

Fields of Dreams: An Economic Democracy Framework for Addressing NIMBYism

by Ori Sharon

Ori Sharon is an Environmental Interface Fellow at Israel's Ministry of Finance. He has an LL.M. (2013) and an S.J.D. (2018) from Duke University School of Law.

Summary

Local opposition to development of socially desirable facilities is one of the most important policy challenges in the United States. Despite decades of effort, a formula to reduce “Not in My Back Yard” (NIMBY) opposition is yet to be found. Cash payments, inclusive deliberation, benefits negotiations, and statutory mandates are only a few of the policy and legislative measures that have been attempted. This Article offers a different approach. Disempowerment is one of the main drivers of NIMBY sentiments. People oppose certain developments largely because they feel a lack of control over decisionmaking procedures that directly affect their lives. Ownership, the author explains, empowers. When a resource is owned by a community, the community possesses the power to set the agenda for the resource. It follows that if communities own, develop, and manage socially desirable facilities, NIMBY sentiments will be attenuated. To test this hypothesis, the Article explores two recent successful examples of communal ownership—the development model for windfarms and the U.K.’s Community Right to Build reform. Both demonstrate the potential of communal ownership to mitigate NIMBY sentiments and provide valuable legal and policy lessons for addressing NIMBY.

On November 8, 2016, Los Angeles residents voted to substantially increase property taxes to fund housing for the homeless.¹ Known as Proposition HHH, the ballot measure called for the city of Los Angeles to issue bonds in the amount of \$1.2 billion to construct 10,000 housing units.² The passage of Proposition HHH was hailed by Los Angeles City Hall as a turning point in Los Angeles’ decades-long fight to end homelessness within its boundaries.³ Reality, however, had different plans. Homeless advocates soon learned a bitter lesson—sometimes money is not enough.⁴ While an overwhelming majority of residents voted to pay more in taxes to end homelessness, few in the City of Angels were willing to live next to homeless people.⁵

In the two years that have passed since the passage of Proposition HHH, local hostility to low-income housing developments has become a major obstacle to its implementation. Battles over the siting and development of housing for the homeless have undermined development in many parts of the city. Voters and homeless advocates who joined hands during the Proposition HHH campaign now bitterly fight one another.⁶

The siting of locally undesirable but socially beneficial facilities almost always engenders intense political con-

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1. *Los Angeles Passed Measure HHH, But There Are Still Hurdles Ahead for Housing Homeless People*, L.A. TIMES, Nov. 15, 2016, <http://www.latimes.com/opinion/editorials/la-ed-hhh-hurdles-20161114-story.html>; Ballotpedia, *Los Angeles, California, Homelessness Reduction and Prevention Housing, and Facilities Bond Issue, Measure HHH (November 2016)*, [https://ballotpedia.org/Los_Angeles,_California,_Homelessness_Reduction_and_Prevention_Housing,_and_Facilities_Bond_Issue,_Measure_HHH_\(November_2016\)](https://ballotpedia.org/Los_Angeles,_California,_Homelessness_Reduction_and_Prevention_Housing,_and_Facilities_Bond_Issue,_Measure_HHH_(November_2016)) (last visited Jan. 2, 2019).
2. CITY OF LOS ANGELES CITY CLERK, VOTER INFORMATION PAMPHLET, SPECIAL MUNICIPAL ELECTION TUESDAY, NOVEMBER 8, 2016, at 3 (2016), http://clerk.cityofla.acsfactory.com/sites/g/files/wph606/f/2016%20November%20County%20WEB_English.pdf.
3. LOS ANGELES COMMUNITY ACTION NETWORK, ALL SHOW AND NO SUBSTANCE—PROPOSITION HHH FIRST YEAR PERFORMANCE ASSESSMENT REPORT 2 (2017), <http://cangress.org/wp-content/uploads/2018/01/All-Show-and-Now-Substance-HHH-Anniversary-Report.pdf>.
4. Adam Nagourney, *For Homeless Advocates, a Discouraging Lesson in Los Angeles: Money Is Not Enough*, N.Y. TIMES, Sept. 29, 2017, <https://www.nytimes.com/2017/09/29/us/homeless-housing-los-angeles.html>.
5. LOS ANGELES COMMUNITY ACTION NETWORK, *supra* note 3, at 13.
6. *Id.*; Nagourney, *supra* note 4; *Hundreds Block Traffic to Protest Koreatown Homeless Shelter*, CBS L.A., May 24, 2018, <https://losangeles.cbslocal.com/2018/05/24/hundreds-protest-koreatown-homeless-shelter/>; *Don’t Let NIMBYs—or Weak-Kneed Politicians—Stand in the Way of Homeless Housing*, L.A. TIMES, Feb. 27, 2018, <http://www.latimes.com/opinion/editorials/la-ed-permanent-supportive-housing-homeless-project-20180227-htmlstory.html>.

flict.⁷ Because the development of projects like homes for the mentally ill, power plants, or waste treatment facilities typically imposes concentrated localized costs while generating widely dispersed benefits, such projects tend to provoke resistance from local communities.⁸ Community opposition to local development is known as the “not in my back yard” syndrome (NIMBY). NIMBY was first coined in the early 1980s⁹ and has since been identified and studied in the context of numerous developments, including, inter alia, airports, prisons, stadiums, homes for the homeless, power plants, halfway houses, cell phone towers, renewable energy facilities, and low-income housing projects.¹⁰

For decades, NIMBY has been “one of the most important and most vexing policy challenges in the United States.”¹¹ Developers have found local opponents to be worthy adversaries, with certain vital facilities becoming “nearly impossible to site due to organized and persistent public opposition.”¹² NIMBY is a “wicked” environmental problem.¹³ These are long-term policy challenges in which multiple and compounding risks and uncertainties combine with sharply divergent public values to generate political stalemate.¹⁴ As Frank Fischer puts it, “wicked problems

are those in which we not only don’t know the solution but are not even sure what the problem is.”¹⁵

Indeed, there is no one driver of NIMBYism. In the decades since it was first observed, researchers have come to realize that the drivers of NIMBY opposition are as diverse as the communities that have expressed them. Although it is certainly true that there is an element of self-interest in NIMBYism, a varying suite of political, ethical, environmental, and economic factors complements this element in fueling NIMBY sentiments.¹⁶ The complexity of NIMBY drivers and reactions “has stymied policy makers, local land use planners, and developers for generations,”¹⁷ and has been “a major stumbling block for solving a growing number of problems.”¹⁸ Some scholars have portrayed NIMBY as a “full-scale public malady,” with others going so far as to call it a “malignant social syndrome.”¹⁹

The common policy approach for addressing NIMBYism is public consultation and deliberation. Proponents of deliberation argue that meaningful and inclusive procedures that allow stakeholders to participate in siting decisionmaking is the only viable policy route for guaranteeing that the needs of impacted communities are properly addressed.²⁰ This line of thinking has supported numerous legislative and policy reforms aimed at increasing the stake of citizens in administrative procedures concerning the siting and development of locally undesirable land uses (LULUs).²¹

However, there is no consensus about the efficacy of public deliberation in addressing the problems that underlie NIMBY. Opponents of community outreach argue that the success of deliberation is contingent upon the political power of the potentially affected community. Unlike politically empowered communities, disenfranchised communities lack the necessary political capital to combat unfair siting decisions and to participate in public deliberation from a position of power. As a result, LULUs tend to be sited in marginalized communities.²² Opponents of deliberation-based policy approaches therefore dismiss them as a “sham,” a regulatory diversion structured to allow lay persons to “blow steam” without affecting the end result over which they have no real control.²³

7. Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001 (1992/1993).
8. *Id.* at 1001-02; Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 31 (2006).
9. Anna O'Brien, *Misadventures in Indian Law: The Supreme Court's Patchak Decision*, 85 U. COLO. L. REV. 581, 583 n.7 (2014); Alfonso Manuel Botelho, *What to Do With the Garbage? Garbage Not in My Back Yard Syndrome in Goa*, in ENVIRONMENTAL CONCERNS AND SUSTAINABLE DEVELOPMENT: SOME PERSPECTIVES FROM INDIA 144 (Sakarama Somayaji & Ganesha Somayaji eds., The Energy and Resources Institute 2010).
10. Lucas R. White, *Untangling the Circuit Splits Regarding Cell Tower Siting Policy and 47 U.S.C. §332(c)(7): When Is a Denial of One Effectively a Prohibition on All?*, 70 WASH. & LEE L. REV. 1981, 1986 (2013); Orlando E. Delogu et al., *Some Model Amendments to Maine (and Other States') Land Use Control Legislation*, 56 ME. L. REV. 323, 345 (2004); Stephen Ansola-behere & David M. Konisky, *Public Attitudes Toward Construction of New Power Plants*, 73(3) PUB. OPINION Q. 566 (2009); Richman & Boerner, *supra* note 8, at 37; Kate Burningham, *Using the Language of NIMBY: A Topic for Research, Not an Activity for Researchers*, 5(1) LOCAL ENV'T 55, 56 (2000); Miranda Schreurs & Dorte Ohlhorst, *NIMBY and Yimby: Movements for and Against Renewable Energy in Germany and the United States*, in NIMBY IS BEAUTIFUL: CASES OF LOCAL ACTIVISM AND ENVIRONMENTAL INNOVATION AROUND THE WORLD 71 (Carol Hager & Mary Alice Haddad eds., Berghahn Books 2017).
11. Richman & Boerner, *supra* note 8, at 31-32.
12. *Id.* at 32.
13. FRANK FISCHER, CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE 128 (2000); Alfred Schutz, *The Well-Informed Citizen: An Essay on the Social Distribution of Knowledge*, in 7 THE SCIENCE OF PUBLIC POLICY: ESSENTIAL READINGS IN POLICY SCIENCES II 154, 175 (Tadao Miyakawa ed., Routledge 2000).
14. Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENVTL. L.J. 295, 331 (2003); Schutz, *supra* note 13, at 175.

15. FISCHER, *supra* note 13, at 128.

16. See discussion *infra* Section I.A.

17. Richman & Boerner, *supra* note 8, at 32.

18. Schutz, *supra* note 13, at 175.

19. *Id.*

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

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

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

23. Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 57-58 (2006); Lawrence E. Susskind, *Overview of Developments in Public Participation*, in PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING 3 (Elissa Lichtenstein & William T. Dunn eds., American Bar

For real change to occur, they argue, legislatures must empower marginalized communities.²⁴

The tension between proponents of deliberation and advocates of empowerment in addressing NIMBY has not yet been resolved.²⁵ To proponents of deliberation, the key to communal empowerment lies in *more* inclusive processes, and observed flaws in participatory mechanisms are simply a matter of inadequate process design or failed implementation.²⁶ To empowerment proponents, increased inclusivity is more of the same thing. NIMBY conflicts will not go away until we address the real cause, which is social inequality and attendant power disparities.

This Article presents an analysis of NIMBYism from the perspective of participatory democracy. Participatory democracy theories advocate democratic participation in all spheres of human interaction, including industry and business.²⁷ This requirement stems from an underlying view that all social institutions are political structures, and therefore democratic participation cannot be reserved to a very limited public sphere.

In the view of participatory democracy, inequality is not merely a social ill but a deep political flaw. If the essence of democracy is participation in all walks of life, then inequality effectively means that the democratic rights of the haves supersede those of the have-nots. To achieve full democracy, proponents of participatory democracy advocate diffusion of ownership and the creation of democratic forms of private property that allocate decisionmaking equally among a community of owners.

When applied to NIMBYism, participatory democracy suggests that communal empowerment may be achieved through ownership. A participatory democracy approach to NIMBYism rejects procedural “fixes” and advocates instead for communal ownership of LULUs. Ownership confers the power to control the resource and enjoy its fruits. Accordingly, if a community owns and develops the LULU, the community controls its design, management, the level of negative externalities it will impose on the community, and the benefits that arise from activities in the LULU. Ownership of a LULU gives the community the

democratic power to determine how the LULU will affect communal life.

Based on this reasoning, the Article develops an argument in favor of communal ownership and development of LULUs. To demonstrate the feasibility of the model of communal development, I explore two examples of communally owned LULUs that have successfully reduced NIMBY animosity—community-owned wind farms and the United Kingdom’s (U.K.’s) “community right to build” initiative. Using these two examples, I map the different drivers of NIMBY and discuss the distinct ways in which communal ownership addresses them.

The communal model advanced in the Article is based on the understanding that NIMBYism is often an expression of resentment, of powerlessness and unfairness, a reaction to a view that LULUs are being “dumped on” the community, symbolically as well as literally.²⁸ The Article acknowledges that NIMBY sentiments exist in strong and weak communities alike. However, LULUs do not climb uphill. NIMBYism in strong communities accelerates the process by which LULUs wind up in marginalized communities. The model of communal ownership suggested herein does not seek to implicitly validate this process by helping the medicine go down, but is rather focused on empowerment. Promoting communal autonomy and agency, the communal ownership model works to attenuate NIMBYism in both high- and low-status communities, helping to prevent the process of LULUs rolling downhill.

The Article proceeds as follows. Part I frames the problem and surveys the economic, social, and political drivers of NIMBY, the connection between NIMBY and environmental justice, and the common policy and legal approaches for addressing NIMBY, as well as their flaws. Part II provides a review of private measures for addressing NIMBY, compensation schemes, and community benefits agreements (CBAs). I explain the theoretical underpinnings of each approach, the legal frameworks that support their implementation, and the factors that render them inadequate to mitigate NIMBY sentiments.

Part III develops a participatory democracy framework for addressing NIMBY conflicts. I identify NIMBY as a failure of democratic participation and discuss the theory of participatory democracy. I explain participatory democracy support for democratic ownership structures to mitigate failures of democratic participation. Connecting NIMBY and participatory democratic ownership structures, I argue that NIMBY conflicts could be attenuated if impacted communities are given property rights in the NIMBY-generating facilities developed in their locality.

To test this hypothesis, I explore two recent examples of community development models that have successfully

Association 1994); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 697-98 (1994/1995).

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

25. Damon Y. Smith, *Participatory Planning and Procedural Protections: The Case for Deeper Public Participation in Urban Redevelopment*, 29 ST. LOUIS U. PUB. L. REV. 243, 256-57 (2009) (critiquing resident-empowerment based suggestions for planning reform, arguing for deeper public participation instead).

26. See, e.g., Corianne Payton Scally & Rosie J. Tighe, *Democracy in Action?: NIMBY as Impediment to Equitable Affordable Housing Siting*, 30(5) HOUSING STUD. 749 (2015); Mark S. Reed, *Stakeholder Participation for Environmental Management: A Literature Review*, 141 BIOLOGICAL CONSERVATION 2417 (2008); Julie L. MacArthur, *Challenging Public Engagement: Participation, Deliberation, and Power in Renewable Energy Policy*, 6(3) J. ENVTL. STUD. & SCI. 631 (2016).

27. CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 41 (1970); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1336, 1339 (1991).

28. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 87 (2003), and references therein. See also Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and Justice*, 47 AM. U. L. REV. 221, 236 (1997) (when legitimacy of siting decisions is questioned by the community, the environmental problem becomes “a single dimension of an overall social condition”).

reduced NIMBYism, community wind farms and the U.K. community right to build reform. Based on these case studies, Part IV discusses best practices for implementation of NIMBY-mitigating communal development models.

I. NIMBYism, Environmental Justice, and the Failure of Policy

A. NIMBY—More Than Self-Interest

NIMBY describes the attitudes of opponents to new development who recognize that the development is necessary to advance general social goals but who are opposed to its siting within their community.²⁹ NIMBY is a rendition of the classic “free rider” collective action problem,³⁰ in which a group of individuals would collectively benefit from pursuing a common goal, but each individual member of the group is disincentivized from incurring the costs associated with attaining the common goal.³¹ Because each individual member prefers that other group members contribute toward the common goal, allowing the noncontributing member to “free ride” on the contributions of others results in inefficiency—the common goal is not achieved.³²

In the context of NIMBYism, it is rational for the general public to support development of LULUs, but it is irrational for any individual member or a specific segment of society to incur the costs of development that benefit all. NIMBYism, therefore, has “the paradoxical quality of a multi-person prisoners’ dilemma: the sum of rational individual decisions can produce an outcome that leaves everyone worse off.”³³

The contrast between public acceptance of the development and community opposition to the specific siting in their locality is sometimes referred to as the “social gap” in NIMBY.³⁴ This social gap has been used to frame local opposition as stemming from self-interest “implying selfishness, ignorance, and irrationality on behalf of residents interested in ‘protecting their own turf’ and putting personal interests ahead of societal benefits.”³⁵ However, a

growing volume of studies suggests that the concept of NIMBY fails to adequately characterize the drivers of local opposition to proposed LULU developments.³⁶ While it is widely recognized that there is a selfish element to local opposition, most researchers today agree that the phenomenon is more complex, and that many factors underlie local opposition to LULUs.³⁷

Studies show that opposition is driven by a complex set of social,³⁸ political,³⁹ emotional,⁴⁰ and economic⁴¹ factors, including, inter alia, concerns about equity,⁴² response to what is viewed as intrusion by external interests,⁴³ distrust of technology, developers, or government regulators,⁴⁴ conflicting information about the risks of a project,⁴⁵ environmental values, and place attachment sentiments.⁴⁶ All of these factors and others influence individual and community acceptance of local development in numerous ways that cannot be fully understood and researched if opposition is simply labeled as NIMBY. Scholars have therefore argued that the continued use of the NIMBY construct impedes development of adequate responses to local opposition because the NIMBY label fails to capture “the multitude of underlying motivations” that drive opposition to siting and development.⁴⁷ As one explained, “the public response to facilities is substantially more complex, and NIMBY is a multidimensional phenomenon that differs from the prevailing construct.”⁴⁸

B. Siting of LULUs and Environmental Justice

In the context of siting, environmental justice literature focuses on “the inequitable distribution of environmen-

29. See OXFORD ENGLISH DICTIONARY (2018) definition of NIMBY: “An attitude ascribed to persons who object to the siting of something they regard as detrimental or hazardous in their own neighborhood, while by implication raising no such objections to similar developments elsewhere.” See also Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58(3) J. AM. PLAN. ASS’N 288, 288 (1992); KATE BURNINGHAM ET AL., THE LIMITATIONS OF THE NIMBY CONCEPT FOR UNDERSTANDING PUBLIC ENGAGEMENT WITH RENEWABLE ENERGY TECHNOLOGIES: A LITERATURE REVIEW 3 (School of Environment and Development, University of Manchester, Working Paper No. 1.3, 2006).

30. Kahan, *supra* note 28, at 85.

31. As an individual.

32. White, *supra* note 10, at 1985-86.

33. Michael Wheeler, *Negotiating NIMBYs: Learning From the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 249 (1994).

34. Dan van der Horst, *NIMBY or Not? Exploring the Relevance of Location and the Politics of Voiced Opinions in Renewable Energy Siting Controversies*, 35 ENERGY POL’Y 2705, 2705 (2007).

35. Maria A. Petrova, *From NIMBY to Acceptance: Toward a Novel Framework—VESPA—For Organizing and Interpreting Community Concerns*, 86 RENEWABLE ENERGY 1280, 1280 (2016).

36. Charles R. Warren et al., “Green on Green”: Public Perceptions of Wind Power in Scotland and Ireland, 48(6) J. ENVTL. PLAN. & MGMT. 853, 857-58 (2005); Burningham, *supra* note 10, at 55.

37. Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 345-46 (2011); van der Horst, *supra* note 34, at 2705; Maarten Wolsink, *Wind Power and the NIMBY-Myth: Institutional Capacity and the Limited Significance of Public Support*, 21 RENEWABLE ENERGY 49, 52 (2000).

38. Veikko Eranti, *Re-Visiting NIMBY: From Conflicting Interests to Conflicting Valuations*, 65(2) SOC. REV. 285, 286 (2017).

39. Robin Gregory et al., *Incentive Policies to Site Hazardous Waste Facilities*, 11 RISK ANALYSIS 667, 672 (1991); William Marble & CLAYTON NALL, BEYOND “NIMBYISM”: WHY AMERICANS SUPPORT AFFORDABLE HOUSING BUT OPPOSE LOCAL HOUSING DEVELOPMENT (Stanford University, Working Paper, 2017).

40. Kahan, *supra* note 28, at 87.

41. Wheeler, *supra* note 33, at 247-48.

42. Howard Kunreuther & Doug Easterling, *The Role of Compensation in Siting Hazardous Facilities*, 15 J. POL’Y ANALYSIS & MGMT. 601, 601-02 (1996).

43. Claire Haggett, *Over the Sea and Far Away? A Consideration of the Planning, Politics, and Public Perception of Offshore Wind Farms*, 10(3) J. ENVTL. POL’Y & PLAN. 289, 298 (2008).

44. Susan Hunter & Kevin M. Leyden, *Beyond NIMBY: Explaining Opposition to Hazardous Waste Facilities*, 23(4) POL’Y STUD. J. 601, 602 (1995).

45. Carol Hager, *A New Look at NIMBY*, in NIMBY IS BEAUTIFUL: CASES OF LOCAL ACTIVISM AND ENVIRONMENTAL INNOVATION AROUND THE WORLD, *supra* note 10, at 5.

46. Sarah C. Klain et al., *Will Communities “Open-Up” to Offshore Wind? Lessons Learned From New England Islands in the United States*, 34 ENERGY RES. & SOC. SCI. 13, 21 (2017).

47. Wolsink, *supra* note 37, at 57.

48. Maarten Wolsink, *Invalid Theory Impedes Our Understanding: A Critique on the Persistence of the Language of NIMBY*, 31 TRANSACTIONS INST. BRIT. GEOGRAPHERS 85, 86 (2006).

tal degradation and systematic exclusion of the poor and people of color from environmental decision making.⁴⁹ Thus, the two dominant strains of environmental justice discussions of NIMBYism are environmental equity—that is, the disproportionate effects of LULUs on people and places⁵⁰—and procedural environmental justice, which is concerned with the fairness of the process of siting and development decisionmaking.⁵¹ Each of these strains affects and shapes NIMBY policy in its own distinct way.

I. Environmental Equity

It has long been observed that LULUs tend to aggregate around minority and poor communities.⁵² Because people of color and the poor tend to live near environmentally hazardous facilities,⁵³ they bear a disproportionate share of health and environmental risks,⁵⁴ and are therefore at higher risk of developing pollution-related health problems.⁵⁵ There are conflicting explanations for why LULUs tend to be found close to minority communities.

In the early 1990s, when the phenomenon gained public awareness, it was believed that the siting of facilities next to minority communities was deliberate. Many scholars argued that “[b]ecause local protest can be costly, time-consuming, and politically damaging, siting decision-makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest effectively.”⁵⁶ Environmental justice advocates therefore lobbied for proactive state intervention to ameliorate the disparate burden of environmental risks, either by creating legal causes of action in discrimination or by adopting

“fair siting” policies that evenly distribute LULUs among all communities.⁵⁷

Siting patterns, however, could also be explained by market forces and residential mobility. According to these explanations, the patterns of LULU siting are not based on deliberate targeting of minority and poor communities, but are rather a result of the dynamics of housing and job markets.⁵⁸ LULUs, researchers explain, reduce real estate prices in their vicinity and attract low-wage workers. Once a LULU is sited and developed in a neighborhood, housing and job market dynamics drive affluent residents away, while attracting lower-income residents.⁵⁹ Current siting patterns are therefore irrelevant for understanding the causes of LULUs’ locational disparity, because they tell us nothing about the processes that created them.

The market dynamics explanation undermined many of the calls for “fair siting” policies. If markets, not community political capital, determine community demographics around LULUs, then legal causes of action asserting discrimination disappear because there is no one to blame for the disparity.⁶⁰ Moreover, if market forces are to blame and not intentional discrimination, equitable distribution of LULUs will not solve the inequities in environmental risk distribution.⁶¹ Even if we find a just way to distribute LULUs evenly across communities,⁶² market forces will “soon recreate a situation where those living next to LULUs were predominately poor and people of color.”⁶³

Another argument leveled against “fair siting” policies is that they take away from communities the ability to make decisions concerning their economy, health, and environment.⁶⁴ As unappealing as it may seem, some communities may prefer the benefits of economic security over environmental risks that come with certain facilities.⁶⁵ A policy of just distribution undermines communal self-determination, because it allocates environmental burdens not based

49. Eileen Maura McGurty, *From NIMBY to Civil Rights: The Origins of the Environmental Justice Movement*, 2(3) ENVTL. HIST. 301, 302 (1997).

50. Susan L. Cutter, *Race, Class, and Environmental Justice*, 19(1) PROGRESS HUM. GEOGRAPHY 111 (1995).

51. Derek Bell & Jayne Carrick, *Procedural Environmental Justice*, in THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 101, 101 (Ryan Holifield et al. eds., Routledge 2017). These are the two dominant strains of environmental justice in most contexts. See DAVID SCHLOSBERG, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE* 5 (2007). See also Kaswan, *supra* note 28, at 230.

52. BENJAMIN GOLDMAN, *NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE* 9 (1993); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 622-27 nn.7-18 (1992); Christopher G. Boone & Geoffrey L. Buckley, *Historical Approaches to Environmental Justice*, in THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE, *supra* note 51, at 222; Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANN. REV. PUB. HEALTH 103, 103-05 (2006); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 925-27 (1992).

53. Cutter, *supra* note 50, at 113.

54. Brulle & Pellow, *supra* note 52, at 104 and references therein; Rachel D. Godsil, *Remediating Environmental Racism*, 90(2) MICH. L. REV. 394, 394-95 (1991); DAVID E. NEWTON, *ENVIRONMENTAL JUSTICE: A REFERENCE HANDBOOK* 60 (2d ed. 2009).

55. Brulle & Pellow, *supra* note 52, at 107 and references therein; Cole, *supra* note 52, at 622-27 nn.7-18; U.S. ENVIRONMENTAL PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES*, VOL. I: WORKGROUP REPORT TO THE ADMINISTRATOR 3 (1992) (EPA 230-R-92-008).

56. Been, *supra* note 7, at 1002; Cole, *supra* note 52, at 628; Godsil, *supra* note 54, at 396, 399; Kaswan, *supra* note 28, at 236-37.

57. See, e.g., Godsil, *supra* note 54, at 421-27; NEWTON, *supra* note 54, at 59 (suggesting legislation that “would create a ‘disparate impact’ model of discrimination for hazardous waste facility siting”); Been, *supra* note 7, at 1005-06.

58. Kaswan, *supra* note 28, at 241; Been, *supra* note 7, at 1016; Vicki Been, *Unpopular Neighborhoods: Are Dumps and Landfills Sited Equitably?*, in THE RFF READER IN ENVIRONMENTAL AND RESOURCE MANAGEMENT 191, 192-93 (Wallace E. Oates ed., RFF Press 1999).

59. Been, *supra* note 7, at 1017.

60. Bezdek, *supra* note 23, at 50-51.

61. *But cf.* U.S. COMMISSION ON CIVIL RIGHTS, *NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE* 15-17 (2003).

62. Which, by itself, is a formidable task. See Been, *supra* note 7, at 1030-40.

63. *Id.* at 1007.

64. Kaswan, *supra* note 28, at 240-41.

65. *Id.* at 240. But the question always remains why, in the first place, low-income communities prefer having dangerous facilities in their community while affluent communities are not faced with such dilemmas. See LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 58-62 (2000); Bezdek, *supra* note 23, at 51 (arguing that there is no free market without government intervention and therefore the government bears responsibility for unequal distribution of burdens).

on communal preferences but according to a formula of overall distribution.⁶⁶

2. Procedural Environmental Justice

Most researchers agree that environmental equity is unattainable in the absence of procedural equity and that “broad, inclusive, and democratic decision-making procedures are . . . a precondition for achieving distributional justice.”⁶⁷ Especially in the context of NIMBY, scholars have argued that if the patterns of LULU siting result from structural marginalization that persists in both society and in politics, then the only way to combat LULU locational disparity is to establish empowering, inclusive, and fair decisionmaking processes.⁶⁸ Procedural justice is more than a means to an end; it is “an element of justice and claim-making in its own right.”⁶⁹ We should therefore strive to eliminate procedural injustice, regardless of whether it produces unequal distributional results, because political equality and individual autonomy require that the institutional structures that profoundly affect our lives are fair.⁷⁰

In the context of NIMBY, autonomy-enhancing procedural environmental justice requires that “those who must bear the brunt of a decision should have an equal and influential role in making the decision.”⁷¹ Government should therefore “not only play the role of protecting the autonomous choices of its citizens but must empower their participation.”⁷² Indeed, there is a big difference between allowing individuals to participate and empowering them to take an active and meaningful part in making decisions that directly affect their lives. Even if our decisionmaking procedures grant equal access to all, marginalized communities will still have fewer resources to effectuate change, and will therefore be disadvantaged in the process.⁷³

Ideally, the requirement to empower marginalized communities should translate to giving communities complete control over decisions that directly affect them.⁷⁴ In practice, however, complete communal control over LULU siting and development decisions is impossible.⁷⁵ Instead, scholars and policymakers have advocated for greater and

more meaningful communal participation in siting, planning, permitting, and development procedures.⁷⁶

Meaningful participation, it is argued, has normative as well as pragmatic benefits. Normatively, meaningful participation should be promoted as a manifestation of the democratic right to participate in decisionmaking affecting one's life.⁷⁷ Meaningful participation reduces marginalization and empowers communities by giving voice to those directly affected by decisions.⁷⁸ The more inclusive and transparent the process of deliberation, the greater the likelihood that the needs and wants of affected stakeholders are considered.⁷⁹ Thus, inclusive, transparent, and meaningful deliberation is conducive to communal autonomy because it gives participants greater influence on the decisionmaking process.

Pragmatically, meaningful participation increases the likelihood of development because it is conducive to trust. The more inclusive the process, the greater its potential to transform the adversarial character of LULU development into beneficial collaboration that signals to participants that “the organization facilitating the process will act in their best interests.”⁸⁰ Moreover, meaningful deliberation facilitates mutual learning, which leads to solutions that are more accommodating of the needs and sensibilities of communities while generating important local knowledge.⁸¹ Meaningful deliberation allows stakeholders to gauge communal opposition or support, and establish relationships with community leaders and local organizations that could serve as brokers to bridge local communities and project proponents.⁸² It therefore improves administrative efficiency and decisionmaking.⁸³

Based on this reasoning, scholars have advocated for greater and more meaningful communal participation in administrative procedures as a way to increase both the legitimacy of decisionmaking processes and the quality of policy decisions.⁸⁴ Heeding these calls, lawmakers have introduced community outreach and deliberation as a prerequisite in environmentally or socially sensitive developments.⁸⁵ Legislative mandates for participatory planning

66. Robert W. Lake, *Volunteers, NIMBYs, and Environmental Justice: Dilemmas of Democratic Practice*, 282 *ANTIPODE* 160, 168-69 (1996).

67. GORDON WALKER, *ENVIRONMENTAL JUSTICE: CONCEPTS, EVIDENCE, AND POLITICS* 47 (2012), and references therein.

68. Sheila Foster, *Race(ial)Matters: The Quest for Environmental Justice Review Essay*, 20 *ECOLOGY L.Q.* 721, 748-50 (1993).

69. WALKER, *supra* note 67, at 47 and references therein. See also Bell & Carrick, *supra* note 51, at 102.

70. Bell & Carrick, *supra* note 51, at 102.

71. COLE & FOSTER, *supra* note 65, at 109 and references therein.

72. John Martin Gillroy, *Moral Considerations and Public Policy Choices: Individual Autonomy and the NIMBY Problem*, 5(4) *PUB. AFF. Q.* 319, 328 (1991).

73. COLE & FOSTER, *supra* note 65, at 79.

74. See generally Lake, *supra* note 66; see Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 *BROOK. L. REV.* 861, 919 (2001) (same in the context of urban redevelopment).

75. Smith, *supra* note 25, at 256-57.

76. *Id.* at 246-47, 248; McFarlane, *supra* note 74, at 866.

77. Reed, *supra* note 26, at 2419.

78. Georgette C. Poindexter, *Who Gets the Final No—Tenant Participation in Public Housing Redevelopment*, 9(3) *CORNELL J.L. & PUB. POL'Y* 659, 682 (2000); Leah Sprain, *Paradoxes of Public Participation in Climate Change Governance*, 25(1) *GOOD SOC'Y* 62, 66 (2016); Reed, *supra* note 26, at 2420.

79. Reed, *supra* note 26, at 2420.

80. Mhairi Aitken, *Wind Power and Community Benefits: Challenges and Opportunities*, 38(10) *ENERGY POL'Y* 6066, 6067 (2010), and references therein; Poindexter, *supra* note 78, at 682; Sprain, *supra* note 78, at 66.

81. McFarlane, *supra* note 74, at 898; Sprain, *supra* note 78, at 66.

82. McFarlane, *supra* note 74, at 898.

83. *Id.*

84. Smith, *supra* note 25, at 246-47, 248, and references therein; McFarlane, *supra* note 74, at 866; NATIONAL RESEARCH COUNCIL, *PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING* 10 (2008), and references therein (generally about the support of broader public participation in environmental decisionmaking).

85. See, e.g., Toxic Substances Control Act, 15 U.S.C. §§2619-2620; Coastal Zone Management Act, 16 U.S.C. §§1457, 1458(b); Surface Mining Control and Reclamation Act, 30 U.S.C. §§1254(c), 1257(e), 1267(f), 1270; Clean Water Act, 33 U.S.C. §§1365, 1344(o), 1342(j); National

were accompanied by an executive encouragement of public participation and a growing awareness of the importance of meaningful and inclusive participation among the public and private sectors.⁸⁶

However, the results of measures to increase participation have been mixed, with many questioning their efficacy.⁸⁷ Measuring the success of public participation is empirically challenging, because it is impossible to attribute specific effects to the deliberation process or determine whether the resulting development would have looked different, absent public participation.⁸⁸ Thus, while inclusive public participation plans have had moderate success in reducing local opposition, scholars have suggested that costly and lengthy participation mechanisms do not justify the results they generate.⁸⁹ Others have questioned whether public participation initiatives “are indeed intended to promote public engagement, or whether they represent a form of political marketing and persuasion”⁹⁰; while some have pointed out that public participation schemes are structured to allow lay persons to “blow steam” without actually affecting the end result.⁹¹

More radical scholars argue that fully inclusive deliberation is simply unattainable in capitalist representative democracies.⁹² For instance, Luke Cole and Sheila Foster argue that no matter how inclusive the process is, it does not address the real problem, which is “power disparities in the relationships of the participants.”⁹³ Existing social, economic, institutional, and political disparities result in a relationship in which “one participant has power over another in a decision-making process because of a network of rules and practices that . . . structure the relationship of participants in that process.” Thus, “regardless of the type of participatory process employed, environmental decision-making processes replicate, and facilitate, the constraints imposed by others in the social structure.”⁹⁴

Despite this critique, inclusive deliberation remains a cornerstone in land use planning and development,⁹⁵ with most researchers asserting that “[c]ommunity engagement that results not just in input on physical planning but in social empowerment is critical to serious planning for sustainable development.”⁹⁶ Observed flaws in participatory mechanisms are mostly attributed to inadequate process design or failed implementation of public outreach and deliberation measures.⁹⁷

II. Private Measures to Address NIMBY

A. Compensation Schemes

Many scholars believed that market-based solutions would better address NIMBY sentiments than deliberation and equal distribution policies.⁹⁸ They therefore advocated solutions based on negotiated monetary compensation between developers and communities for the right to site and develop a LULU in the locality of the community.⁹⁹

Two main arguments have been offered in support of community payments. The first justification is rooted in a theory of fairness: if society cannot guarantee distributional equality, the least we can do is promote “compensated” equality.¹⁰⁰ In other words, those who benefit from LULUs should compensate the ones who are harmed by them.¹⁰¹ This applies both to communities that do not share the burden of hosting a LULU and operators of a LULU that directly benefit from the activity that imposes costs on the hosting community.¹⁰² The second justification is practical: compensation schemes are aimed to address the mismatch between the local costs imposed by LULU development and the general societal benefits LULUs provide.¹⁰³ Paying communities for the costs imposed by development is supposed to reduce local opposition, because it compensates residents for the burdens imposed by LULUs.¹⁰⁴

It was soon discovered that community payments offer no solution for NIMBY conflicts.¹⁰⁵ Most compensation schemes to address NIMBY conflicts were unsuccessful.

Environmental Policy Act, 42 U.S.C. §§4332(C), 4368; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9617, 9659; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§11044, 11046. See also HOPE VI Revitalization and Demolition, 65 Fed. Reg. 9597, 9604 (Feb. 24, 2000), and 42 U.S.C. §1437p(b) (2); Smith, *supra* note 25, at 250 and references therein.

86. See, e.g., President Clinton's Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations. One of the three fundamental goals of the Executive Order is to increase public participation in environmental decisionmaking. See Denis Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 ELR 11133, 11134 (Oct. 2001); U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 61, at 108-18; Schreurs & Ohlhorst, *supra* note 10, at 78.

87. Smith, *supra* note 25, at 250 and references therein.

88. Caron Chess & Kristen Purcell, *Public Participation and the Environment: Do We Know What Works?*, 33(16) ENVTL. SCI. & TECH. 2685 (1999); however, there seems to be a consensus among researchers that public participation could be used by activists to block development entirely, see *id.* at 2688.

89. NATIONAL RESEARCH COUNCIL, *supra* note 84, at 9.

90. Bezdek, *supra* note 23, at 57; Rob Hagendijk & Alan Irwin, *Public Deliberation and Governance: Engaging With Science and Technology in Contemporary Europe*, 44(2) MINERVA 167, 170 (2006).

91. Bezdek, *supra* note 23, at 57-58; Susskind, *supra* note 23, at 3; Cole, *supra* note 23, at 697-98.

92. Bell & Carrick, *supra* note 51, at 106.

93. COLE & FOSTER, *supra* note 65, at 106.

94. *Id.* at 107.

95. McFarlane, *supra* note 74, at 868.

96. Murtaza H. Baxamusa, *Empowering Communities Through Deliberation: The Model of Community Benefits Agreements*, 27 J. PLAN. EDUC. & RES. 261, 261 (2008).

97. See, e.g., Scally & Tighe, *supra* note 26; Reed, *supra* note 26; MacArthur, *supra* note 26.

98. Been, *supra* note 7, at 1040 and references therein.

99. *Id.*

100. *Id.* at 1029-31.

101. NEWTON, *supra* note 54, at 59.

102. See Been, *supra* note 7, at 1047 (as to communities); NEWTON, *supra* note 54, at 59 (as to companies).

103. SARAH KLAHN ET AL., ISLAND INSTITUTE, *ENGAGING COMMUNITIES IN OFFSHORE WIND: CASE STUDIES AND LESSONS LEARNED FROM NEW ENGLAND ISLANDS* 6 (2015); Richard Cowell et al., *Acceptance, Acceptability, and Environmental Justice: The Role of Community Benefits in Wind Energy Development*, 54(4) J. ENVTL. PLAN. & MGMT. 539, 541 (2011).

104. Richman & Boerner, *supra* note 8, at 33.

105. Benjamin J. Walker et al., *Community Benefits, Framing, and the Social Acceptance of Offshore Wind Farms: An Experimental Study in England*, 3 ENERGY RES. & SOC. SCI. 46, 51 (2014).

ful.¹⁰⁶ In 1980, for instance, Massachusetts enacted a law designed to reduce NIMBYism in siting and development of hazardous waste treatment facilities. The Hazardous Waste Facility Siting Act established formal negotiation procedures and an environment supposedly conducive to the provision of negotiated community benefits.¹⁰⁷ The underlying premise of the legislation was that structured collaborative negotiation, coupled with financial incentives, would smooth local NIMBY sentiments.¹⁰⁸

The legislation failed miserably. Despite a dire need for waste treatment facilities in Massachusetts and generous incentive packages, not one new facility was erected.¹⁰⁹ Incentives-based siting programs in other states have had similar unimpressive results.¹¹⁰ More often than not, payments to the local community were perceived as bribes meant to “buy” local support.¹¹¹ When such a perception became entrenched, either through media coverage or public discourse, community opposition actually increased, as locals in the affected community felt that the benefits were not meant to create greater equity but rather to silence them.¹¹²

Three explanations have been offered as to why community compensation schemes have failed to reduce NIMBY sentiments. These are value incommensurability, reciprocity and trust, and autonomy.

I. Value Incommensurability

Community payments approaches are premised on the assumption that the negative impacts imposed on communities by LULUs, whether personal, environmental, ethical, or other, may be exchanged at the right “price.”¹¹³ Implicit in this assumption is a view of values as strongly commensurable—that is, that closing the “social gap” is merely a matter of finding the appropriate payment that will offset all the harms of development and guarantee that those impacted are not left worse off.¹¹⁴ The assumption of value commensurability, however, is hotly contested both

in academia and with the general public.¹¹⁵ Many people argue that some values are incommensurable with others.¹¹⁶

Value incommensurability maintains that not all the things we value can be aligned along a single metric and traded using commensurable units of currency.¹¹⁷ Most individuals will not agree to trade everything they value for money and, even if money is offered as a compensation for injury, it is hardly the case that the injured feels whole merely by the fact that he or she was financially compensated for the loss.¹¹⁸ As Cass Sunstein has observed, things that are important to individuals cannot be reduced to a single currency “without significant loss.”¹¹⁹

Sunstein provides an example of two friends who scheduled a lunch meeting that one of them, Smith, wishes to cancel at the last minute. Knowing that her friend might be offended by the last-minute cancellation, Smith is considering offering a cash payment as compensation. However, because friendship and mutual respect are incommensurable with money, this approach is not expected to yield a positive result. As Sunstein explains:

A cash payment would be inconsistent with the way that someone values a friend. Even if the friend would prefer \$1, or \$10, or \$100, or \$1000 to lunch with Smith—even though at some point the payment would in some sense be worth far more than the lunch and be readily accepted as an alternative—the offer of cash would be perceived as an insult rather than as compensation.¹²⁰

Sunstein’s discussion of value incommensurability explains why community payments are often viewed as “bribes” and therefore intensify animosity instead of facilitating compromise. As one group of researchers argued: “Focusing on the balance of costs and benefits neglects the fact that an array of other factors—including attitudes to the decision-making process, and levels of trust in developers and government—may have greater bearing on people’s stance towards development.”¹²¹ The different values manifested in autonomy and identity, including the values that people find in the environment, their community, and in social equality, “deny the possibility of community benefits being in any sense equivalent to losses, and further undermine the prospect of social acceptability being forged on this basis.”¹²²

106. Richman & Boerner, *supra* note 8, at 41. See also Kahan, *supra* note 28, at 86 (“incentives-based strategy, however, has an unimpressive track record”).

107. Michael O’Hare & Debra Sanderson, *Facility Siting and Compensation: Lessons From the Massachusetts Experience*, 12 J. POL’Y ANALYSIS & MGMT. 364, 366-67 (1993).

108. Wheeler, *supra* note 33, at 256-57.

109. *Id.* at 244; Kahan, *supra* note 28, at 86.

110. Kahan, *supra* note 28, at 86.

111. Noel Cass et al., *Good Neighbours, Public Relations, and Bribes: The Politics and Perceptions of Community Benefit Provision in Renewable Energy Development in the UK*, 12(3) J. ENVTL. POL’Y & PLAN. 255, 263-65, 267, 272 (2010); Aitken, *supra* note 80, at 6068; Derek Bell et al., *The “Social Gap” in Wind Farm Siting Decisions: Explanations and Policy Responses*, 14(4) ENVTL. POL. 460, 473 (2005); Richman & Boerner, *supra* note 8, at 45; Kahan, *supra* note 28, at 86.

112. Walker et al., *supra* note 105, at 51; Richman & Boerner, *supra* note 8, at 45.

113. Cowell et al., *supra* note 103, at 541.

114. *Id.*; Richman & Boerner, *supra* note 8, at 40.

115. Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 781 (1994).

116. For an explanatory discussion of value incommensurability, see Joseph Raz, *Value Incommensurability: Some Preliminaries*, 86 PROC. ARISTOTELIAN SOC’Y 117 (1985/1986).

117. Sunstein, *supra* note 115, at 796.

118. See ROBERT E. GOODIN, *THE POLITICS OF RATIONAL MAN* 65, 81 n.4 (1976) (referring to ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 66 (1976)).

119. Sunstein, *supra* note 115, at 784.

120. *Id.* at 785.

121. Cowell et al., *supra* note 103, at 541.

122. *Id.*

2. Trust and Reciprocity

In recent years, a growing volume of research suggests that collective action problems are not simple matters of costs and benefits distribution. While self-interest plays some part in undermining collective initiatives, the positions that individuals hold in collective action situations are nuanced and often driven by feelings of reciprocity and trust.¹²³ The most notable work on the importance of trust to overcoming collective action problems is that of Nobel laureate Elinor Ostrom. Ostrom, who studied communities that managed to overcome collective action problems, observed that the capacity of individuals to extricate themselves from “free rider” and “prisoner dilemma” challenges is rooted in trust.¹²⁴

Under certain conditions, reciprocity and communication contribute to the development of communal “trust capital” that Ostrom defines as “the expectation of one person about the actions of others that affects the first person’s choice, when an action must be taken before the actions of others are known.”¹²⁵ It is this sense of communal trust that guards against short-term self-interest at the expense of the communal interest. In collective action situations, when individuals believe that others in their community will behave cooperatively, they will reciprocate and act so as to contribute to the collective good. However, if individuals believe that others are taking advantage of them or treating them unfairly, they will reciprocate in costly forms of retaliation.¹²⁶

Hence, for NIMBY negotiations to succeed, the parties must first establish trust. No trust, no prospects for successful negotiations.¹²⁷ However, communal trust is strongly connected with fairness. For an individual or a community to agree to carry the burden of development from which all of society will benefit, the encumbered party must feel assured that no exploitation has occurred.¹²⁸ As long as one perceives the process of decisionmaking as fair, one will be inclined to cooperate.¹²⁹ However, if one does not feel that the community was chosen in a just and fair process, one will tend to “retreat into more narrowly self-interested behavior in self-defense.”¹³⁰

The problem with NIMBYism is that siting conflicts are often characterized by mutual mistrust and hostility between the community, the developer, and the government.¹³¹ When a siting conflict involves marginalized com-

munities, these feelings are enhanced because of what some scholars have termed “enclave consciousness”: a communal sense of alienation, suspicion, and hostility toward other segments of society due to a history of disenfranchisement.¹³² Enclave consciousness drives marginalized communities to view proposed LULU developments as a threat and predisposes community members to hostility toward government and developers.¹³³

Enclave consciousness aggravates trust-based failures in NIMBY because “[i]ndividuals who interpret the decision to impose a LULU on their community as signifying the low social status of its residents—who believe they are being ‘dumped on,’ symbolically as well as literally—are more likely to resist.”¹³⁴ Under such circumstances, offers of compensation are bound to generate increased opposition, because they signal to the local community that other communities are unwilling voluntarily to accept the imposition of the LULU.¹³⁵

3. Autonomy and Control

The relationship between fairness and trust highlights another aspect of communal acceptance of LULUs—autonomy. Unfair decisionmaking processes harm individual and communal autonomy in two distinct ways. First, by failing to “treat people with equal concern and respect,”¹³⁶ unfair decisionmaking processes violate personal dignity.¹³⁷ Second, unfairness in representation and decisionmaking diminishes the capacity of marginalized individuals and communities to participate in and control processes that directly impact their lives. This is a direct assault on autonomy, which holds “that a person should have the freedom and the capacity to make decisions that impact her life.”¹³⁸

An offer of compensation after the fact does not redress an injury to autonomy, it exacerbates it. Post-siting compensation signals to individuals that they have no “right” to

123. Kahan, *supra* note 28, at 71.

124. Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association*, 1997, 92(1) AM. POL. SCI. REV. 1, 12-14 (1998).

125. *Id.* at 12.

126. Kahan, *supra* note 28, at 71.

127. *Id.* at 89; Bell et al., *supra* note 111, at 470; Aitken, *supra* note 80, at 6067 and references therein; Poindexter, *supra* note 78, at 679-80 (“once the Housing Authority garnered the trust of the tenants, redevelopment proceeded smoothly”).

128. Gillroy, *supra* note 72, at 327.

129. *Id.*

130. *Id.*

131. Wheeler, *supra* note 33, at 246; Botelho, *supra* note 9, at 144.

132. Sidney Plotkin, *Community and Alienation: Enclave Consciousness and Urban Movements*, in *BREAKING CHAINS: SOCIAL MOVEMENTS AND COLLECTIVE ACTION* 5, 8 (Michael Smith ed., Transaction Publishers 1991).

133. Poindexter, *supra* note 78, at 681. See also Sioned Haf & Karen Parkhill, *The Muilean Gaoithe and the Melin Wynt: Cultural Sustainability and Community Owned Wind Energy Schemes in Gaelic and Welsh Speaking Communities in the United Kingdom*, 29 ENERGY RES. & SOC. SCI. 103, 105-06 (2017) (making a similar case with regard to communities who suffered from colonialization).

134. Kahan, *supra* note 28, at 87 and references therein. See also Kaswan, *supra* note 28, at 236 (when legitimacy of siting decisions is questioned by the community, the environmental problem becomes “a single dimension of an overall social condition”).

135. Kahan, *supra* note 28, at 88.

136. Kaswan, *supra* note 28, at 233 (referring to RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-73 (1977)) (internal quotation omitted).

137. Gillroy, *supra* note 72, at 328. On the link between discrimination, self-respect, and autonomy, see Beate Roessler, *Autonomy, Self-knowledge, and Oppression*, in *PERSONAL AUTONOMY AND SOCIAL OPPRESSION: PHILOSOPHICAL PERSPECTIVES* 68, 75 (Marina A.L. Oshana ed., Routledge 2015).

138. Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WM. & MARY L. REV. 2105-06 (2015) (referring to OXFORD ENGLISH DICTIONARY (2d ed. 1989) defining “autonomy” as “liberty to follow one’s will, personal freedom,” and BLACK’S LAW DICTIONARY 154 (9th ed. 2009) defining “autonomy” as “[a]n individual’s capacity for self-determination”).

control their lives and participate in decisions concerning processes that directly affect them. In other words, it is the lack of a “say” in the process that increases opposition and NIMBY sentiments.¹³⁹ Payments are unable to solve this problem because the violation of autonomy in the siting process is viewed by affected individuals as an illegitimate state action.¹⁴⁰ For them, the illegitimate siting decision falls into the category of “things that we as a society cannot do to people, even if they are compensated.”¹⁴¹ Thus, as long as the legitimacy of the siting decision is questionable, compensation will fail to reduce NIMBY sentiments.¹⁴²

B. CBAs

The failures of payments schemes and a growing frustration about the inability of public participation arrangements to address local concerns about LULU development supported the emergence of a new private form of community representation in land use development.¹⁴³ This practice is the use of CBAs to address local concerns and reduce opposition to development. First introduced in California in 1998,¹⁴⁴ CBAs have rapidly spread throughout the country.¹⁴⁵ CBAs are privately negotiated legal instruments between the developer and a coalition of community groups with plural interests like civic, labor, environmental, and even religious organizations.¹⁴⁶

Under a standard CBA, the community trades support for a proposed LULU development in exchange for certain benefits.¹⁴⁷ The benefits provided under CBAs are specifically tailored to address the particular needs of the host community, and are as varied as the communities that have

negotiated them.¹⁴⁸ Common benefits include funding for parking, parks, and affordable housing, commitments to local hiring, to a certain percentage of living wage jobs or higher than statutory minimum wage, establishment of hiring and job training programs, environmental remediation measures, and provision of community services.¹⁴⁹

CBAs have several benefits. The informal and flexible character of private negotiations that characterizes CBAs allows communities to address very specific needs and facilitates innovation that is often missing from government-led siting, planning, permitting, and development procedures.¹⁵⁰ By establishing a direct communication channel between the developer and the opposition, CBAs promote mutual trust.¹⁵¹ The coordination and division of power within the coalition of community interests strengthens communal bonds and increases local cohesion.¹⁵² Another clear benefit of CBAs is the ability of communal stakeholders not only to avert or mitigate the negative effects of development, but also to capitalize on the development to address preexisting problems and improve the general welfare of the community through investments that are unrelated to the proposed project.¹⁵³

Through their open and flexible nature, CBAs “provide a focal point for grassroots community interests to channel various concerns regarding a project into one visible movement.”¹⁵⁴ The representation of various perspectives in CBA negotiations and the freedom to design specifically tailored solutions to problems that affect an array of local interests make CBAs a uniquely pluralistic mechanism.¹⁵⁵ CBAs are therefore less subject to value incommensurability failures that arise in compensation schemes.¹⁵⁶ Moreover, either because of their inclusiveness or their potential to provide communal benefits, CBA negotiations have increased local involvement in decisionmaking.¹⁵⁷ Many scholars have therefore hailed the democratic value of CBAs and celebrated it as an efficient solution for building communal capital, empowering disenfranchised communities, reducing racial and social inequality, promoting civic engagement, and mitigating local opposition that has often undermined development.¹⁵⁸

However, like other practices designed to address NIMBY, CBAs are no panacea. Studies have documented

139. Kaswan, *supra* note 28, at 236.

140. *Id.* at 234, 236.

141. Robert E. Goodin, *Theories of Compensation*, 9(1) OXFORD J. LEGAL STUD. 56, 57 (1989).

142. Cowell et al., *supra* note 103, at 542-43.

143. Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility*, 18(1) CORNELL J.L. & PUB. POL’Y 223, 227 (2008); Alejandro E. Camacho, *Community Benefit Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355, 356, 361 (2013); Baxamusa, *supra* note 96, at 262-63. These writers link the emergence of CBAs to the proliferation of public-private partnership, a form of development that has eroded the ability of local interests to affect development. See Bezdek, *supra* note 23, at 59-61; Alejandro E. Camacho, *Mastering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement, and Adaptive Planning in Land Use Decisions—Installation One*, 24 STAN. ENVTL. L.J. 3, 49 (2005); David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America’s Neighborhoods*, 39(3) URB. LAW. 657, 661 (2007).

144. Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice, and Other Considerations for Developers, Municipalities, and Community Organizations*, 26 UCLA J. ENVT. L. & POL’Y 291, 301 n.26 (2008); Marcello, *supra* note 143, at 658.

145. Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773, 1776 (2016); Salkin & Lavine, *supra* note 144, at 300-19.

146. Camacho, *Community Benefit Agreements*, *supra* note 143, at 361; Salkin & Lavine, *supra* note 144, at 294; Baxamusa, *supra* note 96, at 263.

147. Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 IND. L. REV. 621, 632 (2016); De Barbieri, *supra* note 145, at 1776; Camacho, *Community Benefit Agreements*, *supra* note 143, at 356, 361; Sheikh, *supra* note 143, at 229-30; Salkin & Lavine, *supra* note 144, at 293.

148. Salkin & Lavine, *supra* note 144, at 293.

149. Crowder, *supra* note 147, at 632; Camacho, *Community Benefit Agreements*, *supra* note 143, at 356, 361; Salkin & Lavine, *supra* note 144, at 294.

150. Salkin & Lavine, *supra* note 144, at 294; Baxamusa, *supra* note 96, at 263-64 (detailing the differences between public development and CBA deliberations, attributing different characteristics of CBA deliberations to their success and innovative nature).

151. Baxamusa, *supra* note 96, at 263-64.

152. *Id.*

153. Salkin & Lavine, *supra* note 144, at 292, 294.

154. Sheikh, *supra* note 143, at 242.

155. Camacho, *Community Benefit Agreements*, *supra* note 143, at 364-65.

156. See *supra* notes 113-22 and accompanying text.

157. Salkin & Lavine, *supra* note 144, at 294, 299.

158. *Id.* at 294; Camacho, *Community Benefit Agreements*, *supra* note 143, at 356, 363, 365; Been, *supra* note 7, at 15-19; De Barbieri, *supra* note 145, at 1787-88, 1813, 1815-16; Marcello, *supra* note 143, at 662; Baxamusa, *supra* note 96, at 270-71.

opportunistic application of CBAs by developers to undermine opposition and allow the proposed project to proceed. A common tactic in this respect is “divide and conquer” recruitment, under which developers identify influential individuals or groups within the community and recruit them into CBA negotiations by offering benefits that target their specific needs. After these parties “switch sides,” they are dispatched to balkanize coalitions and generate a semblance of public support that increases the chances of approval.¹⁵⁹

Using these tactics, developers can buy off the minimum number of stakeholders required to allow the project to move forward without engaging in bona fide negotiation with all stakeholders.¹⁶⁰ While it is not clear how prevalent the use of the tactic is, scholars have noted that, in general, CBAs “result[] in less-than-optimal agreements that disproportionately reflect the interests of the developer, since it is entirely up to the developer how much to involve other stakeholders.”¹⁶¹

Others have expressed concern that the growing use of CBAs to negotiate for public amenities like parks and parking skews public decisionmaking and is unfair to local communities. Marginalized communities, these scholars explain, are entitled to equal participation in public services and amenities that should be provided by government, not bargained for through opaque private dealmaking.¹⁶² CBAs circumscribe public processes concerning the allocation of public resources and are conducted in a nontransparent manner that raises concerns about unfair dealing and failure to consider broader public interests.¹⁶³

The fact that CBAs are not an inherent part of public planning procedures may contribute to their appearance as “somehow illicit.”¹⁶⁴ Under certain circumstances, CBAs have been found to undermine communal trust in developers, instead of enhancing it. As in the case of payments, developers’ attempts to engage in CBA negotiations have occasionally been perceived as bribes meant to buy local support.¹⁶⁵

No less important is the limited applicability of CBAs. Certain preconditions must be met for a CBA to be feasible. Developers are more willing to enter into CBA negotiations when the project is substantially supported by public funds, when the CBA concerns large-scale developments, or when the development is taking place in a thriving or

up-and-coming market.¹⁶⁶ Not only must the project be large-scale development, but the impacted community must also be relatively large. Coalition-building, research, deliberation, and negotiation costs are substantial. If the impacted community is not large enough, the cost of negotiation will undermine the process.¹⁶⁷

Lastly, the success of CBAs is contingent on government ownership of the land or some other form of government veto power concerning the development. Communities have had the leverage to negotiate concessions from the developer only when development is contingent on public veto power.¹⁶⁸

Two related problems that render the utility of CBAs questionable are monitoring and enforceability. In law, for a contract to be enforceable, it must include valid consideration, “and in order for a contract to have valid consideration, the contract must be a bargained-for exchange in which there is a legal detriment of the promisee.”¹⁶⁹ The problem with CBAs is that they do not appear to include a valid consideration because “groups could not incur a legal detriment by lawfully signing away their individual or collective rights to participate in democracy.”¹⁷⁰

Moreover, the contractual guarantees provided by local representatives under a CBA are not binding on the larger community they represent, and, therefore, probably do not constitute sufficient consideration.¹⁷¹ Attempts to circumvent this problem by incorporating CBAs into development agreements with local governments will also fail. Under current land use and takings law, governments cannot impose conditions to development nor require concessions from developers that are not “roughly proportionate” to the anticipated negative harms associated with the proposed project.¹⁷²

A less discussed problem, related to monitoring and enforcement of CBAs, is the issue of long-term adaptability. Large-scale projects have long-term impacts on the communities that host them. Some of these impacts can be pre-identified, but many cannot. The character of the hosting community could change over time, as can the range of activities undertaken in the facility. As contracts signed in the predevelopment stage, CBAs have a limited ability to foresee and account for all possible developments. This is complicated by issues of enforceability that render future renegotiation to adapt to change unlikely.

159. Camacho, *Community Benefit Agreements*, *supra* note 143, at 369-71; Sheikh, *supra* note 143, at 225, 231.

160. Salkin & Lavine, *supra* note 144, at 322.

161. Camacho, *Community Benefit Agreements*, *supra* note 143, at 356-57.

162. *Id.* at 368; Christine A. Fazio & Judith Wallace, *Legal and Policy Issues Related to Community Benefits Agreements*, 21(3) *FORDHAM ENVTL. L. REV.* 543, 551 (2010).

163. Camacho, *Community Benefit Agreements*, *supra* note 143, at 369, 375; Been, *supra* note 7, at 25-26, 29.

164. Aitken, *supra* note 80, at 6068.

165. Cass et al., *supra* note 111, at 263-65, 267, 272; Aitken, *supra* note 80, at 6068; Bell et al., *supra* note 111, at 473; Richman & Boerner, *supra* note 8, at 45.

166. Salkin & Lavine, *supra* note 144, at 321-22; Sheikh, *supra* note 143, at 245; Marcello, *supra* note 143, at 660.

167. Salkin & Lavine, *supra* note 144, at 323.

168. Sheikh, *supra* note 143, at 245; Marcello, *supra* note 143, at 660.

169. *Neuhoff v. Marvin Lumber & Cedar Co.*, 370 F.3d 197, 201 (1st Cir. 2004) (internal quotations omitted).

170. Sheikh, *supra* note 143, at 233-34.

171. *Id.*

172. *Id.* at 237-39; Camacho, *Mustering the Missing Voices*, *supra* note 143, at 30-31; Camacho, *Community Benefit Agreements*, *supra* note 143, at 372.

III. A Participatory Democracy Framework for NIMBY Conflicts

A. NIMBY as a Participation Failure

NIMBY conflicts are failures of democratic participation. NIMBYism is grounded in the inability of communities to exercise self-determination and autonomy to decide matters that directly affect their lives.¹⁷³ To date, most discussions of NIMBY and participation have been addressed through the prism of procedural justice. However, there is another salient theoretical framework that could be applied to understand NIMBYism, and that is the theory of participatory democracy. According to this theory, for democracy to function properly, individuals and communities must be able to participate in processes that directly affect their lives.¹⁷⁴ The theory of participatory democracy is “built round the central assertion that individuals and their institutions cannot be considered in isolation from one another.”¹⁷⁵

Hence, unlike theories of representative democracy, theories of participatory democracy advocate meaningful democratic participation in all spheres of human interaction.¹⁷⁶ Participatory democracy sees all social institutions as political structures and accordingly calls for democratic participation not only at the local, state, and national levels, but in all walks of life, including in industry and business.¹⁷⁷ According to proponents of participatory democracy, the democratic ideal implicit in modern representative democracies “is implausible because it tolerates too high a degree of material inequality and too circumscribed a scope of participation in decisions of collective significance.”¹⁷⁸ In representative democracies, in other words, material inequality leads to political inequality, because the have-nots are unable to participate in decision-making processes outside a very limited public sphere.¹⁷⁹

To mitigate the effects of economic inequality on political participation, proponents of participatory democracy advocate substantive economic equality (diffused ownership), and the democratization of the business sector.¹⁸⁰ Policies that align with notions of participatory democracy support creation of democratic forms of private ownership that allocate decisionmaking equally among a commu-

nity of owners. Two prominent examples of such property arrangements are producer cooperatives and limited equity housing cooperatives.¹⁸¹ While radical in theory, in practice, changes in ownership structures that increase democratic participation are an inherent part of our life.

One contemporary example for a change in ownership patterns that aligns with notions of participatory democracy is the energy sector. In the past two decades, technological breakthroughs have completely transformed the energy sector.¹⁸² Since 2014, most of the additions to energy capacity in the United States are in forms of renewable energy, which occupies a growing share of the energy market.¹⁸³ Renewable energy has challenged century-old models of energy generation. Historically, the dominant model of energy development was based on centralized generation, with hardly any involvement of citizens in either planning, generation, or delivery.¹⁸⁴

As a form of energy that is locally and cheaply sourced, renewable energy removes entry barriers for small generators and allows individuals and communities to engage in decentralized self-generation.¹⁸⁵ The process by which energy production and distribution gradually tilts from giant energy corporations to millions of small producers has been hailed by many as promoting “energy democratization.”¹⁸⁶ The concept of “democratization” of energy refers to the increasing ability of local communities to “affect meaningful change concerning energy development, as well as opportunities to substantively shape the outcomes associated with energy planning.”¹⁸⁷

Participatory democracy theory supports ownership-based solutions to address failures of disenfranchisement. When applied to NIMBYism, the conceptual framework of participatory democracy suggests that to attenuate NIMBY sentiments, policies should be put in place that

173. Lake, *supra* note 66, at 165.

174. PATEMAN, *supra* note 27, at 41.

175. *Id.*

176. *Id.*; Simon, *supra* note 27, at 1336, 1339.

177. PATEMAN, *supra* note 27, at 41; Simon, *supra* note 27, at 1336, 1339.

178. Simon, *supra* note 27, at 1338.

179. Participatory democracy is not merely a theory, empirical evidence supports the claim that political decisionmaking in representative democracies strongly favors the haves over the have-nots. See e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(3) PERSPECTIVE ON POLITICS, 564, 565 (2014) (finding that “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence”).

180. PATEMAN, *supra* note 27, at 41.

181. Simon, *supra* note 27, at 1336.

182. Mary Finley-Brook & Erica L. Holloman, *Empowering Energy Justice*, 13 INT’L J. ENVTL. RES. & PUB. HEALTH 926, 935 (2016) (discussing drop in renewable energy cost and appurtenant transformation in the energy market).

183. NATIONAL RENEWABLE ENERGY LABORATORY, U.S. DEPARTMENT OF ENERGY, 2015 RENEWABLE ENERGY DATA BOOK 3 (2015); NATIONAL RENEWABLE ENERGY LABORATORY, U.S. DEPARTMENT OF ENERGY, 2016 RENEWABLE ENERGY DATA BOOK 3 (2016).

184. Thomas Bauwens et al., *What Drives the Development of Community Energy in Europe? The Case of Wind Power Cooperatives*, 13 ENERGY RES. & SOC. SCI. 136, 136 (2016); Iain Soutar & Catherine Mitchell, *Towards Pragmatic Narratives of Societal Engagement in the UK Energy System*, 35 ENERGY RES. & SOC. SCI. 132, 135 (2018); Kevin B. Jones & Mark James, *Distributed Renewables in the New Economy: Lessons From Community Solar Development in Vermont*, in LAW AND POLICY FOR A NEW ECONOMY 190 (Melissa K. Scanlan ed., Edward Elgar Publishing 2017).

185. JEREMY RIFKIN, *THE THIRD INDUSTRIAL REVOLUTION: HOW LATERAL POWER IS TRANSFORMING ENERGY, THE ECONOMY, AND THE WORLD* 107 (2011); CHRISTOPH BURGER & JENS WEINMANN, *THE DECENTRALIZED ENERGY REVOLUTION: BUSINESS STRATEGIES FOR A NEW PARADIGM* 1-2 (2013); Soutar & Mitchell, *supra* note 184, at 135; Jones & James, *supra* note 184, at 190-91.

186. RIFKIN, *supra* note 185, at 107; Charles R. Warren & Malcolm McFadyen, *Does Community Ownership Affect Public Attitudes to Wind Energy? A Case Study From Southwest Scotland*, 27(2) LAND USE POL’Y 204, 205 (2010).

187. Shalanda H. Baker, *Unlocking the Energy Commons: Expanding Community Energy Generation in the New Economy*, in LAW AND POLICY FOR A NEW ECONOMY, *supra* note 184, at 220.

support the diffusion of ownership to the underrepresented impacted communities.¹⁸⁸ The resource in which ownership should be diffused is the resource governed by the failed democratic processes—the LULU.

Ownership rights in a potential LULU could empower impacted communities, give locals the power to govern the “resource” in perpetuity, and attenuate the negative effects of economic inequality on democratic participation. Because community members, as owners, will not be externally affected parties, but *the* party controlling the development, representation will not be an issue. Moreover, under an economic democracy development regime, there is no need to negotiate benefits or engage in costly deliberation, because the benefits arising from the enterprise are inherently communal.

Indeed, in recent years, there has been a growing interest in communal ownership arrangements as vehicles for just and sustainable development. For instance, Barbara Bezdek has suggested that to protect low-income communities from the negative impacts of urban redevelopment, legislatures should introduce “community equity corporations,”¹⁸⁹ legal entities that protect residents’ stakes in their community as property rights, thereby “transforming association and democratic participation into ownership-spreading equity-like participations.”¹⁹⁰ Similarly, Sara Tonnesen has written about worker-owned cooperatives as a form of community-focused development strategy.¹⁹¹ According to Tonnesen, the “inherently local” character of worker-owned cooperatives guarantees that the benefits stemming from such enterprises remain in the community and enhance its welfare.¹⁹² The democratic and communal structure of cooperatives strengthens communal cohesion and identity and has positive spillover effects that contribute to community revitalization.¹⁹³

The case of worker-owned cooperatives is especially important to NIMBY discussions because of its risk-reducing tendencies. By giving workers direct control of the conditions of their labor, worker-owned cooperatives eliminate worker exploitation and reduce worker safety concerns.¹⁹⁴ Could communal ownership mitigate certain negative externalities associated with LULUs? There is evidence suggesting that it will. For instance, a nascent and growing trend of worker-owned farms demonstrates that when the ownership of farmland is placed in the hands of the people that work the land and live on it, production practices change for the better.

Ownership of farmland empowers agricultural workers and allows them to adopt healthier practices like limiting

the application of hazardous pesticides or avoiding overuse of chemical fertilizers that threaten their lives and the lives of their families.¹⁹⁵ Similarly, immigrant female workers in the Bay Area have taken control over their working conditions and wages by forming worker-owned cooperatives that provide house cleaning services using nontoxic detergents.¹⁹⁶ In the Bronx, worker-owned cooperatives controlled by locals have adopted a “community-oriented and community-controlled” business strategy that actively promotes environmental justice.¹⁹⁷

In theory, communal ownership of a LULU could solve many of the failures associated with NIMBYism.¹⁹⁸ Assume that instead of opposing LULU development in its locality, a local community incorporates and takes it upon itself to plan, develop, and operate the facility. In such a case, communal autonomy is enhanced. The power to determine the form of development is completely in the hands of the community. Democratic participation and procedural justice are also vindicated: as developers-owners, community members will have a front-row seat at pertinent siting, planning, permitting, and development procedures. Environmental equity concerns are attenuated: as owners, community members will be the direct beneficiaries of the facility and will therefore tend to adopt less harmful practices.¹⁹⁹

In communal ownership arrangements, the owners are embedded in the community. They are emotionally, socially, and personally invested in the sustainability and long-term welfare of the community.²⁰⁰ Moreover, communal ownership means a different balance in management policies that is more communally oriented, often at the price of reduced profits.²⁰¹

B. From Theory to Practice

I. The Case of Wind Farms

The proliferation of community renewable energy developments provides fertile ground for NIMBY-related research. Some forms of renewable energy development generate intense communal opposition. For instance, wind farms are known to engender strong NIMBY sentiments.²⁰²

188. Note that underrepresented communities are not necessarily marginalized communities. NIMBY sentiments arise in weak and powerful communities alike. Inequality and marginalization simply exacerbate NIMBYism.

189. Bezdek, *supra* note 23, at 100.

190. *Id.* at 105.

191. Sara Tonnesen, *Stronger Together: Worker Cooperatives as a Community Economic Development Strategy*, 20 GEO. J. ON POVERTY L. & POL’Y 187 (2012).

192. *Id.* at 196.

193. *Id.* at 189-90.

194. *Id.* at 196.

195. See, e.g., Neil Thapar, *The Future of Farmland (Part 2): Grabbing the Land Back*, SUSTAINABLE ECONOMIES L. CENTER, June 22, 2017, http://www.the-selc.org/reit_blog_part_2.

196. Marge Clarke, *Clean and Green Co-Op*, 13(1) RACE POVERTY & ENV’T 64, 64 (2006).

197. Carmen Huertas-Noble et al., *The Greening of Community Economic Development: Dispatches From New York City*, 31 W. NEW ENG. L. REV. 645, 653 (2009).

198. I discuss challenges for translating theory into practice *infra* Part IV.

199. Huertas-Noble et al., *supra* note 197, at 654 and references therein (explaining that “worker-owned cooperatives commonly adhere to a principle of concern to the community”).

200. *Id.*

201. *Id.*

202. Walker et al., *supra* note 105, at 46; ERIC R.A.N. SMITH & HOLLY KLINK, EXPLAINING NIMBY OPPOSITION TO WIND POWER 1-2 (2007), <http://www.polsci.ucsb.edu/faculty/smith/wind.pdf>.

While the benefits of wind generation are regional, national, and even global, the costs imposed by wind farm developments are mostly local.²⁰³ Moreover, the “social gap” phenomenon is especially conspicuous in wind development (both onshore and offshore). Studies consistently find high and stable levels of public support for wind farm development.²⁰⁴ However, general support for wind energy is in contrast to intense opposition to specific projects at the local level.²⁰⁵

A relatively recent development in the United States,²⁰⁶ community-owned wind farms have been a standard model of development in Europe for decades. Prevalent in Denmark, Germany, the Netherlands, Spain, and Sweden,²⁰⁷ community ownership development models allow members of local communities to become owners of a wind farm by incorporating as a partnership or co-op and developing the project themselves.²⁰⁸ First introduced in Denmark in the 1980s,²⁰⁹ community ownership development models rapidly spread across the country, making Denmark a world leader in wind energy.²¹⁰ The initial impetus behind community ownership was to align costs and benefits—the Danish government sought to “ensure that only those bearing the costs receive the financial benefits” associated with wind energy.²¹¹ The initiative was extremely successful, not only in terms of equal distribution of costs and benefits, but also in “bolstering public support for wind power in Denmark.”²¹²

Community ownership was adopted by other European countries and later applied to offshore wind development as well.²¹³ Today, the vast majority of wind farms in Denmark are owned and operated by local interests.²¹⁴ Studies conducted in Denmark found that people who own shares in wind energy projects are significantly more positive toward wind energy than people with no such property interest. Further, owners were more willing than non-owners to accept additional wind energy developments in their locality.²¹⁵ Similarly, a study in Scotland found that proposed community-owned development models amplify general preexisting support for wind energy and suppress negative attitudes.²¹⁶

In Sweden, citizens expressed demonstrably more support for co-ops and local ownership schemes over private commercial development models, even at the cost of higher electricity rates.²¹⁷ In the United States, a 2016 survey of residents of coastal communities in North Carolina documented increased support for offshore wind development with the introduction of CBAs and an even greater increase in support for community ownership arrangements.²¹⁸ In Europe as well, community ownership has been found to generate stronger support than CBAs for wind farm development.²¹⁹ In general, studies of NIMBYism in renewable energy development consistently find that community ownership models are “associated with more active patterns of local support.”²²⁰

Researchers who studied the link between community ownership and social acceptance of wind farms suggested that the key factor for acceptance is community empowerment. Reduced opposition under communal ownership arrangements has been tied to greater “local control over the siting process,” which resulted in better accommodation of the specific needs of the community in the development process.²²¹ Studies demonstrate that higher levels of control over the development process create a sense of equity, strength, and a feeling that the community has negotiated “a good deal.”²²²

Moreover, communal ownership development models facilitate meaningful local involvement in both economic and political aspects of wind farm development, which “tends to have positive effects upon public perceptions of

203. Erica Schroeder, *Turning Offshore Wind On*, 98 CAL. L. REV. 1631, 1633 (2010).

204. Klain et al., *supra* note 46, at 13; KLAIN ET AL., *supra* note 103, at 12; Willett Kempton et al., *The Offshore Windpower Debate: Views From Cape Cod*, 33 COAST MGMT. 119, 123 (2005); Walker et al., *supra* note 105, at 46; Soren Krohn & Steffen Damborg, *On Public Attitudes Towards Wind Power*, 16 RENEWABLE ENERGY 954 (1999); James Acheson, *Attitudes Toward Offshore Wind Power in the Midcoast Region of Maine*, 21(2) ME. POL’Y REV. 42, 44-45 (2012); Derek Bell et al., *Revisiting the “Social Gap”: Public Opinion and Relations of Power in the Local Politics of Wind Energy*, 22(1) ENVTL. POL. 115, 116 (2013).

205. Kempton et al., *supra* note 204, at 123; Walker et al., *supra* note 105, at 46; Patrick Devine-Wright, *Beyond NIMBYism: Towards an Integrated Framework for Understanding Public Perceptions of Wind Energy*, 8 WIND ENERGY 125, 126 (2005); Warren & McFadyen, *supra* note 186, at 205.

206. ERIC LANTZ & SUZANNE TEGEN, NATIONAL RENEWABLE ENERGY LABORATORY, ECONOMIC DEVELOPMENT IMPACTS OF COMMUNITY WIND PROJECTS: A REVIEW AND EMPIRICAL EVALUATION 1 (2009).

207. David Toke et al., *Wind Power Deployment Outcomes: How Can We Account for the Differences?*, 12 RENEWABLE & SUSTAINABLE ENERGY REV. 1129, 1139 (2008); Aitken, *supra* note 80, at 6068; Warren et al., *supra* note 36, at 856; MARK BOLINGER, LAWRENCE BERKELEY NATIONAL LABORATORY, COMMUNITY WIND POWER OWNERSHIP SCHEMES IN EUROPE AND THEIR RELEVANCE TO THE UNITED STATES 1 (2001); Warren & McFadyen, *supra* note 186, at 206; Dave Toke, *Community Wind Power in Europe and in the UK*, 29(3) WIND ENGINEERING 301, 305-06 (2005).

208. Bell et al., *supra* note 111, at 473-74; David Rudolph et al., *Community Benefits From Offshore Renewables: The Relationship Between Different Understandings of Impact, Community, and Benefit*, 36(1) ENV’T & PLAN. C: POL. & SPACE 92, 113 (2017) (surveying different models of community ownership across Europe); Marie Hyland & Valentine Bertsch, *The Role of Community Involvement Mechanisms in Reducing Resistance to Energy Infrastructure Development*, 146 ECOLOGICAL ECON. 447, 449 (2018).

209. GREG PAHL, *THE CITIZEN-POWERED ENERGY HANDBOOK: COMMUNITY SOLUTIONS TO A GLOBAL CRISIS* 71 (2007).

210. *Id.* at 69.

211. BOLINGER, *supra* note 207, at 13.

212. *Id.*

213. PAHL, *supra* note 209, at 72-75.

214. *Id.* at 69.

215. Devine-Wright, *supra* note 205, at 132-33 and references therein.

216. Warren & McFadyen, *supra* note 186, at 211.

217. Kristina Ek & Lars Persson, *Wind Farms—Where and How to Place Them? A Choice Experiment Approach to Measure Consumer Preferences for Characteristics of Wind Farm Establishments in Sweden*, 105 ECOLOGICAL ECON. 193, 194, 201 (2014).

218. EMILY McAULIFFE ET AL., DUKE UNIVERSITY, THE DYNAMICS OF OFFSHORE WIND PERCEPTION AND ACCEPTANCE ACROSS DEVELOPMENT MODELS 21 (2016), <https://bassconnections.duke.edu/sites/bassconnections.duke.edu/files/documents/dynamics-offshore-wind-perception.pdf>.

219. Aitken, *supra* note 80, at 6068.

220. Warren et al., *supra* note 36, at 856.

221. Bell et al., *supra* note 111, at 473-74.

222. Cowell et al., *supra* note 103, at 552; Aitken, *supra* note 80, at 6074; Walker et al., *supra* note 105, at 47.

windfarms.”²²³ As previously observed, meaningful participation is important for procedural and distributive justice, two prevalent concerns in NIMBY confrontations.²²⁴ Indeed, researchers have emphasized the equity benefits of community wind.²²⁵

An increase in equity entails an increase in trust because “[t]rust and fairness are interrelated concepts with perceptions of either affecting the other.”²²⁶ Communal ownership structures the relationship between communities and developers not as adversaries but as partners, thereby “enabl[ing] cooperation, communication and commitment . . . [in a] . . . consensual rather than divisive” atmosphere that is conducive to trust.²²⁷ By increasing trust among members of the community and other stakeholders, communal development of wind farms has increased the prospects for success of projects, because “trust is key in all facility siting issues.”²²⁸ In contrast to private commercial development that is often viewed by communities as big business intrusion, “community ownership of wind projects raises public awareness and increases the number of individuals with a stake in the success of wind energy,” which, in turn, raises local support for the proposed development.²²⁹

Researchers who studied the “social gap” in wind farm siting suggested four explanations for the disparity between wide public support and intense local opposition.²³⁰ These explanations, as labeled in the literature, are democratic deficits, qualified support, self-interest motivations, and place attachment. It is interesting to explore how community ownership interacts with these explanations, because none of them is unique to wind farm siting and development.²³¹

- *Democratic deficits.* According to this explanation, although a majority of people support wind farms, this general support is not expressed in decision-making processes that are effectively dominated by minority opposition.²³² The discrepancy between

public support and actual active support is grounded in the unique distribution of NIMBY costs and benefits. Because benefits are diffused and general, supporters of wind energy have no incentive to mobilize and rally in favor of local development. Opponents, however, are concerned about concentrated local costs that directly affect them. They therefore have a strong incentive to oppose development, because the potential costs of development outweigh the costs of political participation.²³³

- *Qualified support.* According to this explanation, individual support for wind energy development is qualified. When asked whether they support wind energy, individuals generally express a positive reaction. However, the general support for wind energy development is contingent on certain limits and restrictions (e.g., no impact on wildlife).²³⁴ Since surveys do not provide individuals with the opportunity to express these limitations and only ask whether participants support wind energy, the conditions individuals would like to impose on development are not expressed or recorded.²³⁵ When actual local development is proposed, the specific characteristics of the project rarely meet the limitations supporters favor. When their qualifications are not respected, qualified supporters become opponents.²³⁶
- *Self-interest.* Self-interest is the classic NIMBY view. According to this explanation, individuals who express general support for wind farms are opposed to developments in their locality because they are unwilling to internalize the costs of development.²³⁷ The self-interest explanation is a rendition of the free-rider collective action problem. In the context of wind energy, it is collectively rational for the public to support development, but it is irrational for any individual member of society to incur the costs of development. Individuals therefore prefer to free-ride on the contributions of others (not have a wind farm in their community), thereby leading to an aggregate inefficient result (no wind farms at all).²³⁸
- *Place attachment.* The fourth cluster focuses on the relationships between individuals, communities, and place. According to this explanation, individuals develop place-related relationships with others and environments that generate appreciation and reverence for a “place” that is greater than the sum of its parts.²³⁹ “Place attachment” is defined as “positively experienced bonds, sometimes occurring without awareness, that are developed over time from

223. Devine-Wright, *supra* note 205, at 133-34 and references therein.

224. Walker et al., *supra* note 105, at 47.

225. Warren et al., *supra* note 36, at 206 and references therein.

226. Aitken, *supra* note 80, at 6067.

227. Gordon Walker et al., *Trust and Community: Exploring the Meanings, Contexts, and Dynamics of Community Renewable Energy*, 38(6) ENERGY POL’Y 2655, 2657 (2010).

228. Jeremy Firestone et al., *Public Acceptance of Offshore Wind Power: Does Perceived Fairness of Process Matter?*, 55(10) J. ENVTL. PLAN. & MGMT. 1387, 1391 (2012). See also Aitken, *supra* note 80, at 6067 (“[t]rusting social relationships support and enable cooperation, communication and commitment” (quoting Walker et al., *supra* note 227, at 2657)).

229. BOLINGER, *supra* note 207, at 5.

230. Bell et al., *supra* note 111, at 460; Bell et al., *supra* note 204, at 123.

231. See, e.g., John Sturzaker, *Can Community Empowerment Reduce Opposition to Housing? Evidence From Rural England*, 26(5) PLAN. PRAC. & RES. 555, 563-66 (2011) (suggesting the same explanations in the context of real estate development in the U.K.).

232. Bell et al., *supra* note 111, at 461-62; Poindexter, *supra* note 78, at 675-78 (discussing how public engagement efforts, community deliberation, and participation are often hijacked by a vocal minority that does not necessarily represent the general will of the community but leads organized opposition).

233. Bell et al., *supra* note 111, at 462.

234. *Id.* at 463.

235. *Id.*

236. *Id.* at 463-64. See also SMITH & KLICK, *supra* note 202 (making a similar claim).

237. Bell et al., *supra* note 111, at 465.

238. *Id.*

239. Bell et al., *supra* note 204, at 123.

the behavioral, affective and cognitive ties between individuals and/or groups and their sociophysical environment.”²⁴⁰ This appreciation of communal relationships and identities that are grounded in a “place” rejects change that could harm the unique identity of the community.²⁴¹

The four explanations of NIMBY motivations are not mutually exclusive. People are complex beings and often exhibit more than one attitude toward prospective development.²⁴² Further, some of the motivations positively interact with each other while others advance competing claims as to the makeup of public opinion.²⁴³ Take for instance the first and second explanations—democratic deficit and qualified support. In principle, both are failures of political participation. According to the democratic deficit explanation, underrepresentation of supporters in permitting and siting procedures reduces the prospects of success. Similarly, because the views and positions of qualified supporters are not adequately represented, the proposed project, as it emerges from permitting and siting procedures, fails to satisfy their specific needs, thereby turning their support into opposition.

An alternative explanation focuses on disenfranchisement: it is the lack of meaningful participation avenues and the inability to influence decisionmaking processes that turns qualified supporters into opponents and fuels local antagonism toward development. Indeed, studies have shown that local opposition to wind farm development is often motivated by a sense of lack of control over permitting and siting procedures, and dissatisfaction with these procedures.²⁴⁴ The two explanations are not contradictory but rather complementary—the more disenfranchised the community, the higher the costs of exercising democratic rights of participation.

Ownership of a wind farm entitles one to a share of the profits generated by the wind farm.²⁴⁵ A financial stake in the project is a strong incentive to participate in procedures that affect the project’s likelihood. This incentive will also be found in projects that include CBAs. However, unlike community benefits that are usually designated for general communal purposes, ownership interests are private property rights that confer individual benefits.²⁴⁶

Ownership interests therefore introduce distinct individual incentives for participation in siting, planning, permitting, and development. Moreover, ownership rights introduce a risk that CBAs do not—if the project is not profitable, community owners will see no gains. Members are therefore incentivized not only to take leading roles in decisionmaking, but also to make concessions that will increase the project’s feasibility and profitability.²⁴⁷

The provision of benefits to individual community members through ownership is not only a driver of participation, it also mitigates self-interest. Local owners have two hats—shareholders and residents. As shareholders they enjoy control and financial stakes in the legal entity that owns the development. As residents, they are part of a broad community who will hold them accountable for long-term injuries to the community. Studies consistently find that social influence is a powerful mechanism in overcoming “free rider” and other collective action problems, especially when examined in local and communal contexts.²⁴⁸ Communal ownership also circumscribes the problem of benefits being perceived as bribes because it eliminates the bribing party. When the community is the driving force behind the development process, communal gains are not bribes but money well-earned.

As to disenfranchisement, ownership empowers.²⁴⁹ Communal ownership models allow community members to act in the context of development to further their desired ends.²⁵⁰ Ownership confers control.²⁵¹ As owners of a proposed development, community members have an ability to determine project design, features, and characteristics. An ownership stake in a project changes the power relationship between the parties; it transforms individual community members from bystanders to active participants. In a standard private-led development model, community members are passive external parties whose ability to influence development is contingent on their political power and the developer’s willingness to accede to communal demands.

240. *Id.*

241. *Id.* See also Devine-Wright, *supra* note 205, at 136. Place attachment corresponds with Bezdek’s notion of “community” as a contextual construct tied to a physical environment: “A ‘place,’ like property, is both a material form and a set of lived relationships, simultaneously material and representative of those relationships. Places and the people who live in those places are not fungible” and “collectively inhabited space ‘Home’—one’s abode, one’s home streets and associations—is an experience of place that is both individualizing and collectivizing. The very sharing of an urban space by its residents can make it a site of affirmation of individual and collective identity.” Bezdek, *supra* note 23, at 80, 86.

242. Bell et al., *supra* note 204, at 120–22.

243. *Id.*

244. Devine-Wright, *supra* note 205, at 134 and references therein.

245. Bell et al., *supra* note 111, at 473.

246. Walker et al., *supra* note 105, at 47; Cowell et al., *supra* note 103, at 540.

247. Simon, *supra* note 27, at 1340–41 (“Since the value of property is affected by collective decisions, property is a medium through which the consequences of such decisions are transmitted to individual citizens. Property thus serves as an inducement both to participate and to avoid reckless or opportunistic behavior.”).

248. Ankur Mani et al., *Inducing Peer Pressure to Promote Cooperation*, 3 SCI. REP. 1735, 1735–36 (2013), and references therein.

249. See RICHARD BARNES, PROPERTY RIGHTS AND NATURAL RESOURCES 37 n.83 (2009) (tracing the scholarship on property rights as empowerment mechanisms to John Stuart Mill and Jean-Jacques Rousseau), *id.* at 50 (discussing the view of ownership as conferring autonomy in the context of Aristotle’s justification of property and Jean Bodin’s support of property as securing individual rights).

250. The link between ownership and choice aspects of autonomy provides the conceptual basis to Immanuel Kant’s theory of property. See, e.g., Wayne F. Buck, *Kant’s Justification of Private Property*, in NEW ESSAYS ON KANT 227, 229 (Bernard den Ouden ed., Peter Lang 1987); GREGORY S. ALEXANDER & EDUARDO M. PENALVER, AN INTRODUCTION TO PROPERTY THEORY 72–73 (2012).

251. I do not mean a minority ownership stake in a facility, but forms of ownership that give communities full control. Minority ownership does not confer control, it is simply another form of payment.

A community-led development model moves community members to the driver's seat and gives them the keys to the development car. They are no longer external parties who need to fight for concessions, they are the party making them. Decisionmaking and control are the essence of communal empowerment, frequently defined as "[a] process through which people become strong enough to participate within, share in the control of and influence events and institutions affecting their lives."²⁵²

Through ownership, the community can design a project in its own image, addressing a broad range of communal concerns and keeping qualified supporters satisfied. Communal development models guarantee "that projects can be developed and technologies installed in ways which are locally appropriate."²⁵³ Control over design provides flexibility in implementation and guarantees heterogeneity in mitigation, two celebrated benefits of CBAs.

However, unlike CBAs, communal ownership secures long-term local enforcement. This feature of ownership addresses place attachment concerns as well. When the community owns the facility and controls its development, communal values and needs will receive stronger emphasis, guaranteeing that communal character is protected. For instance, despite significant economic incentives to prefer large wind turbines over small ones,²⁵⁴ community-owned wind farms tend to be smaller in size than commercially owned projects, reflecting a preference of locals to forego increased revenue in favor of local interests.²⁵⁵

2. Community Right to Build

The experience of communal wind farms is a testament to the potential of communal ownership arrangements to reduce NIMBY sentiments. However, some may caution against generalizing from one development model to a problem that exists on numerous development fronts. Recent studies of the U.K.'s planning reform provide further support for the assertion that communal initiatives should be explored as potential vehicles for addressing NIMBY problems.

In mid-2010, immediately after the general election, the new U.K. government targeted the planning system for reform.²⁵⁶ The impetus for reform was the decades-long failure of U.K. governments to promote development of housing units, and a growing shortage in both affordable and

open market housing options.²⁵⁷ This failure was attributed to local protectionism and an aversion to development, as well as to the overly centralized planning system.²⁵⁸

According to the secretary of local government, the existing planning system "robbed local people of their democratic voice, alienating them and entrenching opposition against new development."²⁵⁹ The new government believed that it could increase the rate of growth in housing development by providing "greater collective influence over development" that "would induce citizens to support new house-building . . . by enabling communities to exercise real power in respect of the design and precise location of the development that takes place in the neighbourhood."²⁶⁰

To effectuate the change, Parliament enacted the 2011 Localism Act. Under the Localism Act, a new model for development was introduced that bypassed existing planning procedures. Under the new planning procedure, communities were given the power to propose and develop real estate projects in their locality.²⁶¹ As explained by the government, the new planning model gives "groups of local people the power to deliver the development that their local community wants, with minimal red tape."²⁶² The government anticipated that "giving communities the right to devise neighbourhood development plans would secure their compliance with a pro-growth agenda and increase the number of sites allocated for housing."²⁶³

Under the planning reform, communities were given the option to draw up neighborhood development plans that "will set out a vision, policies and proposals for the future development of an area."²⁶⁴ A neighborhood plan could be drafted by a parish, a town council, or a neighborhood forum consisting of 21 or more representatives of a local area.²⁶⁵ The neighborhood plan is then submitted for review by an independent planning inspector.²⁶⁶ The process of review is less onerous than the standard approval

252. Christopher Rissel, *Empowerment: The Holy Grail of Health Promotion?*, 9(1) HEALTH PROMOTION INT'L 39, 41 (1994).

253. Walker et al., *supra* note 227, at 2657.

254. Marloes Caduff et al., *Wind Power Electricity: The Bigger the Turbine, the Greener the Electricity?*, 46 ENVTL. SCI. & TECH. 4725, 4725-26 (2012).

255. BOLINGER, *supra* note 207, at 6; Devine-Wright, *supra* note 205, at 127-28. Haf & Parkhill, *supra* note 133, at 105 (discussing a successful opposition campaign to a commercially owned large wind farm in Lewis, Scotland, and the eventual development of a smaller community wind project in the region that "was perceived by local residents to be a more considerate development in keeping with the socio-cultural qualities of the area").

256. Sturzaker, *supra* note 231, at 555.

257. Nick Bailey, *Housing at the Neighbourhood Level: A Review of the Initial Approaches to Neighbourhood Development Plans Under the Localism Act 2011 in England*, 10(1) J. URBANISM: INT'L RES. ON PLACEMAKING & URB. SUSTAINABILITY 1, 2 (2017); Sturzaker, *supra* note 231, at 555-56.

258. Sturzaker, *supra* note 231, at 556.

259. Press Release, U.K. National Archives, Eric Pickles Puts Stop to Flawed Regional Strategies Today (July 6, 2010), <http://webarchive.nationalarchives.gov.uk/20120919160104/http://www.communities.gov.uk/news/planningandbuilding/1632278>.

260. Quintin Bradley & William Sparling, *The Impact of Neighbourhood Planning and Localism on House-Building in England*, 34(1) HOUSING THEORY & SOC'Y 106, 109 (2017).

261. PENNY NORTON & MARTIN HUGHES, PUBLIC CONSULTATION AND COMMUNITY INVOLVEMENT IN PLANNING: A TWENTY-FIRST CENTURY GUIDE 112 (2018).

262. Sturzaker, *supra* note 231, at 555.

263. Bradley & Sparling, *supra* note 260, at 107.

264. SUE BROWNILL & QUINTIN BRADLEY, LOCALISM AND NEIGHBOURHOOD PLANNING: POWER TO THE PEOPLE? 25 (2017); GAVIN PARKER ET AL., EXAMINING NEIGHBOURHOOD PLANS IN ENGLAND: THE EXPERIENCE SO FAR 2 (University of Reading, Working Paper in Real Estate & Planning No. 02/17, 2017).

265. BROWNILL & BRADLEY, *supra* note 264, at 25; Martin Field & Antonia Layard, *Locating Community-Led Housing Within Neighbourhood Plans as a Response to England's Housing Needs*, 37(2) PUB. MONEY & MGMT. 105, 106 (2017).

266. BROWNILL & BRADLEY, *supra* note 264, at 25; NORTON & HUGHES, *supra* note 261, at 112.

procedure for development plans, and is mainly concerned with guaranteeing that the neighborhood plan does not violate the broader planning vision for the region.²⁶⁷ After passing cursory external review, the neighborhood plan is submitted to a local referendum and must receive majority support.²⁶⁸ Once approved, a neighborhood development order is issued, confirming the neighborhood plan as a legally binding planning instrument.²⁶⁹

Under the Localism Act, community groups have the authority that had “previously been the preserve of planning professionals.”²⁷⁰ A similar process was instituted for communal development of land.²⁷¹ Known as “community right to build,” this planning and development route gives local communities the power to promote development that aligns with their needs and desires.²⁷² To exercise community right to build, a community must form a local organization with the purpose of “furthering the social, economic and environmental well-being of individuals living, or wanting to live in a particular area.”²⁷³ The organization then applies to the local authority to confirm the geographical boundaries of the site to be developed.²⁷⁴

Once boundaries are approved, the local organization is required to draw up a development plan that identifies involved partners (i.e., private developers, housing associations, etc.). The plan is then submitted for public comments and legal review by designated legal consultants, as well as examination by an independent planning inspector.²⁷⁵ Once approved, the plan is put to local referendum.²⁷⁶ If supported by a majority of the local residents, a community right to build order is issued for the community, which may then proceed with the development of the project without a traditional planning application.²⁷⁷

As explained by the Department for Communities and Local Government, the purpose of communal right-to-build initiatives is to guarantee that “[t]he benefits of the development, such as new affordable housing or profits made from letting the homes, will stay within the community, and be managed for the benefit of the community.”²⁷⁸ Equally important, another principal purpose of the reform was to reduce NIMBY sentiments:

Neighbourhood plans were seen by government at the time as “an alternative governance mechanism . . . creating a ‘virtuous circle’ where communities consent to development because they feel ownership” . . . The assumption behind [neighborhood plans] is thus that if communities have a say over how their area develops they will act in a responsible way and there will be an increase in the acceptance of development.²⁷⁹

The new development models were designed to ensure substantial levels of communal involvement in development procedures and to maintain communal control throughout the process.²⁸⁰ According to the sponsors of the Localism Act, the devolution of power from planning authorities to the members of the local community was designed to allow locals to “develop a shared vision for their neighbourhood and take control of the look and feel of the places where they live.”²⁸¹ The reform was therefore strongly informed by notions of place attachment, place identity, and respect for communal autonomy.²⁸²

Opponents of the reform argued that instead of leading to the development of more housing, increased communal autonomy would confirm existing stereotypes about communities blocking development for parochial reasons or promoting developments to serve short-sighted community interests at the expense of the broader social needs.²⁸³ These concerns were unwarranted. Of the first 75 neighborhood plans to receive approval, most did not restrict development, but rather allocated new housing sites and, more importantly, included policies on affordable housing.²⁸⁴

By 2015, it became apparent that the reform was a success. With 100 neighborhood plans approved and 1,700 more underway, the Housing and Planning Ministry announced: “We are scrapping the broken old planning system that pitted neighbours and developers against each other, and cornered people into opposing any development in their back yard. Our approach of getting the whole community working together is paying off and breaking through local opposition.”²⁸⁵

Analysis of neighborhood plans revealed that local plans tended to allocate more sites for housing than required by law.²⁸⁶ Most importantly, the increase in housing developments did not come at the expense of the environment, local interests, or local identity. A majority of the plans included provisions requiring more green spaces, additional recreation opportunities, mandatory pedestrian

267. BROWNILL & BRADLEY, *supra* note 264, at 25; PARKER ET AL., *supra* note 264, at 6-7; NORTON & HUGHES, *supra* note 261, at 112; U.K. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, A PLAIN ENGLISH GUIDE TO THE LOCALISM ACT 12 (2011), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf.

268. Bradley & Sparling, *supra* note 260, at 110; NORTON & HUGHES, *supra* note 261, at 112.

269. BROWNILL & BRADLEY, *supra* note 264, at 26.

270. PARKER ET AL., *supra* note 264, at 4.

271. LOUISE SMITH, NEIGHBOURHOOD PLANNING 3 (House of Commons Library, Briefing Paper No. 05838, 2016).

272. NORTON & HUGHES, *supra* note 261 at 112-13.

273. A proposed project could also be submitted by an existing neighborhood forum or a parish council. *Id.*

274. *Id.* at 113.

275. *Id.*

276. *Id.*

277. U.K. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, *supra* note 267, at 13.

278. *Id.*

279. PARKER ET AL., *supra* note 264, at 2.

280. NORTON & HUGHES, *supra* note 261, at 112. *See also id.* at 70 (underlying the reform was the government belief that “those most affected by development should have the greatest say” in the development process”).

281. Bradley & Sparling, *supra* note 260, at 110.

282. *Id.* at 110, 113.

283. Bailey, *supra* note 257, at 1, 3.

284. U.K. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, NOTES ON NEIGHBOURHOOD PLANNING (16th ed. 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/472998/151030_Notes_on_NP_16.pdf. *See also* Bradley & Sparling, *supra* note 260, at 110, 111.

285. Bradley & Sparling, *supra* note 260, at 110, 112.

286. *Id.*

and cycle routes, affordable housing, and promotion of local distinctiveness.²⁸⁷

Another concern was that the local bodies would not be representative and only promote the interests of powerful segments within the communities. These concerns have also been refuted. As of 2017, the average “yes” vote for neighborhood plans has been 89%.²⁸⁸ The proliferation of community-led development projects across the U.K. has caused “a shift in geographical imaginations about government . . . open[ing] up political opportunities for a cadre of citizens to engage in the development of their local communities and to reconfigure the balance of power between citizens and the state.”²⁸⁹

Among all policies communities chose to advance through neighborhood plans, the most prominent was promotion of local distinctiveness, which appeared in almost 90% of plans.²⁹⁰ The proliferation of local identity policies is viewed by many as a counter to the concentration of the U.K. real estate development industry. In the U.K., 44% of all new homes are built by 10 companies that vertically control both the development and building industries (volume builders).²⁹¹ Volume builders have often been accused of acting strategically by creating land and property banks to be released into the market at targeted times to control supply and prices.²⁹² Volume builders have also been criticized for their disregard of local interests and profit-oriented strategies.²⁹³ In response, many neighborhood plans “made explicit their opposition to the dominant housing market model and the speculative approach of the volume house-builders.”²⁹⁴

In this context, the promotion of local identity through neighborhood plans is revealed not as a matter of protectionism or parochial politics, but rather a thoughtful expression of communal concern for the preservation of local values and lifestyles. The most significant effect of the U.K. planning reform was therefore in its ability “to shape the spatial practice of neighbourhood plans so that their housing policies enhanced a sense of place and provided for identified local need.”²⁹⁵ Since the enactment of the reform, the U.K. has seen a surge in custom-built, innovative, sustainable, and affordable housing that costs less and is better tailored to meet specific local needs.²⁹⁶

C. An Observation on the Malleability of Property

The two case studies of communal wind development and community right to build demonstrate that under certain

circumstances, communal models of development may not only reduce NIMBYism but also contribute to communal cohesion and empowerment. Researchers have attributed the reduction in NIMBY sentiments under the two development models to participation and control, vindicating the participatory democracy hypothesis.²⁹⁷ Beyond the lessons on the democratic and economic empowerment aspects of communal ownership models, the two case studies provide another interesting observation concerning the malleability of property.

Property is an extremely flexible legal mechanism.²⁹⁸ The malleability of property is not limited to the legal conditions and frameworks that constitute ownership, but is also expressed in the physical world. Because property rights always concern a thing, ownership, with its various rights, values, and preferences, is manifest in various physical forms.²⁹⁹ Personal property is constitutive of personal autonomy.³⁰⁰ One expresses one’s character and expectations through property,³⁰¹ and it is through ownership of things that we act on the external world.³⁰²

Similarly, communal property is constitutive of communal autonomy and facilitates the physical and social expression of communal preferences, values, perceptions, and sentiments.³⁰³ This is because both spheres of human interrelationships—the physical and the legal—are structured in accordance with our values, perceptions, beliefs, and so on.³⁰⁴ Since the set of values that governs interrelationships in communal settings differs from the one that governs other social environments, it produces distinct physical *and* normative spaces. The co-ops discussed in Section III.A. are structured and governed by a set of values manifestly different than that which governs for-profit corporations; and the neighborhood plans that communities in the U.K. draft, like the real estate projects that are developed under them, express a different set of values than the neighborhoods constructed by volume builders.³⁰⁵

297. See, e.g., Devine-Wright, *supra* note 205, at 133-34 and references therein; Bell et al., *supra* note 111, at 473-74; Sturzaker, *supra* note 231, at 567.

298. Richard A. Barnes, *The Capacity of Property Rights to Accommodate Social-Ecological Resilience*, 18(1) *ECOLOGY & SOC’Y* 6, 11 (2013).

299. And non-physical forms, when it is in respect of intangible property.

300. Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 960, 977 (1982). See also Hanoch Dagan, *The Craft of Property*, 91 *CAL. L. REV.* 1517, 1559 n.208 (2003).

301. Radin, *supra* note 300, at 968.

302. *Id.* at 960.

303. Radin’s personhood theory of property is only one of the many theoretical foundations offered by scholars to explain/justify property. The purpose of this section is not to vindicate personhood theory of property, but rather to offer a plausible personhood-based explanation to an observed social phenomenon.

304. Barnes, *supra* note 298, at 11; Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 *COLUM. L. REV.* 1409, 1412 (2012).

305. See Field & Layard, *supra* note 265, at 106:

[N]eighbourhood plans have demonstrated a different way of ‘doing’ planning, emphasising different considerations—age ranges, the sights, smell and feel of a neighbourhood as well as making provision for health and happiness rather than focusing solely on the built environment. Neighbourhood plans demonstrate a range of motivations and aspirations that are fundamentally distinct from the explicit business models of the large UK house-building companies.

287. U.K. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, *supra* note 284, at 5.

288. Field & Layard, *supra* note 265, at 106.

289. *Id.*

290. U.K. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, *supra* note 284, at 5.

291. Bradley & Sparling, *supra* note 260, at 110, 111.

292. *Id.*

293. *Id.* at 111-12.

294. *Id.* at 110, 111.

295. *Id.* at 114.

296. *Id.* at 110, 114-16.

When a community holds property rights in a physical space and controls its development, the community has the power to develop the project in its own image, according to its beliefs, knowledge, understanding, attitudes, values, and sentiments. Two important insights follow from this observation. First, ownership militates against place attachment opposition, because it allows for developments that are locally appropriate and aligned with communal identity. Second, and less intuitively, communally owned developments bond communities together. There is a uniqueness in creating something new in the world, in bringing into existence a creation in which one has invested labor, thought, and care. This uniqueness underlies John Locke's labor theory of property,³⁰⁶ and while Locke's justification of ownership is rooted in desert,³⁰⁷ one cannot disregard the personal and transformative aspects of ownership associated with it.

Margaret J. Radin teaches that "people and things have ongoing relationships"³⁰⁸ and that some objects are part of a person's self.³⁰⁹ The process by which a community is involved in bringing a project to life binds the community and transforms it.³¹⁰ Studies have documented how communal energy projects have strengthened "social and cultural bonds" in marginalized communities "by offering an opportunity for communities to gather once again for a shared aim, and to create objectives that include the strengthening of local cultural attributes along with posing a new reason for community members to socialise."³¹¹

This process also explains why support for wind farms increases in communities that own wind farms.³¹² The process of communal creation brings people together, bonds them through joint efforts in altering their community according to their own vision, and consequently generates "affection and attachment" toward the result.³¹³ This kind of attachment and appreciation can only arise when a community feels that the project is "*their* idea, *their* initiative, and *their* design."³¹⁴

IV. Challenges for Successful Implementation

A. Avoiding Communal Holdouts

Community ownership of a LULU can take many forms. The U.K.'s community right to build and the model of communal wind farms are two very different forms of communal development. Despite their differences, the two models make one thing very clear: for a communal ownership arrangement to successfully resolve NIMBY disputes, it must give the community control over the development process. In the past, empowerment-focused policies that have given communities property-like legal entitlements have been employed by communities to undermine development.³¹⁵

We are therefore faced with a challenge—how can we give communities ownership rights in a LULU without falling into the veto trap? The answer is to avoid legal mechanisms that allow for holdouts. Instead of recognizing legal rights, we should introduce incentives for good-faith participation and remove entry barriers that make communal incorporation costly.

1. Incentives

Incentive-based policies work to increase benefits to parties if they elect to develop a project according to a government-preferred model. For instance, U.K. law provides that any development undertaken based on an approved neighborhood plan will entitle the submitting community to 25% of the tax proceeds collected under the U.K.'s Community Infrastructure Levy Program.³¹⁶ To promote local ownership of wind farms, Danish law exempts individuals from tax liability on income from energy facilities they co-own.³¹⁷

The practice of using tax credits to promote desirable forms of development is common in the United States. Tax breaks for developers are the major driving force behind the growth in renewable energy and alternative fuels investments in the United States.³¹⁸ Two rationales are commonly offered by U.S. policymakers to support

306. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 138-40 (Peter Laslett ed., 1960) (1690).

307. BARNES, *supra* note 249, at 36.

308. Radin, *supra* note 300, at 977.

309. *Id.* at 959.

310. Walker et al., *supra* note 227, at 2660 (documenting community members' reactions to involvement in the development of a community renewable energy project as "feeling[s] of community spirit and pride").

311. Haf & Parkhill, *supra* note 133, at 105, 110. See Tonnesen, *supra* note 191, at 189-90 (finding similar effects for communal engagement through cooperatives).

312. Another way to explain heightened support for additional wind farm development in communities that own wind farms is that people have become accustomed to the presence of turbines and learn to appreciate the benefits they generate. While this explanation is plausible, it is not complete.

313. Yuriko Saito, *Machines in the Ocean: The Aesthetics of Wind Farms*, 2 *CONTEMP. AESTHETICS* (2004); see generally Michael I. Norton et al., *The Ikea Effect: When Labor Leads to Love*, 22 *J. CONSUMER PSYCHOL.* 453-60 (2012) (on the psychological effect that connects labor with value).

314. Yuriko Saito, *Machines in the Ocean: The Aesthetics of Wind Farms*, 2 *CONTEMP. AESTHETICS* (2004).

315. "Property-like legal entitlement" means rights that cannot be taken away for compensation under a liability rule. See Smith, *supra* note 25, at 256-57; Poindexter, *supra* note 78, at 680 (discussing how local communities used mandatory "meaningful deliberation" rights as power levers to veto development through strategic litigation).

316. BROWNILL & BRADLEY, *supra* note 264, at 26; PARKER ET AL., *supra* note 264, at 2.

317. PAHL, *supra* note 209, at 72.

318. See Lars Strupeit & Alvar Palm, *Overcoming Barriers to Renewable Energy Diffusion: Business Models for Customer-Sited Solar Photovoltaics in Japan, Germany, and the United States*, 123 *J. CLEANER PRODUCTION* 124, 127-28 (2016); Gilbert E. Metcalf, *Investment in Energy Infrastructure and the Tax Code*, in 24 *TAX POLICY AND THE ECONOMY* 1, 43 (Jeffrey R. Brown ed., University of Chicago Press 2010); Mona Hymel, *United States' Experience With Energy-Based Tax Incentives: The Evidence Supporting Tax Incentives for Renewable Energy*, 38 *LOY. U. CHI. L.J.* 43, 45 (2006). See also U.S. DEPARTMENT OF ENERGY, *LEVERAGING FEDERAL RENEWABLE ENERGY*

tax breaks for these industries: (1) there is a public interest in development of these industries (e.g., energy security, reduced greenhouse gas emissions, etc.)³¹⁹; and (2) absent government support, the industry will not exist.³²⁰ The second rationale is especially important for justifying tax breaks; if the industry will otherwise not exist, there will be no revenue to tax.³²¹ These rationales also apply to certain NIMBY-related developments.³²²

At least for community-owned LULU development in low-income communities, tax credits already exist through the New Market Tax Credit Program.³²³ Established by Congress in 2000, this program provides tax credits to investors in businesses in low-income communities.³²⁴ For an investment to qualify for tax credits under the Program, it must be made in a “qualified community development entity,” which is any legal entity that has as its primary mission the purpose of “serving, or providing investment capital for, low-income communities or low-income persons,” and is controlled by the community through local representation on its board or other corporate governing body.³²⁵ The New Market Tax Credit Program has been very successful in injecting capital to low-income communities,³²⁶ and has “played a significant role in the rebirth of distressed areas by tapping the incentives of tax credits to spur investment in these long-neglected communities.”³²⁷

2. Entry Barriers

Members of local communities often lack the professional knowledge or resources required to engage in communal development.³²⁸ To reduce entry barriers, the Localism Act requires local planning authorities to provide technical support and professional planning advice to neighborhoods that are interested in a development pursuant to their community right to build.³²⁹ The Localism Act also provides for financial assistance for communities in the form of gov-

ernment grants to cover the cost of preparing comprehensive development plans.³³⁰ Similarly, the U.S. Department of Agriculture administers a financial assistance program that provides development grants to rural cooperatives.³³¹

However, sporadic grants and financial support for professional advice are inadequate to overcome the financial hurdles communal initiatives will face before they become a standard form of LULU development. The most challenging problem for communal development is access to capital. Lacking commercial or credit history, professional knowledge, or collateral, communal ventures will probably find it very hard to recruit the needed capital to develop a LULU.³³² To promote communal ownership, policies should be put in place that make access to capital viable.

One way of achieving this goal is through government guarantees, a common form of government support to small local initiatives that face capital recruitment challenges.³³³ A second way, discussed above, is the provision of tax breaks for investments in communal initiatives for the development of LULUs. Capital access is directly connected to the level of government benefits provided for the project. The more lucrative the benefits, the easier it will be for the community to attract capital for the development of the project.

Existing laws may also impose significant entry barriers. Laws governing the formation of business associations could make incorporation costly or reduce opportunities for raising capital. California’s Worker Cooperative Act is a case in point.³³⁴ Prior to its enactment, the formation and management of cooperatives in California was governed by the 1982 Consumer Cooperative Corporation Law,³³⁵ which made it extremely difficult for individuals to incorporate worker-owned cooperatives in California.³³⁶ In 2016, a campaign by a coalition of organizations and stakeholders led to the enactment of the Worker Cooperative Act. The legislation introduces more flexible governance regimes for cooperatives, eases equity structure requirements, exempts

TAX CREDITS, RESOURCES FOR STATE AND LOCAL GOVERNMENTS 3 (2016) (DOE/EE-1509).

319. CONGRESSIONAL BUDGET OFFICE, FEDERAL SUPPORT FOR THE DEVELOPMENT, PRODUCTION, AND USE OF FUELS AND ENERGY TECHNOLOGIES 1 (2015).

320. Hymel, *supra* note 318, at 45.

321. *Id.* This justification is limited to capital that would not otherwise be invested in other industries.

322. Infrastructure facilities are required public goods. Siting conflicts for certain NIMBY-related facilities have become so acute that scholars have suggested that the NIMBY label needs to be replaced by BANANA—“build absolutely nothing anywhere near anything.” Richman & Boerner, *supra* note 8, at 32.

323. 26 U.S.C. §45D.

324. Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills?: Lost Opportunities for Business Development in Urban, Low-Income Communities Through the New Markets Tax Credit Program*, 37 U. MEM. L. REV. 659, 662 (2007).

325. 26 U.S.C. §45D(c)(1). The legal entity must also be certified by the secretary of the treasury.

326. Tonnesen, *supra* note 191, at 206-07.

327. Jackson, *supra* note 324, at 704.

328. Dan DePasquale et al., *Forging Food Justice Through Cooperatives in New York City*, 45 FORDHAM URB. L.J. 909, 932-33 (2018) (making the same argument with regard to community food cooperatives).

329. U.K. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, *supra* note 267, at 12-13; SMITH, *supra* note 271, at 4.

330. NORTON & HUGHES, *supra* note 261, at 113.

331. U.S. Department of Agriculture, Rural Development, *Rural Cooperative Development Grant Program*, <https://www.rd.usda.gov/programs-services/rural-cooperative-development-grant-program> (last visited Jan. 2, 2019).

332. DePasquale et al., *supra* note 328, at 928-30; Tonnesen, *supra* note 191, at 206-07; Field & Layard, *supra* note 265, at 110.

333. See, e.g., the U.S. Department of Energy §1703 Loan Program under Title XVII of the Energy Policy Act of 2005; U.S. Department of Agriculture, Rural Development, *Business & Industry Loan Guarantees*, <https://www.rd.usda.gov/programs-services/business-industry-loan-guarantees> (last visited Jan. 2, 2019); SBA.com, *Government Small Business Loans*, <https://www.sba.com/funding-a-business/government-small-business-loans/> (last visited Jan. 2, 2019).

334. CAL. CORP. CODE §12200.

335. A.B. 816, 2015/2016 Leg., Reg. Sess. (Cal. 2015).

336. Legislative Counsel’s Digest, A.B. 816, 2015/2016 Leg., Reg. Sess. (Cal. 2015) (approved by governor Aug. 12, 2015, filed with secretary of state Aug. 12, 2015); Cat Johnson, *New Bill to Spur Growth of Worker Coops in California*, SHAREABLE, Apr. 22, 2015 (quoting Sushil Jacob, director of the Community Enterprise Development Clinic at the East Bay Community Law Center, and member of the California Worker Cooperative Policy Coalition steering committee).

cooperatives from securities registration, and explicitly permits the creation of worker cooperatives.³³⁷

Not all communal-ownership initiatives should be pursued through the legal entity of a worker-owned cooperative. Communities should elect the form of business association that best suits their needs.³³⁸ However, it is important to consider that emerging forms of associations often face legal barriers from statutes that were not designed to accommodate these forms of associations. States interested in promoting communal ownership through democratic forms of association should therefore work to amend their respective laws to better accommodate emerging forms of association.³³⁹

B. How to Define a “Community”

A fundamental design challenge concerns the definition of “community.” In every NIMBY context there is no single impacted community, but rather a mix of several communities of interests.³⁴⁰ This is further complicated by the fact that the burden of development is heavier on some than others. The U.K. and Swedish governments limited this problem by introducing legal and economic grounds for grassroots incorporation. Instead of defining communities, the two governments created favorable conditions for communities to pursue autonomous self-determination. This approach is more promising than creating regulatory definitions of impacted communities, given the heterogeneity of NIMBY conflicts and their context-specific nature.

The impacted community from the rural development of a wind farm in Kitty Hawk, North Carolina, shares almost no attribute with the residents of Orange County, California, who feel that they are negatively impacted by a proposed development of housing for the homeless. The different interests and potential impacts make one-size-fits-all regulatory solutions infeasible. The suggestion to focus on incentives rather than to define communities top-down is one potential approach out of many available. To overcome the challenge of defining “impacted communities,” others have suggested focusing on political boundaries, land area, per capita impacts, and more.³⁴¹ Each of these approaches has advantages and disadvantages that should be further explored.³⁴²

The purpose of this subsection is not to solve all the challenges associated with defining “impacted communities,” but rather to delineate potential solutions and avenues for further discussions and research. One thing to bear in

mind is that communal ownership does not exclude the use of other common NIMBY-related strategies. The fact that a community of impacted stakeholders owns and develops a LULU does not exclude other stakeholders from pursuing alternatives to advance their interests. Deliberation is always an option, as is the signing of a CBA. A community could elect to develop a LULU and enter into a CBA with local environmental and labor organizations, for instance.

V. Conclusion

As a “wicked” problem, there can be no single solution to NIMBY.³⁴³ Because NIMBY cannot be objectively defined by one set of underlying causes, there simply is “no objectively right or wrong answer” to NIMBY.³⁴⁴ Analyzing NIMBYism from the perspective of participatory democracy, this Article develops a novel communal ownership-based framework for mitigating NIMBY sentiments that is both pluralistic and empowering. Community ownership is aimed to complement existing policies. If community ownership was *the* answer, all wind farms and every new housing development in the U.K. would be communally owned.

Indeed, some developments are inherently unfit for communal ownership and development. A community will lack the professional knowledge required for developing and running a nuclear power plant.³⁴⁵ Other developments will simply not fit a community and therefore drive opposition regardless of the development model proposed.

However, the core argument advanced here is based on the understanding that NIMBY opposition is often an expression of injury to communal autonomy. Communal autonomy could be harmed by a siting decision the community would not accept, regardless of the decisionmaking procedure employed. However, communal autonomy could also be harmed by what Amartya Sen describes as a violation of process freedom—the inability to choose whether to host a *potentially* desirable facility, and under what terms.³⁴⁶

It is on this group of NIMBY drivers that this Article focuses. My purpose is not to offer a panacea for all NIMBY, but rather to outline a promising community-based approach for addressing a common group of NIMBY-generating developments. The case studies lay a foundation for further research on reducing entry barriers and devising specifically tailored incentives to promote community ownership arrangements, especially in the context of highly contentious developments.

337. Legislative Counsel’s Digest, *supra* note 336. See also DePasquale et al., *supra* note 328, at 932.

338. See, e.g., DePasquale et al., *supra* note 328, at 932 (explaining that “some cooperatives may find it preferable to form as a limited liability company, which protects members from being personally liable and allows for flexibility in organization and management”).

339. See, e.g., DePasquale et al., *supra* note 328, at 937-38 (discussing Minnesota’s 2003 Cooperative Associations Act that provides for greater flexibility in the formation and governance of cooperatives).

340. Aitken, *supra* note 80, at 6073.

341. Been, *supra* note 7, at 1034-35 and references therein.

342. *Id.*

343. Doremus, *supra* note 14, at 331.

344. *Id.*

345. In some complicated developments, a joint community-developer ownership arrangement could reduce communal lack of expertise.

346. Amartya Sen, *Human Rights and Capabilities*, 6 J. HUMAN DEV. 151, 152-53 (2005).