



2022

Infrastructure Sharing in Cities


Sheila Foster

Georgetown University Law Center, srf42@georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/2507>
<https://ssrn.com/abstract=4261073>

Yale Law Journal Forum, Vol. 132, 2022.

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Land Use Law Commons](#), [Law and Economics Commons](#), and the [Property Law and Real Estate Commons](#)

Infrastructure Sharing in Cities

Sheila R. Foster

ABSTRACT. In this Essay, I reflect on the different ways in which cities engaged in what I call “infrastructure sharing” during the COVID-19 pandemic. Cities around the world responded to the pandemic by repurposing their streets and sidewalks into outdoor seating, dining spaces, and car-free pedestrian corridors. At the same time, many cities and states also faced calls to “reclaim” underutilized public and private structures like empty houses and hotels and put them to a use responsive to the crisis. The Essay will highlight the difference between sharing property and assets that are part of the “public estate” and dedicated exclusively to public purposes, and sharing property and assets that cities hold in a more proprietary manner. The difference between these two kinds of public property carries implications for what kind of sharing of their infrastructure cities can do and the kinds of regulatory and policy mechanisms they might use to accomplish that sharing.

While cities found creative ways to repurpose the public estate during the pandemic that may prove lasting, they have had a harder time reimagining the productive use of their more proprietary assets. That lack of imagination is problematic not just for creating more healthy and sustainable cities, but more particularly for addressing unequal access to infrastructure. Whether expanding or repurposing the public estate or acquiring and transferring underutilized land and structures, I argue that cities can provide new public goods and services to meet the different needs and exigencies of diverse communities through infrastructure sharing. However, sharing assets held or obtained in a city’s proprietary capacity with specific marginalized groups has more potential to facilitate the creation, or cocreation, of goods and services that directly address urban infrastructure inequity.

INTRODUCTION

Cities around the world responded to the COVID-19 pandemic by repurposing their streets and sidewalks into outdoor seating, dining spaces, and car-free pedestrian corridors. They converted parks, parking lots, sports facilities, and convention centers into testing sites and makeshift hospitals as their existing health, civic, and social infrastructure became overwhelmed. These interventions were not unprecedented. Cities have long adapted their infrastructure to respond and adapt to exogenous shocks. In the aftermath of storms and other

natural disasters, both public and private spaces and buildings – public schools, libraries, and stadiums, for example – are regularly repurposed to shelter and feed people. Outside of the natural-disaster and public-health-crisis contexts, cities also have often facilitated the conversion of city-owned vacant lots into community gardens and other green spaces, underutilized parking lots into farmers’ markets, parking spaces into small parks and seating areas (i.e., “parklets”), and entire city blocks into pedestrian plazas (e.g., a pedestrianized Times Square).¹

The COVID-era transformations to urban infrastructure, however, were notable for their scale across entire cities. Through pilot programs such as “open streets,” “open restaurants,” and “shared spaces,” many cities, particularly dense ones, created new policies that transformed access to public spaces.² These spaces’ transformations were largely driven by the efforts of residents, businesses, and community groups to repurpose and recreate their use. Cities facilitated these efforts in several ways: they relaxed previous restrictions, permitting, and other regulations; provided staffing; and supplied monetary support.³ Some of these changes have become, or are likely to become, permanent in large cities like New York, Washington, D.C., San Francisco, and Paris.⁴ In other cities,

-
1. See, e.g., GORDON C.C. DOUGLAS, *THE HELP-YOURSELF CITY: LEGITIMACY AND INEQUALITY IN DIY URBANISM* 130-63 (2018) (providing examples of city-initiated and resident-initiated projects that utilize or adapt streets, sidewalks, vacant lots, and other public property and assets to implement civic-minded and socially oriented improvements to urban spaces).
 2. See, e.g., Becky Steckler & Tiffany Swift, *How Are Communities Using Open Streets to Accommodate Economic Recovery During the COVID-19 Pandemic?*, COVID MOBILITY WORKS, <https://www.covidmobilityworks.org/insights/how-are-communities-using-open-streets-to-accommodate-economic-recovery-during-the-covid-19-pandemic> [https://perma.cc/TD2K-N78P].
 3. See, e.g., Winnie Hu, *How New York City Lost 63 Miles of Pedestrian-Friendly ‘Open Streets,’* N.Y. TIMES (Aug. 11, 2022), <https://www.nytimes.com/2022/08/11/nyregion/open-streets-nyc.html> [https://perma.cc/YD26-PR5L].
 4. See, e.g., N.Y.C. Local Law No. 55 (May 13, 2021) (codified at N.Y.C., N.Y. ADMIN. CODE § 19-107.1 (2022)), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9611098&GUID=A2DBB532-oF1D-4D9C-A349-B75CB4486ACo> [https://perma.cc/AM8C-DJBR] (making the Open Streets program in New York City permanent); see also Michael Laris & Luz Lazo, *Cities Are Making COVID-Era Street Changes Permanent. Some Are Facing Pushback.*, WASH. POST (June 26, 2021), <https://www.washingtonpost.com/transportation/2021/06/26/covid-street-closures> [https://perma.cc/LBJ8-XA3B] (discussing federal policy and upcoming changes in Washington, D.C.); *Mayor London Breed Introduces Legislation to Implement Car-Free JFK*, S.F. RECREATION & PARKS (Mar. 15, 2022), <https://sfrecpark.org/CivicAlerts.aspx?AID=682> [https://perma.cc/J6NB-LPD8] (describing San Francisco’s closing of part of John F. Kennedy Drive in Golden Gate Park to cars to provide more space for pedestrians, cyclists, and recreation); *Paris Crée Une Zone Apaisée dans le Centre de la Capitale*, VILLE DE PARIS (Apr. 15, 2022), <https://www.paris.fr/pages/paris-cree-une-zone-apaisee-dans-le-centre-de-la-capitale-20426> [https://perma.cc/7A8H-M25J] (reporting that Paris officials plan to ban private vehicles from the historic heart of the city by early 2024 in a move designed

these initiatives have already been scaled back or suspended altogether as cars and drivers reassert their presence on the urban landscape.⁵

But another, less immediately visible kind of transformation of urban infrastructure also occurred during the pandemic. The pandemic's "shelter-in-place" requirements highlighted the precarity of working-class, low-income, Black, Hispanic, immigrant, and Indigenous populations who were more likely to suffer from COVID infection *and* housing insecurity.⁶ Many of them did not have homes; others were in danger of losing theirs. For this reason, cities and states faced calls to "reclaim" underutilized public and private structures and put them to a use responsive to the housing crisis that was unfolding in tandem with the public-health crisis.⁷ Housing-insecure city dwellers argued that it was unacceptable that usable, state-owned homes were sitting idle and empty when people were homeless and living on the street, particularly during a pandemic.⁸ In California, state officials responded by eventually agreeing to lease more than twenty vacant homes owned by CALTRANS, the state transportation agency, which allowed a dozen families to live in them for two years.⁹ In Pennsylvania, the city of Philadelphia and the Philadelphia Housing Authority agreed to

to decrease congestion and improve air quality); Winnie Hu, *The Pandemic Gave New York City 'Open Streets.' Will They Survive?*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/09/nyregion/open-streets-jackson-heights.html> [<https://perma.cc/42LN-AMD3>] (describing a permanent open-streets program on 34th Avenue in Queens, New York that clears space on public roads for walking and biking).

5. See Hu, *supra* note 3 (reporting that cities like Oakland, Berkeley, and Chicago have phased out, wound down, or replaced their COVID-era open-streets initiatives).
6. See Yung Chun & Michal Grinstein-Weiss, *Housing Inequality Gets Worse as the COVID-19 Pandemic Is Prolonged*, BROOKINGS (Dec. 18, 2020), <https://www.brookings.edu/blog/up-front/2020/12/18/housing-inequality-gets-worse-as-the-covid-19-pandemic-is-prolonged> [<https://perma.cc/YZ4A-CCSE>]; Lindsay M. Monte & Daniel J. Perez-Lopez, *COVID-19 Pandemic Hit Black Households Harder than White Households, Even When Pre-Pandemic Socio-Economic Disparities Are Taken into Account*, U.S. CENSUS BUREAU (July 21, 2021), <https://www.census.gov/library/stories/2021/07/how-pandemic-affected-black-and-white-households.html> [<https://perma.cc/6LBF-TMS9>].
7. See, e.g., RECLAIMING OUR HOMES, <https://reclaimingourhomes.org> [<https://perma.cc/VC7Q-393J>]; Lizzie Tribone, *These Mothers Are Fighting for Their Families by Occupying Vacant Homes*, REWIRE NEWS GRP. (July 30, 2020, 12:42 P.M.), <https://rewirenewsgroup.com/2020/07/30/these-mothers-are-fighting-for-their-families-by-occupying-vacant-homes> [<https://perma.cc/66ZZ-9ZKJ>].
8. See, e.g., Susan Phillips, Opinion, *Homeless Mothers Squat Federal Housing Sites as Encampment Deadline Looms*, WHY? (Sept. 8, 2020), <https://why.org/articles/homeless-mothers-squat-federal-housing-sites-as-encampment-deadline-looms> [<https://perma.cc/D8AL-MFA6>].
9. Sylvie Douglis, *Empty Houses, Reclaimed*, NPR (Mar. 1, 2021, 5:02 PM ET) <https://www.npr.org/transcripts/971873769> [<https://perma.cc/4C7U-BUWY>].

rehabilitate and transfer fifty houses to a community land trust, and to create two “tiny house villages.”¹⁰

Other cities pursued similar proactive changes. Hotels have long been repurposed as overflow spaces for homeless residents during cold-weather snaps or to meet overload demands.¹¹ As they have done previously, some cities like New York and San Francisco thus used hotels as temporary housing for homeless residents to stem the spread of the virus.¹² But, again, the scale of this recent undertaking and its potential permanence promises to be transformative. Although initially repurposed through short-term programs, some hotels are now being converted into permanent housing for homeless people across the country as a result of programs and legislation by states like California, Oregon, and New York and local governments like San Francisco, New York City, Austin, and King County in Washington.¹³ Pandemic-induced changes in work patterns are

-
10. Robin Kaiser-Schatzlein, *How Housing Activists Took On Philadelphia and Won*, ECON. HARDSHIP REPORTING PROJECT & NEW REPUBLIC (Mar. 29, 2021), <https://economichardship.org/2021/03/how-housing-activists-took-on-philadelphia-and-won> [<https://perma.cc/BJ5V-JYHS>] (reporting on a deal to “transfer 25 houses from [the Philadelphia Housing Authority] and 15 houses owned by the city into a community land trust, as well as a number of rapid rehousing units and a tiny-house village”); Taylor Allen, *PHA and Housing Activists to Show First Homes from Encampment Deal*, AXIOS PHILA. (Dec. 21, 2021), <https://www.axios.com/local/philadelphia/2021/12/21/philly-homeless-encampment-deal-camp-teddy-homes> [<https://perma.cc/9FL5-QBWT>].
 11. Kevin T. Dugan, *The Homeless-to-Hotels Program Is Ending. Neither Residents nor Hoteliers Are Ready.*, CURBED (June 15, 2021), <https://www.curbed.com/2021/06/homeless-hotels-program-ending-nyc-crisis.html> [<https://perma.cc/5PMT-UU33>] (“[B]efore the pandemic hit, [New York City] was housing 3,500 people in hotel rooms who would otherwise be out on the street.”); Erika Bolstad, *Prompted by Pandemic, Some States Buy Hotels for the Homeless*, PEW: STATELINE (Dec. 4, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/04/prompted-by-pandemic-some-states-buy-hotels-for-the-homeless> [<https://perma.cc/C8FQ-2L4G>] (describing prepandemic uses of hotels).
 12. Conor Dougherty, *One Way to Get People Off the Streets: Buy Hotels*, N.Y. TIMES (Apr. 17, 2021), <https://www.nytimes.com/2021/04/17/business/california-homeless-hotels.html> [<https://perma.cc/FD6B-K485>]; Vivian Ho, *‘A True Emergency:’ Covid-19 Pushes Homeless Crisis in San Francisco’s Tenderloin to the Brink*, GUARDIAN (May 19, 2020), <https://www.theguardian.com/world/2020/may/19/a-true-emergency-covid-19-pushes-homeless-crisis-in-san-franciscos-tenderloin-to-the-brink> [<https://perma.cc/9CF8-TNGW>].
 13. See Marisa Kendall, *San Jose Wins \$25 Million to Turn Downtown Hotel into Homeless Housing*, MERCURY NEWS (May 11, 2022, 3:50 PM), <https://www.mercurynews.com/2022/05/11/san-jose-wins-25-million-to-turn-downtown-hotel-into-homeless-housing> [<https://perma.cc/A5KY-YXK2>]; Bolstad, *supra* note 11; David Brand, *NYC Now Leasing 11 Hotels for Families as Homeless Population Rises*, CITY LIMITS (Aug. 10, 2022), <https://citylimits.org/2022/08/10/nyc-now-leasing-11-hotels-for-families-as-homeless-population-rises> [<https://perma.cc/BR79-DQV6>]; Joe Kukura, *SF to Purchase Another Homeless Hotel at 12th and Folsom, This One for Families*, HOODLINE (Apr. 27, 2022), <https://hoodline.com/2022/04/sf-to-purchase-another-homeless-hotel-at-12th-and-folsom-street-this-one-for-families> [<https://perma.cc/2DFL-WSJL>]; Mihir Zaveri, *From ‘Illegal’ Hotel to Housing for the Homeless on Upper West Side*,

creating the potential to convert empty commercial buildings into market-rate or subsidized housing in high-cost markets like San Francisco, New York, and Washington, D.C.¹⁴ These conversions are being incentivized by changes to zoning to permit housing in areas previously zoned only for commercial uses.¹⁵

In this Essay, I reflect on the different ways in which cities engaged in what I call “infrastructure sharing” during the pandemic. By infrastructure, I mean the public and private structures and systems that constitute and make possible city life and that contribute to the well-being of urban inhabitants.¹⁶ A city’s infrastructure includes roads, streets, buildings, parks, land, and many systems essential for city life, including energy and communication systems. “Infrastructure sharing,” then, occurs when cities facilitate the creation of shared spaces and structures from this existing infrastructure in order to provide public benefits and goods.

This Essay will highlight the difference between sharing property and assets that are part of the “public estate” and sharing property and assets that cities hold in a more proprietary manner. The former includes streets, sidewalks,

N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/nyregion/royal-park-hotel-manhattan-homeless.html> [<https://perma.cc/9YBW-U437>]; Andrew Schnitker, *Austin Approves Northwest Austin Hotel Purchase for People Experiencing Homelessness*, KXAN (Aug. 12, 2021, 12:09 PM CDT), <https://www.kxan.com/news/local/austin/austin-approves-northwest-austin-hotel-purchase-for-people-experiencing-homelessness> [<https://perma.cc/SHX9-S4WN>]; Ted Land, *King County Plans to Buy a Dozen Hotels to House Homeless in 2021*, KING 5 (Jan. 1, 2021, 11:13 PM PST), <https://www.king5.com/article/news/local/homeless/king-co-plans-to-buy-a-dozen-hotels-to-house-homeless-in-2021/281-242108da-7d5b-4021-b14b-38ee71979095> [<https://perma.cc/G7KQ-2S5C>].

14. See, e.g., Janaki Chadha, *Cities with Empty Offices See New Room to Expand Housing*, POLITICO (Nov. 11, 2021 4:30 AM EST), <https://www.politico.com/news/2021/11/11/new-york-shrinking-offices-housing-520318> [<https://perma.cc/82PA-ALTF>]; C.J. Hughes, *What Will Happen to All the Empty Office Buildings and Hotels?*, N.Y. TIMES (May 2, 2021), <https://www.nytimes.com/2021/04/16/realestate/empty-office-buildings-hotels.html> [<https://perma.cc/7EUW-VFAK>].
15. See, e.g., Greg David, *Midtown Office-to-Apartment Conversion Concept Gains Hochul and Adams Support*, CITY (Mar. 8, 2022 9:15 AM), <https://www.thecity.nyc/manhattan/2022/3/7/22966532/midtown-office-apartment-conversion-hochul-adams> [<https://perma.cc/TV7A-92H5>] (noting that the Governor of New York and Mayor of New York City support these conversions and that the Governor’s budget “proposes to revise the state’s multiple dwelling law to allow more flexibility on floor area, light and air requirements for office building conversions south of 60th Street in Manhattan”).
16. See Intergovernmental Panel on Climate Change, *Annex II: Glossary*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 2897, 2912 (Hans-Otto Pörtner et al. eds., 2022) https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Annex-II.pdf [<https://perma.cc/Q2RZ-ZSBK>] (defining “infrastructure” as “[t]he designed and built set of physical systems and corresponding institutional arrangements that mediate between people, their communities and the broader environment to provide services that support economic growth, health, quality of life and safety” (emphasis omitted)).

roads, and other governmental property held or dedicated exclusively to public purposes, while the latter includes vacant lots, empty, abandoned or underutilized buildings and structures. The difference between these two kinds of public property carries implications for what kind of sharing of their infrastructure cities can do and the kinds of regulatory and policy mechanisms they use to accomplish that sharing. During the pandemic, cities employed a range of regulatory and policy mechanisms to change, reutilize, rededicate, and transfer diverse types of infrastructure for particular public purposes (e.g., health) or on behalf of specific populations. The different tools and policies that they used varied according to what kind of property relationship they had to the infrastructure.

This Essay's main point is to highlight that while cities found creative ways to repurpose the public estate that may prove lasting, they have had a harder time reimagining the productive use of their more proprietary assets. That lack of imagination is problematic not just for creating more healthy and sustainable cities, but more particularly for addressing infrastructure inequity. Many low-income communities and communities of color exist in “infrastructure deserts”—areas that are deficient in multiple and overlapping infrastructure types.¹⁷ These deficiencies include inadequate sidewalks, roads, green spaces, street tree canopy, safe gathering places, food access, internet access, public-transit stops, financial services, and housing, among others. Whether expanding or repurposing the use of the public estate or acquiring and transferring underutilized land and structures, I argue that cities can provide new public goods and services to meet the different needs and exigencies of diverse communities through infrastructure sharing. However, sharing assets held or obtained in a city's proprietary capacity with specific marginalized groups has more potential to facilitate the creation, or cocreation, of goods and services that directly address urban infrastructure inequity.

The Essay proceeds as follows. In Part I, I argue that there is a distinction between the ways that cities share the public estate and the ways that they share land and buildings that they are free to transfer, much like a private property owner could. These two different ways of sharing a city's infrastructure inform cities' responses to both exogenous shocks, such as a global pandemic, and endogenous problems, such as systemic racial inequality. In Part II, I highlight the equity implications of both kinds of infrastructure sharing. Improvements to or expansion of public spaces, streets, parks, and roadways—the public estate—are often concentrated in city centers and business districts and too often ignore areas that are “infrastructure deserts.” Such improvements also, predictably, tend to displace economically and socially vulnerable populations and communities. On the other hand, when cities share proprietary infrastructure—for example,

17. See *infra* Part III for a discussion of infrastructure deserts.

underutilized land or buildings—they tend to share them directly with, or specifically for the benefit of, socially and economically underserved populations. In Part III, I discuss some examples of how cities can and do engage in this form of equity-driven proprietary infrastructure sharing. That said, this practice raises its own set of distinct concerns, which I address briefly at the end of the Essay.

I. TWO PATHS OF INFRASTRUCTURE SHARING: THE CITY AS TRUSTEE AND THE CITY AS PROPRIETOR

There is a key difference between the creative “placemaking” efforts during the pandemic that occurred in streets, plazas, sidewalks, parks, vacant lots, and other open spaces, and the conversion of available public and private assets into tangible goods for specific populations. The former involves changing who has access to the public estate that members of the public share in order to benefit a different class of users.¹⁸ As mentioned above, cities across the country “responded swiftly” to the demands for additional public space and alternative forms of transport by reallocating roadway space away from motor vehicles and “toward walking, bicycling, and active recreation.”¹⁹ Cities allowed restaurants and stores to use sidewalks, parking spaces, and streets. While these changes were transformative, they did not alter the underlying *character* of these resources. The spaces remained public or government property, held by the state on behalf of the unorganized public or “publics” who are—at least ostensibly—free to access their benefits.²⁰

On the other hand, converting underutilized land or structures into housing for homeless or housing-insecure populations usually involves the transfer of these resources to or on behalf of a limited class of users, either permanently or temporarily. The beneficiaries are not members of the public who can freely access the resource, like they could a shared street, sidewalk, square, or park. Rather, title to the land or property is transferred to a public authority or nonprofit organization to be held, used, or governed in a way that benefits a particular group. The resource users in question are typically vulnerable or marginalized populations who lack access to basic amenities and goods such as housing (or

18. See JOHN PAGE, PUBLIC PROPERTY, LAW AND SOCIETY: OWNING, BELONGING, CONNECTING IN THE PUBLIC REALM 37-41 (2021).

19. Tabitha S. Combs & Carlos F. Pardo, *Shifting Streets COVID-19 Mobility Data: Findings from a Global Dataset and a Research Agenda for Transport Planning and Policy*, 9 TRANSP. RSCH. INTERDISC. PERSPS. art. no. 100322, at 1 (2021).

20. See Nadav Shoked, *Property Law’s Search for a Public*, 97 WASH. U. L. REV. 1517, 1533 (2020) (noting that there is no “unitary and fixed concept of a public” and that the law recognizes different publics).

affordable housing), fresh food and vegetables, green or recreational spaces, and wireless and broadband access.

There is a difference between expanding—but not changing—the nature of the public estate and transferring other kinds of private and public property to a targeted population or community. This difference goes to a distinction between property that is held by a city in its *governmental* capacity and property that is held in a city’s *proprietary* capacity. The Supreme Court obliquely referred to this distinction in *Hunter v. City of Pittsburgh*²¹ in describing the limits of state authority over local-government actions. Relying on the fact that state courts have long recognized this distinction, the Court held that municipal corporations can and do “hold property for the same purposes that property is held by private corporations.”²² This proprietary property is distinct from the public estate, which is held on behalf of the public and typically has limits on transfers and uses that are inconsistent with public purposes.²³ As the Court explained in the earlier case of *Meriwether v. Garrett*, “In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the [municipal] corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction.”²⁴

The distinction between cities behaving as trustees for the public at large and as private property owners lives on through the application of the public trust doctrine. Some states protect public parks, city streets, and other municipal property under the public trust doctrine, invoking the doctrine to prevent local officials from appropriating or selling those resources for nonpublic uses. For instance, New York requires legislative approval before parkland can be alienated or used for nonpark purposes for an extended period.²⁵ And Illinois courts have

21. 207 U.S. 161 (1907).

22. *Id.* at 179. More recently, state courts have clarified that when a city holds land in a governmental capacity, it “acts merely as the agent of the state,” but when it holds land in a proprietary capacity, “it is clothed with the same full measure of authority over its property that private corporations and individuals enjoy.” *Buckhout v. City of Newport*, 27 A.2d 317, 320 (R.I. 1942); *see also* *McRobie v. Mayor of Westernport*, 272 A.2d 655, 657 (Md. 1971) (distinguishing between governmental and proprietary property held by local governments and noting that the former includes streets, alleys, public squares, parks, and wharves).

23. This category of property is akin to the Roman law *res publicae* category, which includes publicly owned and protected physical spaces and resources whose use is most often “supplied,” “financed,” and “overseen” by organized governments and public institutions. Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 *LAW & CONTEMP. PROBS.* 89, 99 (2003).

24. 102 U.S. 472, 513 (1880).

25. *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053-54 (N.Y. 2001); *see also* *Avella v. City of New York*, 80 N.E.3d 982, 984-85 (N.Y. 2017) (holding that the

prevented cities from renting or leasing land beneath city streets to telecommunications providers, reasoning that “municipalities do not possess proprietary powers over the public streets,” but only “regulatory powers.”²⁶ For proprietary public property, on the other hand, cities can and do behave much like private owners would and thus are free to alienate property without the limitations imposed on them by the public trust and related doctrines.²⁷

Cities use their regulatory powers over the public estate to share infrastructure held in a governmental capacity with different publics. During the pandemic, cities expanded the public right-of-way by relaxing stringent restrictions in some cases and imposing new restrictions in others.²⁸ Some cities streamlined permitting processes and made it easier for businesses to share sidewalks and streets with pedestrians and cars.²⁹ Others restricted car traffic on some streets to provide outdoor space and new bike and green transportation routes for residents. Changing restrictions allowed residents and businesses to enjoy “pop-up” parks and cafes, parklets, new playgrounds and social spaces, and bike pathways. Cities and states often facilitated these efforts with small grants, loans, and subsidies to help residents purchase materials and businesses weather the immediate economic crisis.

construction of a retail entertainment center on city parkland without the authorization of the state legislature violated the public trust doctrine).

26. *Am. Tel. & Tel. Co. v. Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993). There are counterexamples, however, in which state courts have refused to apply the public trust doctrine to public streets and alleys. As the Supreme Court of Iowa said, “[A]n alley is not a natural resource.” *Fencel v. City of Harpers Ferry*, 620 N.W.2d 808, 814 (Iowa 2000).
27. For instance, property that is held by a city in its governmental capacity may not be leased nor transferred to private parties for the benefit of those parties, whereas property held in a proprietary capacity can be leased or sold to private parties. *Compare, e.g., Green v. City of Norman*, 455 P.2d 58, 59–61 (Okla. 1969) (finding that a municipality was not authorized to grant a private party a lease for a tract of land that had been dedicated as a street in the city’s original plat, since that land was held in trust for the public and could not be alienated), *with Mayor & City Council of Balt. v. Balt. Steam Packet Co.*, 164 A. 878, 881 (Md. 1933) (finding that piers belonging to the city were, unlike streets and other property maintained for public use, held in the city’s private-ownership capacity and thus “available to be given over into exclusive private use, for the purpose of raising revenue”).
28. See Elinor Haider, *How COVID Changed the Way City Governments Support Local Businesses*, PEW CHARITABLE TRS. (Mar. 29, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/03/how-covid-changed-the-way-city-governments-support-local-businesses> [<https://perma.cc/37JY-LT9E>] (“Many cities also reported that they designed outdoor dining and on-street programs to encourage business owners to participate, stressing clear guidance, predictable timelines, and easy application processes.”).
29. *Id.* (summarizing interviews with fourteen city officials and finding that “municipal governments adapted their business regulatory practices, changed how they communicated with the business community, and streamlined some procedures, in addition to providing funds”).

On the other hand, when cities share vacant or underutilized land or buildings that are proprietary public property to produce benefits for a class of their citizens, they often must change the very character of those resources. Sometimes this change involves transferring property already owned by the city to a private entity for use on behalf of the benefited class. In other cases, cities must acquire privately owned property, convert it into city-owned property, then dedicate it to provide goods or services for a particular class. The clearest and most widespread example of this kind of infrastructure sharing during the pandemic was cities converting hotels and motels to provide noncongregate housing to their homeless populations to mitigate the spread of COVID.³⁰ These conversions are often enabled by state and local policy and facilitated by public and private funding.

To provide housing for homeless populations, both during and after the pandemic, some cities have scaled up previous efforts to use hotels and other commercial buildings to address an increasingly severe problem caused in part by a lack of housing supply.³¹ Thanks to pandemic-related funding and state enabling legislation,³² local governments were in a strong position to overcome regulatory obstacles—such as restrictive zoning and building laws—that would have waylaid these conversions.³³ Still, many obstacles remained, including the expense of converting hotels and other commercial properties to affordable or supportive housing.³⁴ These conversions may also become unsustainable as

30. See *supra* notes 12–13 and accompanying text.

31. See *id.*; German Lopez, *America’s Homelessness Crisis Is Getting Worse*, N.Y. TIMES: THE MORNING (July 15, 2022), <https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html> [<https://perma.cc/8UM7-ECUB>]; see also Arpit Gupta, *Homelessness and Housing*, CITY J. (MAY 31, 2022), <https://www.city-journal.org/homelessness-and-housing> [<https://perma.cc/7NGZ-R2GB>] (reporting a substantial rise in homeless populations in several large metropolitan areas—including Los Angeles, New York, and San Francisco—from 2010 to 2020, attributable in part to increasing housing costs and regulatory constraints on housing supply).

32. See, e.g., Act of June 7, 2022, ch. 214, § 1, 2022 N.Y. Sess. Laws (McKinney) (authorizing “any dwelling with a certificate authorizing occupancy as a Class B hotel to also authorize occupancy of such units in such dwellings for permanent residence purposes”).

33. See, e.g., Roshan Abraham, *Housing in Brief: New York Makes It Easier to Convert Hotels into Homeless Housing*, NEXT CITY (June 16, 2022), <https://nextcity.org/urbanist-news/new-york-makes-it-easier-to-convert-hotels-into-homeless-housing> [<https://perma.cc/LTW4-TYRN>]; Act of Aug. 13, 2021, ch. 396, 2022 N.Y. Sess. Laws (McKinney) (establishing “a mechanism for the state to finance the acquisition of distressed hotels and commercial office properties by nonprofit organizations to maintain or increase affordable housing”); Act of June 7, 2022, ch. 214, § 1, 2022 N.Y. Sess. Laws (McKinney).

34. See Noah Kazis, Elisabeth Appel & Matt Murphy, *Challenges and Opportunities for Hotel-to-Housing Conversions in NYC*, N.Y.U. FURMAN CTR. 19 (Aug. 2021), https://furmancenter.org/files/publications/Challenges_and_Opportunities_for_Hotel-To-Housing_Conversions_in_NYC_Final.pdf [<https://perma.cc/SS55-NDX3>].

cities' tourism industries rebound and office workers return to previously underutilized buildings.³⁵ Accordingly, one implication of using proprietary, rather than public trust, measures to share a city's infrastructure is the immediate financial cost of doing so. If this cost is prohibitive, particularly for cities facing long-term structural budget issues or temporary financial shocks from a pandemic, many cities will forgo the opportunity to repurpose their proprietary infrastructure for public benefits.

California's Homekey program is an example of the kind of financial incentive that states can offer local governments to convert hotels and other underutilized buildings into permanent supportive homes for housing-insecure populations.³⁶ The Homekey program began as "Project Roomkey," which was established in March 2020 as part of the state response to the COVID-19 pandemic, in order to place homeless individuals in hotel rooms to quarantine following COVID-19 exposure or recuperate after infection.³⁷ Project Roomkey was designed to be temporary but soon expanded into the Homekey program, which has now provided two rounds of state funding to localities, local public entities, and tribal authorities to, among other things, "convert commercial properties and other existing buildings to [p]ermanent or [i]nterim [h]ousing for the [t]arget [p]opulation."³⁸ The result is that many local governments around the state have converted, or are converting, hotels, motels, and other vacant properties into housing and supportive infrastructure — such as community centers and outdoor space — that benefit specific vulnerable populations and communities.³⁹ Some of these projects have intentionally been built near public

-
35. For example, New York City relied on hotels as overflow space for homeless residents during the pandemic but suspended the program last year in hopes of filling hotels with tourists. Andy Newman, *8,000 Homeless People to Be Moved from Hotels to Shelters, New York Says*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/06/16/nyregion/homeless-deblasio-hotels.html> [<https://perma.cc/86XD-7PMY>].
36. See 2020 Cal. Stat. 1287, 1318-19 (codified at CAL. HEALTH & SAFETY CODE § 50675.1.1 (West 2022)) (program's enabling legislation); *Homekey*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/grants-and-funding/homekey> [<https://perma.cc/L6MW-U5NF>] (overview of program).
37. *Project Roomkey/Housing and Homelessness COVID Response*, CAL. DEP'T OF SOC. SERVS., <https://www.cdss.ca.gov/inforesources/cdss-programs/housing-programs/project-roomkey> [<https://perma.cc/B8R4-LDWY>].
38. *Program Background*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/grants-and-funding/homekey/program-background> [<https://perma.cc/44FP-TK55>].
39. See e.g., Ben Brazil, *Orange County Receives More Funding to Convert Motels into Housing for Homeless*, DAILY PILOT (Mar. 17 2022), <https://www.latimes.com/socal/daily-pilot/entertainment/story/2022-03-17/orange-county-receives-more-funding-to-convert-motels-into-housing-for-homeless> [<https://perma.cc/9MZF-FH8F>] (reporting that Orange County and several cities within the county received first-round Homekey financing to convert hotels and motels into permanent supportive housing, including a project that will build a

amenities such as transit stops, grocery stores, pharmacies, schools, parks, and daycare centers.⁴⁰

Incentivizing the conversion of hotels and commercial properties is not the only way cities can share their proprietary infrastructure to generate public benefits for residents who lack the most basic goods and amenities. Many cities and counties have recently enacted laws and policies that facilitate making publicly owned land and buildings available for affordable housing, among other public benefits, often prioritizing this use over other uses.⁴¹ Often, surplus parcels of public land or buildings are sold at public auctions to the highest bidder, which permanently removes this land from being used exclusively for public purposes or to benefit particular populations. Local governments sometimes require that any surplus public parcels appropriate for residential development be sold or leased to develop affordable housing.⁴² In other cases, local governments may simply incentivize the use of surplus land for affordable housing when sold to a developer—for example, by requiring developers of multifamily housing built on surplus city-owned land to reserve at least twenty to thirty percent of units for low-income households.⁴³

community building and outdoor space on a vacant lot next to the properties); *State to Pay for Conversions of Inland Empire Hotels for Homeless: Project Homekey Program Behind 99 Rooms in Redlands, 53 Rooms in Corona*, REAL DEAL (Mar. 17 2022), <https://therealdeal.com/la/2022/03/17/state-to-pay-for-conversions-of-inland-empire-hotels-for-homeless> [<https://perma.cc/635C-K5Z3>] (reporting that California awarded a combined forty-two million dollars in Homekey grants to the city of Redlands, Riverside County, and the city of Corona to acquire hotels for homeless housing); *Oakland, SF Win Homekey Grants for Hotel-to-Housing Conversions*, BAY CITY NEWS (Mar. 30, 2022), <https://sfbayca.com/2022/03/30/oakland-sf-win-homekey-grants-for-hotel-to-housing-conversions> [<https://perma.cc/CKM8-FT2S>] (reporting that Oakland and San Francisco received a combined twenty-two million dollars in state grants to convert hotels into permanent housing for homeless residents).

40. See, e.g., *Homekey Round 2: LA County Converting More Motels into Housing: Governor Greenlights Additional Homekey Funding for LA County Housing Projects*, L.A. CNTY. HOMELESS INITIATIVE, <https://homeless.lacounty.gov/news/homekey-round-2-la-county-converting-more-motels-into-housing> [<https://perma.cc/KJ7S-KASN>].
41. See, e.g., KING CNTY., WASH. CODE § 4.56.100(A)(12)(a) (2022), https://aqua.kingcounty.gov/council/clerk/code/07_Title_4.htm#_Toc412720794 [<https://perma.cc/J3TB-A24S>] (requiring all County property to be sold at an auction except if the property is declared as “surplus to the future foreseeable needs of the county” and sold to a governmental agency that will, among other things, compensate the county and provide “public benefits . . . which include, but are not limited to, the provision of affordable housing, open space or park land, child care facilities, public art beyond what is required under applicable law, or monetary contribution toward such benefits”).
42. See, e.g., *id.* § 4.56.070(C)(1).
43. See Land Disposition Transparency and Clarification Amendment Act of 2016, 64 D.C. Reg. 2152, 2155-56 (Feb. 24, 2017), <https://code.dccouncil.us/us/dc/council/laws/21-267> [<https://perma.cc/U7MP-GAVH>].

To sum up, the chart below illustrates the side-by-side comparison of how cities share different kinds of infrastructure and the mechanisms they use to do so:

	CITY AS TRUSTEE	CITY AS PROPRIETOR
<i>Nature of Intervention</i>	Changes who has access to resource	Changes the character of resource
<i>Legal Powers</i>	Regulatory powers only	Private property-like legal entitlements
<i>Legal Effects</i>	Expand or limit access to user group	Freedom to alienate
<i>Facilitates Sharing Through</i>	Lifting of administrative burdens	Freedom to dedicate to private use
<i>Nonfinancial Support</i>	Placemaking by individuals, entities	Enabled by state and local policy
<i>Financial Support</i>	Facilitated by small grants and loans	Facilitated by subsidies, state funding

II. INFRASTRUCTURE-SHARING ON UNEQUAL LANDSCAPES

Whether expanding or adapting the use of the public estate, or acquiring or transferring underutilized land and structures, cities can provide new public goods and services to their residents to meet different needs and exigencies. However, improvements to the public estate – public spaces, streets, parks, and roadways – are often criticized as creating or exacerbating urban inequality, particularly for those on the losing side of urban agglomeration economies.⁴⁴ Improvements to the public estate tend to be concentrated in “core” urban areas and contribute to increases in property values and gentrification. These rising real-estate values tend to benefit proximate property owners disproportionately.⁴⁵ In other words, new recreational spaces and “green” transportation corridors too often become the type of urban amenities that attract residents willing to pay a premium to live near them while driving away those who are not or cannot.

44. See, e.g., Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480, 482-87 (2017) (describing the mobility challenges and internal barriers and costs that low-income and disadvantaged populations face in many urban markets that depend on a growth strategy designed to attract and agglomerate a certain class or type of urban resident attractive to knowledge economy firms).

45. See, e.g., Sarah Fox, *Environmental Gentrification*, 90 U. COLO. L. REV. 803, 820-26 (2019).

These amenities, then, make it more difficult for middle- and low-income residents to remain in their neighborhoods.

For example, after a “once blighted and abandoned” railway area was rezoned and transformed into the city-owned High Line Park in New York City,⁴⁶ housing prices predictably skyrocketed in the proximate surrounding neighborhoods.⁴⁷ The area rapidly transformed into one of the most exclusive in the city, fostering what one commentator labeled “super-gentrification” – “the displacement of the rich by the ultra-rich.”⁴⁸ Similarly, other cities that have repurposed abandoned transportation infrastructure into urban parks or green beltways have experienced resident displacement, runaway home values, and speculative investment.⁴⁹ This is not to deny that there are immense social, economic, and environmental benefits that accrue to the city and the public from repurposing old infrastructure into new public goods.⁵⁰ Most cities are better off with more parks, safe bicycle lanes, pedestrian corridors, and places for the public to safely

-
46. The High Line Park runs from roughly 14th Street to 33rd Street on the west side of Manhattan, including the Meatpacking District and the Chelsea neighborhood. For a great history of the old industrial infrastructure and the development of the High Line, see Phillip Lopate, *Above Grade: On the High Line*, PLACES J. (Nov. 2011), <https://placesjournal.org/article/above-grade-on-the-high-line> [<https://perma.cc/B7DL-X7TR>].
47. Katie Jo Black & Mallory Richards, *Eco-Gentrification and Who Benefits from Urban Green Amenities: NYC’s High Line*, 204 LANDSCAPE & URB. PLAN., Dec. 2020, at 1 (finding that homes closest to the High Line experienced a 35.3% increase in housing values and that that homes with relatively the same height as the High Line received the largest premium).
48. Emma van der Staaijvan, Penn Globe & The High Line Effect: The Social and Economic Effect of Public Space on its Surrounding Neighborhoods in Midtown Manhattan (July 10, 2020) (master’s thesis, Delft University of Technology), <https://repository.tudelft.nl/islandora/object/uuid:7a438b6a-32a7-4eae-ac78-b981a2679c9f/datastream/OBJ3> [<https://perma.cc/BQ5C-CMMV>]; see also Mariela Quintana, *Changing Grid: Exploring the Impact of the High Line*, STREETEASY (Aug. 8, 2016): <https://streeteasy.com/blog/changing-grid-high-line> [<https://perma.cc/72XL-YSFX>] (explaining the effect of the High Line on the real-estate markets of surrounding neighborhoods).
49. Jared Brey, *The Atlanta BeltLine Wants to Prevent Displacement of Longtime Residents. Is It Too Late?*, NEXT CITY (May 4, 2021), <https://nextcity.org/urbanist-news/the-atlanta-beltline-wants-to-prevent-displacement-of-longtime-residents> [<https://perma.cc/V68Z-6XY8>].
50. There is qualitative evidence capturing these benefits. See, e.g., Sarah Weber, B. Bynum Boley, Nathan Palardy & Cassandra Johnson Gaither, *The Impact of Urban Greenways on Residential Concerns: Findings from the Atlanta BeltLine Trail*, 167 LANDSCAPE & URB. PLAN. 147, 147 (2017) (finding that the Atlanta BeltLine was “perceived by residents to be improving property values, places for outdoor recreation, and social spaces for gathering, while slightly increasing litter, crime, vandalism, and property taxes”); Jisoo Sim, Lynell Bohannon Cermetrius & Patrick Miller, *What Park Visitors Survey Tells Us: Comparing Three Elevated Parks – The High Line, 606, and High Bridge*, 12 SUSTAINABILITY art. no. 121, at 1 (2019) (surveying park visitors from three representative elevated parks – the High Line in New York City, the 606 in Chicago, and the High Bridge in Farmville – and reporting on a range of positive activities, perceived benefits, and satisfaction from their use).

gather and enjoy urban life. The issue is that the benefits that accrue from expanding the public estate – public parks, green spaces, etc. – are often not shared broadly (or broadly enough) if we consider the most economically and socially vulnerable populations in these cities. We must acknowledge the costs to local populations when new neighborhood amenities can be captured by the most well-off members of the public.⁵¹

Similarly, “placemaking” efforts in public spaces have been criticized as perpetuating inequality because they usually occur in affluent or gentrifying parts of the city.⁵² Critics of these pandemic-era efforts observed that open- and slow-street programs were often put in place without public or community input, threatening to “deepen inequity and mistrust in communities that have been disenfranchised and underserved for generations.”⁵³ Even though more urban green and open spaces were created and used in cities during the pandemic, the lower-income and ethnic-minority communities most impacted by COVID frequently had the least access to those spaces⁵⁴ or reported feeling less of a sense of belonging because they lacked well-maintained and safe spaces.⁵⁵

-
51. Even the presence of community gardens, created from vacant lots, is correlated with increases in property values. Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 246 (estimating the impact of community gardens on neighborhood property values data for New York City and finding that gardens have significant positive effects, especially in the poorest neighborhoods).
 52. DOUGLAS, *supra* note 1, at 157 (noting that even broadly positive additions to public space, from street trees to bike lanes to farmers’ markets, can “code areas as spaces of affluence and privilege,” and that spaces such as pedestrian plazas tend to be “more explicitly controlled and regulated than standard streets and sidewalks”).
 53. Destiny Thomas, ‘Safe Streets’ Are Not Safe for Black Lives, BLOOMBERG (June 8, 2020, 11:44 AM), <https://www.bloomberg.com/news/articles/2020-06-08/-safe-streets-are-not-safe-for-black-lives> [<https://perma.cc/E64Q-5Y5K>]; see also Emily Badger, *The Pandemic Has Pushed Aside City Planning Rules. But to Whose Benefit?*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/07/20/upshot/pandemic-city-planning-inequality.html> [<https://perma.cc/BJB3-UU4C>] (observing that rapid changes to cities during the COVID-19 pandemic reflected city responsiveness to wealthy inhabitants, rather than marginalized residents).
 54. See, e.g., Erin N. Spotswood, Matthew Benjamin, Lauren Stoneburner, Megan M. Wheeler, Erin E. Beller, Deborah Balk, Timon McPhearson, Ming Kuo & Robert I. McDonald, *Nature Inequity and Higher COVID-19 Case Rates in Less-Green Neighbourhoods in the United States*, 4 NATURE SUSTAINABILITY 1092, 1092 (2021) (finding that the majority of U.S. ZIP codes with people of color had both higher COVID-19 case rates and less green space).
 55. See, e.g., Jennifer M. Pipitone & Svetlana Jović, *Urban Green Equity and COVID-19: Effects on Park Use and Sense of Belonging in New York City*, 65 URB. FORESTRY & URB. GREENING art. no. 127338, at 5-10 (2021) (finding evidence that COVID-19 has widened existing socio-spatial disparities present across numerous neighborhoods of New York City; in particular finding increased use of urban green spaces among White participants and participants living in more upper-middle- and upper-income areas, and also that the lowest-income neighborhoods were

Large-scale urban planning initiatives that seek to leverage and scale the pandemic-induced opening of streets to bicyclists and pedestrians, in pursuit of the innovative “fifteen-minute city,” have also come under scrutiny for their potential to aggravate socio-spatial inequalities. The fifteen-minute city, which has been embraced by Paris and U.S. cities as diverse as Detroit and Portland,⁵⁶ promises to transform neighborhoods so that locals can access all of their essentials within fifteen minutes by foot or bicycle, furthering both sustainability and safety goals.⁵⁷ Yet some city-planning experts have questioned whether such top-down planning proposals are likely to reinforce existing inequalities without engaging residents, designing around the needs of communities, and taking equity into account.⁵⁸

Of course, placemaking advocates and urban planners are well aware of the equity-based critique of their work to transform urban infrastructure into a more walkable, sociable landscape. They are pushing cities to respond to these inequities by evening out the distribution of public spaces and making available alternative transportation infrastructure. For instance, New York City now requires at least twenty open streets to be maintained in underserved areas, of which ten or more must be five blocks or longer.⁵⁹ New York also recently

significantly less likely to report increased use or appreciation of urban green space, but significantly more likely to report COVID-19 concerns within their local urban green space).

56. Feargus O’Sullivan & Laura Bliss, *The 15-Minute City – No Cars Required – Is Urban Planning’s New Utopia*, BLOOMBERG (Nov. 12, 2020, 7:00 AM), <https://www.bloomberg.com/news/features/2020-11-12/paris-s-15-minute-city-could-be-coming-to-an-urban-area-near-you> [<https://perma.cc/4S7E-XWU8>]. Other innovations such as the “superblock” concept, which repurposes roads as extended living or play space for residents, were well underway in many cities before the pandemic struck but are now viewed as a model for postpandemic urban recovery. See generally Kimberly Burrowes & Joseph Schilling, *From Streets to Citizen Spaces: Positioning Parks and Green Spaces in an Equitable COVID-19 Recovery*, URB. INST. 2-12 (Oct. 2021), https://www.urban.org/sites/default/files/publication/104931/from-streets-to-citizen-spaces_o.pdf [<https://perma.cc/H3HC-ZR9Z>] (examining the superblock programs in Barcelona and other cities).
57. Carlos Moreno, Zaheer Allam, Didier Chabaud, Catherine Gall & Florent Pratlong, *Introducing the “15-Minute City”: Sustainability, Resilience and Place Identity in Future Post-Pandemic Cities*, 4 SMART CITIES 93, 98-106 (2021); see also Andres Duany & Robert Steuteville, *Defining the 15-Minute City*, CONG. FOR NEW URBANISM: PUB. SQUARE (Feb. 8, 2021), <https://www.cnu.org/publicsquare/2021/02/08/defining-15-minute-city> [<https://perma.cc/L48Y-UBLH>] (noting that the concept of a fifteen-minute city offers opportunities for urbanists in terms of sustainability and design).
58. See Skip Descant, *Equitable Urban Planning May Mean Ditching the 15-Minute City*, GOV’T TECH. (Mar. 9, 2021), <https://www.govtech.com/fs/equitable-urban-planning-may-mean-ditching-the-15-minute-city.html> [<https://perma.cc/UT5S-UKXU>].
59. N.Y.C. Local Law No. 55 (May 13, 2021) (codified at N.Y.C., N.Y. ADMIN. CODE § 19-107.1 (2022)), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9611098&GUID=A2DBB532-oF1D-4D9C-A349-B75CB4486ACo> [<https://perma.cc/AM8C-DJBR>]. Officials say they have met the first part of that regulation, with thirty open streets in neighborhoods that are

announced a plan for a major expansion of its greenway network⁶⁰ across all five boroughs, with a focus on historically underserved, lower-income communities that lack access to affordable transportation and job opportunities.⁶¹

Nevertheless, cities could, and should, go further to protect vulnerable populations from the risk of displacement that often accompanies improvements to public spaces and resources in their neighborhoods. In particular, cities might consider pairing public-estate interventions with proprietary interventions to ensure that the benefits of both are widely shared. For instance, if a city's extension of bike lanes or a greenway network into historically disinvested communities threatens to gentrify a neighborhood, one policy response to counteract this effect could be for the city to acquire housing stock in the area and preserve it for particularly vulnerable residents, through mechanisms like community land trusts that are addressed in the following Part.⁶²

The equity challenge is much deeper than housing affordability and displacement. The reality is that too many communities, particularly low-income Black and Latino neighborhoods, exist in “infrastructure deserts.”⁶³ These neighborhoods lack essentials such as adequate sidewalks, pedestrian trails, street tree canopy, public transportation, and internet access.⁶⁴ In other words, underserved neighborhoods lack the public infrastructure necessary to support community well-being and improve the lives of the residents living there.⁶⁵ Recent research reveals that these deserts consist of significant deficiencies in *multiple* infrastructure types, worsening the inequity between low-income and

underserved by the initiative, but only six of these span at least five blocks. See Hu, *supra* note 3; see also N.Y.C., N.Y. ADMIN. CODE § 19-107.1 (2022) (requiring consideration of “equitable distribution of open streets throughout the city”).

60. Urban greenways can constitute a “living network” that provides “people with access to open spaces close to where they live . . . and link together rural and urban spaces.” Olivia S. Horte & Theodore S. Eisenman, *Urban Greenways: A Systematic Review and Typology*, 9 LAND art. no. 40, at 2 (2020).
61. *Mayor Adams Announces NYC Receives \$7.25 Million Federal Grant To Plan Major Expansion of Greenway Network*, HARLEM WORLD, <https://www.harlemworldmagazine.com/mayor-adams-announces-nyc-receives-7-25-million-federal-grant-to-plan-major-expansion-of-greenway-network> [https://perma.cc/5Y6D-XVUJ].
62. See *infra* notes 90-95 and accompanying text.
63. Zheng Li, Xinlei Wang, Jessie Zarazaga, Janille Smith-Colin & Barbara Minsker, *Do Infrastructure Deserts Exist? Measuring and Mapping Infrastructure Equity: A Case Study in Dallas, Texas, USA*, 130 CITIES art. no. 103927, at 4 (2022).
64. See Stacy Rickard, *SMU Identifies 62 Areas of Dallas with ‘Highly Deficient’ Neighborhood Infrastructure*, SPECTRUM NEWS 1 (Mar. 7, 2022), <https://spectrumlocalnews.com/tx/dallas-fort-worth/news/2022/03/08/smu-identifies-dallas--infrastructure-deserts> [https://perma.cc/8X88-9ZXQ].
65. Li et al., *supra* note 63, at 1-2 (noting studies that demonstrate the importance of neighborhood infrastructure for human health, community growth, and community safety).

middle- and high-income neighborhoods.⁶⁶ For example, according to a recent study, the southern part of Dallas contains several infrastructure deserts – areas labeled with ten or eleven infrastructure deficiencies, out of twelve total infrastructure types – in predominantly Black and low-income neighborhoods.⁶⁷ Dallas, the study found, had both the worst infrastructure and the most inequity of all four cities studied (compared to Chicago, New York, and Los Angeles).⁶⁸ In addition to lacking basic public infrastructure, “infrastructure deserts” may also have significant numbers of vacant lots and abandoned structures that often sit idle for long periods until they are torn down by the city.⁶⁹ Infrastructure deserts present an opportunity for cities to engage in more equitable forms of infrastructure sharing by repurposing these spaces for public benefit.

Although infrastructure deserts are still an understudied phenomenon, the clear implication of these recent findings is the need for targeted and long-term investments in low-income neighborhoods.⁷⁰ Some of these investments are on the horizon as a result of unprecedented federal commitments, particularly in historically disinvested communities.⁷¹ Given the scope of need, these public investments will likely fall short of addressing the multiple types of infrastructure deficiencies in the most socially and economically distressed communities. However, as cities have demonstrated during the height of the pandemic, urban infrastructure sharing can also be a means of improving and transforming different kinds of infrastructure – including parks, streets, vacant lots, abandoned homes, and businesses – through regulatory changes to local land-use laws and policies. Infrastructure sharing, along with infrastructure investments, should be part of the public-policy and urban-planning landscape to address not only infrastructure deserts but also the quality of city life for different populations.

66. *Id.* at 7.

67. Rickard, *supra* note 64. Further within the same section of Dallas, predominantly Black neighborhoods are up to five times more likely to have bad infrastructure than other neighborhoods and low-income neighborhoods are up to four times more likely to have bad infrastructure than wealthy neighborhoods. *Id.*

68. *Id.*

69. *Id.*; see also Nate Ela, *Property and the Problem of Disuse*, 100 WASH. U. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4066799> [<https://perma.cc/JYG6-RKND>] (highlighting the problem of idle resources, particularly in times of acute need, and the tension between individual owners’ interest in leaving their property vacant and the conflicting societal interest in ensuring that vital resources are put to use on behalf of those in need).

70. Li et al., *supra* note 63, at 9 (calling for investment prioritization and capital funding in these areas).

71. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 6701(f)(3)(D)(i), 135 Stat. 429, 664-65 (2022) (requiring consideration of proposed projects’ impact on historically disadvantaged communities and populations when disbursing transportation grant funding).

Just as importantly, as the next Part will argue, cities should engage more intentionally in the kind of infrastructure sharing that helps communities to create, or cocreate, new kinds of goods and services for their most vulnerable and disadvantaged populations. Sharing the infrastructure of the city in this way promises to not only address infrastructure inequity, but also to correct for the legacy of unjust land-use practices that have shaped contemporary urban landscapes. In the next Part, I offer examples of how cities, acting in their proprietary capacity, are sharing surplus infrastructure with marginalized communities, and helping to create new kinds of property relations that allow property to be utilized and stewarded by residents most lacking essential infrastructure, goods, and services.

III. TRANSFORMING PROPRIETARY PUBLIC INFRASTRUCTURE INTO COMMON GOODS

Cities often facilitate the sharing of existing urban infrastructure by allowing it to be transformed into a kind of common good used exclusively by or on behalf of members of a bounded community in order to meet their specific needs.⁷² By common good, I am referring to property that is shared with, held by, or held on behalf of a specific group or population.⁷³ This is done almost exclusively with infrastructure held in a city's proprietary capacity, allowing it to treat the property as a private owner would.⁷⁴ While some of this property was always publicly owned, cities have increasingly taken possession and ownership of private property through tax-lien foreclosures or abandonment.

It should be noted that these systems of municipal property transfer are not neutral. As scholars have pointed out, these foreclosures are sometimes illegal and often unjust, reflecting “predatory” behavior by local officials that

72. The idea that a range of urban infrastructure can be made more accessible and shared more widely with a bounded community of users is consonant with the theory of the urban commons that I have developed elsewhere. See, e.g., Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011); Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281 (2016).

73. This is akin to *res universitatis* under Roman law, which is a “bounded form of *res publicae*,” or a limited common-property regime “more limited in membership than the public at large.” Rose, *supra* note 23, at 105-06; see also Elinor Ostrom & Charlotte Hess, *Private and Common Property Rights* 6-8 (Ind. Univ. Bloomington Sch. of Pub. & Env't Affs., Working Paper No. 2008-11-01, 20011), <https://ssrn.com/abstract=1936062> [<https://perma.cc/P7DX-PL7Q>] (explaining the difference between an open-access common-pool resource and a common-property regime for members of a clearly demarcated group).

74. See *supra* notes 22-24 and accompanying text.

systematically dispossesses predominantly Black residents of their homes.⁷⁵ This behavior is unfortunately part of a long history of resistance to Black property ownership that dates to the postabolition period, through the loss of Black farmland in the mid-twentieth century, to racially discriminatory mortgage lending and home appraisals today.⁷⁶ In part because of this long legacy of bias and discrimination, cities should consider publicly owned vacant and underutilized structures as an opportunity to leverage their role as proprietor towards promoting inclusion and justice.⁷⁷ They can do so by sharing this surplus infrastructure with communities most lacking access to adequate resources and essential goods and services.

Many cities have so much abandoned and dispossessed land that they use land banks, authorized by their states, to facilitate the process of clearing title and putting the properties back to productive use. Land banks are quasi-governmental entities created to acquire, hold, and repurpose distressed properties for community benefit.⁷⁸ They are controversial in some cities because public officials are seen as reluctant to share this property with residents of disinvested neighborhoods, which are also likely to be infrastructure deserts. For example, Detroit's land-bank program has been a sore point with many of its long-time residents who are not directly reaping the benefits of the city's downtown and midtown revitalization.⁷⁹ The Detroit Land Bank Authority holds title to almost a quarter of the land in the city, and as many as 90,000 properties—66,000 vacant lots and 23,000 structures—much of which has been acquired, in recent

75. See Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107 (2020).

76. See, e.g., K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1068-69 (2022) (explaining how the history of the colonial-era expropriation of land, and the legal system that authorized these conquests, helped to powerfully reorganize the land system to circumvent Black property rights after the abolition of slavery); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 563-567 (tracking the processes through which Black rural landowners have gradually been dispossessed of more than ninety percent of the land held by their predecessors); Jonathan Rothwell & Andre M. Perry, *Biased Appraisals and the Devaluation of Housing in Black Neighborhoods*, BROOKINGS (Nov. 17, 2021), <https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods> [<https://perma.cc/X9AC-TYNK>] (surveying the evidence of racial bias and discrimination in mortgage lending and home appraisal).

77. See generally Foster & Iaione, *supra* note 72 (articulating a theory of more inclusive and equitable urban governance).

78. *Land Banks*, LOC. HOUS. SOLS., <https://localhousingolutions.org/housing-policy-library/land-banks> [<https://perma.cc/S9RL-K38L>].

79. See generally Tom Perkins, *The Detroit Land Bank and Its Many Controversies, Explained*, CURBED DETROIT, (Apr. 30, 2020), <https://detroit.curbed.com/2020/4/30/21166791/detroit-land-bank-authority-vacant-house-for-sale> [<https://perma.cc/KJ2P-R9Y4>] (describing criticism of the Detroit Land Bank Authority).

years, through tax foreclosures.⁸⁰ Local newspaper stories recount the frustration of many residents, particularly those living in neighborhoods still in economic decline, trying to acquire property through the land bank. While the Land Bank has programs that allow current property owners to purchase side lots and “buy back” foreclosed homes,⁸¹ residents that have been stewarding some of the vacant land for urban farming and other neighborhood amenities have pushed the city to transfer ownership to those stewards.⁸²

Other cities are beginning to see how surplus public property can be shared with communities to address historic and structural inequities. Consider the city of Seattle’s response to mass protests against systemic racism after the murder of George Floyd and during the pandemic. The city granted three of its properties to community organizations that had been operating or planned to operate public-service programs at those sites, including transferring ownership of an old fire station to an organization that has run food bank and housing-assistance programs out of the building since 1969.⁸³ The city also deeded a senior center

-
80. John Gallagher, *Detroit Land Bank Admits Faults, Carries on Amid Complaints It Moves Too Slowly*, DETROIT FREE PRESS (Dec. 3, 2019, 6:00 AM ET) <https://www.freep.com/story/money/business/john-gallagher/2019/12/03/detroit-land-bank-criticism-weve-accomplished-tremendous-amount/2586225001> [https://perma.cc/6D4N-YMKX]. More recent accounts put that number around 75,000 parcels, most of which are vacant lots. Aaron Mondry & Malak Simli, *10 Things to Know About Detroit’s Largest Landowner*, OUTLIER MEDIA (June 15, 2022), <https://outliermedia.org/detroit-land-bank-authority-explainer> [https://perma.cc/Z683-NAWX].
81. *See Detroit Land Bank Authority Sells 20,000 Side Lots to Detroit Homeowners*, MICH. CHRON. (Dec. 7, 2021), <https://michiganchronicle.com/2021/12/07/detroit-land-bank-authority-sells-20000-side-lots-to-detroit-homeowners> [https://perma.cc/P9UR-GKDL]; Dejanay Booth, “One-of-a-Kind Opportunity”: 100-Plus Detroiters Given Deeds to Their Homes Through City’s Buy Back Program, CBS NEWS (Sept. 1, 2022, 12:59 PM), <https://www.cbsnews.com/detroit/news/100-plus-detroiters-given-deeds-to-their-homes-through-citys-buy-back-program> [https://perma.cc/YPH5-QWNP].
82. Some observers claim that the city of Detroit has had no problem selling hundreds of parcels of vacant lots to large corporations to expand its commercial urban tree nurseries, renovate dilapidated homes, and free up land for a car assembly plant. Chad Livengood, *Detroit Strikes Land Deal with Hantz Farms as Part of FCA Plant Project*, CRAIN’S DETROIT BUS. (Apr. 15, 2019, 7:41 PM), <https://www.craindetroit.com/real-estate/detroit-strikes-land-deal-hantz-farms-part-fca-plant-project> [https://perma.cc/3MY9-DN6H]. Small-scale, long-established Black farms in the city, in contrast, have had difficulty purchasing the land on which they farm from the Land Bank. According to one account, despite their interest and attempts to purchase the land on which they have stewarded acres of farm sites that serve the needs of food-insecure homes and neighborhoods, Black farmers have been unsuccessful in convincing the city to allow them to purchase the land. Rachael Baker, *Racial Capitalism and a Tentative Commons*, in COMMONING THE CITY: EMPIRICAL PERSPECTIVES ON URBAN ECOLOGY, ECONOMICS, AND ETHICS 25, 28-29 (Derya Özkan & Güldem Baykal Büyüksarac eds., 2020).
83. David Gutman & Daniel Beekman, *Seattle Moves to Give 3 Central District Properties to Black-Led Community Organizations*, SEATTLE TIMES (Sept. 23, 2020, 4:30 PM), <https://www.seattle>

to the same nonprofit that has operated the center since 1975.⁸⁴ In addition, the city entered into a long-term lease for another decommissioned fire station with Africatown Community Land Trust, which planned to convert the building into a cultural-innovation center to support Black-owned businesses.⁸⁵ To support these efforts, Seattle’s mayor pledged one hundred million dollars of her annual budget toward programs for communities of color.⁸⁶

The ability of cities to engage in proprietary transfers is, of course, heavily dependent on how much underutilized or “surplus” property they have and how much they can lend economic support to grassroots efforts to repurpose specific properties, as well as on population flows into and out of their cities. For instance, Detroit is famously revenue poor but land rich, while Seattle is comparatively well funded thanks to its booming economy and real-estate market.⁸⁷ In its quest to raise money in a context in which there is no regional tax sharing with its more affluent suburbs, Detroit’s vacant land and structures are valuable assets that could help attract the kind of investment and new residents that would increase its tax base. Many residents might reasonably argue, however, that there is plenty of surplus property to share with developers *and* communities willing to steward or repurpose it, given the trajectory of Detroit’s

times.com/seattle-news/politics/seattle-moves-to-give-3-central-district-properties-to-black-led-community-organizations [https://perma.cc/P2EV-HMKP].

84. *City Council Approves Transfer of Central Area Senior Center and Fire Station to Black-Led Organizations*, SEATTLE MEDIUM (Nov. 4, 2020), <https://seattlemedium.com/city-council-approves-transfer-of-central-area-senior-center-and-fire-station-to-black-led-organizations> [https://perma.cc/DCJ7-7Y7C].
85. *Id.*; see also Gutman & Beekman, *supra* note 83 (“The structure hasn’t been used as a firehouse since 2013, when it was replaced with a new, larger facility.”).
86. Anthony Derrick, *Mayor Durkan Applauds City Council’s Vote to Transfer the Central Area Senior Center and Fire Station 6 to Black-Led Community Organizations*, SEATTLE OFF. OF THE MAYOR (Nov. 2, 2020), <https://durkan.seattle.gov/2020/11/mayor-durkan-applauds-city-councils-vote-to-transfer-the-central-area-senior-center-and-fire-station-6-to-black-led-community-organizations> [https://perma.cc/EG7Y-RQB3] (noting that the senior center and leased fire station “are in the heart of the Central District (CD), a [Black] community that has endured rampant displacement”).
87. See Gary Sands & Mark Skidmore, *Detroit and the Property Tax: Strategies to Improve Equity and Enhance Revenue*, LINCOLN INST. OF LAND POL’Y 10-11, 21-22 (2015), https://www.lincolninst.edu/sites/default/files/pubfiles/detroit-and-the-property-tax-full_o.pdf [https://perma.cc/S3DA-ZLTQ]; Daniel Gilbert & Daniel Beekman, *Behind Seattle’s Government Spending Spree: A Deluge of Taxes, Six-Figure Pay and Officials Eager to Do More*, SEATTLE TIMES (Dec. 21, 2017), <https://www.seattletimes.com/seattle-news/times-watchdog/seattle-went-on-a-government-spending-spree-with-a-deluge-of-taxes-six-figure-pay-and-officials-eager-to-do-more> [https://perma.cc/8DM9-RS6J].

development. Detroit is often referred to as a tale of two cities.⁸⁸ In one city, private capital has fueled development in the downtown and midtown areas, including areas close to some of the city's universities and hospitals, populated by gentrifying young white professionals. The other city consists mainly of neglected, predominantly Black residential neighborhoods populated by longtime residents who have not been able to or have not wanted to leave the city. Much of the land and homes in those neighborhoods have been left idle, without much reasonable expectation that they will attract significant new investment.

The city of Seattle's infrastructure sharing of proprietary public property provides an initial, if limited, demonstration of how this practice can both transform urban communities and address the problematic history of development in Black neighborhoods. Past urban-renewal and revitalization policies, particularly at the local level, often did more harm than good, leaving Black communities just as or even more economically marginalized than they were before. Although urban-renewal policies and practices have shifted over the decades, leading to important distinctions between midcentury efforts and latter twentieth-century and more contemporary efforts, one recurring pattern is the focus on stimulating redevelopment of underutilized areas located near central business districts.⁸⁹ The result has too often been the displacement of Blacks, particularly the poorest, from central-city neighborhoods with rising land values, and simultaneous abandonment and disinvestment of Black neighborhoods outside the urban core. Because of this history, many Black urban communities are deeply distrustful of any top-down policies and planning solutions that have not empowered their residents or community-based institutions. Seattle's transfers are an important step toward allowing historically disinvested communities to control surplus land. Ultimately, however, even its transfers have been limited in scope thus far, involving only a handful of properties.

The increasing use of community land trusts (CLTs) provides an opportunity for cities to scale up the transfer of vacant lots and available structures, thus leveraging their proprietary powers to more robustly address the lack of infrastructure and essential goods in specific communities. A CLT is a nonprofit entity that acquires and develops land to create affordable housing, commercial space, or green and recreational resources in communities that lack these assets. CLTs effectively create a stewardship relationship in which those that govern the trust—typically a mix of property users, community residents and institutions,

88. Sarah Alvarez & Leah Samuel, *Real Estate Is Hot in Detroit. But Its Top Owner, the City, Isn't Selling.*, BRIDGE MICH. (Aug. 21, 2018), <https://www.bridgemi.com/urban-affairs/real-estate-hot-detroit-its-top-owner-city-isnt-selling> [<https://perma.cc/KKF8-BJXN>].

89. Derek S. Hyra, *Conceptualizing the New Urban Renewal: Comparing the Past to the Present*, 48 URB. AFFS. REV. 498, 502-506 (2012).

public officials, and others – are responsible for keeping the property accessible and affordable for future generations.⁹⁰

Many cities have stepped up support of CLTs in neighborhoods where residents lack affordable housing and other basic goods and may be at risk of displacement. This support includes transfers of vacant lots and underutilized buildings to CLTs, property-tax exemptions for CLTs, first priority in property-tax auctions to CLTs, and funding to rehabilitate acquired properties into affordable housing and other community infrastructure.⁹¹ For example, the Los Angeles County Board of Supervisors unanimously voted to provide fourteen million dollars in seed money for CLTs to purchase properties in the county that have gone into tax default and convert them to affordable housing.⁹² The New York City Council passed legislation that allows the city’s Department of Housing Preservation and Development to enter into agreements with CLTs⁹³ and has allocated millions of dollars to incubate and expand CLTs as a means to develop permanently affordable housing and curb displacement in low-income neighborhoods.⁹⁴ Finally, cities like Albany, Atlanta, and Columbus have created partnerships between land banks and land trusts to “help reverse the trajectory of disinvestment” and to “unlock a pipeline of [vacant, abandoned, and deteriorated] properties” to “support neighborhood stabilization and prevent displacement of vulnerable residents.”⁹⁵

90. John Emmeus Davis, *Origins and Evolution of the Community Land Trust in the United States*, in THE COMMUNITY LAND TRUST READER 3, 24, 38 (John Emmeus Davis ed., 2010).

91. See, e.g., Alex Brown, *Cities Support Community Land Trusts to Protect Affordable Housing*, PEW CHARITABLE TRS. (May 25, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/25/cities-back-community-land-trusts-to-protect-affordable-housing> [<https://perma.cc/NJ9X-6NNE>] (discussing examples from cities and proposals by state lawmakers in California, New York, Vermont, Maryland, Michigan, Pennsylvania, and Illinois); see also David Brand, *Legislation Would Give Nonprofits First Crack at Developing NYC-Owned Land*, CITY LIMITS (Aug. 11, 2022), <https://citylimits.org/2022/08/11/legislation-would-give-nonprofits-first-crack-at-developing-nyc-owned-land> [<https://perma.cc/F8QU-4BER>] (“[The] new bill would prevent[] the city from selling off land to private, for-profit developers unless no qualified nonprofit group makes an offer.”).

92. Brown, *supra* note 91.

93. N.Y.C., N.Y. ADMIN. CODE § 26-2001 (2022).

94. See, e.g., Caroline Spivack, *Community Land Trusts Score Crucial Funds in City Budget*, CURBED (June 18, 2019), <https://ny.curbed.com/2019/6/18/18682466/nyc-community-land-trusts-funding-city-budget> [<https://perma.cc/AR9E-N6T3>]; Roshan Abraham, *NYC Is Fighting for More Community Land Trust Funding*, NEXT CITY (Apr. 21, 2022), <https://nextcity.org/urbanist-news/nyc-is-fighting-for-more-community-land-trust-funding> [<https://perma.cc/GMT9-KV3H>].

95. Kim Graziani, *Land Banks and Community Land Trusts: Partnering to Provide Equitable Housing Opportunities Now and for Future Generations*, CTR. FOR CMTY. PROGRESS 3-4 (Dec. 2021),

Outside of the United States, cities are also treating empty or underutilized land and structures akin to common goods by recognizing the right of city residents to share public infrastructure. Not all of these efforts are directed at the most vulnerable populations and communities, but they do empower cities to utilize surplus public *and* private property to meet the needs of diverse city inhabitants. For example, “meanwhile use” in the United Kingdom and Europe is a form of property tenure or stewardship that allows for temporary use—for weeks, months, or years—of public or private land or buildings that lie dormant.⁹⁶ The practice is supported by changes to land-use regulations, such as merging use categories to make it easier to change between land uses without having to seek permission from the local government, as well as introducing the concept of “part use,” or changing the use class of a portion of a building without needing prior approval.⁹⁷ In cities like London and Paris, meanwhile use enables these properties to be used temporarily as workspaces, artistic spaces, restaurants, community centers, shops, or housing.⁹⁸ Empty storefronts, former police stations, and hospitals are among the properties that have become “meanwhile spaces.”⁹⁹ These spaces are temporarily leased or loaned by local governments or developers to local nonprofits, community groups, arts organizations, start-ups, and charities. They have provided shelter for refugees and homeless persons, work space for remote workers and artists, affordable long-term housing, maker spaces, and community gardens, among other uses.¹⁰⁰ While most of these

<https://communityprogress.org/wp-content/uploads/2021/11/Land-Banks-and-Community-Land-Trusts-LB-CLT-TA-Report.pdf> [<https://perma.cc/5LFB-NQLV>].

96. *Meanwhile Use Leases and Guidance for Landlords*, GOV.UK (Oct. 16, 2013), <https://www.gov.uk/government/collections/meanwhile-use-leases-and-guidance-for-landlords> [<https://perma.cc/BCY2-T2CH>]; Laura Latham, *The Rise of the ‘Meanwhile Space’: How Empty Properties are Finding Second Lives*, *GUARDIAN* (Nov. 28, 2018, 2:30 EST), <https://www.theguardian.com/cities/2018/nov/28/the-rise-of-the-meanwhile-space-how-empty-properties-are-finding-second-lives> [<https://perma.cc/Q5C9-CRVK>].
97. Rebecca Delaney, Dominic Cunliffe & Constance Shaw, *Covid-19 and the “Meanwhile Use” of Unused and Unoccupied Premises*, *MACFARLANES* (Oct. 27, 2020), <https://blog.macfarlanes.com/post/102gix4/covid-19-and-the-meanwhile-use-of-unused-and-unoccupied-premises> [<https://perma.cc/D27H-EZR4>].
98. Latham, *supra* note 98.
99. *Id.*
100. See, e.g., Nicolas Bosetti & Tom Colthorpe, *Meanwhile, in London: Making Use of London’s Empty Spaces*, *CTR. FOR LONDON* (Oct. 3, 2018), <https://www.centreforlondon.org/reader/meanwhile-use-london/introduction> [<https://perma.cc/QQM4-XH77>]; Delaney et al., *supra* note 97.

arrangements are temporary, some have lasted for much longer than originally anticipated.¹⁰¹

A similar policy in some European cities is allowing “civic uses” for dormant property under public ownership. The city of Naples in Italy, for example, passed a series of local resolutions that recognize “urban civic and collective uses” of public buildings.¹⁰² The regulation grants a nonexclusive use right for abandoned and underutilized buildings, as well as land owned or controlled by the city, to communities that are already using and managing these resources informally. It allows the local administration to enter into an agreement with the community of users, termed a Declaration of Civic and Collective Use, that lays out the norms for use, accessibility, and governance of the space.¹⁰³ Naples encourages civic uses such as health-care facilities, centers for migrants and asylum seekers, educational spaces, urban gardens and farms, artistic installations, and recreational spaces.¹⁰⁴ Other European cities, such as Barcelona, have also recently adopted civic-use legislation or policies designed to produce particular public benefits from the use of city-owned buildings, such as environmental sustainability and collective or solidarity economies (e.g., cooperatives).¹⁰⁵

These U.K. and European policies embody an important contrast to the “proprietary” relationship that U.S. cities have with their infrastructure. By recognizing the right to access and use surplus property for defined “civic” uses and on behalf of particular populations, these policies resonate more with the “right to the city” framework that has seeped into a number of non-U.S. legal systems, particularly in Latin America.¹⁰⁶ Instead of protecting the right of cities to

101. Jonathan Berk, “Meanwhile” Use in London and the Lessons for America’s Vacant Spaces, MEDIUM (Jan. 14, 2019), <https://medium.com/opportunity-in-excess-capacity/meanwhile-use-in-london-and-the-lessons-for-america-adfd83fod9c8> [<https://perma.cc/K2H9-RV8D>].

102. SHEILA R. FOSTER & CHRISTIAN IAIONE, CO-CITIES (forthcoming 2022) (manuscript at 135) (on file with author); see also *id.* (manuscript at 135-38) (describing the Naples policy and providing background on its implementation).

103. *Id.* (manuscript at 137); see also *id.* (manuscript at 138) (“The Declarations require that the use and regeneration of these buildings must be directed toward ‘civic profitability,’ and therefore it should not be driven by economic or aesthetic ends. These civic assets can be conceived as part of the civic patrimony of the city of Naples, albeit co-utilized and co-managed by city inhabitants, toward the realization of activities pursuing the general interest.”).

104. *Id.* (manuscript at 138).

105. *Id.* (manuscript at 139).

106. Specifically, the right to the city has been embraced by Brazil’s 2001 City Statute and the Mexico City Charter. Edesio Fernandes, *Implementing the Urban Reform Agenda in Brazil: Possibilities, Challenges, and Lessons*, 22 URB. F. 299, 305 (2011); Abigail Friendly, *The Right to the City: Theory and Practice in Brazil*, 14 PLAN. THEORY & PRAC. 158, 163-66 (2013); David Adler, *The Fragmented City: Mexico City and the Right to the City Charter*, in THE RIGHT TO THE CITY: A VERSO REPORT loc. 89, 89 (2017) (ebook).

exclude and to maintain the property as idle, these policies instead embody the right of the poor and vulnerable “not to be excluded” from the property of the city.¹⁰⁷ More affirmatively, the above-referenced policies recognize a kind of collective claim to the infrastructure of the city out of recognition that the enclosure of these resources, by private or public actors, operates to exclude the poor and the most vulnerable.

Before concluding, it is important to note that there is much to be critical or concerned about if cities were to scale up the sharing of underutilized public (and private) property for the benefit of specific populations and communities. We might wonder whether such property will be put to proper public uses or purposes. There may be concerns about the mechanisms for governance and stewardship over time and the risk that some resources that are taken out of the public realm permanently may be misused or misappropriated for private gain. We might also wonder whether the transfer of resources continues the state’s retreat away from providing essential public goods and services, relying instead on private individual or collective action to supply them. All of these are legitimate concerns, as I have suggested elsewhere in greater depth.¹⁰⁸

These concerns can be addressed in large part through good design of programs and policies that enable cities to share their proprietary infrastructure through the outright transfer or long-term use of public property to designated populations and communities. For example, concerns about the misuse of property in the public domain for excessive private gain can be mitigated with restrictive covenants that run with the land. These covenants can limit uses of the property consistent with the goals of a particular city policy. For instance, if a city wants to catalyze the development of CLTs around a city as part of its affordable-housing plan, it could restrict the use of the land transferred to CLTs for such housing.¹⁰⁹ Similarly, if a city wanted to transfer some of its infrastructure to historically disinvested and marginalized communities as part of a reparative justice project, as Seattle did, they could do so as part of a larger, participatory reparations process in conversation with affected communities. The city of

107. Nicholas Blomley, *Enclosure, Common Right, and the Property of the Poor*, 17 SOC. & LEGAL STUD. 311, 316, 320 (2008); see also *id.* at 316 (noting that “[w]e can find many examples in cities across the world where state or private actors use the power to exclude, which is central to private property, to displace, evict and remove the poor”).

108. See generally Foster & Iaione, *supra* note 102, at 157-64, 169-73, 204 (raising and addressing these and other concerns across several contexts, particularly with regard to when cities facilitate and support the cocreation of different kinds of resources utilizing city buildings and land).

109. It can also require that CLTs adopt bylaws containing principles of land stewardship consistent with the purposes for which the land is being dedicated. Such principles can include ensuring lasting affordability, allowing limited transfers of land between users, maintaining community control, and ensuring robust representation on the trust’s governance board.

Evanston, Illinois is currently working to determine what such a process might look like, led by a city commission that is holding town halls to solicit community feedback.¹¹⁰ One result of the first few town halls was the city council's passage of a reparations resolution, including a reparations fund and a housing initiative, as a first step in the development of a more expansive program.¹¹¹ This level of transparency and deliberation is important for accountability to public values and purposes when repurposing city infrastructure.

In many of the examples cited above, cities are actively sharing property and resources under their control with populations and communities that lack adequate goods (and services) that support health, quality of life, economic growth, and safety. Instead of retreating from the provisions of these goods, cities are investing in and often funding the creation (or cocreation) of these goods. They are doing so by centering the needs of those often least represented and least empowered in infrastructure and development decisions. We might therefore understand the city's role as an enabler or facilitator of significant infrastructure investment in communities not only as spaces for civic engagement, but also as productive units of inclusive and sustainable economic development.¹¹² In this way, the enabling state represents a *resurgence* of the state after its decline into neoliberalism, a period characterized by a strong reliance on the private sector for the provision of public goods and a stark rise in economic inequality. Instead, the enabling state is *the* essential actor in sharing resources and infrastructure with its residents, facilitating a good life for *all* communities.

CONCLUSION

As I have argued in this Essay, one of the things the pandemic has taught us is that cities can and do engage in different kinds of infrastructure sharing at a scale that is transformative for urban inhabitants. They do so both in their role as trustees of public spaces and parks that are largely kept in the public realm, and in their proprietary role with land and buildings that they can sell or transfer

110. *Evanston Local Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> [<https://perma.cc/X9AE-G4AM>] (“Attendees identified five priority categories for action: Housing[,] Economic development[,] Education[,] Finances[,] [and] History/Culture.”).

111. *Id.*

112. I have referred in previous work to the “state enabling” function of cities that invest in collective efforts of residents, along with various public and private actors, and transfers resources to support those efforts (such as available land and funding), as well as sometimes providing technical support to increase the capacity of the actors involved. *See generally* Foster, *supra* note 72 (articulating, delimiting, and discussing the “enabling” role of the state in coordinating private actors to govern themselves).

freely, much as a private property owner would. We have also seen that the impetus for infrastructure sharing includes responding to exogenous shocks, such as a significant climate event or pandemic, as well as addressing endemic problems of housing insecurity and institutionalized racism. Infrastructure sharing can transform neighborhoods, communities, vulnerable populations, and even entire cities.

These pandemic-related programs highlight the capacity of cities to create public benefits and goods out of existing urban infrastructure in order to meet the needs of their most vulnerable residents. Adequate infrastructure is critical to support health, safety, quality of life, and economic opportunity. However, despite the examples of infrastructure sharing we saw during the pandemic, these efforts did not fully reach communities most in need, and too many remain infrastructure deserts. Of course, there is no quick fix that will address the multiple deficiencies in these communities. However, scaling up the forms of infrastructure sharing that target specific populations, as well as facilitating the creation — and cocreation — of essential goods and services, promises to be a powerful intervention in persistent inequalities that plague urban environments both here and abroad.

Scott K. Ginsburg Professor of Urban Law and Policy, Professor of Public Policy, Georgetown University. Many thanks to Taylor Hall-Debnam for research assistance and to Nestor Davidson and Elena De Nictolis for their thoughtful feedback on earlier drafts. I extend deep gratitude to the terrific editors of this online Collection, whose feedback made this a much better piece.