Neighborhood Attributes*, 16 INT’L J. ENV’T. RSCH. & PUB. HEALTH 4072 (2019).

118. See *id.*

in the Black population in the areas adjacent to the old right of way, as compared to the rest of West Oakland.¹¹⁹

Several highway teardowns, cappings, and tunnel projects have included modest anti-displacement measures in their redevelopment plans. D.C. has an inclusionary zoning law that requires developers to set aside a percentage of units for affordable housing; that program applies to the units built on the I-395 deck.¹²⁰ The New York State Housing Finance Agency sponsored an affordable housing development as a part of Rochester's Inner Loop Project.¹²¹ These efforts have, or will, deliver only a modest amount of affordable housing. No highway teardown project has used the decommissioned right of way to build a meaningful amount of affordable housing—subsidized or otherwise—to protect against local displacement pressures.

The Biden Administration's infrastructure bill originally contained \$20 billion in funding to "reconnect neighborhoods" harmed by past highway projects.¹²² This money would be available not just to fund teardown projects, but also to fund planning efforts for anti-displacement measures.¹²³ Unfortunately, this proposal was reduced to just \$1 billion in the final version of the bill.¹²⁴

119. *See id.*

120. *See* Sernovitz, *supra* note 84.

121. *See* Press Release, Governor Cuomo Announces Completion of \$12 Million Affordable Housing Development in Rochester (Sept. 24, 2019), <https://www.governor.ny.gov/news/governor-cuomo-announces-completion-12-million-affordable-housing-development-rochester> (last visited Nov. 17, 2021).

122. *See* Brad Plumer & Nadja Popovich, *America Has Long Favored Cars over Trains and Buses. Can Biden Change That?*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/04/02/climate/biden-public-transit-amtrak.html>.

123. *See* Jim Tankersley & Zolan Kanno-Youngs, *Biden Seeks to Use Infrastructure Plan to Address Racial Inequities*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/us/politics/biden-infrastructure-racial-equity.html>; *see also* Sam Mintz, *How Biden Is Betting on Buttigieg to Drive a New Era of Racial Equity*, POLITICO (Mar. 8, 2021, 4:30 AM), <https://www.politico.com/news/2021/03/08/biden-buttigieg-acial-equity-473928>.

124. *See* Audra D.S. Burch, *One Historic Black Neighborhood's Stake in the Infrastructure Bill*, N.Y. TIMES (Nov. 20, 2021), <https://www.nytimes.com/2021/11/20/us/claiborne-expressway-new-orleans-infrastructure.html>. *See also* FACT SHEET: President Biden Announces Support for the Bipartisan Infrastructure Framework, THE WHITE HOUSE (June 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the->

Regardless of federal funding, any highway teardown and redevelopment project must navigate a complex array of local, state, and federal laws. Federal funding will ultimately mean very little if policymakers are unable to decommission and gain control of highway rights of way and guide a proposal through environmental review, or if local land use restrictions render anti-displacement redevelopment schemes infeasible. The final section of this paper considers how New York City and New York State actors could decommission a portion of a highway, tear the highway down, and redevelop the right of way with affordable housing.

IV. RULES OF THE ROADS: HOW TO REPLACE HIGHWAYS WITH AFFORDABLE HOUSING IN NYC

New York City would be highly dependent on the cooperation and support of the state if it attempted to decommission a state highway in the city and transform the right of way into an affordable housing development.¹²⁵ If the city wanted to remove a highway that is a part of the federal Interstate System, it would require the support of the state, the Federal Highway Administration (FHWA), and a little-known regional planning organization called the New York Metropolitan Transportation Council (NYMTC).¹²⁶

Once the city has the support of the state and/or federal government to decommission and remove a highway, it then must guide any teardown and development project through its land use review process and through federal, state, and local environmental review processes.¹²⁷ These environmental and land use review laws were passed, in part, to protect

bipartisan-infrastructure-framework/.

125. See N.Y. HWY. LAW § 349-C(3.5) (Consol. 2021) (establishing that the city needs approval from the state to remove even city owned portions of the highway system).

126. See N.Y. HWY. LAW § 340-b (Consol. 2021) (on the treatment and inclusion of Interstates as a part of the state's highway system for purposes of the Highway Law); see also FHWA, *Guidance on the Withdrawal or De-designation of Segments of the Interstate Highway System*, https://www.fhwa.dot.gov/planning/national_highway_system/interstate_highway_system/withdrawalqa.cfm (Apr. 10, 2018) (explaining the process for de-designating an Interstate).

127. See discussion *infra* Sections III.B–III.C.

communities from further urban highway construction.¹²⁸ Ironically, these laws now form some of the most serious obstacles to tearing down urban highways and making more sustainable and beneficial use of the rights of way.¹²⁹

A New York governor who wanted to transform a state-owned, state highway into affordable housing would encounter less difficulty than a New York City mayor. The governor currently has the power to decommission and redevelop state-owned, state highways without further legislative, city, or federal approval.¹³⁰ Like the city, the state would have to go through environmental review to remove and redevelop a state highway. Unlike the city, however, the state could develop a retired state highway right of way without going through the city's land use review process and without adhering to local zoning.¹³¹

A. Decommissioning and Obtaining the Highway Right of Way

1. Decommissioning a Highway Right of Way

The city is responsible for day-to-day maintenance and operations of the 235 miles of state and federal highways passing through the five boroughs.¹³² The city also owns a significant portion of this highway system.¹³³ Under the state Highway Law, however, the city cannot decommission *any* portion of a highway from highway usage without state authorization. The city may not make a change “in the basic plans of the state arterial system in the city which will affect adversely the integrity of the said expressways and parkways in such system

128. *See id.*

129. *See* Teju Adisa-Farrar Raul Garcia, *How ‘Freeway Revolts’ Helped Create the People’s Environmental Law*, PROTECTNEPA (June 14, 2019), <https://protectnepa.org/freeway-rebellions-nepa-1960s/>; *see also* Barbara Eldredge, *What is ULURP? And Why Do We Have It?*, BROWNSTONER (NOV. 24, 2015, 11:38 AM), <https://www.brownstoner.com/development/ulurp/>.

130. *See* discussion *infra* Sections III.A–III.C.

131. *See* discussion *infra* Section III.C.

132. *See* Juita-Elena (Wie) Yusuf, Lenahan O’Connell & Sawsan Abutabenjeh, *Paying for Locally Owned Roads: A Crisis in Local Government Highway Finance*, 16 PUB. WORKS MGMT. POL’Y 250, 250 (2011).

133. *See* N.Y. STATE DEPT. OF TRANSP., *supra* note 1 (the city owns 95 miles of state and Interstate highways).

by abandoning or relocating a section . . . without approval in writing by the [State Department of Transportation] commissioner.”¹³⁴

For state-owned sections of the state highway system, the state Department of Transportation (DOT) commissioner may decommission, sell, and exchange state highway rights of way “on terms beneficial to the state.”¹³⁵ The law does not meaningfully constrain the state DOT commissioner’s discretion in decommissioning state highway rights of way. The only clear exception involves state highways “where access is not controlled.”¹³⁶ This restriction would, for example, prevent the state from decommissioning and removing the Westside Highway between the Battery and fifty-seventh street. However, most state highways in New York City are limited access highways to which this restriction does not apply.¹³⁷

State, regional, and federal approval is required to decommission and remove segments of the Interstate Highway System.¹³⁸ Like with state highways, the city is dependent on state approval to remove even city-owned segments of Interstates. Only state DOTs may apply to the FHWA to have a highway de-designated.¹³⁹ While the state DOT must explain how the de-designation and ultimate removal of any Interstate segment will impact the overall Interstate system, the de-designation process is overall a deferential one.¹⁴⁰ The federal government, however, would be entitled to a portion of the proceeds of any disposition of an Interstate right of way.¹⁴¹

The FHWA, however, will not consider a state request for de-designation if it has not been approved by the relevant regional Metropolitan Planning Organization (MPO).¹⁴² MPOs are organizations created under federal law to encourage regional transportation planning and cooperation.¹⁴³ The

134. N.Y. HWY. LAW § 349-C(3.5) (Consol. 2021).

135. N.Y. HWY. LAW § 30(18) (Consol. 2021).

136. *Id.*

137. *See* N.Y. HWY. LAW § 349-F (Consol. 2021).

138. *See* FHWA, *supra* note 126.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See* Todd Goldman & Elizabeth Deakin, *Regionalism Through Partnerships? Metropolitan Planning Since ISTEA*, 14 BERKELEY PLAN. J. 46,

FHWA cannot approve federal funding for transportation projects that are not included in periodic MPO planning documents called “transportation improvement plan[s] (TIP)[.]”¹⁴⁴

While MPOs have been highly deferential to state and local departments of transportation,¹⁴⁵ it is worth pausing to comment on their remarkable power and anti-democratic makeup. New York City’s MPO, NYMTC, is comprised of nine voting members.¹⁴⁶ Two of these members represent New York City agencies, two represent state agencies, and the remaining five members are the executives of Putnam, Rockland, Westchester, Nassau, and Suffolk counties.¹⁴⁷ TIPs and de-designations require *unanimous* support of the NYMTC’s voting members.¹⁴⁸ This means the executive of Putnam County, whose population is 98,000, can unanimously block de-designation or federal highway funding for a project supported by the remaining eight voting members who collectively represent a population of approximately 19.45 million people.

Some have suggested that MPOs may be unconstitutional because they violate the constitutional principle of One-Person, One-Vote.¹⁴⁹ In 1990, the Supreme Court held that New York City’s Board of Estimate, which afforded Staten Island as much representation as Brooklyn, violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁰ The same year, a district court similarly struck down the Seattle Metro Council, which controlled water pollution abatement and public transportation funding throughout the Seattle region.¹⁵¹

MPOs, unlike the Board of Estimate and Metro Council,

46–49 (2000).

144. Kraft-Klehm, *supra* note 8, at 231.

145. *See* Goldman & Deakin, *supra* note 143, at 49.

146. *See* N.Y. METRO. TRANSP. COUNCIL, *Voting Council Members*, <https://www.nymtc.org/ABOUT-US/who-we-are/council-members> (last visited Sept. 30, 2021) (listing voting members of NYMTC).

147. *See id.*

148. *See* N.Y. METRO. TRANSP. COUNCIL, COMPENDIUM OF AGREEMENTS AND OPERATING PROCEDURES 10 (2020), https://www.nymtc.org/Portals/0/Pdf/Compendium/Compendium_updated_May_2020.pdf?ver=2020-05-15-103439-980.

149. *See* Goldman & Deakin, *supra* note 143, at 50.

150. *See* Board of Estimate v. Morris, 489 U.S. 688, 703 (1989).

151. *See* Cunningham v. Municipality of Metro. Seattle, 751 F.Supp. 885, 885 (W.D. Wash. 1990).

serve no state or municipal legislative function. Instead, MPOs are congressionally created bodies that approve federal projects and funding. There may be a One-Person, One-Vote principle in local governance, but there is no such rule involved in the approval of federal projects and funding, even if such projects are crucial to local governments. Congress is essentially free to create deeply anti-democratic measures to plan and finance transportation funding.

The constitutionality of MPOs has not been challenged, perhaps because MPOs have generally functioned as rubber stamps for state and local DOTs.¹⁵² In fact, the NYMTC recently approved the de-designation of I-895 in the Bronx.¹⁵³ Still, one could imagine the temptation of suburban leaders to block a more expansive interstate removal project, or a removal project they believe will inconvenience their constituents.

In conclusion, while the city is dependent on the state to decommission any stretch of highway passing through the five boroughs, the state can unilaterally act to decommission a state-owned segment of the state highway system. While the state requires federal approval to de-designate and teardown a city- or state-owned segment of the federal Interstate system, this approval process tends to be deferential to state requests. De-designation requests, however, are rare. If the state endeavors to remove large portions of the Interstate system from the city, it might meet more resistance. The Biden Administration has made it clear it supports highway teardowns, but each of the suburban Putnam, Westchester, Rockland, Nassau, and Suffolk county executives have the power to unilaterally block the de-designation and removal of an Interstate within New York City.

2. State Takings Law and Highway Teardowns

One of the greatest advantages of converting highway rights of way to housing is that valuable urban land can be obtained by the city or state without the use of eminent domain. However, even if the city or state does not physically acquire or physically

152. See Goldman & Deakin, *supra* note 143, at 49.

153. See N.Y. METRO TRANSP. COUNCIL, PLAN 2045 REVISIONS, <https://www.nymtc.org/Required-Planning-Products/Regional-Transportation-Plan-RTP/Plan-2045-Revisions> (last visited Sept. 29, 2021) (includes approval for I-895 (“Sheridan”) removal).

infringe on land adjacent to a decommissioned right of way, adjacent landowners may have an actionable claim under state takings law.

The mere removal or relocation of a limited access highway is not a compensable taking under New York law.¹⁵⁴ Even when the “highest and best use” of a property was “contingent on highway continuity,” such a removal is not compensable.¹⁵⁵ But, if a teardown and redevelopment project physically limits *access* to a property in a manner diminishing its highest and best use, then there is an actionable taking.¹⁵⁶

Proximity to a highway is not the same as access.¹⁵⁷ “Access” under New York takings law in the highway removal context has a physical quality. An example of a compensable loss of access from a highway removal is when the highest and best use of a property is light industry, and the highway removal project somehow narrows the property’s driveway limiting the ability of the property owner to get trucks to and from the site.¹⁵⁸

In the context of New York City, one could imagine circumstances in which an elevated right of way abutting industrial sites has been taken down, and the redeveloped right of way no longer affords enough space for certain kinds of trucks or equipment to access the site. In these circumstances, property owners may be entitled to compensation.

3. Public Parks and the Public Trust Doctrine

Parks are subject to the public trust doctrine under New York law.¹⁵⁹ Teardown and redevelopment projects requiring parks to be temporarily unavailable for meaningful periods of

154. *See* *La Briola v. State*, 328 N.E.2d 781, 784 (N.Y. 1975). Recall from Section III.A, *supra*, the state may not deprive landowners of frontage to open access highways. This is not a meaningful restriction in New York City where highways are generally limited access.

155. *La Briola*, 328 N.E.2d at 782, 784.

156. *See In re Metropolitan Transp. Auth.*, 958 N.Y.S.2d 405, 412 (N.Y. App. Div. 2013).

157. *See id.* at 413.

158. *See id.* at 412 (“if the State’s appropriation of highway-abutting land or the *physical construction of the improvement itself* so impairs access to the remaining property that it can no longer sustain its previous highest and best use, then the State must pay consequential damages.”).

159. *See Friends of Van Cortlandt Park v. City of New York* 750 N.E.2d 1050, 1055 (N.Y. 2001).

time may require legislative approval, even if the right of way is being used for a public purpose, and even if the park space is ultimately restored.¹⁶⁰ The public trust doctrine may therefore provide opponents an important tool to delay, or prevent, teardowns while the mayor and governor wrangle legislative approval for their plans.

If the public trust doctrine applies to highway projects that disturb parks, the impact could be substantial. Much of New York City's highway system abuts and passes over parks. For example, the 1.4-mile section of the BQE currently under consideration for various replacement schemes passes over, under, or abuts twelve parks.¹⁶¹

The city and state DOTs could argue that highway teardowns serve a park purpose. Under New York law, legislative approval for an intrusion on park space is only required when there is a "substantial intrusion of parkland for *non-park purposes*."¹⁶² While the Court of Appeals has held that public agencies cannot use public parks to store highway construction materials, in those cases, the highway projects were *unrelated* to the parks in which they were stored.¹⁶³ With highway teardowns, the city or state would remove structures looming over or dividing parks and that cause significant pollution problems within parks through air, noise, and runoff pollution. Furthermore, the redeployment plans could include further improvements to the parks. So long as the redevelopment plans do not remove park space, it is possible that teardowns and development schemes do not require legislative authorization to temporarily disturb and block access to parks.

160. *See id.*

161. The Van Voorhees, Adam Yauch, Brooklyn Bridge, Brooklyn Heights Promenade, For Stirling, Squibb, Harry Chapin Playground, Hillside Dog, Clumber Corner, Bar and Grill, Maritcha R. Lyons, and Trinity Parks.

162. *Friends of Van Cortlandt Park*, 750 N.E.2d at 1054 (emphasis added).

163. *See Capruso v. Village of Kings Point*, 16 N.E.3d 527, 529 (N.Y. 2014).

B. Environmental Review

1. NEPA and the Westway Debacle

If federal action or funding is involved in a teardown project, or the highway in question received federal funding, then the project must comply with the National Environmental Policy Act (NEPA). Compliance with NEPA is also a requirement to receive Interstate de-designation approval from FHWA.¹⁶⁴ Teardowns are not listed as categorical exclusions under NEPA, and because these actions are likely to have a “significant” environmental impact, cities and states performing teardowns must prepare Environmental Impact Statements (EIS).

The value and wisdom of NEPA is beyond the scope of this paper. It is clear, however, that the preparation of an EIS is often a time-consuming and expensive process. The average time it takes to complete an EIS has increased from about three years in 1998 to over five years today.¹⁶⁵ NEPA also provides opponents a powerful tool to delay the implementation of both environmentally beneficial and environmentally damaging projects.

The death of New York City’s Westway is an example of the potentially catastrophic consequences of botching environmental review. The Westway was a project to replace the Westside Highway after an overloaded dump truck and a car fell through the crumbling highway in 1973.¹⁶⁶ The plan for the Westway was to extend the Manhattan shore through landfill dumped in the Hudson River, tunnel under the landfill for the new highway right of way, and then use the old right of way for a park and housing.¹⁶⁷ Local environmentalists sued to halt the

164. See FHWA, *supra* note 126.

165. See Mark C. Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States, and How to Fix It*, REGUL. TRANSPARENCY PROJECT 12 (2018), <https://regproject.org/wp-content/uploads/RTP-Energy-Environment-Working-Group-Paper-National-Environmental-Policy-Act.pdf>.

166. See Steve Cohen, *Rocky’s Last Laugh: The Westway Controversy Comes Full Circle*, OBSERVER (Feb. 24, 2014, 10:30 AM), <https://observer.com/2014/02/rockys-last-laugh-the-westway-controversy-comes-full-circle/>.

167. See *id.*

project under both the Clean Water Act (CWA) and NEPA.¹⁶⁸

Due to the Westway involving landfill in the Hudson, the Army Corps of Engineers had to approve an infill permit under the CWA.¹⁶⁹ The new tunnel was going to disrupt certain striped bass “overwintering” habitat.¹⁷⁰ In the draft EIS for the Westway, the Corps said construction would have a “significant adverse impact” on the striped bass.¹⁷¹ In the final EIS, the Corps said the impact would be “minor.”¹⁷² Crucially, the Corps did not explain how or why it reached this different conclusion.¹⁷³ Environmental groups sued, arguing that the Corps violated NEPA by failing to explain its changed findings, and that the Corps violated the CWA by granting the infill permit despite the significant impact.¹⁷⁴

The Corps claimed there was nothing to explain because the use of the word “significant” was merely a very poor word choice.¹⁷⁵ The Corps stated it had simply meant the project would have an appreciable adverse impact on the bass.¹⁷⁶ The court rejected this explanation, pointing to the Corps’ own regulations, and finding that the Corps should have recognized its use of the word “significant” in this context was, well, significant.¹⁷⁷ The district court issued a permanent injunction against the project. The Second Circuit reversed in part, making the injunction temporary and allowing the Corps to update the EIS to provide a reasoned explanation for the change from “significant adverse impact” to “minor impact.”¹⁷⁸

The city and state decided they could not afford any further delays and, fourteen years after the project began, finally let the Westway die.¹⁷⁹ The project had been supported by both the

168. *See id.*

169. *See* *Sierra Club v. U.S. Army Corps of Eng’rs*, 772 F.2d 1043, 1048 (2d Cir. 1985).

170. *Id.* at 1047.

171. *Id.*

172. *Id.* at 1048.

173. *See id.*

174. *See generally id.* at 1043.

175. *See id.* at 1052.

176. *See id.*

177. *Id.* at 1053.

178. *See id.* at 1051–54.

179. *See* Owen Moritz, *How the ‘Soot Lady’ and Striped Bass Defeated the Westway Development Project*, N.Y. DAILY NEWS (Aug. 14, 2017, 6:00 AM),

Carter and the Reagan administrations, the mayor, the governor, unions, and the building industry.¹⁸⁰ Nearly half a billion dollars had already been expended on the project.¹⁸¹ If we are to believe the Corps' account, the project was ultimately felled by NEPA due to poor word choice. While the Corps still had the opportunity to retroactively update its EIS and provide a rational explanation for the shift from "significant" to "not significant," the city no longer believed the project was viable.¹⁸²

The lessons of the Westway regarding teardown and redevelopment schemes should perhaps not be overstated. Unlike the Westway project, which would have built a new highway into a river, highway teardown and redevelopment projects will simply build housing and parks on space currently used only by motorists. The CWA was crucial to the outcome in this case, and highway teardown projects are unlikely to implicate the CWA. Furthermore, so long as an agency has taken a hard look at an environmental problem and a reasonable range of alternatives, then it has satisfied NEPA, even if it chooses to move ahead with a potentially environmentally harmful project.¹⁸³

In a way, the interaction between NEPA and the CWA implicated substantive requirements that are typically not present in NEPA analysis. While it may be true that poor word choice in the environmental review process killed this major project, it is more than possible the Corps realized its finding of "significant adverse impact" would doom the project under the CWA¹⁸⁴ and therefore, it arbitrarily changed its determination

<https://www.nydailynews.com/new-york/soot-lady-defeated-westway-development-project-article-1.818854>.

180. See Albert Amateau, *Why Westway Sleeps with the Fishes*, AM NY (June 22, 2004), <https://www.amny.com/news/why-westway-sleeps-with-the-fishes/>; see also Cohen, *supra* note 166.

181. See Moritz, *supra* note 179. In 2021 dollars. Inflation calculated using US Inflation Calculator, <https://www.usinflationcalculator.com/>.

182. *Sierra Club*, 772 F.2d at 1054.

183. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (finding the duties imposed on agencies by NEPA are "essentially procedural" and that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has *considered* the environmental consequences . . .") (emphasis added).

184. See *Sierra Club*, 772 F.2d at 1051 ("The Clean Water Act provides a more intrusive power of review, one whose purpose is to *prohibit* agency action whenever certain environmental impact thresholds are met.").

to unlawfully keep the project alive. This is certainly what the district court and court of appeals believed had happened.

Still, the Westway debacle shows how powerful a tool NEPA can be for opponents to delay or derail even major projects with substantial political support. As one critic of environmental review has suggested, NEPA means there's no such thing as a "shovel-ready project."¹⁸⁵ Political leaders in support of a highway teardown project in theory might balk at the prospect of years of review and potential backlash from opponents for a project that, even under the best of circumstances, is unlikely to break ground before the next election cycle.

2. SEQRA/CEQR

Unlike NEPA, the New York State Environmental Quality Review Act (SEQRA) applies to all highway teardown projects in New York City. This is because the state is a necessary actor in any highway teardowns taking place within the city. Under state regulations, the removal of a highway segment carrying tens of thousands of vehicles daily will almost certainly require an EIS under SEQRA because of the potential for adverse traffic impacts,¹⁸⁶ because the teardown would constitute a "substantial change in the use, or intensity of use, of land,"¹⁸⁷ and because the project would permanently "attract[] a large number of people" to the right of way.¹⁸⁸

If the city is the lead agency, provides discretionary approvals, or provides funding for a teardown and redevelopment project, then it must adhere to the City Environmental Quality Review (CEQR).¹⁸⁹ CEQR is the process by which New York City agencies perform environmental review.¹⁹⁰ SEQRA allows for local governments to create their own environmental review procedures, so long as they adhere to the minimum requirements of SEQRA.¹⁹¹

185. Rutzick, *supra* note 165, at 4.

186. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c)(i) (2020).

187. *Id.* § 617.7(c)(viii).

188. *Id.* § 617.7(c)(ix).

189. N.Y.C. Mayor's Off. of Env't. Coordination, *CEQR Basics*, <https://www1.nyc.gov/site/oec/environmental-quality-review/ceqr-basics.page> (last visited Nov. 17, 2021).

190. See *id.*

191. See *id.*

For purposes of highway teardowns, the most important substantive difference between SEQRA/CEQR and NEPA is that SEQRA and CEQR require reasonable efforts be made to mitigate or avoid adverse environmental effects revealed by the EIS.¹⁹² While this is often presented as a “substantive” requirement, SEQRA does not require any mitigation measures to actually take place. Instead, agencies are to impose mitigation measures “to the maximum extent practicable” in accordance with the “the balancing philosophy” of SEQRA; courts are highly deferential on this requirement.¹⁹³ In practice, the SEQRA mitigation requirement is satisfied if the lead agency takes a “hard look” at a reasonable range of mitigation measures or project alternatives.¹⁹⁴ Thus, “SEQRA requires an agency to document and consider ways in which any adverse effects might be minimized, but it does not require an agency to impose every conceivable mitigation measure, or any particular one.”¹⁹⁵

One potential challenge raised by this mitigation requirement in the highway removal context is that state and local DOTs rely on traffic models that are likely to overstate any traffic congestion caused by teardowns. Specifically, DOTs rely on models that predict significant traffic increases, even when such models consistently have been proven wrong in the past.¹⁹⁶ DOTs also sometimes simply assume that traffic demand along a highway corridor will not change, regardless of the teardown. They assume the drivers who were using the highway before the teardown will simply shift to nearby local streets after the teardown.¹⁹⁷ Studies of traffic patterns after teardowns have

192. See Archer, *supra* note 6, at 1320; see also Association for Cmty. Reform v. Bloomberg, 824 N.Y.S.2d 752, 752 (2006).

193. Association for Cmty. Reform, 824 N.Y.S.2d at 762.

194. *Id.* at 760.

195. Jackson v. New York State Urb. Dev. Corp., 494 N.E.2d 429, 439 (1986).

196. See, e.g., Aaron Gordon, *The Broken Algorithm that Poisoned American Transportation*, VICE (Aug. 24, 2020, 8:00 AM), <https://www.vice.com/en/article/v7gxy9/the-broken-algorithm-that-poisoned-american-transportation-v27n3>.

197. See Noah Kazis, *Advocates: State DOT Analysis Engineered to Preclude Sheridan Teardown*, STREETS BLOG (July 14, 2010), <https://nyc.streetsblog.org/2010/07/14/advocates-state-dot-analysis-engineered-to-preclude-sheridan-teardown/>; see also Tri-State Transp. Campaign, *Questionable Data, Narrow Vision Still Mar Sheridan Study*,

shown that many drivers will shift to public transit, different corridors, or will simply drive less.¹⁹⁸

The need to take a “hard look” at mitigation measures and alternatives to avoid an overstated adverse traffic impact could lead agencies to take a conservative approach to highway teardowns that fails to improve environmental outcomes. This appears to be what happened with the Sheridan Expressway in the Bronx. Originally, the plan was to replace the Sheridan with housing and a surface boulevard that had transit, biking, and pedestrian improvements.¹⁹⁹ The state DOT felt this approach would increase congestion and consequently pushed for a plan that would replace the highway with a wide, Westside Highway style boulevard designed to maximize the flow of automobile traffic.²⁰⁰ Critics claim the state DOT relied on an outdated traffic model failing to account for induced demand.²⁰¹

C. Land Use Review and Zoning

Once the City has garnered state and, if necessary, federal approval to decommission a highway, has obtained any right of way owned by the state, and has drafted an environmental impact statement for the project, it is ready to begin the city’s Uniform Land Use Review Procedure (ULURP).²⁰² The City cannot develop or sell any of its land without passing ULURP,²⁰³ a lengthy, complex, and exacting process.

State law provides mechanisms for certain state-sponsored developments to sidestep both ULURP and the city’s zoning laws entirely. This raises fascinating possibilities about the governor’s power to set aside a small portion of existing highway infrastructure to build a large number of affordable housing units on land that is—apart from teardown, infrastructure, and

MOBILIZING THE REGION (July 22, 2010), <http://blog.tstc.org/2010/07/22/questionable-data-narrow-vision-still-mar-sheridan-study/>.

198. See discussion *supra* Section II.B.

199. See *New York City | Sheridan Expressway*, CONGR. FOR THE NEW URBANISM, <https://www.cnu.org/new-york-city-sheridan-expressway> (last visited Nov. 17, 2021).

200. See *id.*

201. See *id.*

202. See Eldredge, *supra* note 129.

203. See *id.*

environmental remediation costs²⁰⁴—essentially free.

1. City Disposition and Development of Rights of Way

Since 1975, every use or disposition of city land must go through ULURP.²⁰⁵ ULURP requires review and input from the local community board, the relevant borough president, the City Planning Commission (CPC), the New York City Council, and the mayor.²⁰⁶ Community board recommendations are non-binding.²⁰⁷ If the borough president recommends approval, then the application requires the support of seven of thirteen CPC commissioners to move forward in the process.²⁰⁸ If the borough president recommends rejection, however, then the application requires the approval of nine of thirteen CPC commissioners.²⁰⁹

If the project fails to garner the necessary votes from the CPC, it is dead.²¹⁰ If the plan makes it to the city council, it can be approved with majority support. The mayor then has five days to veto, which the Council can override with a two-thirds majority vote.²¹¹ Both the CPC and the Council have the power to amend the plan before approving.²¹² Altogether, the process requires at least three public hearings and takes around 205 days to be completed, though an application can be rejected sooner.²¹³

Like environmental planning laws, ULURP was passed in large part in reaction to mid-century urban highways and other

204. Given the runoff and soil pollution caused by highways, the city or state, or any private partners, may be responsible for environmental cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act. CERCLA is beyond the scope of this paper. See EPA, *Summary of Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (last visited Nov. 17, 2021).

205. See Eldredge, *supra* note 129.

206. See *id.*

207. See *id.*

208. See *id.*

209. See *id.*

210. See *id.*

211. See *id.*

212. See *id.*

213. See *id.*

urban redevelopment projects.²¹⁴ ULURP was meant to protect neighborhoods from being wiped off the map by capricious urban planners.²¹⁵ After ULURP, planners needed to go out into the community and build consensus before inflicting their grand visions on the rest of the city.

Unfortunately, there is evidence that the city's planning pendulum has swung too far against central control and bold action since the mid-century urban renewal years. Even modest attempts to increase density for the sake of affordable housing struggle to survive ULURP. The city recently pushed for a city-wide rezoning that would allow slight height increases—ten to fifteen feet—on the condition that the additional space had to be used for affordable housing or affordable senior housing.²¹⁶ The reforms would also allow for higher ceilings at the ground level of buildings to support retail spaces. The planned rezoning would have reduced or removed parking requirements for certain affordable senior housing developments in outer-borough neighborhoods to help increase the production of badly needed affordable senior housing.²¹⁷

Citywide, ninety percent of community boards rejected these reforms.²¹⁸ No borough presidents supported these reforms.²¹⁹ While a version of the plan was ultimately passed by

214. *See id.*

215. Throughout the 1930s, 1940s, 1950s, and 1960s, thousands of acres of New York City neighborhoods were bulldozed to make way for highways, public housing developments, performing arts centers, convention centers, and other megadevelopments. *See* Jacob Winkler, *New York City Atlas of Urban Renewal*, ISSUU, 6–7, 14 (Aug. 16, 2017) (M.S. thesis, Parsons School of Design), https://issuu.com/jakobwinkler5/docs/nyc_atlas_of_urban_renewal; *see also* Eldredge, *supra* note 129.

216. *See* Jesse M. Keenan et al., *Using Design Technology to Explore the Implications of the New York City Zoning Amendment for Quality and Affordability*, 59 ARCHITECTURAL SCI. REV. 496, 505 (2016) (finding most height changes allowed by ZQA are marginal and “likely not perceptible to even the most observant resident.”).

217. *See id.*

218. *See* Tanay Warerkar, *NYC's Controversial New Affordable Housing Proposals, Explained*, N.Y. CURBED (Feb. 8, 2016, 11:45 AM), <https://ny.curbed.com/2016/2/8/10940798/nycs-controversial-new-affordable-housing-proposals-explained>.

219. *See generally* NYC DEP'T OF CITY PLAN., HOUS. NEW YORK, ZONING FOR QUALITY AND AFFORDABILITY: PUBLIC REVIEW, <https://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability-2.page> (June 22, 2016). The Brooklyn Borough President did not officially disapprove. Rather, he sent a letter to the City Planning Commission

the city council, the ULURP process exacted significant concessions. Some of the parking reforms were scrapped, and many wealthy neighborhoods—including all of Manhattan below 110th Street—were ultimately exempted from the reforms entirely.²²⁰

One of the problems with ULURP is that community boards are not representative of the broader community. Community boards tend to be older, whiter, wealthier, and more skeptical of development than the communities that they serve.²²¹ Beyond the makeup of the community boards themselves, white residents are more likely than nonwhite residents to participate in local land use meetings, such as the three required by ULURP, and to oppose any new development.²²²

It is possible that the need to go through ULURP will be fatal to any given highway teardown and redevelopment project. A plan to remove a portion of an urban highway and use the right of way to develop affordable housing is likely to engender opposition from the local community board. Without energetic support from the overall council and, crucially, the local councilmember, a city-sponsored highway teardown and redevelopment project is unlikely to succeed. If the project fails to pass ULURP, it is either dead or will have to be amended in a manner that will likely force the city to restart the environmental review process.²²³

reiterating the concerns of the Brooklyn Borough Board.

220. See Jeff Mays, *Here's How City Council Changed De Blasio's Citywide Rezoning Plan*, DNA INFO (Mar. 15, 2016, 5:53 PM), <https://www.dnainfo.com/new-york/20160315/civic-center/heres-how-city-council-changed-de-blasios-citywide-rezoning-plan/>.

221. See Kelly Mena & Meaghan McGoldrick, *How Well Does Your Community Board Represent the District? Not Very.*, BROOKLYN DAILY EAGLE (Nov. 26, 2019), <https://brooklyneagle.com/articles/2019/11/26/community-board-diversity/>.

222. See Sarah Holder & Kriston Capps, *The Push for Denser Zoning Is Here to Stay*, BLOOMBERG CITYLAB (May 21, 2019, 7:00 AM), <https://www.citylab.com/equity/2019/05/residential-zoning-affordable-housing-upzoning-real-estate/588310/>.

223. The CPC and city council can amend proposals throughout ULURP, but only if their changes would not trigger a new environmental review. A rejection would imply the CPC and city council could not agree to a version of the plan that would not trigger a new environmental review. See Eldredge, *supra* note 129.

2. State Disposition and Development of Rights of Way

Unlike the city, the state can remove a highway and develop the right of way with affordable housing without adhering to local zoning or going through ULURP. The New York State Urban Development Corporation Act (UDCA) established the Empire State Development Corporation (ESDC).²²⁴ Once the state decommissions a state highway, it may turn the right of way over to the ESDC, which may then engage in a streamlined land use review process known as a General Project Plan (GPP). Through a GPP, the ESDC could build affordable housing on a retired right of way without having to obtain approval from community boards, borough presidents, the mayor, or even the city council.

Under the GPP process, the ESDC must perform an environmental review and hold a public hearing. Like with ULURP, the CPC can recommend disapproval, approval, or approval with modifications.²²⁵ The ESDC, however, can override the CPC's recommendations or disapproval upon the vote of five of seven board members. The governor, with the consent of the state senate, appoints the ESDC's board members.²²⁶ The city council, community boards, borough presidents, and the mayor have no official role to play in the GPP process.

There are two core requirements for the ESDC to use GPP to override ULURP. Highway teardown and redevelopment projects could easily be designed to meet both requirements. First, the project in question must advance the goals of the UDCA. Courts have interpreted the purpose of the UDCA very broadly, and removing a structure causing environmental harm in order to develop affordable housing would fall comfortably within the explicit blight removal, development, public health, and affordable housing production goals of the UDCA.²²⁷

224. See N.Y. MUN. LAW § 6254 (MCKINNEY 2021).

225. See *CPC Recommendations on General Project Plans*, NYC DEP'T OF CITY PLAN., <https://www1.nyc.gov/site/planning/about/cpc-recommendations.page> (last visited Nov. 17, 2021).

226. See *Board of Directors*, EMPIRE STATE DEV., <https://esd.ny.gov/about-us/leadership> (last visited Nov. 17, 2021) (indicating current board members).

227. See *East Thirteenth St. Cmty. Ass'n v. New York State Urb. Dev. Corp.*, 595 N.Y.S.2d 961, 964–65 (N.Y. App. Div. 1993).

Second, the ESDC must be a necessary party to the development proposal.²²⁸ While the ESDC may work with—and indeed is meant to work with—both city and private partners to advance the goals of the UDCA, a project cannot benefit from the UDCA and avoid ULURP if the ESDC is not a necessary party. That said, courts have applied somewhat circular reasoning to this prong. Being that one of the goals of the UDCA is to allow the state to step in to cut the red tape to coordinate complex projects, the ESDC is seen as a necessary actor if its involvement in the project simply helps other parties avoid ULURP.²²⁹ That is, the ESDC must be a necessary party to avoid ULURP, but if the ESDC’s involvement is primarily to help a project avoid ULURP, then it is a necessary party.²³⁰

The UDCA also directly and unambiguously permits the ESDC to override local zoning laws.²³¹ Section 16 of the UDCA explicitly allows the ESDC to “in its discretion” override “local laws, ordinances, codes, charters or regulations applicable to [development projects].”²³² The New York Court of Appeals has found that this language allows the ESDC to constitutionally override local zoning.²³³ The state has used this zoning override power to redevelop Times Square in the early 1990s,²³⁴ rebuild the World Trade Center following the September 11th attacks,²³⁵ and most recently, for the Atlantic Yards project.²³⁶ Governor

228. *See id.* at 963–65.

229. *See id.*

230. *See id.* at 963–67.

231. *See* N.Y. MUN. LAW §§ 6266(3) (2021) (granting explicit authority to sidestep local zoning laws and granting broader override authority for local laws, respectively).

232. N.Y. MUN. LAW § 6266(3).

233. *See* *Floyd v. New York State Urb. Dev. Corp.*, 300 N.E.2d 704, 706 (N.Y. 1973) (upholding the constitutionality of the UDCA and its right to displace local zoning).

234. *See* Lynne B. Sagalyn, *Mediating Change: Symbolic Politics and the Transformation of Times Square*, Departmental Papers, DEP’T OF CITY & REG’L PLAN. 1, 8 (2001).

235. *See* Tom Angotti, *New York City’s Big Planning Projects: Avoiding the Public?*, *GOTHAM GAZETTE* (Mar. 19, 2003), <https://www.gothamgazette.com/development/1756-new-york-citys-big-planning-projects-avoiding-the-public>.

236. *See* Daniel Geiger, *Cuomo Likely to Steer Amazon Project Around City Council*, *CRAINS NEW YORK* (Nov. 9, 2018, 12:05 PM), <https://www.craainsnewyork.com/real-estate/cuomo-likely-steer-amazon-project-around-city-council>.

Cuomo planned to override local zoning to develop Amazon HQ2 in Long Island City,²³⁷ and before his resignation announced plans to use his authority under the UDCA to build ten towers to fund the redevelopment of Penn Station.²³⁸

The ability to sidestep local zoning is an extremely powerful tool. A governor committed to affordable housing could take a modest portion of land from the city's highway system and develop dense, mixed-use, mixed-income, permanently affordable housing.²³⁹ The ESDC would be able to experiment with various affordable housing models that are simply not possible under the current zoning code or under local land use processes. The ESDC could develop projects without, for example, adhering to expensive minimum parking requirements that still apply throughout much of the city.²⁴⁰ Three of the greatest barriers to the production of affordable housing in New York City are zoning, the land use review process, and the cost of land. A highway teardown-to-affordable housing development under GPP would help a governor avoid all three of these issues.

V. CONCLUSION: ENVIRONMENTAL JUSTICE, HOUSING, CLIMATE CHANGE, AND DEMOCRATIC LEGITIMACY

The removal of portions of New York's 235-mile urban highway system represents an opportunity to improve local environmental quality, reduce regional greenhouse gas emissions, and build desperately needed affordable housing. Policy leaders sometimes struggle to improve urban environmental quality without increasing local displacement

237. *See id.*

238. *See* Matthew Haag & Luis Ferré-Sadurní, *To Save Penn Station, New York Wants to Build 10 Skyscrapers*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/05/05/nyregion/penn-station-redevelopment.html>.

239. *See* Caroline Spivack, *Transform or Tear Down? The BQE Reconstruction, Explained*, NY CURBED (Feb 25, 2020), <https://ny.curbed.com/2019/3/12/18248873/brooklyn-heights-bqe-repair-dot> (Yetsuh Frank estimates 290 acres of developable land would be available from tearing down BQE alone which would make room for hundreds of thousands of units of housing).

240. *See generally* Donald C. Shoup, *The High Cost of Free Parking*, 17 J. PLAN. EDUC. & RSCH. 3 (1997); *see also* C.J. Gabbe & Gregory Pierce, *Hidden Costs and Deadweight Losses: Bundled Parking and Residential Rents in the Metropolitan United States*, 27 HOUS. POL'Y DEBATE 217 (2017).

pressures.²⁴¹ Urban highway teardowns could simultaneously improve the local environment, increase local land values, and allow for redevelopment in a manner that protects long-time community members.

New York City highway teardown and affordable housing redevelopment schemes implicate local, state, and potentially federal environmental review laws, state and potentially federal highway laws, state constitutional law, state public trust doctrine, local zoning, and local and state land use review processes. The city is highly dependent on state actors to decommission local highways. A city-sponsored highway teardown and redevelopment scheme must survive exacting, politically charged, and time-consuming environmental and land use review processes.

The governor of New York has far more power than the mayor of New York City to unilaterally advance a highway teardown and redevelopment project within the city. While the state cannot avoid environmental review, it can sidestep both local land use review and local zoning laws. Without federal approval or any further legislative approval, state agencies controlled by the governor can remove highways from the state highway system, transfer ownership to state development agencies, and then redevelop the rights of way into affordable housing in a manner entirely unconstrained by local zoning laws or land use review processes.

A governor acting unilaterally to decommission, remove, and develop a highway right of way would, of course, raise questions about democratic legitimacy. Land use is generally considered a fundamentally local issue, and New York City law is designed to give existing community members a strong voice in government projects that have an impact on the built environment.²⁴² But both the law enabling the governor to decommission and develop highway rights of way, and the law allowing the governor to sidestep local land use review and zoning, were passed by the state legislature. The latter of which was explicitly passed to allow the state government to avoid local red tape preventing crucially needed affordable housing from

241. See Anguelovski, *supra* note 14, at 27.

242. See generally Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017) (on land use as a fundamentally local issue).

being built. Given the toxicity of urban highways, the environmental injustice of urban highways, the looming climate crisis, and the ongoing affordable housing crisis, it is at the very least worth noting that the governor has this remarkable power.