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CONCEPTUALIZING THE URBAN COMMONS: THE PLACE OF BUSINESS IMPROVEMENT DISTRICTS IN CITY GOVERNANCE¹

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Business Improvement Districts (BIDs) are self-taxed organizations that are comprised of businesses and property owners, are approved by city governments, and spend funds to improve profitability within certain neighbourhood boundaries. BID governance structures can also include neighbourhood residents and city councillors as voting or non-voting members. Numerous scholars have written about the role of BIDs in city governance, including the extent to which they improve or undermine inclusivity and accountability. This paper focuses on a related question that has not yet been deeply analysed in legal scholarship: can BIDs be considered a form of urban commons? The term ‘urban commons’ is contested, but generally refers to the application of the property law notion of the commons to the shared management of bounded city spaces. This paper extends from existing debates on the meaning of the “urban commons” and its application to BIDs. This paper uses BIDs in Toronto to introduce decision-making, representation, and accountability as elements of just urban governance can serve as the basis of an evaluation of the urban commons.

Introduction

The word ‘city’ comes from the Latin *cīvitās*, meaning a highly organized community – something that has existed almost as long as human history.² In the context of Ontario, Canada, the word ‘city’ is undefined in statutory terms: the most recent set of municipal statutes removed references to titles like ‘city,’ ‘town,’ and ‘village.’³ Generally, cities are nested within the jurisdiction of provincial, state, or federal governments that limit their authority, and are also understood as democratic governments that represent their residents.⁴ In addition to city councils that serve as the legislatures of decision-making, residents and businesses are also represented by associations that seek a decision-making role in local matters. One example is a Business

¹ I owe heaps of gratitude to the many people who provided valuable feedback on this draft, especially Amelia Thorpe, Sarah Hamill, Carol Rose, Mariana Valverde, Nicholas Blomley, and Doug Harris. Many thanks as well to the participants of the Celebrating Commons Conference at the Georgetown Law Centre in October 2018 and to the Property and the City Workshop at Allard School of Law in March 2017. All errors and omissions are my own.

² René Maunier, “The Definition of the City” (1910) 15:4 *American Journal of Sociology* 536; See also UN Habitat, 2014.

³ In Ontario, there are two principal pieces of legislation that determine the powers and obligations of local governments: *City of Toronto Act, 2006*. S.O. 2006, Ch. 11 [hereinafter “COTA”] applies exclusively to Toronto, while the *Municipal Act, 2001*, S.O. 2011, c. 25 applies to all other 444 municipalities.

⁴ *Ibid.* at s. 1.

Improvement District (BID). In most cities, these are formed through a city bylaw that levies a tax on local businesses and property owners, which can amount to millions of dollars per year. BIDs can have a strong voice in local matters. As BIDs represent private interests, their role within city governance is uncertain. There is wide debate in the academic literature as to whether they are lobbyists for businesses, enablers of local action, or a part of a broader local governance network. Depending on which of these roles they serve, the existence and oversight of BIDs raise important questions about whose interests are given priority in city governance.

The term ‘urban commons’ has no uniform definition or agreed upon principles, and is used in a wide range of disciplines.⁵ The city is an especially interesting setting for commons debates, as it is “not a frictionless agglomeration of commoners, but rather a site for ongoing contestation about what counts as a common and who counts as commoners.”⁶ Its theoretical meaning emerged from a form of property interest called ‘common property,’ whereby land or resources are owned, and therefore managed, together with others, rather than having a single owner. Emerging scholarship is examining the use of the ‘urban commons’ as a theoretical tool to advance the notion of the ‘just city.’ Most of this scholarship is grounded within the social sciences, often connecting the urban commons to movements for greater public involvement in decision-making, whereas in law, the commons is often explored as a kind of property interest. The urban commons advances that, regardless of whether spaces are privately or publicly owned, the city is a territorial space in which citizens claim to have a role or stake, a norm which is reinforced in law.⁷ At the same time, scholars have observed that creating neighbourhood boundaries and enabling localized power can also lead to “insiders” and “outsider” and disproportionately impacts racialized, low-income people.⁸ In recent scholarship, notions of the commons have been applied to discussions of the environment, communications, the rights of the homeless, among others.⁹ The conversation about the urban commons is central to situations

⁵ Maja Hojer Braun, “Communities and the commons” in Christian Borch and Martin Kornberger, eds., *Urban Commons: Rethinking the City* (Routledge, 2015) at 154.

⁶ Christian Borch & Martin Kornberger, *Urban Commons: Rethinking the City* (Routledge, 2015) at 15.

⁷ Sheila Foster & Christian Iaione, “The City as a Commons” (2016) 34 *Yale L. & Pol’y Rev.* 281.

⁸ See e.g. Ford, Richard Thompson, “The Boundaries of Race: Political Geography in Legal Analysis” (1994) 107 *Harv. L. Rev.* 1843; Ford, Richard Thompson, “Law’s Territory (A History of Jurisdiction)” (1999) 97 *Mich. L. Rev.* 843; and Frug, Gerald E. “The Geography of Community” (1996) 48 *Stanford Law Review* 1047.

⁹ See e.g. Braun, *supra* note 5; Borch & Kornberger, *supra* note 6; and Foster & Iaione, *supra* note 7.

where multiple bodies claim to have rights to govern within an urban context, how such claims are mediated, and by whom.¹⁰

BIDs are meant to represent the interests of local businesses and property owners, and have been critiqued as exacerbating space-based tensions, in particular in relation to historically disadvantaged residents.¹¹ This article brings together these two rich scholarly conversations by examining the role that BIDs play in city governance and their relationship to the urban commons. Scholars from many disciplines have analysed BIDs in relation to governance and geography, often struggling with the self-interested and privileged focus of BIDs within the larger democratic agendas of city governments. Although they have not explored the relationship between BIDs and the urban commons, Sheila Foster and Christian Iaione drew upon Elinor Ostrom's famous work *Governing the Commons* to note in passing how BIDs incorporate the design principles of the commons and inspire other creative conceptualizations of a commons framework in the urban context, leading to the promise of a more collaborative urban governance environment.¹² Without delving deeply into the conceptualizing of BIDs alongside the urban commons, other scholars, including Elizabeth Blackmar and Sarah Hamill, have challenged the application of the idea of the commons to characterize all or part of city space.¹³

This paper explores the tensions between conceptualizing BIDs as a tool for collaborative justice or, alternatively, as an exclusive interest group that is privileged within urban governance. The aim is not to set out a grand, generalized theory of BIDs and their place within the governance of cities, but rather to understand whether and how BIDs can be considered an example of the urban commons. It begins by summarizing the existing literature on the scope and meaning of the 'urban commons,' including as a form of property interest and a political movement. What do we mean by the governance of the 'urban commons,' and how do BIDs fit into this scheme? Next, it

¹⁰ This is a different conception of the urban commons from Harvey (DATE), for example, who suggests that spaces become urban commons through social action.

¹¹ Gabriella Schaller & Susanna Modan, "Contesting Public Space and Citizenship Implications for Neighborhood Business Improvement Districts" (2005) 24:4 *Journal of Planning Education and Research* 394.

¹² Foster & Iaione, *supra* note 7.

¹³ Elizabeth Blackmar, "Appropriating 'the Commons': The Tragedy of Property Rights Discourse" in Low, S., and N. Smith, *The Politics of Public Space* (New York: Taylor & Francis, 2006) at 49-80 (examining how the language of property rights has shaped the kinds of claims that are made on and about public property, leading to the opening and closing of democratic public space); Sarah Hamill, "Private Rights to Common Property: The Evolution of Common Property in Canada" (2012) 58:2 *McGill Law Journal* 365.

uses examples from the city of Toronto, the first municipality to introduce BIDs as a form of local representation, to explore the existing legal framework of BIDs. Can they be considered a form of urban commons? Specifically, it explores how an analysis that focuses on decision-making, representation, and accountability as elements of just urban governance can serve as the basis of an evaluation of the urban commons. This paper also applies normative characteristics to evaluate claims about the commons. Can the language of the ‘urban commons’ be used to understand BIDs, or does Foster and Iaione’s call for “visible, equal, contestable, and legitimate” decision-making render this characterization theoretically problematic? How is the language of the urban commons used in overlapping claims in city governance? By exploring these issues, this paper helps clarify how dominant groups leverage and rely on state power to further their economic interests.

Conceptualizing the Urban Commons

Scholars have explored the meaning of the commons and its implications to urban centres in various ways, but generally all refer to Garrett Hardin and Elinor Ostrom, the grandparents of contemporary notions of the commons. Hardin, a biologist, claimed that the commons is an unsatisfactory form of property interest: individual parties do not have a vested interest to conserve or sustainably use the resource, which inevitably leads to depletion and destruction.¹⁴ Hardin ominously called this the ‘tragedy of the commons.’¹⁵ Free-riders will take advantage of the public nature of the good or land: because there are no consequences to this abuse, the common property will ultimately fall into disrepair. Elinor Ostrom later critiqued his claims on, among other reasons, the basis of governance.¹⁶ She asserted that a commons is not solely a single resource, as Hardin saw it. She argued that it is a resource *plus* the social community and its corresponding values, rules, and norms that are used to manage or govern the resource. In her book, *Governing the Commons*, for which she won the Nobel Prize in 1999, Ostrom offered real-world examples of the management of common goods such as fisheries, land irrigation systems,

¹⁴ Garrett Hardin, “The Tragedy of the Commons” (1968) 162 *Science* 1243 at 1244.

¹⁵ *Ibid.*

¹⁶ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990). See also Lee Anne Fennell, *Ostrom’s Law: Property Rights in the Commons* (2011) 5:1 *Int’l J of the Commons* 9, online: < <http://www.law.uchicago.edu/files/file/SSRN-id1962336.pdf>>.

and farmlands.¹⁷ She argued that the tragedy of the commons could be solved, and identified a number of factors conducive to successful resource management: first, the resource should have definable boundaries; second, there must be a perceptible threat of resource depletion and it must be difficult to find substitutes; third, the presence of small and stable populations with a strong social network and social norms promoting conservation; and fourth, appropriate community-based rules and procedures in place with built-in incentives for responsible use and punishments for overuse.¹⁸ These factors were later used in evaluating the commons as applied to cities.¹⁹

The commons and the city

A discussion of an urban commons first requires situating the city. Saskia Sassen described the large, complex city as “a new frontier zone.”²⁰ She wrote, “Access to the city is no longer simply a matter of having or not having power. Urban spaces have become hybrid bases from which to act” through robust governance structures.²¹ Legal authority and governance structures are critical to action.²² As Canadian legal scholar Hoi Kong wrote, “Cities can be many things, but they are necessarily creations of the law.”²³ Law is key to governance, in that it shapes the microspaces and bodies within the complex city that play a role in local and city-wide decision-making.²⁴ The law serves a critical role in empowering people and communities within an urban space to engage and act.

The language of the urban commons invokes property law.²⁵ Many property scholars would agree that formal law (meaning that expressed in codes and on paper) is inadequate in capturing

¹⁷ Elinor Ostrom, James Walker, & Roy Gardner, "Covenants With and Without a Sword: Self-Governance Is Possible" (1992) 86:2 *American Political Science Review* 404

¹⁸ *Ibid.*

¹⁹ Foster & Iaione, *supra* note 7.

²⁰ Saskia Sassen, *Cities in a World Economy* (Pine Forge Press, 2012) at 86.

²¹ *Ibid.*

²² Ester Fuchs, “Governing the Twenty-First Century City” (2012) 65:2 *Journal of International Affairs* 43 at 45.

²³ Hoi Kong, “Toward a Federal Theory of the City” (2012) 56:3 *McGill LJ* 473 at 478.

²⁴ Ron Levi and Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44:3 *Osgoode Hall Law Journal* 409.

²⁵ See esp Elizabeth Blackmar, *supra* note 13 at 49-80, who examines how the language of property rights has shaped the kinds of claims that are made on and about public property, leading to the opening and closing of democratic public space.

how communities form rights and interests in connection to land.²⁶ Law school students are taught that property's lineage, back to the origins of English common law, provides a stabilizing model upon which much of the legal system can be understood. Property courses typically begin by categorizing the world into four (sometimes overlapping) categories that more or less explain how title to land and goods can be understood: private, common, public, and non-property or open access.²⁷ In this model, private property is owned by individuals who can exclude others from access. Common property is collectively owned, while public property is managed and controlled by government. The final category has no ownership and can be freely used by all. Hamill argued that these categories are "hopelessly inadequate for the real world."²⁸ Many other scholars have recently criticized what they consider an overly simplistic, strictly doctrinal understanding of property, which oversimplifies the idea of 'owner' and the many parties with legal and other interests in property,²⁹ the link between belonging and property,³⁰ whether property includes obligations to third-party non-interest holders,³¹ the transformative effects of environmental and indigenous law on property,³² who sets the agenda for private property,³³ and the many communities who live on and put land to work without any desire to formalize their rights.³⁴

Common property presents a particular problem for traditional interpretations of property law.³⁵ Common property interests are shared among many users, without necessarily having divided lines, hierarchical interests, or the capacity to exclude, each of which feature in traditional

²⁶ See e.g. Estair Van Wagner, "Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning" (2015) *Revue Générale De Droit* 43; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2014); and Nicole Graham, *Landscape: Property, Environment, Law* (Oxon: Routledge, 2011).

²⁷ Daniel H. Cole & Elinor Ostrom (eds.) *Property in Land and Other Resources* (Lincoln Institute of Land Policy, 2012) at 42-43.

²⁸ Hamill, *supra* note 13 at 8.

²⁹ Van Wagner, *supra* note 26 at 275.

³⁰ Keenan, *supra* note 26.

³¹ Christopher Essert, *Property in Licences and the Law of Things* (2014) 59:3 *McGill LJ* 559.

³² Graham, *supra* note 26.

³³ Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 *University of Toronto Law Journal* 275 at 278.

³⁴ Nicholas Blomley, *Unsettling the city: Urban land and the politics of property* (Routledge: 2004) at 20; Daniel Fitzpatrick, "Fragmented Property Systems" (2017) 38:1 *UPenn J Int'l L* 137.

³⁵ Hamill, *supra* note 13.

conceptions of private property.³⁶ But these divisions are neither neat, nor generalizable. Carol Rose, for example, disputed the characterization of common property as an inevitable tragedy, arguing instead that public property, which is both owned and managed by society at large, is better understood as a “comedy.”³⁷ Law controls access of certain lands to the public, because “public access to those locations is as important as the general privatization of property in other spheres of our law.”³⁸ In her comprehensive account, common property is crucial to protecting the interests of private property holders; it is not a separate binary.

According to Foster and Iaione’s urban commons framework, regardless of whether spaces are privately or publicly owned, the city is a territorial space in which citizens have a role or stake, a norm which is reinforced in law.³⁹ They built on Ostrom’s argument, which challenged the assumption that common property cannot be governed collectively without substantial waste and inefficiency to the urban form. In the context of the city, common pool resources are particular urban spaces, which then become sites of governance. Public–private organizations can work together to effectively play a role in governing specific city areas, but to do so they must incorporate ‘bottom-up’ governance. The city as commons is thus a system of governance over particular city spaces, which incorporates *subsidiarity*, or delegated authority, and *polycentrism*, meaning multiple parties are working together.

Three key debates have emerged in conceptualizing the ‘urban commons.’ First, scholars have conceptualized the city as a whole an example of the commons, as well as micro-spaces within the urban commons, e.g., public streets, public parks, any public and neighbourhood amenities, and public spaces.⁴⁰ Nicholas Blomley argued that an ‘urban commons’ includes community gardens, land trusts and squatting; he provided an example of a large private property development in downtown Vancouver that resulted in the eviction of a sizeable homeless

³⁶ Elinor Ostrom, James Walker, & Roy Gardner, "Covenants With and Without a Sword: Self-Governance Is Possible" (1992) 86:2 *American Political Science Review* 404.

³⁷ Carol Rose, “The Comedy of the Commons: Commerce, Custom, and Inherently Public Property” (1986) 53 *U. Chi. L. Rev.* 711 at 720.

³⁸ *Ibid.* at 781.

³⁹ Foster & Iaione, *supra* note 7.

⁴⁰ *Ibid.* Vinay Gidwani & Amita Baviskar, “Urban Commons” (2011) 46:50 *Economic and Political Weekly* 1 at 2, online: <http://environmentportal.in/files/file/Commons_1.pdf>.

population.⁴¹ He recommended that the idea of the commons be reframed as a model that is not as “radically dissimilar from private property as one might suppose,”⁴² especially as the commons was historically considered exclusive under English law.⁴³ He argued that property had political weight, providing individuals and groups in the city with a language for “naming, blaming and claiming.”⁴⁴ From this perspective, it is possible to apply the idea of the urban commons – the weight of private property as crafted by city governments through the vehicle of law – to equally argue that non-property owners have a right to a parcel of land.⁴⁵ Blomley wrote, “Not only does the making of property entail the making of space ... but property’s enactments are also caught up in the creation of particular landscapes that are simultaneously material and representational.”⁴⁶

Second, scholars have debated whether the actual ownership of a resource, public or private, is relevant in the context of the urban commons or whether the focus should instead be placed on governance.⁴⁷ Institutions are meant to protect and enhance shared resources in a city,⁴⁸ and land use regulations are seen as a way to improve utility or value within an urban landscape. To some scholars, the city government is the appropriate decision-maker.⁴⁹ Foster and Iaione argued that if local government does not manage the urban commons appropriately for whatever reason, “regulatory slippage” can occur, whereby the common resource is degraded in value or attractiveness for other types of users and uses.⁵⁰ They continued that at this point, the space in question “creates conditions which begin to mimic the type of commons problem that Hardin wrote about—that is, such resources become rivalrous and prone to degradation and perhaps

⁴¹ Nicholas Blomley, “Enclosure, common right, and the property of the poor” (2008) 17 *Social and Legal Studies* 311 at 318.

⁴² *Ibid* at 154.

⁴³ Briony McDonagh & Carl J Griffin, ‘Occupy! Historical geographies of property, protest and the commons, 1500-1850’ (2016) 53 *J Hist Geog* 1.

⁴⁴ Blomley, *supra* note 38 at 154.

⁴⁵ Hamill, *supra* note 13.

⁴⁶ Nicholas Blomley, "Un-real Estate: Proprietary Space and Public Gardening" (2004) 36:4 *Antipode* 614 at xvi.

⁴⁷ Foster and Iaione, *supra* note 7.

⁴⁸ Tara Lynne Clapp & Peter B Meyer, "Managing the Urban Commons: Applying Common Property Frameworks to Urban Environmental Quality" (May 31-June 4, 2000) *Constituting the Commons: Crafting Sustainable Commons in the New Millennium, the Eighth Biennial Conference of the International Association for the Study of Common Property* 1 at 1-2, online: <dlc.dlib.indiana.edu/dlc/handle/10535/1963>.

⁴⁹ Foster and Iaione, *supra* note 7 at 298.

⁵⁰ *Ibid*.

destruction.”⁵¹ The openness of many cityscapes yields social benefits but quickly mimics the conditions of a common pool resource of overuse in either volume or intensity. Put simply, the ‘common pool resource’ of the city may be owned by a variety of actors, with the governance of these actors as the more relevant discourse in a commons analysis.⁵²

A third debate centres on how the interests of third parties are mediated.⁵³ There are more than two possible choices in maintaining the urban commons, not just government centralized regulation or privatization. There are alternative avenues for decision-making and management of the urban commons, such as those used for cooperative natural resource management regimes.⁵⁴ From this perspective, the city government may not act as an appropriate steward of city space, so some other form of governance can and should be invoked to limit the degradation of city resources. This is sometimes called ‘bottom up governance’ – making room for co-partners, or co-collaborators who use and have a stake in the commons.⁵⁵ In other words, urban commons can be conceived as spaces with shared access to local resources for residents with a common stake in ensuring the longevity of a resource: a commons governance model that includes non-government actors can protect the ‘common good.’⁵⁶ For example, non-state actors can get involved in a governance model when governments are too strained to address a broader range of city issues.⁵⁷ Clapp and Meyer use the commons framework to describe the governance practices of institutional actors with regard to the environment.⁵⁸ They questioned the ability of city governments to limit environmental depletion, due to existing municipal institutions of varying scales, regulatory structures, land markets, and state and local government policies and regulations. They argued that to ensure distributional equity, municipal institutions should allow communities to protect themselves from harm through the establishment of shared cooperative normative structures. In this way, governance beyond the state achieves a degree of fairness that is otherwise not possible.⁵⁹

⁵¹ *Ibid.*

⁵² Similarly, recent property law scholarship as reoriented governance or “agenda setting” as a crucial question in understanding “ownership.” See e.g. Larissa Katz, *supra* note 28.

⁵³ Foster & Iaione, *supra* note 7.

⁵⁴ Rose, *supra* note 37 at 721.

⁵⁵ Foster, *supra* note 7 at 57.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Clapp & Meyer, *supra* note 48.

⁵⁹ *Ibid* at 133.

These debates, although important and different from one another, each frame the urban commons as a model of collaborative governance. Whether the space is part or all of the city, and regardless of ownership, the government and third parties interact in the management of the resource. Scholars are torn with regard to the extent to which cooperative management is facilitated by a strict centralized government action versus privatized actions.⁶⁰ For example, Foster argued that the state needs to create “the conditions under which citizens can develop collaborative relationships with each other” and cooperate together and with public authorities.⁶¹ Are BIDs an example of an urban commons?

What is a Business Improvement District?

BIDs are self-taxed organizations that operate at the local level. They complicate notions of the urban commons. On one hand, they participate in governance in particular areas of the city as independent third parties. On the other hand, they are part of a city’s local governance framework and are accountable to the city and the public.⁶² Despite the emergence of these organizations internationally, no naming conventions or definitions have been standardized,⁶³ but BID is one common term.⁶⁴ A BID generally has three features: first, it provides a specific set of powers to business and property owners to achieve their mandate, most notably an organizational structure and direct access to the local councillors who serve on their boards. Second, it is funded through a required levy against local property owners or businesses, which functions as a form of taxation. Local businesses cannot back out of paying even if they voted against forming a BID or

⁶⁰ Nicole Stelle Garnett, "Managing the Urban Commons" (2012) 160:7 *University of Pennsylvania Law Review* 1995.

⁶¹ *Ibid.*

⁶² Peter Parker & Staffan Schmidt, "Commons-based governance in public space: user participation and inclusion", online: <<https://dspace.mah.se/bitstream/handle/2043/20741/Commons-based%20governance%20in%20public%20space.pdf?sequence=2>>.

⁶³ Lorlene Hoyt & Devika Gopal-Agge, "The Business Improvement District Model: A Balanced Review of Contemporary Debates" (2007) *Geography Compass* 1/4 946.

⁶⁴ Elisabeth Peyroux, Robert Pütz & Georg Glasze, "Business Improvement Districts (BIDs): The internationalization and contextualization of a 'travelling concept'" (2012) 19:2 *European Urban and Regional Studies* 111 at 118. I use the term “BID” where referenced in the original text.

disagree with its activities. Third, it supplements public services offered by the City, which more broadly defines their entrenched governance role.⁶⁵

The first BID worldwide was established in Toronto in 1970, and was called a “business improvement area.” Toronto defines a business improvement areas as an association comprised of commercial and industrial property owners and business tenants within a specified geographic area district, which is officially approved by the City to stimulate business and improve economic vitality.⁶⁶ In the late 1960s, a small group of business leaders wanted to create a form of business association that would circumvent the ‘free-rider problem,’ whereby improvements by a small set of business owners would also advantage those who did not pay or otherwise contribute. They created an independent, privately managed organization with the power to impose an additional tax on all commercial property owners in the area to be directed to local revitalization initiatives, regardless of whether specific businesses individually agreed to form the BID.⁶⁷ Local business leaders believed that a stable and effective funding source would help with beautification and improvement, promote urban business areas, and ultimately allow them to regain market share.⁶⁸ This organizational form has not changed substantially in the following 45 years.⁶⁹ A long, complex process must be followed in order for City Council to pass a bylaw designating a BID, including a formal public consultation meeting and the polling of BID members.⁷⁰

⁶⁵ Gerald E. Frug, “The Seduction of Form” (2010) 3:1 Drexel Law Review.

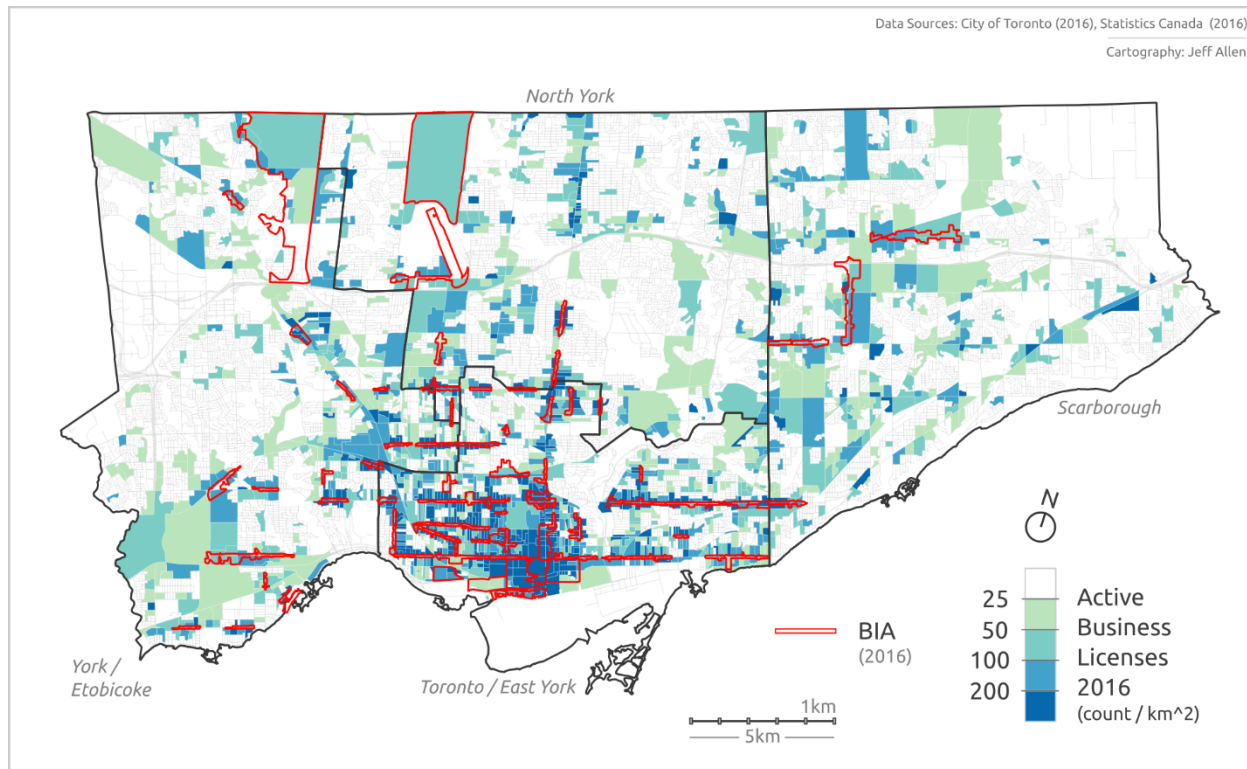
⁶⁶ City of Toronto, “Business Improvement Area (BID)” (2016) Board of Management Orientation Modules.

⁶⁷ Hoyt & Gopal-Agge, *supra* note 63 at 947.

⁶⁸ *Pivot Legal Society v. Downtown Vancouver Business Improvement Association*, [2012] at 26.

⁶⁹ City of Toronto, *City of Toronto Municipal Code*, s. 170-70.

⁷⁰ *Ibid.* at s. 19-4.



Map 1: BIDs in Toronto (Original research, 2016).

Despite this cumbersome process, Toronto now has 82 BIDs, 43 of which were created after 2000.⁷¹ Many are now located in industrial areas and suburbs outside of the downtown core.⁷² They vary greatly in their levies, from thousands to millions of dollars.⁷³ They also differ based on their year of origin and size. BIDs are also distributed unevenly across Toronto, with different kinds of businesses. Overall, BIDs represent only 36.1% of businesses in the city, as illustrated in Map 1.⁷⁴ The largest and wealthiest are located in downtown and central areas. The downtown and central section of the city, known as the Toronto-East York Community Council area, comprises less than a quarter of the city's population, but has 59% of its BIDs. While Toronto-East York continues to have the majority of new BIDs, with 27 having been created since 2000 and five since 2010, its relative share of BIDs has declined since 2010. Map 2 illustrates the

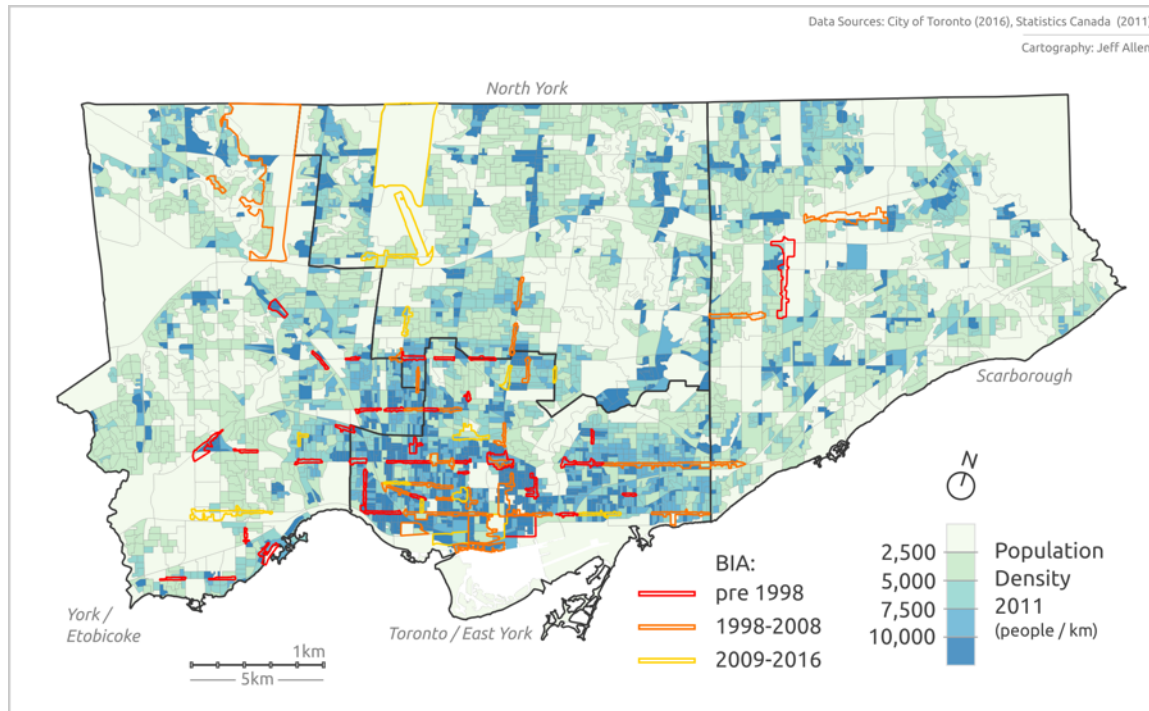
⁷¹ Rebecca Melnyk, "BIDs drive ethnic retail neighbourhoods" (April 7, 2015) The Remi Network, online: <<https://www.reminetwork.com/articles/BIDs-face-change-in-ethnic-retail-neighbourhoods/>>.

⁷² City of Toronto, "Board Governance Structure - Profiles - Agencies and Corporations" (2016) Business Improvement Areas at b.

⁷³ City of Toronto, 2014; City of Toronto, 2015.

⁷⁴ Invest Toronto, 2016; Toronto Association of Business Improvement Areas, 2015.

relationship between BIDs and density, with the oldest of Toronto’s BIDs appearing in denser neighbourhoods.



Map 2: Map of BIAs and density (Original research, 2016).

Municipal bylaws tell two conflicting stories about the legal status of BIDs. On one hand, they are defined as ‘local boards’ and are therefore subject to numerous operating requirements that include open meeting requirements and record keeping. The appointment of their members must follow the city’s public appointments policy. Directors and board members, including the local city councillor, must conduct their affairs in compliance with all applicable law and City policies, which include privacy legislation, conflict of interest requirements, and the public appointments policy.⁷⁵ The requirements for creating a BIDs are detailed in the procedural bylaw and their funding is collected through the city’s formal levying authorities and coordinated through an office dedicated to supporting their operations. The levy is drawn from local businesses and then forwarded to the BID when its annual budget is approved by City Council. All members of the BID are legally obligated to pay the municipality their portion of the levy,

⁷⁵ City of Toronto, *City of Toronto Municipal Code* s 19-15(K).

which is based on the assessment values of the individual and neighbourhood properties.⁷⁶ BIDs are tasked with overseeing the improvement, beautification, and maintenance of municipally owned land, buildings, and structures in the BID beyond standard City levels.⁷⁷ The City's bureaucratic structure provides professional operational and administrative support to BIDs to ensure compliance with the Municipal Code and other relevant City policies.⁷⁸ A BID office, operated out of the economic development department, also oversees partnership projects with BIDs, including a capital cost-share program for streetscape improvement projects, street beautification initiatives, and grants to upgrade the physical appearance of their buildings.⁷⁹

The second story involves BIDs as independent organizations representing their members within specific geographic boundaries. Toronto city councillors represent local interests at City Council. Ward councillors consult and are lobbied by numerous bodies advocating on behalf of residents, businesses, and other stakeholders, including BIDs, neighbourhood associations, and park associations, with varying degrees of formal connection to the city. Ward councillors have great discretion over many issues, including local planning, spending on local development, and bringing together the various representatives to resolve conflicts and initiate projects. Within this framework, BIDs – together with organizations like neighbourhood associations – are often privileged in terms of consultation and involvement in decision-making, especially in higher-income areas, as shown in Map 3. Ward councillors play a key role in the creation of BIDs, stewarding the passing of bylaws needed for their creation and helping local businesses meet city requirements.⁸⁰ Once established, BIDs are important participants in city planning decisions, and include councillors, staff, and city-paid consultants.⁸¹

⁷⁶ Moreover, how do dominant groups leverage and rely on state power to further their economic interests?? And should that be a shared agenda with the state?? How complicit should the state be in the exclusion of less worthy common space users?

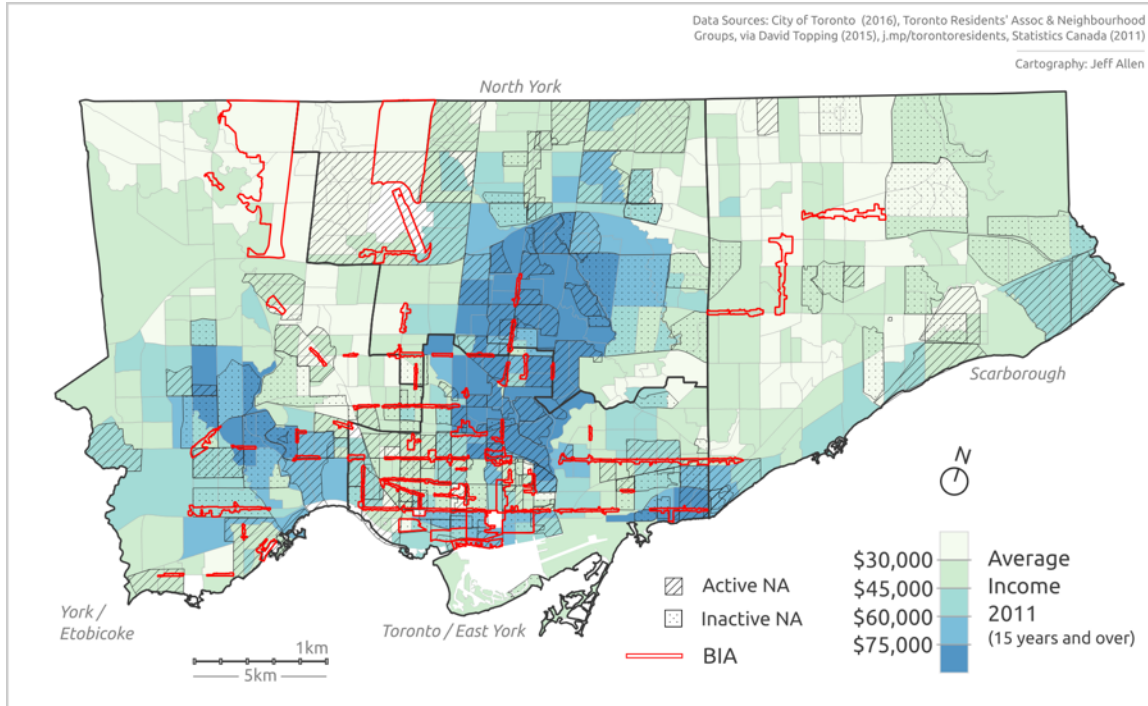
⁷⁷ City of Toronto, *City of Toronto Municipal Code* s 19.

⁷⁸ City of Toronto, "Board Governance Structure - Profiles - Agencies and Corporations" (2016) Business Improvement Areas at a.

⁷⁹ *Ibid.*

⁸⁰ [Name removed for review]

⁸¹ *Ibid.*



Map 3: BIAs, neighbourhood associations, and income levels (Original research, 2016).⁸²

In interviews I conducted for a larger project related to city governance,⁸³ one senior staff member at the City of Toronto explained that BIDs are “self-funding, defiant entities that operate in neighbourhoods, they’re actually not really democratic. They’re self-governing within the boundaries defined.”⁸⁴ A former city councillor similarly referred to these organizations as “tiny little cities” within their areas.⁸⁵ The relevant laws reflect this account: once their creation is approved by City Council, BIDs operate largely independently, subject to having their budgets approved. Their boards make decisions on what activities and actions the BID will undertake, without review by city officials.

Evaluating BIDs: Relationship to city government, inclusivity, and representation

⁸² Original research (Name removed for review).

⁸³ Note methodology

⁸⁴ Anonymous interview with City of Toronto staff member #1, City Clerk’s Office, Toronto, Ontario, Canada (18 December 2015) – author conducted.

⁸⁵ Anonymous interview with City of Toronto councillor #1, Toronto, Ontario, Canada (5 July 2016) – author conducted.

BIDs have been described as “institutions that manage or govern common urban resources.”⁸⁶ Their role is critical to understanding how they fit within the meaning of the urban commons. This section expands upon existing scholarship, focusing on the effects of BIDs in Toronto and elsewhere. Specifically, it explores three elements: the relationship of BIDs to city government, who they represent, and how they are accountable.

Relationship to city government

BIDs exacerbate the tension in the line between ‘public’ or ‘private’ governance. They are not simply private actors seeking additional power and do not fit easily within particular descriptions as exclusionary or inequality-enhancing.⁸⁷ they are complex organizations that defy easy categorization.⁸⁸ For example, some studies have found that BID administrators do not consider the organizations governmental institutions, but rather part of the private sector.⁸⁹ Wolf argued that BIDs are “a part of urban governance and public administration,”⁹⁰ and that BIDs must be placed within the public administration context, even if their objectives focus on the ‘private’ concerns of their members. Richard Briffault noted that the ‘public’ and ‘private’ spheres are interconnected as a result of the taxation model that creates BID funding: “BIDs are created by public governments in a process in which their boundaries, programs, finances and governance structures are shaped by government decisions.”⁹¹ Some scholars have concluded that BIDs are a form of neoliberal management meant to compensate for declining public resources in increasingly privatized economies with an ethos of low taxation in an era of “if you want it, you’re going to have to fund it yourself.”⁹²

⁸⁶ *Ibid* at 289.

⁸⁷ Randy Lippert, “Urban Revitalization, Security, and Knowledge Transfer: The Case of Broken Windows and Kiddie Bars” (2007) 22 *Can. J. Law Soc.* 29.

⁸⁸ Poul F Kjaer, ‘From the Private to the Public to the Private – Historicizing the Evolution of Public and Private Authority’ (2018) 25 *Indiana J Global Legal Studies* 13.

⁸⁹ J.F., Wolf, (2006). “Urban Governance and Business Improvement Districts: The Washington, DC BIDs”(2006) 29:2-3 *International Journal of Public Administration* 53 at 70)

⁹⁰ *Ibid.* at 74.

⁹¹ Richard Briffault, “A Government for Our Time? Business Improvement Districts and Urban Governance”, (1999) 99:2 *Columbia Law Review* 365 at 471.

⁹² Nathaniel M. Lewis, “Grappling with Governance: The Emergence of Business Improvement Districts in a National Capital” (2010) 46:2 *Urban Affairs Review* 180 at 187.

In practice, BIDs and local governments can have a highly cooperative relationship, operating almost like a public–private partnership; in other contexts, the BID may function exclusively as a private sector initiative. Most BIDs provide services and programs that would ordinarily be the responsibility of municipal governments, like security, sanitation, physical improvements, beautification, social services, and business-oriented programs.⁹³ Some BIDs also play a substantially more proactive role in local governance and administration by establishing policy partnerships with local governments.⁹⁴ Nathaniel Lewis found that as BIDs become service providers, development brokers and place makers, there is a corresponding retreat of municipal government.⁹⁵ In Canada, the United States, and New Zealand, BIDs commonly offer consumer marketing, often through community events. Functions may also differ based on size: a study of BIDs in New York found that smaller organizations focus on physical maintenance, mid-sized BIDs focus on marketing and promotional activities, and large BIDs take care of a massive range of activities, including capital improvements.⁹⁶

Hamill noted that the privileged status of local business improvement bodies ultimately implies greater property rights, because such bodies are given the opportunity to lobby governments for modifications to adjacent common property in a way that no other private property holder is entitled to do.⁹⁷ In this way, BIDs may also serve as lobby organizations for business interests, which have enhanced access to the city government. However, Foster and Iaione argued that BIDs are examples of the urban commons in that they allow a collection of public and private actors to manage public resources within a nested governance structure.⁹⁸ For example, one of the largest BIDs in Toronto is the Toronto Entertainment BID. It was created in 2008 and straddles two electoral districts due to its large size (156 city blocks). It represents more than

⁹³ Julia Wilder, “Note: But in Detroit? Business Improvement Districts and the Business of Improving Detroit: Speramus Meliora; Resurget Cineribus (We Hope For Better Things; It Shall Rise From The Ashes)” (2013) *Wayne Law Review* at 93. Note, however, that while most BIDs use their budget to provide municipal-level public goods like sanitation, security, and capital improvements, BID services and service delivery patterns vary substantially both nationally and internationally (Jerry Mitchell, “Business Improvement Districts and the “New” Revitalization of Downtown” (2001) *Economic Development Quarterly* 115).

⁹⁴ Göktug Morçöl and Patricia Patrick, “Business Improvement Districts in Pennsylvania: Implications for Democratic Metropolitan Governance” (2006) 29 *International Journal of Public Administration*.

⁹⁵ Lewis, Nathaniel M. “Grappling with Governance: The Emergence of Business Improvement Districts in a National Capital” (2010) 46:2 *Urban Affairs Review* 180.

⁹⁶ Hoyt & Gopal-Agge, *supra* note 63 at 949.

⁹⁷ Hamill, *supra* note 13 at 376.

⁹⁸ Foster & Iaione, *supra* note 7.

1800 businesses and its 2016 budget was more than two million dollars (CAD). In 2013, it funded a Master Plan drafted by consultants, setting out in more than 100 pages the BID's proposals for the public realm, focusing on details such as streetscaping, planters, cycling lanes and other matters that fall within the jurisdiction of the City of Toronto.⁹⁹ With regard to any city proposals relating to the BID area, the Master Plan outlines in what circumstances the BID should provide "official written endorsements," only where "the BID is assured that the spirit and intent of the Master Plan are respected." It proposes a set process for councillor and staff review of the Master Plan in connection with proposed developments. The Master Plan further states that, "Where proposals are deemed to be fundamentally at odds with the spirit and intent of the Master Plan, the BID reserves its right to voice its opposition to the application to the City and/or Ontario Municipal Board."¹⁰⁰

Previous research on BIDs in Toronto has revealed the difficulty in categorizing them. In his study of the development of the "creative city" within the Entertainment BID, Sébastien Darchen found that the BID had a strong voice in community deliberations and that its interests were specific to advantages for the member businesses.¹⁰¹ While council ultimately supported a mixed-use neighbourhood with a more diverse range of economic activities than those proposed by the BID, Darchen concluded that the promotion of arts and culture as imagined by the BID led to revitalization of the area.¹⁰² Another study of BIDs revealed that BIDs shape boundaries, market neighbourhoods, and affect governance overall.¹⁰³

The privileged role of BIDs in urban governance increases over time. A comprehensive study of BIDs in Center City, Pennsylvania evaluated the role of BIDs in urban governance. It revealed

⁹⁹ The Planning Partnership, "Toronto Entertainment District BID Master Plan" (2015) 1, online: <<http://www.torontoed.com/wp-content/uploads/2015/06/TED-MasterPlanUpdate-March4-2015.pdf>>; Dtah, "St. Lawrence Market Neighbourhood BID Public Realm Master Plan" (2015) www.stlawrencemarketBID.ca/images/01_SLMNBID-Final-Report_full_Edited%20June%208%202015%20Optimized.pdf; Olivia Truong, "The Kennedy BID Project Re-Kennedy" (2013) 1, online: < <http://www.oliviatruong.ca/workshop/img/design/projectrekennedy.pdf>>.

¹⁰⁰ *Ibid.* at 105. The Ontario Municipal Board is an adjudicative body that handles disputes on land use planning matters.

¹⁰¹ Sébastien Darchen, "The Creative City and the Redevelopment of the Toronto Entertainment District: A BID-Led Regeneration Process" (2011) 18:2 *International Planning Studies* 188.

¹⁰² *Ibid.* at 201.

¹⁰³ John Paul Catungal, Deborah Leslie and Yvonne Hii, "Geographies of Displacement in the Creative City: The Case of Liberty Village, Toronto" (2009) 46 *Urban Studies* 1095.

that BID directors play a profoundly important role in urban governance, and that their involvement in the city's governance became "deeper and wider" over the years. In particular, BID directors began to advocate on positions that went beyond the BID to citywide matters such as land-use planning, zoning, and intergovernmental funding for infrastructure repair.¹⁰⁴ This kind of organizational longevity appears to apply to Toronto as well: a study of Toronto's Downtown Yonge BID revealed that its objectives tended to evolve from basic operational and tactical tasks to more strategic tasks.¹⁰⁵

Representation

Susanna Schaller and Gabriella Modan argued that BIDs fundamentally increase space-related tensions.¹⁰⁶ This tension is especially prevalent in economically and ethnically mixed neighbourhoods, where they can have the same kinds of impacts as in communities being subject to gentrification. Schaller and Modan noted that, "In such neighborhoods, it is very often the case that the constituents who are marginalized from the public decision-making process are the same people who are most vulnerable to changes in the housing market. As rents and property taxes increase, the residents who were ostensibly to benefit from such innovations may be displaced from the neighborhood, and the democratic spaces of interaction where social networks are created and maintained may disappear."¹⁰⁷ Another study found that BIDs insulate development decisions from communities and neighbourhoods.¹⁰⁸ It also found that BIDs do not engage in neighbourhood advocacy or government-business relations, but instead focus on entertainment and high-rent housing, with minimal attention to the interests of existing residents, with "profound implications for notions of spatial and social justice."¹⁰⁹

¹⁰⁴ Göktuğ Morçöl, Triparna Vasavada & Sohee Kim, "Business Improvement Districts in Urban Governance: A Longitudinal Case Study" (2014) 46:7 Administration & Society 796 at 814.

¹⁰⁵ Tony Hernandez & Ken Jones, "Downtowns in transition: Emerging business improvement area strategies" (2005) 33:11 International Journal of Retail & Distribution Management 789 at 802.

¹⁰⁶ Gabriella Schaller & Susanna Modan, "Contesting Public Space and Citizenship Implications for Neighborhood Business Improvement Districts" (2005) 24:4 Journal of Planning Education and Research 394.

¹⁰⁷ *Ibid.* at 394.

¹⁰⁸ Lewis, *supra* note 92 at 208.

¹⁰⁹ *Ibid.*

Legal and anecdotal evidence suggests that BIDs make decisions that expressly undermine inclusivity.¹¹⁰ A poignant example is Los Angeles, where four separate cases have been brought against the City and its BIDs for confiscating the property of homeless people, despite clear jurisprudence preventing this.¹¹¹ These unlawful seizures appeared to be random occurrences while homeless people were at missions and downtown shelters getting food and services, with items like tents, bedding, identification, and medications being seized.¹¹² A permanent injunction has been ordered against the City of Los Angeles, enjoining it not to confiscate and destroy personal property that does not appear abandoned without notice.¹¹³ The plaintiffs allege that the City of Los Angeles “acts in concert with the BID to identify property to be removed and to ensure that the removals were not stopped or hindered.”¹¹⁴ In 2015, Toronto’s Chinatown BID objected to a plan to introduce a youth homeless shelter within the boundaries of the BID.¹¹⁵ The BID noted a lack of consultation on the proposal and possible negative effects on the area, stating: “the BID had worked hard for a decade to “clean up” the area, and business owners are worried the facility will turn Spadina into a “centre of homelessness.”¹¹⁶ The protest culminated in placards within member businesses, as well as a demonstration at City Hall.¹¹⁷

Representation is a major element of these space-based tensions, specifically in relation to the composition and mandates of BID boards. At present, residents have few, if any, representative votes on BID boards.¹¹⁸ The board composition concentrates power among property and business owners, restricting the scope of representation.¹¹⁹ This framework reinforces political dynamics

¹¹⁰ *Ibid* at 954.

¹¹¹ Schonburn Seplow Harris & Hoffman, LLP, *Skid Row Residents/Organizations Sue Downtown Business Improvement District and the City of Los Angeles for Unlawful Seizure of Property* (2016).

¹¹² *Los Angeles Catholic Worker et al v. Los Angeles Downtown Industrial District BID*, [2014] 2:14-cv-07344 1.

¹¹³ *Lavan v. City of Los Angeles*, [2011] 797 F.Supp.2d 1005.

¹¹⁴ *Ibid* at 1.

¹¹⁵ Kendra Mangione, “We don’t need any more grit’: Chinatown BID on street youth centre” (December 30, 2015) CTV News Toronto, online: <toronto.ctvnews.ca/we-don-t-need-any-more-grit-chinatown-BID-on-street-youth-centre-1.2718615>.

¹¹⁶ *Ibid* at 1.

¹¹⁷ Connie Wardle, “Toronto BID Protests Street Mission’s Plans to Move into the Neighbourhood” (February 1, 2016) Presbyterian Record, online: <<http://presbyterianrecord.ca/2016/02/01/toronto-BID-protests-street-missions-plans-to-move-into-the-neighbourhood/>>.

¹¹⁸ Jonathan B. Justice & Robert S. Goldsmith, “Private Governments or Public Policy Tools? The Law and Public Policy of New Jersey’s Special Improvement Districts” (2006) 29:1-3 *International Journal of Public Administration* 107.

¹¹⁹ Hoyt & Gopal-Agge, *supra* note 63 at 951.

that exclude marginalized and low-income residents, as well as small businesses.¹²⁰ Some scholars have advocated for changing the composition of BID boards. For example, Schaller and Modan noted that individual claims over neighbourhood space are greatly influenced by immigration status, property ownership, class, and duration of residency in the community, and argued that city officials should ensure that any BID includes community members.¹²¹ They argued that including neighbourhood residents would ultimately not lead to a shift in power away from businesses and property owners, because the other BID members would ultimately carry the most power.

Accountability

In this context, accountability refers to the degree to which BIDs operate with openness and fairness, and especially the degree to which they are subject to the same transparency and accountability requirements as other public bodies.¹²² Briffault noted that BIDs are “autonomous, even though subjected to municipal oversight in theory.”¹²³ He defined accountability in terms of reporting requirements to public officials, making a BID accountable to its board, the business community that it represents, city council, and the public.¹²⁴ City governments may implement measures such as annual reports, outside audits, and sunset and reauthorization requirements. The rationale for these mechanisms is to ensure continuous evaluation of BID performance and to give power to municipal governments if BIDs are overstepping their authorities, although others argue that they are pro forma and after the fact.¹²⁵ In a popular newspaper, Ian Cook stated that BIDs may claim accountability to the public through their links to city council, but “ultimately BIDs are not really accountable to the public in general and are more focused on being accountable – of sorts – to businesses.”¹²⁶

¹²⁰ *Ibid.*

¹²¹ Schaller and Modan, *supra* note 103 at 395.

¹²² Paul Gallagher, "Business Improvement Districts: Local firms charged with funding BIDs say they are unaccountable - and are fighting back" (October 11, 2014) Independent, online: <<http://www.independent.co.uk/news/uk/politics/business-improvement-districts-local-firms-charged-with-funding-bids-say-they-are-unaccountable-and-9789270.html>>.

¹²³ Briffault, *supra* note 91 at 414.

¹²⁴ *Ibid.*

¹²⁵ Hoyt & Gopal-Agge, *supra* note 63 at 952.

¹²⁶ Gallagher, *supra* note 122.

Some scholars have argued that the design of BIDs limits the degree to which they can ever be accountable. According to Wayne Batchis, Supreme Court jurisprudence has constitutionally permitted municipal fragmentation, inequality, and privatization in the United States, all of which made BIDs an essential tool for urban success.¹²⁷ This ‘success’ ultimately allows BIDs to achieve their goals by eliminating the “messiness” of democracy,¹²⁸ and the price of this process is to allow what has been conceived as “public” to become incrementally more “private.”¹²⁹ One example is the accountability of BIDs in relation to public safety.¹³⁰ A study of street vendors in New York revealed the extent to which BIDs use strategies such as public realm design (e.g., planters), collaboration with police, surveillance techniques, and even harassment to limit street vending (which is largely illegal) within their boundaries.¹³¹ These techniques are highly successful, and the landscape of street vending reflects the “decentralized, privatized and informalized vending management” of BIDs, rather than formal laws.¹³²

The City of Toronto manages accountability issues through various laws and policies, principally the *Code of Conduct for Members of Local Boards*, which sets out the requirements of BIDs and other local boards in the city.¹³³ They specify that members may not accept a fee, advance, gift or personal benefit that is connected directly or indirectly with the performance of his or her duties of office; may not disclose confidential information unless required by law; may not use City or BID land, facilities, equipment, supplies, services, staff or other resources for activities other than the business of the local board or the City; must improperly use their influence; and must not lobby public office holders without following the *Lobbyist Code of Conduct*. If BID board members are found to have breached the *Code of Conduct for Members of Local Boards*, the city’s Integrity Commissioner may also recommend that Council or the BID may remove members of BID board members, among other sanctions.¹³⁴ Thus, accountability requirements

¹²⁷ Wayne Batchis, “Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization” (2010) 38 *Hastings Const. L.Q.* 91.

¹²⁸ *Ibid.* at 92.

¹²⁹ *Ibid.* at 94.

¹³⁰ Göktuğ Morçöl & Ulf Zimmermann, “Metropolitan governance and business improvement districts” (2006) 29:1-3 *International Journal of Public Administration* 5 at 21.

¹³¹ Ryan Thomas Devlin, “‘An area that governs itself’: Informality, uncertainty and the management of street vending in New York City” (2011) 10:1 *Planning Theory* 53 at 59.

¹³² *Ibid.* at 60.

¹³³ City of Toronto, *Code of Conduct for Members of Council City of Toronto Annotated Version* (2011) 1.

¹³⁴ City of Toronto, *City of Toronto Act, 2006*, s 160.

may effectively regulate BIDs as organizations, yet fail to capture the broader community effects of BID actions.

This brief review of relevant literature related to governance shows that, in their existing design, BIDs have significant decision-making power in local geographies of the city and represent BID members rather than the broader local public. Accountability provisions may not safeguard the effects of BID activities on the public, particularly the most vulnerable. BIDs may be viewed in two different ways: as an independent organization or as a formal actor in local governance.

What if BIDs could be conceptualized as one part of a broader commons?

BIDs and the urban commons framework

The legal and social problems identified in BID governance – representation, accountability, and an uncertain relationship with city governments – reflect the challenges of BIDs within a broader system of local governance. Ultimately, the interests of BIDs reflect those of a privileged subset that has considerable power in local governance without democratic legitimacy or strenuous accountability. Any discussion of the urban commons should include issues related to power: a devolution of responsibility and power to organizations like BIDs may ultimately exacerbate the very sense of belonging that advocates of the urban commons seek to foster. According to Ostrom, the urban commons is a matter of collaborative governance. However, urban governance arrangements are generally voluntary and bind only those actually involved in the governance scheme. Such arrangements can have effects for many, beyond the actors that are specifically involved: “[I]n the case of urban commons governance institutions the governance arrangement may affect the everyday life of all city inhabitants that fall within the boundaries of the governance scheme (think of the BIDs, the decisions of which can have an impact also on those who are not part of the BID governance).”¹³⁵ Foster and Iaione acknowledged that the bodies that are sharing governance authority may further inequality amongst residents.¹³⁶ They stressed the need for questions of accountability and legitimacy to be “raised and constantly

¹³⁵ Foster & Iaione, *supra* note 7 at 339.

¹³⁶ *Ibid* at 133.

invoked” when querying collaborate governance in the urban commons.”¹³⁷ As Parker and Schmidt wrote, “The urban commons perspective may also underplay the role of government in deliberately creating shared urban resources and in selecting and enabling particular groups.”¹³⁸

BIDs deserve particular scrutiny in terms of their role within the urban commons framework. On one hand, they are woven into city administration through the existence of a dedicated office, an approved budget, and accessible information on how they may be contacted. This suggests that they are like any other local board of the City, with the responsibility to deliver a set of services and accountability with regard to how they use their funds. On the other hand, in local planning and other debates, they act as a privileged interest group to be consulted. This dual role creates confusion as to what role they serve (local boards or interest groups?) and to whom they are accountable (to the public or their members?). This confusion and narrow set of interests ultimately undermine the urban commons by depleting the ‘common pool interest’ – the democratic legitimacy of the local area.

The debates about the urban commons explored above – the site of the commons as the city as a whole or a smaller geographic area; whether the resource is owned or not; and how decision-making is mediated – illustrate the uneasy nesting of BIDs as an example of the urban commons. The ‘common pool resource’ engaged in BIDs is the spatial area defined by city bylaws. However, the spaces are not simply those that belong to business and property owners, but include ‘public’ areas like sidewalks and street furniture, and may include residential areas above or adjacent to storefronts.¹³⁹ Thus, the resource interest is shared among a diverse set of property holders: BID members, but also a broader range of residents and the public. Non-property owners have a stake in the area in question, however, these broader interests are not reflected in the BID governance model.¹⁴⁰ Moreover, this ‘common pool resource’ is also subject to many city policies and bylaws, with numerous other parties asserting interest in the same spaces,

¹³⁷ *Ibid.* at 340.

¹³⁸ Peter Parker & Stefan Schmidt, *Commons-based governance in public space: user participation and inclusion* (Unpublished draft) at 8.

¹³⁹ Foster & Iaione, *supra* note 7. Vinay Gidwani & Amita Baviskar, “Urban Commons” (2011) 46:50 *Economic and Political Weekly* 1 at 2, online: <http://environmentportal.in/files/file/Commons_1.pdf>.

¹⁴⁰ Hamill, *supra* note 13.

including elected officials and organizations such as neighbourhood associations.¹⁴¹ In many sites, there is no evidence that ‘regulatory slippage’ has occurred in BID areas such that the common resource has degraded based on measures like quality of life. Indeed, BID areas in Toronto are generally located in the most affluent areas of the city. Rather than municipal institutions and land use regulations seeking to balance the competing interests of those in the area, it may well be that the BID is focusing on augmenting a single slippage: the profitability of member businesses.¹⁴²

Conceptualizing BIDs as an example of an urban commons has significant limitations. The ‘regulatory slipping’ in question is not necessarily the degradation of the resource (for example, the city street) as identified by Hardin, where the resource becomes prone to destruction. Instead, the regulatory slippage is reflected in the erosion of openness and participation in city-making, caused by a focus on narrow interests to the detriment of a broader population.¹⁴³ American scholar Richard Schragger challenged local decision-making on the basis that it may have negative implications for historically disenfranchised groups.¹⁴⁴ He demonstrated that local institutions can easily become instruments for the private management of civic life, captured by powerful interest groups enforcing “a particular conception of public life to the exclusion of other competing conceptions.”¹⁴⁵

I suggest that BIDs should not be conceptualized as an example of the urban commons. Doing so undermines the strength and importance of the ‘urban commons’ as a conceptual and legal tool in reimagining city governance. The common pool resource – city spaces – must be governed by a broader range of interests. The BID should be one of many actors with a stake in what Foster and Iaione called “a visible, equal, contestable, and legitimate manner.”¹⁴⁶ Scholars have proposed various ways of encouraging involvement, including charrettes,¹⁴⁷ opportunities for

¹⁴¹ Clapp & Meyer, *supra* note 48 at 1-2; Foster and Iaione, *supra* note 7 at 298.

¹⁴² *Ibid* at 59.

¹⁴³ *Ibid* at 133.

¹⁴⁴ Richard Schragger, "The Limits of Localism" (2001) 100:2 Michigan Law Review 371.

¹⁴⁵ *Ibid.* at 445.

¹⁴⁶ *Ibid.* at 252-3.

¹⁴⁷ Frug, *supra* note 65 at 1104.

deliberative participation,¹⁴⁸ and community-level institutions grounded in group-based “differentiated solidarity.”¹⁴⁹ I agree with Foster and Iaione’s statement that “thinking of the city as an institution that promotes collaboration all the way across and down as a way to ‘share’ the resources it controls can spur a host of innovative and progressive policies that address the social and economic inequality that is becoming a feature of 21st century urbanization.”¹⁵⁰

Understanding the BID as one player among many in urban governance reframes the BID as only one of many interests, with an urgent call for a more thoughtful, inclusive, and representative local governance model. City governments, and especially councillors, must acknowledge the narrow interests that BIDs represent by reducing the extent to which they can exert decision-making power. This would help achieve Gerald Frug’s vision for a healthy community, “transformed from a concrete source of normative regulation to a loose confederation joined by common symbols, sights, and spaces, an artifact of subjective identification rather than tightly bounded common experiences.”¹⁵¹

Conclusion

The urban commons is not merely about rights and who has what interest in the standard ‘bundle’ language that property law asserts. In a city, it is also about a meaningful governance model that permits residents, businesses’ and other key stakeholders to have a say and a role over what happens in local spaces. This conception of the urban commons causes conflict when considered in relation to BIDs, which have a conflicting identity as both an independent organization and as part of the city’s governance framework. This paper advances that, instead of framing BIDs as an example of the urban commons, scholars may adopt a broader, messier notion of local governance that incorporates multiple voices, including BIDs, in a visible, equal, and legitimate manner.

¹⁴⁸ Elena Fagotto & Archon Fung, “Empowered Participation in Urban Governance: The Minneapolis Neighborhood Revitalization Program” (2006) 30:3 *International Journal of Urban and Regional Research* 638.

¹⁴⁹ Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 9.

¹⁵⁰ Foster & Iaione, *supra* note 7.

¹⁵¹ Richard T. Ford, “*Law’s Territory (A History of Jurisdiction)*” (1999) 97 *Michigan Law Review* 843 at 237.