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Doing Public Participation Better

In This Issue:

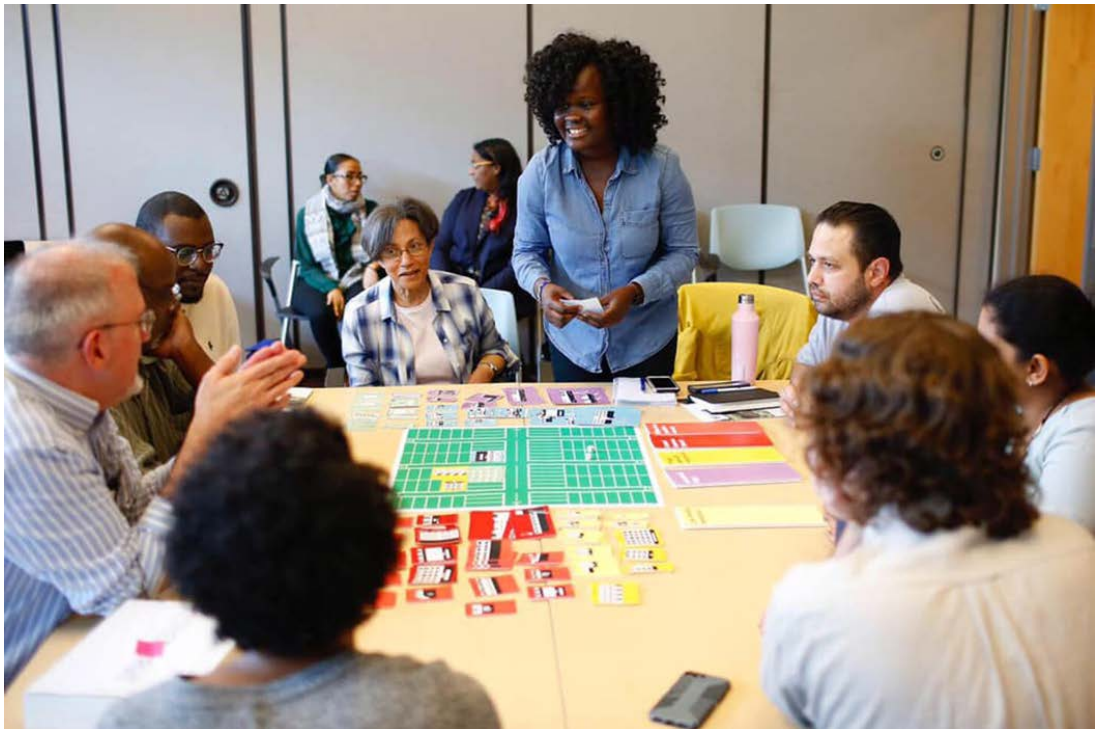
Doing Public Participation Better

By Anika Singh Lemar

There is a growing awareness that the approach taken to public participation in land use and zoning processes is flawed. Often when public participation goes wrong, it overrepresents certain viewpoints and voices and ignores important policy priorities. Participants in public processes are predictably nonrepresentative of their larger communities (Einstein, Palmer, and Glick 2019). They tend to be well-off, older homeowners who are more opposed to new housing production than the average resident is.

Because planners must advance policy goals (set out in zoning and planning ordinances and state constitutions and zoning and environmental laws) that are often not priorities for the people who most commonly testify in the public hearing process, local decision-makers may be tempted to ignore those policy goals. When this happens, it makes housing more scarce and less affordable and generally preserves an inequitable status quo.

This issue of *Zoning Practice*, which draws from and builds on my earlier work, recounts some key flaws of typical public participation processes and, more importantly, proposes some solutions. My hope is that some of the proposals described here can be adopted and implemented by city, town, and county staff and commissioners, without the need for drawn out fights for new state enabling legislation. Other solutions will require changes to state enabling legislation that would better advance the goals of public participation, equal treatment, and transparency.



Detroit residents playing the Game of Zones to inform the city's comprehensive zoning rewrite process (Credit: Detroit City Planning Commission)

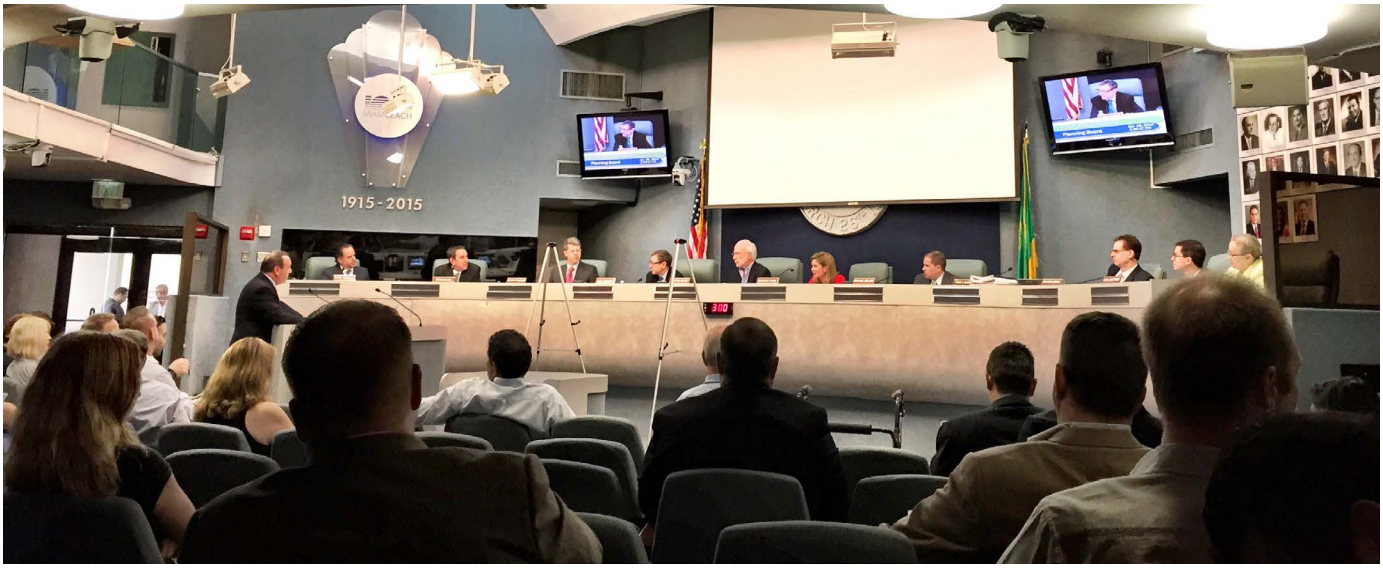
Participation Requirements

The Standard State Zoning Enabling Act, for the most part, defers to local governments to establish the process by which they adopt a zoning code. It does, however, require one element of the process: a public hearing held prior to initial adoption of or later amendment to a local zoning code. The Standard Act is explicit that the public hearing should be open to all "citizens," including those who do not own property in the relevant zoning district. While the Standard Act grants participation rights to all, it prioritizes participation by nearby property owners. If immediately adjacent property owners or the owners of 20 percent of nearby lots object to a proposed rezoning, a 75-percent supermajority of the zoning commission must approve a rezoning. While a number of states have done away with this protest petition provision in their state enabling acts, 20 states continue to require supermajorities in the event of a protest petition (Furth and McKinley 2022).

Notably, the Standard Act distinguishes between decisions to adopt or modify generally applicable zoning provisions and site-specific decisions. The Standard Act does not require public hearings in connection with site-specific relief, like variances, conditional use permits, and site plan approvals. Over the course of the last century, of course, many states have modified their state zoning enabling acts and, in doing so, have added public participation requirements to the processes required in connection with site-specific relief. In some states, additional public participation requirements are sometimes layered onto zoning and land use requirements. Some states, most notably New York (§43-B-8) and California (Public Resources Code §21000 et seq.), impose state-level environmental review requirements on adoption of an amendment to zoning ordinances. These "little NEPAs" include their own public notice and comment opportunities in connection with land use and transportation planning decisions.

The Participation Problem

Unfortunately, in the land use and zoning sphere, public participation models are not built to draw in underrepresented voices, to address misinformation, or to force commissioners and board members to decide which (if any) participants are providing useful information to the process. The process does not typically permit or attempt to facilitate community education or dialogue. The loudest voices at public hearings tend to skew decision-making in predictably nefarious ways. As a result, the processes amplify, rather than counteract, self-interested misinformation. This section describes some of the ways in which typical public participation processes fail.



A public hearing in front of the Miami Beach, Florida, Planning Board (Credit: Ines Hegedus-Garcia, Flickr)

Local Prejudice and Misinformation

While an idealized public hearing might feature knowledge sharing and dialogue, regular public hearing attendees know that those features are rare (Bezdek 2013). Testimony is often impassioned and unreliable because it is both self-interested and speculative. Resident expertise does not lie in predicting the impacts (e.g., from traffic to nearby property values) of a proposed development project (MacLeod 2013). Local expertise lies, instead, in describing the current neighborhood and expressing desires for the neighborhood's future. These are necessary, but not at all sufficient, elements of an effective neighborhood planning process.

While some public participation is willfully ignorant or dishonest, even well-intentioned participation can have nefarious impacts on local development and governance decisions.

While some public participation is willfully ignorant or dishonest, even well-intentioned participation can have nefarious impacts on local development and governance decisions. As an Oakland, California, transportation planner, Warren Logan, recounts, while it is informative to hear from commuters about the travel conditions they navigate, their proposed solutions are likely to be blind to the needs of other commuters and are unlikely to incorporate empirical data about the effects of those solutions in various contexts (Holder 2019). In other words, crowdsourced knowledge has its limits and must be balanced.

It is hardly surprising, then, that when a development is built despite public opposition, it often does not yield the negative impacts anticipated by public testimony. One frequently hears from neighbors of once-controversial development projects: "Now that it's in, it's OK."

One of the most contentious real estate developments of the last century was the Ethel R. Lawrence Homes, the affordable housing project built as a result of ***Southern Burlington County NAACP v. Township of Mount Laurel*** 336 A.2d 713, 67 N.J. 151 (1978), finding that New Jersey municipalities must zone in furtherance of statewide general welfare and, in doing so, accommodate the development of affordable housing. Neighbors decried the development's potential nefarious impacts: lower property values, more crime, more traffic, and overburdened public schools (Massey et al. 2013). The project was built only after decades of civil rights litigation forced the town's hand.

Examining the impacts of the Ethel R. Lawrence Homes on both residents and neighbors, researchers found that none of the claimed nefarious impacts came to pass. Neighbors were even wrong about the impact on property values, a data point one might assume could be reliably crowdsourced. The development had significant positive impacts on the people who moved in, none of whom were "existing residents" or "neighbors" whose views would have been credited or prioritized during the public participation process.

Because of the overwhelming demand for the units at Ethel Lawrence Homes, tenants were selected on a first-come, first-served basis. The tenant selection process made it possible for researchers to compare life outcomes between those who were selected and those who were not. It also created a situation in which, even if public participation processes had been open to and inclusive of future residents, those future residents had very little incentive to participate, because any one potential tenant had a small chance of success in obtaining a unit, even if it were built.

Insularity and Hoarding

Not everyone is heard or credited during the public participation process. Crafting participation processes requires determining who the participants ought to be. In theory, public participation opportunities might provide a mechanism to counterbalance low-income people's inability to participate in the marketplace. Presumably, the effects of urban renewal on communities of color would have been

substantially less disastrous had displaced families had the resources to depart for more desirable neighborhoods. That is, in fact, what happened to white families displaced by urban renewal who, unlike their Black counterparts, enjoyed access to subsidized mortgage lending and a welcoming suburban housing market. As Richard Rothstein recounts, the housing market was not just unfriendly to Black individuals, it was violent—and that violence was undertaken under color of law (2017).

Today, low-income communities lack control over their neighborhoods in part because they cannot leave their neighborhoods. Market power requires the ability to exit and to exercise purchasing ability. Low-income residents have less ability to exit both because of irreplaceable social capital and because of their lack of wealth. Notably, the inability to exit, or credibly threaten to exit, also dampens the efficacy of low-income people's exercise of public participation rights. As Carol M. Rose puts it, "the opportunity for exit has been a constant threat behind voice at the local level" (1983). Moving is expensive. And the more desirable a neighborhood is, the higher the cost of housing in that neighborhood. Because poor people cannot effectively participate in the marketplace, perhaps they require a greater ability to participate in the public process around real estate development.

The majority of low-income people who live in low-income neighborhoods, however, cannot exercise power and influence by testifying at local land use hearings simply because, without new development, there are no land use hearings to attend. Only a small minority of all low-income people reside in desirable, gentrifying neighborhoods (Zuk et al. 2018; Mallach 2018; Richardson, Mitchell, and Franco 2019). Public participation empowers only those people who live in neighborhoods attractive to developers, and those people are disproportionately well-off. And even where there are gentrification pressures, often that gentrification manifests as combining multiple units to create fewer, larger units, a conversion that does not require land use approvals (Godsil 2013).

However, low-income communities are disproportionately targeted for undesirable uses, such as the operation of power plants. These uses are often subject to a different land use and public participation regime centralized at the state level. For example, in Connecticut undesirable facilities seeking to locate in heavily impacted neighborhoods must conduct additional community engagement and public participation prior to filing permit applications (§22a-20a). This is, in any event, properly addressed with enhanced participation rights tied specifically to environmental injustices and limited to communities disproportionately impacted by such uses.

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Finally, while participation proponents cite a need to counterbalance developers' market power, they do not often acknowledge the power imbalances inherent to public participation fora. There is nothing inherently inclusive about participation (Rahman and Simonson 2020). And the political sphere often replicates the inequities apparent in the economic sphere. It is hardly surprising, then, that researchers studying participation processes find that participants are not representative of the broader population and that participants' contributions are not valued equally (Einstein, Palmer, and Glick 2019; Tauxe 1995).

Researchers find that participants testifying at Boston-area land use hearings are whiter, wealthier, and more opposed to housing development than the population of the neighborhoods in which they reside or voters in those neighborhoods (Einstein, Palmer, and Glick 2019). Even in wealthy towns, the people who participate in land use hearings are still wealthier than their average neighbor. Unsurprisingly

then, almost two-thirds of mayors nationwide report that, while "policy areas like schools and policing [are] dominated by majority public opinion," when it comes to housing development, "a small group with strong views" dominates public discussion (Einstein, Palmer, and Glick 2019).

Other research concludes that, even where participation is widespread, authorities use race and class to prioritize some voices over others. "[Setting participation as a goal] assumes that government can employ neutral tactics and obtain a fair result even in the face of significant hierarchies of power" (McFarlane 2001), but there is no reason to make such an assumption. In fact, participants with less formal education, less wealth, and less political power can be "systematically disempowered by the formal planning process, so that their voices carr[y] less weight in decisions" (Tauxe 1995). Homogenous, well-off communities that share physical space, like an existing neighborhood, are much easier to organize than are heterogenous population spread out over large spaces. In addition, a host of illegitimate factors will influence a decision-maker's willingness to take testimony seriously. Researchers posit that those factors include homeownership status, the likelihood that participants might bring litigation to enforce their preferences, and participants' ability to make political donations or otherwise influence the electoral process (Stern 2011; Tauxe 1995). These factors vary positively with household wealth and income. As a result, public participation processes do not counteract wealth and income disparities; they exacerbate them.

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Prioritizes Current Residents at Others' Expense

Many public participation processes are designed to preference the people who already live in the neighborhood where the development will take place. Formally, only neighbors typically receive notice of public hearings mailed to their homes. Some zoning enabling acts and zoning codes also require posted notice in addition to mailings, but again, existing residents are the people most likely to see the posted notice. Informally, when delivering testimony, people commonly describe themselves not as neighbors or residents or would-be residents, but as current homeowners, and recite the length of their tenure in the neighborhood, all to secure legitimacy in the eyes of the people—themselves disproportionately homeowners—making land use planning decisions.

Certainly, existing residents are affected by new development in a way that others are not. New construction may deviate from their previous expectations as to what local resources their property affords them, regardless of whether the property is owned by a homeowner or leased by a tenant. Courts and legal scholars have long prioritized owners' expectations when considering whether certain property rights ought to be protected (Rosser 2015). It is far from clear that the preferences of people already comfortably housed ought to come at the expense of the needs of people seeking new homes.

But even if one assumes that existing communities deserve more say in development than outsiders do, the tools available to existing communities are crafted to delay development and preserve the status quo, rather than to encourage the development of beneficial goods and resources. Zoning codes that prioritize the status quo risk sacrificing one of the key characteristics of the urban environment: dynamism (Singh Lemar 2015). Demographics change. Average household size changes. The average number of children per family changes. The average age at which people become parents changes. Birth rates go up, and birth rates go down. Housing preferences evolve. The nature and location of jobs and industry respond

to technological innovation and economic booms and busts. Transportation costs rise and fall.

Neighborhoods, particularly those proximate to amenities, must evolve as well. Too often neighborhoods are not allowed to change as a result of land use regulations, whether aesthetic strictures tied to existing context or prioritization of existing residents in decision-making. As a result, quality of life suffers because households are not able to find housing that meets their needs and preferences. Poor households are most likely to lose when demand outpaces supply. It is no surprise, then, that empiricists studying public participation in land use hearings worry that "rather than empowering underrepresented interests, these institutions could, in fact, be amplifying the voices of a small group of unrepresentative individuals with strong interest in restricting the development of new housing…" (Einstein, Palmer, and Glick 2019).

Solutions

Public participation is not the only basis on which boards and commissions make zoning and land use decisions. Instead, public participation must be balanced against property rights and policy goals described in both state enabling acts and local zoning ordinances. These policy goals vary by state but might include traffic, infrastructure, desegregation, environmental, and housing affordability considerations. Planners face two fundamental problems in connection with public participation. First, they must advance that broad array of policy goals, many of which are often simply not priorities for the people who most commonly testify in the public hearing process. When public input dictates a zoning decision, those policy goals are likely to be ignored. Second, planners must balance public input against other data, such as expert studies. Notably, while expert studies are held to familiar evidentiary standards, public input is not and is admitted without regard to relevance or expertise.

While some public participation requirements are set out in state law, others are the result of local ordinance, policy, or practice. In my previous writing, I have proposed major reforms to state zoning enabling acts that would bring land use public participation processes in line with public participation processes in other areas of law (Singh Lemar 2015). I describe these proposals below in Things That Will Have to Happen at the State Level. First, however, I discuss reforms that can take place more immediately, at the local level, without waiting for statehouses to act.

Things You Can Do Locally

State law sets out minimum requirements for accommodating public participation. Local governments can layer on additional requirements, most importantly, to seek input from those who are otherwise least likely to participate. I have described some of these problems as "overparticipation" and am generally skeptical that more public participation can wholly correct for the problems described above. That said, it makes good sense to develop processes that solicit input widely. Most importantly, planning and zoning staff ought reach out to groups of people that are underrepresented in existing participation fora.

Go Where the People Are

First, staff should consider conducting outreach through the community events and gatherings that people attend organically, whether or not they have an outsized self-interest in a particular planning or zoning decision. Attend community festivals and get-togethers to solicit perspectives on pending planning decisions (Holder 2019). Relying on traditional public meetings risks preferencing the perspectives of "wealthy homeowners." In addition to community festivals and events, planners might use local public schools, houses of worship, public library branches, parks, and social services agencies to host hearings, disseminate information, or seek feedback. For example, at a table at a street festival, staff might provide information on a comprehensive planning or rezoning process and permit people to submit testimony on their phones using a QR code.

While zoning enabling acts require that notice be given to neighbors, zoning and planning departments can go further and distribute notice more broadly. A public

The Montgomery County, Maryland, Planning Department table at a community festival (Credit: Montgomery Parks, MNCPPC, Flickr)

school district can use its listservs and text messaging systems to disseminate information. A high school student body can provide feedback on proposals affecting their neighborhoods. Anyone should be able to sign up for a listserv that disseminates notice of all land use hearings. Connecticut, for example, requires each individual town to make such registries available (§8-7d(g)(2)). Towns could go a step further and collaborate and share such registries. Affordable housing advocates, the homebuilders' lobby, disability advocates, advocates for social services agencies, and others could then easily register to receive notice and share their expertise on relevant applications. And staff can reach out to known experts and advocates alerting them to a meeting agenda item, whether or not they have registered to receive notice.

Track and Respond to Feedback

Staff and commissioners ought to track public comments, including commenters' addresses and home ownership status. Knowing whether commenters were representative of the locality or the broader region should inform outreach efforts, in connection with the instant application or proposal and future ones.

Local bodies are not, generally, subject to the procedures required of federal and state agencies. They can, however, and should adopt those procedures that would better incorporate and balance public participation. Administrative agencies subject to the federal Administrative Procedures Act (5 USC §551 et seq.) or one of its state analogs must not only receive public input, but also respond to it. Under the model state administrative procedures law, issuance of a final rule must be accompanied by an explanatory statement that responds to substantive feedback and commentary made in oral and written testimony (NCCUSL 2010). A board or commission that must respond to arguments made cannot rely on public participation as a proxy for a referendum. Instead, it is required to explain why it agreed with or credited certain comments and not others. When writing the decision, staff will want to describe the comments received, and whose perspective those comments represented. While this is hardly a failsafe against unreasonable decisions, it provides a better basis for judicial review in those instances when a neighbor, a would-be developer, or another party challenges a decision in court. Because the board or commission

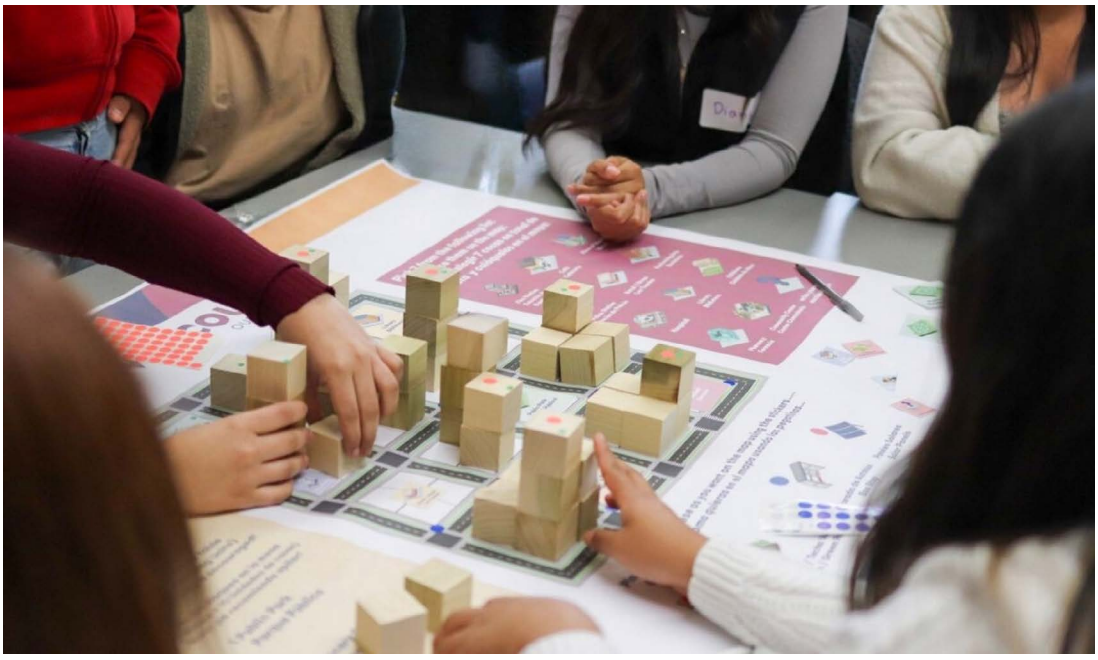
has explained its decision, a court is better equipped to assess whether that decision comports with the law.

Responding to comments will provide commissioners and staff an opportunity to assess both the relevant and the validity of comments received. Comments might be forceful and impassioned but irrelevant to the standards set out in the zoning code or authorizing statute. Alternatively, they might be unsubstantiated. A written assessment of those comments requires the writer to engage with the reasoning, not the passion. For example, if a homeowner claims that a proposed development will pollute a nearby watershed or lower property values but does not present evidence of their claim, a written decision that responds to comments should take that lack of evidence into account (Infranca, forthcoming).

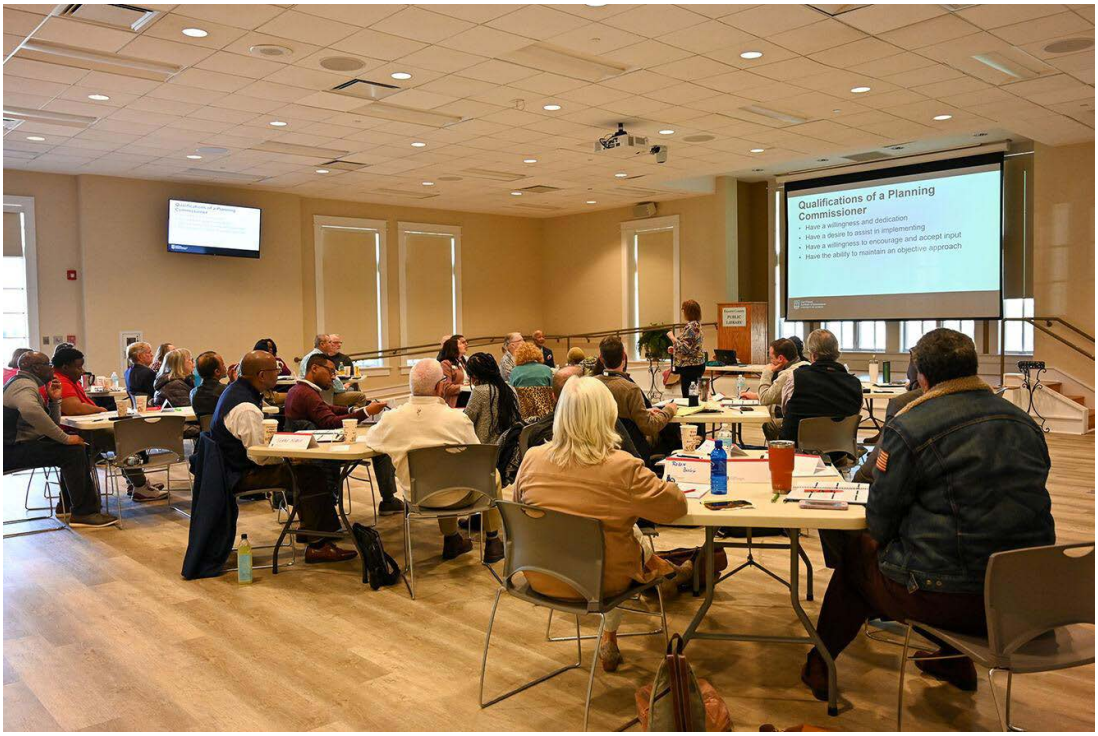
Reach Out to a Broad Array of People and Interests

Tracking commenters will allow staff to direct outreach to those groups least well-represented at traditional public hearings. Katherine Levine Einstein and Maxwell Palmer suggest convening focus groups consisting of groups underrepresented in the public hearing process, groups such as people with disabilities, renters, and young people (2022). If, for example, renters are poorly represented at a traditional public hearing, it might make sense to compose a focus group consisting of renters or disseminate surveys and collect survey data from a broader range of respondents. Einstein and Palmer tracked one Massachusetts town's work with focus groups and found that "the differences in housing support between the focus group participants and traditional meeting attendees are massive."

Einstein and Palmer found that some will argue that focus groups are "unfair" because they are outside of the public testimony process with which many serial NIMBYs are familiar. But the point of public comment is to maximize relevant information received by the board or commission, not to set up a competition to see who can mobilize the most people to attend a hearing. Diversifying the sources of that information serves an important purpose because it maximizes information and allows the board or commission to parse that information and assess it. If voices are missing from the conversation, it is more likely that facts and information will be missing.



Youth participating in a comprehensive planning workshop in Vancouver, Washington (Credit: City of Vancouver)



Newly appointed planning commissioners from across Georgia at a training event hosted by Fayette County, Georgia (Credit: Fayette County)

Train Commissioners to Balance Public Input Against Other Considerations

Commissioners should receive periodic training on land use law. In addition, they should be advised as to the scope of their jurisdiction. If a different board, commission, or agency is charged with protecting wetlands, determining sewer or septic capacity, historic preservation, or making traffic decisions, then planning and zoning officials should be advised that public testimony on those issues is irrelevant to their charge. In addition, commissioners and board members should be trained on fair housing and discrimination law and the ways in which biases appear in public testimony, particularly where there is a risk that illegal considerations will inform a planning or zoning decision (e.g., ***Mhany Management, Inc. v. County of Nassau***, 819 F.3d 581 (2d Cir. 2016); ***Avenue 6E Investments, LLC v. City of Yuma, Ariz.***, 818 F.3d 493 (9th Cir. 2016)). They should also be trained on the trade-offs inherent in land use and zoning decisions.

In addition, commissioners should be trained on the proper, legal bases on which planning and zoning decisions can be made. Zoning enabling legislation often sets out proper purposes for zoning. In states where purpose language is no longer included in zoning enabling statutes, nevertheless, there will be case law and local law that sets out what zoning can and cannot be used to regulate. Commissioners should be made aware of both the scope and the limits of their authority so that they can properly parse public comment.

Changes to Local Regulations/Policies

While none of the changes described above require changes to local or state law, a local government earnestly committed to better public participation processes could incorporate some of these reforms into local law. More inclusive public participation can be codified in broader notice requirements, for example (see "An Equitable Approach to Zoning Notifications" in the May 2024 issue of *Zoning Practice*). And local law can require that boards and commissions not only decide on applications but issue written decisions explaining their reasoning and the ways in which their decisions responded to or rejected public comments received.

Things That Will Have to Happen at the State Level

While the modest reforms described above can be made locally, systemic reform must take place at the state level. If reform takes place locally, then only those jurisdictions that are already most interested and invested in best practices will embrace them. The jurisdictions most committed to exclusion will continue to use dysfunctional public participation processes to launder those exclusionary practices. For that reason, my hope would be that some of these reforms will find their way into state law and that planners working locally would work in furtherance of better state laws.

Elsewhere I have argued at length that land use and zoning boards ought to follow the same participation processes used by agencies subject either to the federal Administrative Procedures Act or one of its state analogs (Singh Lemar 2021). In short, public hearings are held when a rule or standard is being adopted but not every time it is applied to an individual applicant. Those rules must comply with policies and priorities defined by statute. An agency acting to adopt a rule must balance public input against other data and it must assess and respond to public input when it issues a final rule. Public hearings should not be used to launder poor decision making as simply being "responsive" to the "community."

Conclusion

There is growing awareness that local land use and zoning processes are broken and that major, systemic reform must take place in state law. In the meantime, however, local actors, including staff, can make important changes to improve processes, making them more inclusive and equitable, and less likely to result in detrimental impacts to housing affordability and the environment. Local governments are sometimes hesitant to embrace process changes because they fear legal challenges from vested interests that benefit from the status quo. There are, however, changes that can be made consistent with state law.

Equally important, there is a role for local governments to play in advocating for state law reforms that will better allow local governments to serve a greater number of people, particularly those who are housing insecure. Local government lobbies have frequently served as barriers to progress and defenders of the status quo. Those local planners who have developed best practices for engaging in productive public participation and balancing those processes against expertise and data can use their experience to advocate for necessary state law reforms.

Note: Portions of this article are adapted from Anika Singh Lemar, "**Over-participation: Designing Effective Land Use Public Processes**," *Fordham Law Review* 90: 1083–1150 (2021).

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