

## Public Participation\*: Planning's Conundrum

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*“Who Participates in Local Government? Evidence from Meeting Minutes,”* a forthcoming article in *Perspectives on Politics* by Katherine Levine Einstein, Maxwell Palmer, and David M. Glick has been making waves in neighborhood zoning debates, and was the focus of a recent forum held in Boston by the Citizens’ Housing and Planning Association. The authors comb through reams of publicly available meeting minutes from 97 towns and cities in the Boston metro between 2015–2017, focusing on planning and zoning board hearings on new housing. What they find is striking: nearly two-thirds of meeting attendees opposed new housing, even in communities that have shown high support for statewide affordable housing laws. The authors connect this to the fact that the attendees of these meetings were not representative of the communities in which these meetings took place, as attendees were disproportionately older, male, and/or homeowners. While these public meetings are important in theory, if in practice they are attracting a subset of communities that do not represent those communities and perpetuate affordability issues and political inequality, their structure, timing, and method should be reassessed.<sup>1</sup>

Public participation in the land use planning and regulatory contexts, while outwardly loved by most participants in those fields, is often secretly loathed. Although it evokes images of exercising the cherished constitutional rights to free speech and petitioning the government for redress of grievances,<sup>2</sup> public participation has been vilified in the planning field for its capacity to promote insularity, resistance to change, and elitism.<sup>3</sup> This article will examine the many faces

of public participation in the land use planning and regulatory processes, with the underlying premise that such participation is simply a tool held by interested persons or entities with no *inherent* moral status. Rather, its status and limitations are governed by the political, economic, and social circumstances of its use. In conducting this examination, we will use the example of one state in particular—Oregon—to illustrate both the democratic ideal of its use and the occasional reality of its abuse as an obstacle to needed change.

## **I. Introduction**

While it is not clear that members of the public have an individualized constitutional right to participate in the legislative process,<sup>4</sup> the Due Process Clause of the U.S. Constitution has been interpreted to require an opportunity for individuals to be heard when their interests are affected by the application of legislation in individual circumstances.<sup>5</sup> However, while individuals have a right to participate in proceedings that affect their interests, that participation does not necessarily translate into a right to challenge those proceedings in court. The public's ability to challenge local land use proceedings is limited by a doctrine commonly known as "standing,"<sup>6</sup> which is often governed by state statutory law and which this article does not address.<sup>7</sup>

Assuming that the Constitution guarantees rights to notice and some opportunity to be heard, the contours of public participation in local land use decisions is at best unclear, absent statutory direction. There is no United States Supreme Court decision directly on point in this area of law, and most states have adopted statutes that provide for hearings with varying degrees of public participation.<sup>8</sup> Those statutes are usually vague, however, leaving much room for local governments to prescribe the specifics by local ordinance. This is important because, beyond notice and some opportunity to be heard, it is up to state and local elected officials to determine

the substance and parameters of the public's right to participate. We now turn to the idealized version of public participation, followed by a more skeptical view, and finally to some ideas for how the skeptics' concerns might be met.

## **II. The Idealization of Public Participation**

The American model of land use planning, though diverse in form, usually includes a local legislative body, such as a city council or board of county commissioners, which adopts land use regulations and may share planning responsibility with an appointed planning commission or similar body.<sup>9</sup> Typical state enabling legislation does not distinguish between legislative, or "policy-making," decisions and quasi-judicial, or "policy application," decisions. Neither does enabling legislation address such areas as the content of the right to be heard, evidentiary issues, or conflicts of interest among decision-makers. One leading case from Oregon has determined that, in procedures regarding small-tract zone changes, affected individuals possess certain procedural rights independent of statutory grants.<sup>10</sup> In setting these quasi-judicial proceedings apart from other proceedings, the Oregon Supreme Court has said that:

[T]he approach we adopt contains no absolute standards or mechanical tests. We believe, however, that . . . [p]arties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter i.e., having had no pre-hearing or ex parte contacts concerning the question at issue and to a record made and adequate findings executed.<sup>11</sup>

This distinction between quasi-judicial land use proceedings and legislative proceedings is profound, and has resonated in some other states.<sup>12</sup> The result has been to require local quasi-judicial hearings to be more like—but not the same as—adjudicative hearings under the various

state administrative procedures acts. In Oregon, these requirements have been codified so that notice and hearings are now standard practice on a statewide basis.<sup>13</sup> The tradeoff for these procedural protections is a requirement that the parties must generally raise all issues and arguments at the local level or risk that they will be considered waived on appeal.<sup>14</sup> Oregon law also provides detailed requirements for permit hearings at the county and city levels, which are generally co-extensive with those for quasi-judicial proceedings.<sup>15</sup>

Even in states where the foregoing view predominates, however, that fact alone does not necessarily move the needle very much—notice and an opportunity to be heard are generally required anyway. And while the right to present evidence to an impartial tribunal is indeed a significant change, the findings requirement is more often the subject of further administrative or judicial review. This presents an interesting question. If most of these requirements were generally already present, why would a state or local government bother to adopt them legislatively?

Much of planning literature is framed so as to promote public participation, emphasizing the need to enhance public knowledge of the planning process in order to make that participation more effective.<sup>16</sup> In an influential article, Sherry Arnstein has described a “Ladder of Participation” with steps ranging from “manipulation” up to “citizen control,” implying that the top of the ladder is most desirable.<sup>17</sup> Another influential leader was Paul Davidoff who, with his collaborator and wife, Linda Stone Davidoff, represented “advocacy planning” as a route to greater public participation and especially as a means to empower underrepresented segments of society.<sup>18</sup> And who can forget Jane Jacobs, the humbler of those planning, building, and engineering elites represented by Robert Moses, who advocated a pragmatic view of how cities work?<sup>19</sup> In addition to providing a voice and political power to the marginalized, public

participation often appeals to democratic ideals—the Norman Rockwell portrayal of Freedom of Speech.<sup>20</sup> This resonates well with most Americans and is reflected in Oregon’s land use system<sup>21</sup> which, while centralized in terms of policy, holds out as its first statewide land use planning standard—or “Goal”—an effective program for “Citizen Involvement.”<sup>22</sup> This Goal begins with the mission statement: “To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.”<sup>23</sup> The Goal’s components include:

1. Providing widespread citizen involvement;
2. Providing effective two-way communications with citizens;
3. Providing opportunities for citizens to be involved in all phases of the planning process;
4. Assuring technical information is available in an understandable form;
5. Providing feedback mechanisms; and
6. Providing financial support for citizen involvement efforts.<sup>24</sup>

The original 1973 legislation that provided for this Goal also required the establishment and maintenance of a State Citizen Involvement Advisory Committee to advise the newly created planning agency, the Land Conservation and Development Commission (LCDC), on public participation matters.<sup>25</sup> Thus, an inclusive public participation process was envisioned.

While this Goal is only the first of nineteen binding standards for local government planning and land use regulation, it is fair to say that it has been a consistent underachiever, and that its enforcement has historically been weak.<sup>26</sup> Oregon law does require every city and county to periodically submit their program for public participation to the state for review, and that those programs provide “a citizen advisory committee or committees broadly representative of

geographic areas and of interests relating to land uses and land use decisions.”<sup>27</sup> Nonetheless, compliance with this requirement is virtually non-existent, and such committees are effectively relegated to a talking shop.<sup>28</sup>

Another positive aspect of public participation in Oregon is the statutory requirement that “recognized” neighborhood associations receive notice of various types of land use actions.<sup>29</sup> Moreover, these associations are automatically granted standing to appeal those actions—and the appeal fees may be modified or waived if the local government so provides.<sup>30</sup>

To put Oregon’s program into perspective, a comparison of public participation in two American cities is worthy of discussion. The Mayor of Los Angeles, California, has introduced an initiative to empower neighborhoods to foster public participation in their service delivery and planning processes.<sup>31</sup> New York City has gone even further, beginning with a 1975 Charter Amendment which enabled various local community boards to review, but not approve, certain land use actions.<sup>32</sup> Since then, additional charter amendments have been proposed to give these community boards even more power and to otherwise reform the process.<sup>33</sup>

In sum, there is no detailed or national uniform process for public participation. Although notice and an opportunity to be heard are standard practices and often thought of as constitutional rights, it has often been left to state and local governments to provide the content of those rights.<sup>34</sup>

### **III. Public Participation Questioned**

Robert Fischel has advanced the notion of the “homevoter” to describe how the economic interests of American homeowners have influenced their political and social attitudes towards land use and other aspects of local politics.<sup>35</sup> Fischel explains why local governments, funded

largely through property taxes, provide public services such as schools and land use planning more efficiently than other entities and are more carefully monitored by their citizens:

The reason that local governments perform better is that the benefits and costs of local decision-making are reflected in the value of property in the jurisdiction.

The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government. Homeowners are acutely aware that local amenities, public services, and taxes affect (“are capitalized in”) the value of the largest single asset they own. As a result, they pay much closer attention to such policies at the local level than they would at the state or national level. They balance the benefits of local policies against the costs when the policies affect the value of their home, and will tend to choose those policies that preserve or increase the value of their homes.<sup>36</sup>

In addition, Fischel suggests that private economic interests, while far from being determinative, play a significant role in local politics—especially the allocation of different uses in comprehensive plans and land use regulations.<sup>37</sup> Indeed, the popularity of private streets and gated communities attests to the strength of these interests.<sup>38</sup> The upshot of this theory is that such economic interests support resistance to change and NIMBYism, particularly with respect to affordable housing proposals. Addressing the implications of the homevoter theory, Professor Kenneth Stahl suggests that local—as opposed to federal—notions of citizenship are more market-oriented and consumerist, and threaten to support the reinvigoration of ethno-nationalism.<sup>39</sup>

As with many land use phenomena, these issues have played out first in California, where the left-leaning state legislature recently rejected several bills geared towards increasing the housing supply, bowing to objections such as the deprivation of local land use control by democratically elected city and county officials.<sup>40</sup> This battle appears to pit an organization called “Livable California,” comprised of a powerful segment of older, relatively liberal, home-owning Californians who view themselves as stewards of the things they love, against those they characterize as deluded, entitled Millennials whose political leaders are bankrolled by the real estate industry in an effort to increase density.<sup>41</sup>

In the midst of this conflict, the City of Portland, Oregon, has questioned the utility of its “neighborhood network” program, which allows ninety-four recognized neighborhood associations to provide direct input on city programs and automatically grants them both standing and the ability to appeal initial decisions to other city bodies without paying a fee.<sup>42</sup> While some have proposed reforms to this system to ensure the inclusion of non-geographically based communities, such as black business groups and LBGTQ+ associations, those proposals have proven controversial and it is not clear what lies ahead.<sup>43</sup> However these disputes are resolved, they will not be the last of their kind around the country. However as discussed below, addressing concerns over equity in planning and other aspects of community life need not come at the expense of public participation.<sup>44</sup>

Others in Oregon have questioned the value of encouraging public participation in land use appeals.<sup>45</sup> Under Oregon’s land use system, anyone who appears in a local land use proceeding either orally or in writing is automatically granted standing to appeal the decision.<sup>46</sup> Almost all of those appeals are heard in Oregon’s Land Use Board of Appeals, rather than in a trial court.<sup>47</sup> For internal appeals, such as when decisions of the planning commission are



appealed to a city council, state statutes allow local governments to set “reasonable” appeal fees and to require a non-refundable payment to cover the legal costs associated with reviewing those appeals.<sup>48</sup> Unlike the City of Portland, some cities have no automatic fee waiver for neighborhood associations or other interest groups, but may waive fees on a case-by-case basis.<sup>49</sup> The impact of these waivers on effective public participation is profound; on the other hand, even internal appeals are costly, and such subsidies should therefore be scrutinized. In addition, there are areas in which some public participation issues have been raised but never definitively resolved by state law—such as the existence and composition of local “citizen involvement” committees, the effect of public meeting and public records laws, appeal fee waivers, and the like. Thus, we have the public participation conundrum—how to accommodate the public’s interest in meaningful participation and local governments’ interest in efficient and fiscally responsible decision-making.

#### **IV. What Is To Be Done?**

As an ideal, public participation in local government is desirable. It gives the public a stake in the enterprise of governance and provides, among other things, an incubator for future civic leaders, a place where policy proposals can be debated and refined, and a forum that is not controlled by the government of the day. On the other hand, there is credence to the charge that existing public participation systems are too traditional and elitist—too dominated by older white persons, too oriented toward the existing arrangement of land uses, and too resistant to change—to accommodate the needs of everyone. While there may be little *overt* discrimination against those who are younger, are darker, or maintain less traditional lifestyles and orientations, the centripetal forces that dominate existing public participatory organizations make it difficult to accommodate change.

The following principles might facilitate the accommodation of that change, both in Oregon and elsewhere:

1. Give Real Authority to Public Participation Supervisory Authorities – If an entity is serious about public participation, it must establish an authority to supervise those activities, either at the state or local level, and ensure diversity in the experiences, ages, colors, and lifestyles of the participants. The current Oregon State Citizen Involvement Committee lacks both power and respect, and has not given content to the state’s public participation program in its nearly fifty years in existence. Such committees should be given the ability to review local public participation programs, and local committees should be created to supervise approved local programs and oversee their implementation. If elected or appointed officials do not wish to delegate authority to such committees, they should at least allow them to review disputes and present their recommend dispositions.
2. Legislate Limits to Appeal Fees at the Local Level – While local governments should not be forced to subsidize land use litigation, democracy requires that certain government activities be accessible notwithstanding the financial capabilities of members of the public. In Oregon, both county and city enabling legislation provides that, where transcript fees are more than \$500, the local government must share the excess costs with the appellant and, if the appellant prevails, refund the fee entirely.<sup>50</sup> Similar provisions can be patterned after these statutes to ensure that land use appellants have “skin in the game” and that appeal fees do not overly restrict public participation.

3. Act Beyond the Aspirational – If governments are to act transparently and comport with democratic ideals, then public participation must be more than window dressing. For example, there should be statutory requirements for both quasi-judicial and legislative proceedings.<sup>51</sup> There must also be operational contours that require the government of the day to defer, at least with respect to notice and public hearings, to independent agencies, such as ethics and public participation bodies, so as to imbue local proceedings with an element of integrity.

By implementing policies such as these, public agencies may be entitled to the confidence of their constituents. In most places in the United States, the cynicism directed at local land use processes today is an attestation to the lack of that confidence.

## Appendix

Oregon's Statewide Planning Goals & Guidelines – GOAL 1: CITIZEN INVOLVEMENT

**(OAR 660-015-0000(1))**

**To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.**

The governing body charged with preparing and adopting a comprehensive plan shall adopt and publicize a program for citizen involvement that clearly defines the procedures by which the general public will be involved in the on-going land-use planning process.

The citizen involvement program shall be appropriate to the scale of the planning effort. The program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.

Federal, state and regional agencies and special-purpose districts shall coordinate their planning efforts with the affected governing bodies and make use of existing local citizen involvement programs established by counties and cities.

The citizen involvement program shall incorporate the following components:

**1. Citizen Involvement -- To provide for widespread citizen involvement.**

The citizen involvement program shall involve a cross-section of affected citizens in all phases of the planning process. As a component, the program for citizen involvement shall include an officially recognized committee for citizen involvement (CCI) broadly representative of

geographic areas and interests related to land use and land- use decisions. Committee members shall be selected by an open, well- publicized public process.

The committee for citizen involvement shall be responsible for assisting the governing body with the development of a program that promotes and enhances citizen involvement in land-use planning, assisting in the implementation of the citizen involvement program, and evaluating the process being used for citizen involvement.

If the governing body wishes to assume the responsibility for, development as well as adoption and implementation of the citizen involvement program or to assign such responsibilities to a planning commission, a letter shall be submitted to the Land Conservation and Development Commission for the state Citizen Involvement Advisory Committee's review and recommendation stating the rationale for selecting this option, as well as indicating the mechanism to be used for an evaluation of the citizen involvement program. If the planning commission is to be used in lieu of an independent CCI, its members shall be selected by an open, well-publicized public process.

**2. Communication -- To assure effective two-way communication with citizens.**

Mechanisms shall be established which provide for effective communication between citizens and elected and appointed officials.

**3. Citizen Influence -- To provide the opportunity for citizens to be involved in all phases of the planning process.**

Citizens shall have the opportunity to be involved in the phases of the planning process as set forth and defined in the goals and guidelines for Land Use Planning, including Preparation of Plans and Implementation Measures, Plan Content, Plan Adoption, Minor Changes and Major Revisions in the Plan, and Implementation Measures.

**4. Technical Information -- To assure that technical information is available in an understandable form.**

Information necessary to reach policy decisions shall be available in a simplified, understandable form. Assistance shall be provided to interpret and effectively use technical information. A copy of all technical information shall be available at a local public library or other location open to the public.

**5. Feedback Mechanisms -- To assure that citizens will receive a response from policy-makers.**

Recommendations resulting from the citizen involvement program shall be retained and made available for public assessment. Citizens who have participated in this program shall receive a response from policy-makers. The rationale used to reach land-use policy decisions shall be available in the form of a written record.

**6. Financial Support -- To insure funding for the citizen involvement program.**

Adequate human, financial, and informational resources shall be allocated for the citizen involvement program. These allocations shall be an integral component of the planning budget. The governing body shall be responsible for obtaining and providing these resources.

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\* While some of the sources cited herein refer to “citizen” participation or involvement, citizenship is in reality not a prerequisite for engaging in these activities. Hence, the term “public” participation is used.

\*\* B.A., St. John’s University (N.Y.), 1966; J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham, 1998; Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978.

<sup>1</sup> David Luberoff, *What We’ve Been Reading, Watching, and Listening To*, JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV. (Dec. 26, 2018), <https://www.jchs.harvard.edu/blog/what-weve-been-reading-watching-and-listening-to/>. See also Richard Florida, *NIMBYS Dominate Local Zoning Meetings*, CITYLAB (Sept. 6, 2018), <https://www.citylab.com/life/2018/09/nimbys-dominate-local-zoning-meetings/569440/>.

<sup>2</sup> In 1943, Norman Rockwell (1894–1978), the pictorial lyricist of Americana, painted images of the Four Freedoms that President Roosevelt posed as reasons for winning World War II. One of these paintings depicts a workingman speaking at a public assembly, and is commonly associated with public participation in America. See NAT’L ENDOWMENT FOR THE HUMANITIES, *PICTURING AMERICA: TEACHERS RESOURCE BOOK 82* (2008), [https://picturingamerica.neh.gov/downloads/pdfs/Resource\\_Guide/English/English\\_PA\\_TeachersGuide.pdf](https://picturingamerica.neh.gov/downloads/pdfs/Resource_Guide/English/English_PA_TeachersGuide.pdf). In addition to exercising these rights, pragmatic reasons for supporting public participation in local planning efforts have also been advanced, such as to provide a “reality check” on professional staff in terms of policy-making. See

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Charles Edward Hillman, *Citizen Participation in Urban Policy* (June 1974) (unpublished B.S. thesis, Massachusetts Institute of Technology), <https://dspace.mit.edu/bitstream/handle/1721.1/67264/25980043-MIT.pdf?sequence=2&isAllowed=y>.

<sup>3</sup> See Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217 (2018) (contrasting suburban NIMBYism, which is often concerned with impacts on property values, with urban NIMBYism, which is often led by renters who are concerned about the impacts of change on continued tenure and rental costs, and suggesting that the face of NIMBYism changes with the circumstances). Professor Been is now a Deputy Mayor of New York City, dealing with housing and related matters. See Press Release, N.Y.C., Mayor de Blasio Appoints Vicki Been as New Deputy Mayor for Housing and Economic Development (Apr. 4, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/180-19/mayor-de-blasio-appoints-vicki-been-new-deputy-mayor-housing-economic-development>.

<sup>4</sup> For approximately fifty years, between its decisions in *Mugler v. Kansas*, 123 U.S. 623 (1887), and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the United States Supreme Court held that the Due Process Clause required it to review the substance of legislative decisions to determine whether they advanced the “public health, safety, morals, or general welfare,” and whether they were “arbitrary [or] unreasonable.” See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Court’s decision in *Carolene Products* limited that review to questions involving certain specific constitutional provisions, restrictions on the political process, and government actions that adversely affect the rights of “discrete and insular minorities.” *Carolene Products*, 304 U.S. at 252 n.4.

<sup>5</sup> See, e.g., *Londoner v. City & Cty. of Denver*, 210 U.S. 373 (1908); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). In *Londoner*, the plaintiff challenged a special assessment that was levied to enable the paving of a street, alleging that the lack of a hearing on the application of the special assessment to them in particular contravened the Due Process Clause. See *Londoner*, 210 U.S. at 380. A majority of the Supreme Court agreed, explaining:

But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. . . .

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.

*Id.* at 385–86. Later, in *Bi-Metallic*, the Court refused to extend the requirement for an individualized hearing to situations when an entire class was equally affected, such as by a general increase in taxes:

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society -- by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been, by the state’s doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power. . . . There must be a limit to individual argument in such matters if government is to go on.

*Bi-Metallic*, 239 U.S. at 445 (citing *Londoner*, 210 U.S. at 385). See also *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

<sup>6</sup> Standing in federal court depends on various statutory requirements as well as the “case or controversy” provision of the U.S. Constitution. See *Exploring Constitutional Conflicts: Constitutional Limitations on the Judicial Power*, UNIV. OF MO. AT KANSAS CITY, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/caseorcontroversy.htm> (last visited Aug. 17, 2019). However, it should be noted that tension exists between the Constitution’s “case or

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controversy” requirement and Congressional efforts to broaden standing in certain situations. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U.L. REV. 169 (2012).

<sup>7</sup> State constitutions and courts are much more diverse, and range from merely recognizing the interests of land use applicants themselves, and perhaps adjacent property owners, to broadly recognizing anyone who might have an interest in the outcome of a proceeding. *See* DANIEL R. MANDELKER, *LAND USE LAW* § 8.02 (5th ed. 2014); MODEL STATUTE ON LOCAL LAND USE PROCESS (AM. BAR ASS’N 2008), [https://www.americanbar.org/content/dam/aba/administrative/state\\_local\\_government/report\\_to\\_the\\_house\\_of\\_delegates.pdf](https://www.americanbar.org/content/dam/aba/administrative/state_local_government/report_to_the_house_of_delegates.pdf).

<sup>8</sup> *See, e.g.*, *Harz v. Borough of Spring Lake*, 191 A.3d 547 (N.J. 2018) (construing the state’s Municipal Land Use Law (MLUL) to require a hearing on a neighbor’s challenge to a zoning permit for a dwelling that allegedly exceeded dimensional requirements, but finding no constitutional violation since the neighbor did not avail herself of that opportunity).

<sup>9</sup> This model was initially set forth in the Standard State Zoning Enabling Act, which approximately 75% of the states have adopted in some form. *See* U.S. DEP’T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* (rev. ed. 1926), [https://planning-org-uploaded-media.s3.amazonaws.com/legacy\\_resources/growingsmart/pdf/SZEnablingAct1926.pdf](https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf). About 50% of the states have also adopted the Standard City Planning Enabling Act, which provides for the creation of a planning body primarily concerned with municipal infrastructure and facilities. *See* U.S. DEP’T OF COMMERCE, *A STANDARD CITY PLANNING ENABLING ACT* (1928), [https://planning-org-uploaded-media.s3.amazonaws.com/legacy\\_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf](https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf). Some states have also enabled the creation of Zoning Boards of Appeal to address certain aspects of the administration of local zoning ordinances. *See, e.g.*, N.Y. DEP’T OF STATE, *ZONING BOARD OF APPEALS OVERVIEW*, <http://www.ongov.net/planning/documents/A.ZBAOverview.pdf> (last visited Aug. 25, 2019); MASS GEN. LAWS ch. 40A, § 12; John W. Reys, *Discretionary Powers of the Board of Zoning Appeals*, 20 L. & CONTEMP. PROBS. 280 (1955). The first systematic revision of the Standard Acts recommended that “qualified” neighborhood organizations be given a statutory right to appear and be heard in adjudicative land use proceedings and to appeal decisions. MODEL LAND DEV. CODE §§ 2-307, 2-304(2), (5)(c) (AM. LAW INST. 1976).

<sup>10</sup> *See* *Fasano v. Bd. of Cty. Comm’rs*, 507 P.2d 23 (Or. 1973).

<sup>11</sup> *Id.* at 30 (citing Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972)). While the Oregon Supreme Court did not state the source of these requirements, a concurring opinion from the Court Appeals characterized them as a product of “due process considerations.” *West v. City of Astoria*, 524 P.2d 1216, 1223 (1974). Because there is no Due Process Clause in the Oregon Constitution, this must have been a reference to the U.S. Constitution. *See* Hans A. Linde, *Without “Due Process”*: *Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1969). Regardless, however, the origin of these rights has been moot for nearly fifty years, as the Oregon Legislature has enacted detailed procedural requirements for land use hearings before cities and counties. *See* OR. REV. STAT. §§ 215.402–438, 227.160–186.

<sup>12</sup> *See* Edward J. Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAW. 50 (1974); Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449 (2002).

<sup>13</sup> *See* OR. REV. STAT. § 197.763. Indeed, it may be argued that Oregon is prone to providing individual notice of general regulatory changes—something which is not constitutionally required—with wording that is designed to evoke fear and opposition, even when those changes are required by law. For example, a 1999 referral required that such notices inform property owners when a proposed plan amendment or land use regulation “will affect the permissible uses of [their] property and may reduce [their property’s] value.” 1999 Or. Laws 1. Though this referral was eventually modified, similar, but less alarming, individual notice requirements still apply to city, county, and regional governments. *See* OR. REV. STAT. §§ 215.503, 227.186, 268.393.

<sup>14</sup> *See id.* § 197.763(1). This “raise it or waive it” requirement also applies to applicants who wish to challenge the constitutionality of conditions or approval. *See id.* § 197.796(3)(a). In both cases, local governments must inform parties of this requirements at the hearing. *See id.* §§ 197.763(5)(c), .796(3)(b).

<sup>15</sup> *See id.* §§ 215.402–438, 227.160–186.

<sup>16</sup> *See, e.g.*, ROBERT E. HOWELL ET AL., *W. RURAL DEV. CTR., DESIGNING A CITIZEN INVOLVEMENT PROGRAM: A GUIDEBOOK FOR INVOLVING CITIZENS IN THE RESOLUTION OF ENVIRONMENTAL ISSUES* (1987), [https://ir.library.oregonstate.edu/concern/technical\\_reports/qn59q4741](https://ir.library.oregonstate.edu/concern/technical_reports/qn59q4741); STEVEN H. GRABOW ET AL., *UNIV. OF WIS.-EXTENSION, COMPREHENSIVE PLANNING AND CITIZEN PARTICIPATION* (2006),



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<https://jefferson.extension.wisc.edu/files/2010/09/CPCPfinal06.pdf>. Reflecting this inclusive view of the role of public participation, a 2010 Charter amendment requires the City of New Orleans to:

[E]stablish by ordinance a system for organized and effective neighborhood participation in land use decisions and other issues that affect quality of life. It shall provide for timely notification to a neighborhood of any proposed Land Use Action affecting the neighborhood; it shall also provide the opportunity for meaningful neighborhood review of and comment on such proposals. In addition, it shall provide the opportunity for meaningful neighborhood participation in the formulation of the Master Plan or any amendment thereto.

NEW ORLEANS, LA., HOME RULE CHARTER § 5-411.

<sup>17</sup> Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (1969). These steps include manipulation, therapy, information, consultation, placation, partnership, delegation, and citizen control, and they represent the struggle of underrepresented people of color to take control of their communities and the resources therein. *See id.* *See also* Kimberly Farnham, *The Ladder of Citizen Participation*, CATCOMM, <https://catcomm.org/ladder-participation/> (last visited Aug. 18, 2019); Andrea Cornwall, *Unpacking ‘Participation’: Models, Meanings and Practice*, 43 COMMUNITY DEV. J. 269 (2008).

<sup>18</sup> *See* Marcia Marker Feld & Patricia Baron Pollak, *Advocacy Planning*, 1 ENCYCLOPEDIA OF URBAN STUDIES 3–6 (Ray Hutchison ed. 2010), [https://pauldavidoff.com/wp-content/uploads/2016/06/AboutPD\\_Advocacyplanning\\_MarkerandBaron\\_2010.pdf](https://pauldavidoff.com/wp-content/uploads/2016/06/AboutPD_Advocacyplanning_MarkerandBaron_2010.pdf). Davidoff rejected the notion that planners should be neutral on matters of policy and encouraged them to agitate for political and social ideals. *See* Paul Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331 (1965). Davidoff’s ends, if not his means, are reminiscent of those of Saul Alinsky, an organizer of marginalized people who saw planning activism as a quest for power. *See* SAUL ALINSKI, *RULES FOR RADICALS* (1971).

<sup>19</sup> *See* JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

<sup>20</sup> *See supra* note 2. Democratic principles are often cited or assumed as the basis for public participation. *See, e.g.*, Marilyn Gittell, *Democracy and Citizen Participation in the U.S.: The Role of Local Government* (1998) (unpublished manuscript), <https://assets.aspeninstitute.org/content/uploads/files/content/upload/4Gittell.pdf> (last visited Aug. 18, 2019). Others have suggested that there are pragmatic, as well as political, reasons to favor broad public participation. *See* Bob Parker, *Planning Analysis: The Theory of Citizen Participation*, UNIV. OF OR. (Oct. 21, 2003), <https://pages.uoregon.edu/rgp/PPPM613/class10theory.htm>.

<sup>21</sup> *See* Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357 (2012).

<sup>22</sup> OR. ADMIN. R. 660-015-0000(1). Oregon law requires the state planning agency to “[i]nsure widespread citizen involvement and input in all phases of the process” and to establish a State Citizen Involvement Advisory Committee to advise on effective public participation. OR. REV. STAT. §§ 197.040(2)(f), .160. However, the latter statutory charge has been a dead letter from its inception; the Committee has no power and has been largely ineffective. The most lasting success in this regard was the vigorous public hearing process that accompanied the adoption of the original statewide planning Goals between 1974 and 1977, pursuant to OR. REV. STAT. § 197.235. However, even during that process, some expressed concerns that neighborhood groups would use the planning system as a “negative force,” especially with regard to housing. Andree Tremoulet & Sy Adler, *An Unlikely Alliance: How Oregon Addressed Exclusionary Zoning in the 1970s 8–9* (2010) (unpublished manuscript), <https://sightline-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Tremoulet-Adler-Unlikely-Alliance-2010.pdf>.

<sup>23</sup> OR. DEP’T OF LAND CONSERVATION & DEV., GOAL 1: CITIZEN INVOLVEMENT 1, <https://www.oregon.gov/lcd/OP/Documents/goal01.pdf> (last visited Aug. 18, 2019). The Goal goes on to require that local governments “adopt and publicize a program . . . that clearly defines the procedures by which the general public will be involved in the on-going land-use planning process,” that is “appropriate to the scale of the planning effort[,]” that “provide[s] for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues[,]” and that is coordinated with the planning efforts of other public agencies. *Id.* This Goal, and its non-binding implementing guidelines, are appended to this article.

<sup>24</sup> *Id.* at 1–2.

<sup>25</sup> *See* OR. REV. STAT. § 197.160. The Committee is charged with reviewing “the proposed programs submitted by each city and county and report to the commission whether or not the proposed program adequately provides for public participation in the planning process, and, if it does not so provide, in what respects it is inadequate.” *Id.* § 197.160(1)(c). However, the Committee’s role is merely advisory in nature, and it “has no express or implied authority over any local government or state agency.” *Id.* § 197.160(2).

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<sup>26</sup> No appellate decision has turned on compliance with the Citizen Involvement Goal. In one case in which public participation was raised as a substantive objection, Oregon courts rejected the argument that the Goal should provide a basis to overcome statutory filing deadlines, concluding that such general expressions of policy do not trump statutory law. *See Oakleigh-McClure Neighbors v. City of Eugene*, 344 P.3d 503, 508 n.11 (Or. Ct. App. 2015). Nor has any case from the Oregon Land Use Board of Appeals (LUBA), an administrative agency created to adjudicate appeals of most local government land use decisions, turned exclusively on the Goal’s application. LUBA requires appellants to show that a local government has failed to comply with its approved Citizen Involvement Program in a manner that prejudices their interests; a threshold that, thus far, no case has met. *See, e.g., Graser-Lindsey v. City of Oregon City*, 74 Or. LUBA 488 (2016); *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or. LUBA 263 (1998); *Churchill v. Tillamook County*, 29 Or. LUBA 68 (1995). In only one administrative law case has the Land Conservation and Development Condition remanded a city action for violation of the Citizen Involvement Goal. *See Elkton Citizen Advisory Committee v. City of Elkton*, 3 Or. LCDC 107 (1979). In that case, the city’s decision—which was made without notice or a public hearing—to dissolve an existing Citizen Advisory Committee comprised of residents both within the city’s existing boundaries and its proposed urban growth boundary, and to replace it with a new committee comprised only of residents within the city’s present boundary, violated the Goal’s requirements for a transparent process and a committee that is broadly representative of those affected by the city’s plan and land use regulations. *See id.* at 111. Indeed, more than twenty years ago, the author himself described the Goal as being “relatively ineffective and meaningless.” Edward J. Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 824 (1998). The situation has not changed.

<sup>27</sup> OR. REV. STAT. § 197.160(1)(b).

<sup>28</sup> One reason for this result is the state’s unwillingness to impose financial obligations on local governments. *See, e.g., OR. CONST.* art. XI, § 15. Another is the longstanding tradition of “home rule” self-governance. *See id.* art. VI, § 10, art. XI, §§ 2, 14. In addition, due to several property tax limitations adopted by initiative, the state has assumed the bulk of school financing obligations. *See id.* art. XI, § 11. Lastly, some of the concerns addressed by the Citizen Involvement Goal are also addressed by the Land Use Planning Goal, which requires, *inter alia*, the availability of planning documents, public hearings on plans and land use regulations, and that “[o]pportunities . . . be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementation ordinances.” OR. ADMIN. R. 660-015-0000(2); OR. DEP’T OF LAND CONSERVATION & DEV., GOAL 2: LAND USE PLANNING 1, <https://www.oregon.gov/lcd/OP/Documents/goal2.pdf> (last visited Aug. 21, 2019).

<sup>29</sup> Such notice is required in the case of limited land use decisions, such as those involving site and design review and land divisions in urban areas, *see OR. REV. STAT.* § 197.195, expedited land divisions creating three or fewer parcels in certain situations, *see id.* § 197.365(2), all quasi-judicial land use decisions, *see id.* § 197.763(2)(b), city land use permitting and rezoning requests, *see id.* § 227.175(10)(b), 175(10)(c)(B), similar county actions, *see id.* § 215.416(10)(b), .416(10)(c)(B), and proposed composting operations. *See id.* § 215.401(7)(b)(C). This aspect of public participation can also be negative. *See* discussion of the critical view of that participation in terms of notice, standing and appeal fees *infra* pp. 6–9.

<sup>30</sup> *See* PORTLAND, OR., PERMANENT RULE RELATING TO TITLE 33.750 PLANNING AND ZONING FEES (Oct. 19, 2015), <https://www.portlandoregon.gov/citycode/article/633192>; PORTLAND, OR., LAND USE SERVICES FEE SCHEDULE (eff. July 1, 2019–June 30, 2020), <https://www.portlandoregon.gov/bds/article/727186>. Such fee waivers may be contested. *See Riverview Abbey & Mausoleum Co. v. City of Portland*, LUBA No. 2018-016, 2018-017, 2019 WL 497319 (Or. Luba Oct. 12, 2018).

<sup>31</sup> The status and powers of the City’s Neighborhood Councils are set forth in its Administrative Code. *See* L.A., CAL., ADMINISTRATIVE CODE art. IX, <http://www.coj.net/city-council/docs/consolidation-task-force/la-citycharter-neighborhooddept.aspx>. The City has its own Department of Neighborhood Empowerment, whose purpose it is to “provide operational support to and facilitate the sharing of resources among Certified Neighborhood Councils, including but not limited to, meeting and office space, office equipment and mail and communications in order to communicate among constituents, Certified Neighborhood Councils, City Departments and governing officials.” *About Neighborhood Councils*, L.A. DEP’T OF NEIGHBORHOOD EMPOWERMENT, <https://empowerla.org/about-neighborhood-councils/> (last visited Aug. 21, 2019).

<sup>32</sup> *See Step 5: Uniform Land Use Review Procedure (ULURP)*, N.Y.C. DEP’T OF CITY PLANNING, <https://www1.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page> (last visited Aug. 21, 2019) (explaining New York City’s Uniform Land Use Review Procedure (ULURP)); *Uniform Land Use Review Procedure*, N.Y.C. DEP’T OF CITY PLANNING,

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<https://www1.nyc.gov/assets/planning/download/pdf/applicants/applicant-portal/lur.pdf> (last visited Aug. 21, 2019) (explaining ULURP in chart form).

<sup>33</sup> See Ross F. Moskowitz et al., *The Charter Proposals That Could Reshape NYC Land Use*, COMMERCIAL OBSERVER (Jan. 14, 2019, 8:11 AM), <https://commercialobserver.com/2019/01/the-charter-proposals-that-could-reshape-nyc-land-use/>. Presumably, these reforms are intended to address applicants' "aversion to and evasion of ULURP[.]" TOM ANGOTTI, LAND USE AND THE NEW YORK CITY CHARTER 5–8 (2010), <http://www.hunter.cuny.edu/ccpd/repository/files/charterreport-angotti-2.pdf>; Alfred M. Williams, Jr., Note, *Reforming New York City's "ULURP": Less Confusing than its Name*, 28 J. CIV. RIGHTS & ECON. DEV. 399 (2015).

<sup>34</sup> While the debate over the merits and models of public participation continues, the techniques of achieving it have evolved as society becomes more technically savvy. See Daren C. Brabham, *The Effectiveness of Crowdsourcing Public Participation in a Planning Context*, 17 FIRST MONDAY, Dec. 3, 2012,

<https://journals.uic.edu/ojs/index.php/fm/article/view/4225/3377>; Mattias Hjerpe, Erik Glaas & Sofie Storbjörk, *Scrutinizing Virtual Citizen Involvement in Planning: Ten Applications of an Online Participatory Tool*, 6 POL. & GOVERNANCE, no. 3, 2018, at 159, <https://www.cogitatiopress.com/politicsandgovernance/article/view/1481/1481>.

<sup>35</sup> See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2005). Others have agreed with Fischer's descriptive analysis, but caution that distributive justice considerations must also play a role. See Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 664 (2001) (book review).

<sup>36</sup> FISCHER, *supra* note 35, at 5. Fischer dedicated his work to the memory of noted economist Charles Tiebout, who argued that one test for the maximization of wealth was the number of people who "voted with their feet" by remaining in or leaving a community. See *id.* at vii; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). The "homevoter" hypothesis, often associated with suburban politics, is manifested in urban environments as well. See Been, *supra* note 3.

<sup>37</sup> See FISCHER, *supra* note 35. In line with Fischer's suggestion, Daniel Hertz has identified a perceived Manichean conflict between two recognizable parties to local land use disputes—the elitist "growth machine" favored by developers, financiers, and economic growth advocates, and the "homevoter" coalition wishing to protect homeowners' property values—and suggests the latter camp is ascendant, at least in New York. See Daniel Hertz, *Homeoters v. The Growth Machine*, CITY OBSERVATORY (Dec. 15, 2015), <http://cityobservatory.org/homevoters-v-the-growth-machine/>.

<sup>38</sup> Robert Nelson, *Welcome to the New—and Private—Neighborhood: Local Government in a World of Postmodern Pluralism*, REASON (Apr. 2006), <https://reason.com/2006/04/01/welcome-to-the-new-and-private/>.

<sup>39</sup> See KENNETH STAHL, LOCAL CITIZENSHIP IN A GLOBAL AGE: HOW CITIES ARE CHANGING WHAT IT MEANS TO BE A CITIZEN (forthcoming 2020). Stahl has also discussed the increasing tensions between rural, mostly Republican forces and urban, mostly Democratic forces, and state preemption of local regulations abhorred by the former, à la the North Carolina "bathroom bill." See Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133 (2017).

<sup>40</sup> See Laura Bliss, *The NIMBY Principle*, CITYLAB (July 26, 2019), <https://www.citylab.com/equity/2019/07/nimby-vs-yimby-single-family-zoning-laws-california-housing/594373/>.

<sup>41</sup> See *id.* Livable California leader and certified liberal, Susan Kirsch, who received 42% of the vote in an unsuccessful bid for Marin County Commissioner, has said that "[c]limate change is a serious problem, and we need to get a handle on it . . . by focusing on local control: local solutions for local issues." *Id.* Bliss's article notes the shortage of ideas from Livable California to solve the housing crisis, focusing instead on stopping projects and legislation that would create more housing:

The group may share a few strands of DNA with Marxist critiques and use the language of citizen empowerment, but to critics . . . it is a force of elitism. Proposition 13, California's property tax freeze of the 1970s, and the appreciation of urban land in coastal communities created what he terms a "bizarre middle-class aristocracy" that's based almost solely on homeownership. "Single-family zoning has a lot of parallels to aristocratic land-holding systems," [said one critic]. "It's, 'Protect our regime from these predatory outside capitalists who don't have the *noblesse oblige* that we have for our communities.'"

*Id.* Without ascribing darker motives to organizations such as Livable California, the changing demographics both in that state and nationally cannot be ignored from a planning perspective. See William H. Frey, *The US Will Become "Minority White" in 2045*, CENSUS PROJECTS, BROOKINGS INST. (Mar. 14, 2008), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/>.

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<sup>42</sup> See *supra* note 30.

<sup>43</sup> See, e.g., PORTLAND, OR., STANDARDS FOR NEIGHBORHOOD ASSOCIATIONS, DISTRICT COALITIONS, BUSINESS DISTRICT ASSOCIATIONS, AND THE OFFICE OF NEIGHBORHOOD INVOLVEMENT (adopted by Res. 36329, Portland City Council, July 13, 2005), <https://www.portlandoregon.gov/civic/article/97870> (existing standards); PORTLAND, OR., CITY CODE §§ 3.96.010–.060 (existing code language); PORTLAND, OR., CODE CHANGE LANGUAGE RECOMMENDED BY COMMITTEE 3.96 (July 18, 2019), <https://www.portlandoregon.gov/civic/article/738276> (proposed reforms pending Council review); Michael Mehaffy, *A Helpful History of Portland’s Neighborhood Association System*, LIVABLE PORTLAND (Aug. 28, 2018), <http://livableportland.org/2018/08/15/a-helpful-history-of-portlands-neighborhood-association-system/> (tracing the history and discussing the value of Portland’s ninety-five “recognized” neighborhood associations); Alex Zielinski, *In Search of Equal Representation, Portland Looks Beyond Neighborhood Associations*, PORTLAND MERCURY (Aug. 1, 2019), <https://www.portlandmercury.com/news/2019/08/01/26894563/in-search-of-equal-representation-portland-looks-beyond-neighborhood-associations>; Midge Pierce, *Associations May Go Dark Under New Code*, SE. EXAMINER (July 2, 2019), <https://www.southeastexaminer.com/2019/07/associations-may-go-dark-under-new-code/>. On January 25, 2019, the Oregon Land Conservation and Development Commission approved revised guidelines for citizen participation, which include equity considerations. See LAND CONSERVATION & DEV. COMM’N, PUBLIC PARTICIPATION GUIDELINES FOR POLICY DEVELOPMENT (Jan. 25, 2019), [https://www.oregon.gov/LCD/About/Documents/20190125\\_PublicParticipationGuidelines.pdf](https://www.oregon.gov/LCD/About/Documents/20190125_PublicParticipationGuidelines.pdf). However, it is not clear whether these guidelines have any legal status.

<sup>44</sup> Indeed, Oregon is awash with activist groups in the planning and land use regulatory fields, beginning in 1974 with the formation of 1000 Friends of Oregon to ensure implementation of the recently-adopted statewide planning goals, see *About Us*, 1000 FRIENDS OF OR., <https://friends.org/about-us/our-story> (last visited Aug. 21, 2019), and now including diverse groups such as Oregonians in Action, a defender of property rights, see *About Us*, OREGONIANS IN ACTION, <http://www.oia.org/about-us/> (last visited Aug. 21, 2019), and Housing Land Advocates, which seeks to ensure provision for affordable housing in local plans and land use regulations. See HOUS. LAND ADVOCATES, <https://www.housinglandadvocates.org> (last visited Aug. 21, 2019).

<sup>45</sup> Oregon law reflects a legislative desire—even impatience—to complete the land use process quickly and efficiently, by awarding attorney fees to applicants when local governments exceed their statutory deadlines. See OR. REV. STAT. §§ 197.835(10(b)), 215.437(3), 227.182(3). More recently, the Legislature has provided an award of attorney fees for local governments when appellants unsuccessfully challenge approvals for publicly supported housing. See Ch. 221, 2019 Or. Laws, §§ 1-2. It is not difficult to foresee similar measures proposed with respect to non-prevailing opponents of other projects.

<sup>46</sup> See, e.g., OR. REV. STAT. § 197.830(2)(c).

<sup>47</sup> LUBA has “exclusive jurisdiction” over local government “land use decisions” A fairly expansive set. OR. REV. STAT. § 197.825(1), .015(10). As a result, state trial courts rarely encounter such cases. See also Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979–1999*, 41 WILLAMETTE L. REV. 441 (2000).

<sup>48</sup> OR. REV. STAT. § 215.422(1)(c) (“The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and shall not exceed the actual cost of preparing the transcript up to \$500. . . .”). A similar statute governs city appeals. See OR. REV. STAT. § 227.180(1)(c).

<sup>49</sup> The Land Use Board of Appeals recently upheld this practice. See *Nicita v. City of Or. City*, LUBA No. 2018-038, 2018 WL 6433339 (Or. Luba Nov. 30, 2018). In *Nicita*, the City charged a “base fee” for the filing and an additional \$4,427.50 for the time spent by its attorneys on the appeal itself. See *id.* at \*2 n.2.

<sup>50</sup> See OR. REV. STAT. § 215.422(1)(c), 227.180(1)(c).

<sup>51</sup> See, e.g., OR. REV. STAT. §§ 197.763, .796 (local quasi-judicial land use hearings), 215.402–.438 (county planning and zoning hearings), 227.160–.186 (city planning and zoning hearings).