

# NOTES

## BIDS FARE WELL: THE DEMOCRATIC ACCOUNTABILITY OF BUSINESS IMPROVEMENT DISTRICTS

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*A Business Improvement District, or BID, is a territorial subdivision within a municipality. Within a BID, local property and business owners pay district-specific assessments to fund local improvements such as enhanced security, sanitation, marketing, and infrastructure. Because BIDs are often managed by private entities controlled principally by local property or business owners, critics have charged that BIDs are undemocratic and insufficiently accountable. In this Note, Brian Hochleutner argues that BIDs are both democratic and accountable, at least to the BID's most likely stakeholders and to the extent that those stakeholders are likely to be affected by the BID's activities. As Hochleutner demonstrates, a BID's small size and limited purpose work to limit accountability concerns generally. Further, a BID's size and purpose also work with other aspects of the BID model—such as substantial oversight by local government officials and the BID's own corporate governance mechanisms—to ensure that BIDs are not only particularly responsive to the interests of local property and business owners, but also sufficiently accountable to the interests of local residents. Hochleutner concludes that the BID model provides a way of governing sublocal commercial districts and downtown areas that is more fair and accountable to those actually governed than any obvious alternative.*

### INTRODUCTION

A new form of sublocal governmental body, the Business Improvement District (BID), is changing the way America governs its shopping districts, commercial areas, and downtowns. More than forty states have statutes allowing for the formation of Business Improvement Districts, and there are already more than a thousand throughout the United States.<sup>1</sup> A BID is a territorial subdivision

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<sup>1</sup> Judith Evans, D.C. Wants to Join the Boom for BIDs, *Wash. Post*, Jan. 13, 1996, at E1. The first Business Improvement District (BID) was formed in 1975, Maria Puente, Public-Private Teaming Is Revitalizing Downtowns, *USA Today*, Nov. 18, 1997, at 3A, and a recent study of 264 BIDs found that almost sixty percent had been created since 1990,

within a municipality in which property or business owners pay a district-specific tax to fund district-specific services—e.g., sanitation, policing, social services, infrastructure improvements, and marketing—that supplement the services already provided by local government.<sup>2</sup> The BID model of sublocal governance is a unique mixture of public and private: Public funds generated by district-only taxes are channeled into the hands of private entities that manage district affairs.<sup>3</sup>

State statutes, local ordinances, and individual district contracts take different approaches to even basic questions about BID formation, control, financing, and functions, but some generalizations can be made.<sup>4</sup> BID formation is generally governed by statutes that require local government and property owners to approve the district; BIDs are usually managed by a public or private BID board that advises, or is advised by, local government officials; BIDs are financed primarily by assessments on local property; and BID activities tend to focus on the delivery of traditional municipal services, such as providing street and sidewalk maintenance and security in the district.<sup>5</sup>

The BID model is popular largely because it works.<sup>6</sup> More nimble than traditional city bureaucracies,<sup>7</sup> BIDs have improved conditions within their borders,<sup>8</sup> particularly in terms of increased business

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Jerry Mitchell, PricewaterhouseCoopers Endowment for the Bus. of Gov't., *Business Improvement Districts and Innovative Service Delivery* 17 (1999). Large, medium, and small communities support BIDs, with city populations ranging from approximately 1000 to over 7,000,000. *Id.* at 17. The total number of BIDs is difficult to determine, since many jurisdictions have unique names for BID-like entities. Compare Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 *Colum. L. Rev.* 365, 366 n.1 (1999) (estimating 1000 to 2000 BIDs exist in country), with Sinn Fein in the City, *Bus. & Fin.*, Apr. 27, 2000, 2000 WL 9643248 (suggesting at least 30,000 in United States).

<sup>2</sup> See Briffault, *supra* note 1, at 368-69.

<sup>3</sup> See *id.* at 366 (noting unique public and private nature of BIDs). BIDs have no "governmental" powers beyond their highly regulated power to tax. See *infra* notes 46-53 and accompanying text (discussing limited powers of BIDs). Not all BIDs are managed by private entities, see *infra* note 37 and accompanying text, but this Note is primarily concerned with BIDs that are, see *infra* note 18 (defining "BID officials" for purposes of this Note).

<sup>4</sup> See Briffault, *supra* note 1, at 368-69; see also Mitchell, *supra* note 1, at 10 ("No two BIDs are exactly alike because each is an experiment in public administration for a particular area.").

<sup>5</sup> See Briffault, *supra* note 1, at 368-69, 378, 389, 409 (describing features of BID model); *infra* Part I (same).

<sup>6</sup> See Heather M. Donald, *BIDs Really Work*, City J., Spring 1996, at 29.

<sup>7</sup> See Daniel R. Garodnick, *What's the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 *U. Pa. L. Rev.* 1733, 1733 (2000) (praising nonbureaucratic aspects of BIDs).

<sup>8</sup> See, e.g., John A. Barnes, 'Business Improvement' Districts: Doing What Government Doesn't, *Investor's Bus. Daily*, Sept. 6, 1995, at B1 (discussing improvements made by BIDs); Puente, *supra* note 1, at 3A (same); Julia Vitullo-Martin, *The Private Sector*

activity.<sup>9</sup> According to their backers, BIDs are more effective and efficient than traditional models of local governance,<sup>10</sup> and because of their success, BIDs have become *the* means for revitalizing America's downtowns.<sup>11</sup> Despite the praise, however, the quid pro quo implicit in the BID model—payment of additional taxes in exchange for extra services and (more critically) a degree of control by local property owners—has been attacked by critics and challenged in the courts.<sup>12</sup>

The most serious legal challenge to the BID model's quid pro quo essentially was based on the charge that BIDs were so undemocratic as to be unconstitutional.<sup>13</sup> In *Kessler v. Grand Central District Management Ass'n*, residents of a Manhattan BID sued the BID's corporate management entity. The residents argued that the BID's method of electing BID board members (giving property owners majority control) violated the constitutional "one-person—one-vote" principle, a doctrine derived from the Equal Protection Clause that generally prohibits allowing nonresident property or business owners to vote in local elections.<sup>14</sup> The U.S. Court of Appeals for the Second Circuit rejected the residents' claim, holding that BIDs are exempt from the one-person—one-vote doctrine because they exist for a special limited purpose, have a disproportionate impact on property owners, and

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Shows How to Run a City, Wall St. J., May 20, 1998, at A14 (citing restoration of Bryant Park as "most striking symbol" of New York City's revitalization and crediting BID for "turnaround").

<sup>9</sup> See Evans, *supra* note 1, at E1 (discussing use of BIDs to increase economic activity).

<sup>10</sup> See, e.g., Robert Lipsyte, On the Civic Side of the Profit Motive, N.Y. Times, July 30, 1995, §13 (City), at 1 ("B.I.D.'s can sometimes cut through bureaucracy."); Fred Siegel, Reclaiming Our Public Spaces, City J., Spring 1992, at 35, 42 (noting "path-breaking role" of BIDs in "revival of public parks"); Tony Walker, Private Sector Revitalises New York's Mean Streets, Fin. Times (London), July 2, 1998, at 6 (arguing that traditional municipal governments are "nervous" about success of BIDs).

<sup>11</sup> See Barnes, *supra* note 8, at B1 (noting widespread use of BIDs "filling in for government").

<sup>12</sup> See, e.g., Frederick Gabriel, As Roles, Powers Expand, BIDs Come Under Scrutiny, Crain's N.Y. Bus., Sept. 1, 1997, at 19 (charging that BIDs have misused their authority); *infra* notes 13-16 and accompanying text (discussing court challenge to BID).

<sup>13</sup> See Briffault, *supra* note 1, at 455 ("[T]he issue of accountability underlies and drives the one person, one vote [doctrine], but one person, one vote and democratic accountability are not interchangeable.").

<sup>14</sup> See *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 93-94 (2d Cir. 1998). A detailed discussion of the Supreme Court's one-person—one-vote jurisprudence and its impact on local and sublocal government is beyond the scope of this Note. For such a discussion, see generally Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339 (1993).

have “no primary responsibilities or general powers typical of a [general purpose] governmental entity.”<sup>15</sup>

The *Kessler* litigation represents part of a lively debate about BIDs and the one-person—one-vote doctrine—a debate that this Note will not rehash.<sup>16</sup> Instead, this Note will focus on a related, but distinct, issue:<sup>17</sup> The democratic accountability of BID officials and whether they are accountable to BID stakeholders in proportion to the extent to which those stakeholders are impacted by BID activities.<sup>18</sup> This Note is divided into three Parts. Part I provides an overview of the BID model, describing how BIDs are formed and funded, what they do, and how they are governed. Part II examines who BID officials are accountable to and for, identifying three categories of stakeholders impacted by BID activities—property and business owners, BID residents, and city residents—and arguing that BID accountability should be measured in relation to these groups and the degree to which BID activities impact them. Part III looks at the BID model and how it makes BID officials accountable, arguing that BID officials are (properly) most accountable to property and business owners—who are most impacted by BID activities—but that the BID model

<sup>15</sup> *Kessler*, 158 F.3d at 108. Judge Weinstein, sitting by designation, dissented. *Id.* at 108-34 (Weinstein, J., dissenting) (arguing that nontraditional nature of BIDs does not excuse them from one-person—one-vote requirement).

<sup>16</sup> See, e.g., Briffault, *supra* note 1, at 430-46; Briffault, *supra* note 14, at 383-84; Mark S. Davies, *Business Improvement Districts*, 52 Wash. U. J. Urb. & Contemp. L. 187, 200 (1997) (suggesting doctrine should not be applied to BIDs created under New York’s BID statute); Garodnick, *supra* note 7, at 1753-68; David J. Kennedy, Note, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 Yale L. & Pol’y Rev. 283, 294-99 (1996). BIDs have not received much attention from academics outside of the one-person—one-vote context, Lawrence O. Houstoun, Jr., *BIDs: Business Improvement Districts 95* (1997) (stating that attention in media had “yet to stimulate serious research”), although not all academic criticism of BIDs concerns one-person—one-vote issues. See, e.g., Heather Barr, *More Like Disneyland: State Action*, 42 U.S.C. § 1983, and *Business Improvement Districts in New York*, 28 Colum. Hum. Rts. L. Rev. 393 (1997) (discussing whether 42 U.S.C. § 1983 should apply to BID security forces); Clayton P. Gillette, *Opting Out of Public Provision*, 73 Denv. U. L. Rev. 1185, 1190 & n.27 (1996) (discussing criticisms of BIDs as elitist and exclusionary).

<sup>17</sup> The plaintiffs in *Kessler*, to the extent that their suit involved accountability issues, were concerned only with BID accountability to residents. *Kessler*, 158 F.3d at 97-98. This Note examines BID accountability to both residents and nonresidents. Cf. Briffault, *supra* note 1, at 457 (discussing need for “‘internal’ BID accountability” to property and business owners).

<sup>18</sup> “BID officials,” is used in this context to mean BID managers who do not report directly to, or serve wholly at the pleasure of, elected representatives of state or local government. These BID officials raise accountability concerns that are unique to the BID model. BID managers appointed by elected officials also implicate accountability concerns, but in a more conventional way. For more on the conventional accountability problems raised by the fact that many public officials are not elected, see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975) (discussing accountability problems in administrative law).

also includes safeguards to ensure that the interests of BID and city residents are not disregarded.

## I OVERVIEW OF THE BID MODEL

Specific schemes for BID formation vary from jurisdiction to jurisdiction. The framework for BID formation is usually set out in a BID-enabling statute enacted by the state legislature.<sup>19</sup> The majority of these statutes establish a two-step process through which a BID's proponents must show local support: (1) district property or business owners must vote for formation; and (2) local elected officials must enact an ordinance that formally creates the BID and determines its powers and boundaries.<sup>20</sup> Typically, both of these steps involve numerous public hearings and other opportunities for community debate, helping to ensure the existence of significant local backing or at least the lack of significant opposition.<sup>21</sup>

After a BID has been created, revenues normally are generated through a special assessment on district property.<sup>22</sup> Assessments usually are collected along with other local property taxes by local government officials and are then remitted to the BID's governing body.<sup>23</sup> Some jurisdictions place a limit on BID assessments keyed to property taxes or assessed valuation of land.<sup>24</sup> Even in jurisdictions

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<sup>19</sup> See *Houstoun*, *supra* note 16, at 24-25. In at least one instance, rather than having a distinct procedure for the creation of BIDs, a state has allowed BIDs to be established under laws regulating the creation of special districts, special assessment districts, or some other form of sublocal governmental structure similar in form or function to a BID. See Pa. Stat. Ann. tit. 53, §§ 302(l), 306(B)(w) (West 1997) (repealed 2001).

<sup>20</sup> See *Briffault*, *supra* note 1, at 378-79 (stating that after petitions are signed by property or business owners and filed, local government typically must pass local law to form BID and establish its "boundaries, functions, budget, and financing formula").

<sup>21</sup> See Staff of Fin. Comm., Council of the City of N.Y., *Cities Within Cities: Business Improvement Districts and the Emergence of the Micropolis 8-10 (1995)* [hereinafter *Cities Within Cities*] (describing New York City's method of ensuring sufficient local support for BID prior to City Council's vote on formation); Andrew M. Manshel, *Business Improvement District Accountability*, 1 *Citylaw* 102, 103 (1995) (discussing practical difficulties of BID formation in New York City, even with broad support).

<sup>22</sup> See *Briffault*, *supra* note 1, at 389 & n.137 (noting that BIDs generally are funded by assessments); *Mitchell*, *supra* note 1, at 17-18. Besides assessments, other BID revenue sources include voluntary donations, federal and state subsidies, funding from local governments, the sale of goods and services by the BID, and, infrequently, the issuance of bonds. *Id.* at 17. Some states allow for imposition of other taxes for the benefit of the district. See, e.g., Mo. Rev. Stat. § 67.1461 (2002) (allowing for imposition of sales taxes, business license fees, and real property taxes, if approved by qualified voters).

<sup>23</sup> See *Houstoun*, *supra* note 16, at 36.

<sup>24</sup> See, e.g., Idaho Code § 50-1703A(6) (Michie, WESTLAW through 2002 legislation) (limiting assessment to at most twenty percent of market value of land); Mass. Gen. Laws Ann. ch. 400, § 7 (West, WESTLAW through 2002 legislation) (limiting assessment to at

without such limits, "assessments are effectively capped by the need to win the support of those who have to pay the assessments,"<sup>25</sup> just as local property taxes are functionally capped by the desire of local politicians to get reelected.

The assessment imposed upon a particular property may be calculated according to many possible formulas, taking into account factors such as the property's size, frontage, assessed value, and use.<sup>26</sup> As one might expect, assessments range considerably.<sup>27</sup> Assessment formulas generally are designed to impose the heaviest burden for financing a BID upon commercial property owners, the group that is likely to receive the most tangible benefit from increases in local business.<sup>28</sup> In fact, residential property owners often pay only nominal amounts, and nonprofit corporations and governmental entities rarely pay anything.<sup>29</sup>

The funds raised through BID assessments generally are dedicated to BID activities.<sup>30</sup> These activities vary significantly, even among BIDs in the same locality,<sup>31</sup> and annual expenditures can range

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most one-half of one percent of sum of assessed value of property); Or. Rev. Stat. § 223.114 (WESTLAW through 2001 legislation) (limiting assessments to one percent of market value of all property in district). In New York's Times Square BID, for example, total fees amount to approximately 0.3% of the assessed valuation of commercial buildings. Times Square Bus. Improvement Dist., Economic Indicators/Annual Report 3 (1998), <http://www.timessquarebid.org/bookshelf/pdfs/annual98.pdf> [hereinafter Times Square BID].

<sup>25</sup> Briffault, *supra* note 1, at 390.

<sup>26</sup> See Cities Within Cities, *supra* note 21, at 9.

<sup>27</sup> See Houstoun, *supra* note 16, at 37 (citing survey which showed significant variation, but stating that rates varied from six to eight cents per square foot for most business districts).

<sup>28</sup> See Staff of Comm. on Fin., Council of the City of N.Y., *Managing the Micropolis: Proposals to Strengthen BID Performance and Accountability 9* (1997) [hereinafter *Managing the Micropolis*] (describing assessment formula for New York BID which required commercial property owners to pay 13.6 cents per square foot, versus 4.5 cents per square foot for all other property owners); see also Times Square BID, *supra* note 24, at 3 (noting that top twenty most-valuable properties, out of 399 total properties in BID, contributed sixty-six percent of total district budget, and top one hundred properties contributed eighty-eight percent).

<sup>29</sup> Cities Within Cities, *supra* note 21, at 9. In the Times Square BID, for example, residential owners pay a nominal fee of one dollar per year. Times Square BID, *supra* note 24, at 3.

<sup>30</sup> Assessments do not legally constitute taxes, but are instead a type of exaction, a burden imposed upon property in exchange for a directly related benefit. See, e.g., *Evans v. City of San Jose*, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992). For more on the differences between an assessment and a tax, see Clayton P. Gillette & Lynn A. Baker, *Local Government Law* 553-77 (2d ed. 1999).

<sup>31</sup> See Mitchell, *supra* note 1, at 20-21 tbl.4-5 (providing breakdown of BID activities by city and budget size); see also Houstoun, *supra* note 16, at 37 (detailing results of study of BID assessments and expenditures).

from a few thousand dollars to many millions per year.<sup>32</sup> Still, there are four types of core BID activities: (1) the provision of traditional municipal services to supplement the services provided by the local government (particularly sanitation and security); (2) the construction of capital improvements; (3) the marketing and promotion of district businesses; and (4) the provision of social welfare services.<sup>33</sup> In addition to these core activities, BIDs also often act as informal advocates for the interests of their members, using the BID's relationship with city hall to lobby for legislation, regulation, or other action (or inaction) favorable to the interests of the BID's constituents.<sup>34</sup> Just who these constituents are will be discussed in Part II.

Schemes of BID governance differ significantly from locality to locality, as well as from BID to BID within localities.<sup>35</sup> Nonetheless, the management scheme for most BIDs includes some division of power between district property or business owners and officials elected by local residents.<sup>36</sup> While a significant minority of BIDs are managed directly by governmental bodies or by public nonprofit partnerships, the majority are operated by nonprofit corporations under the supervision of local government.<sup>37</sup> In these BIDs, formal decisionmaking authority rests with the BID management corporation's

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<sup>32</sup> Mitchell, *supra* note 1, at 17 (noting range in expenditures from \$8000 to \$15 million).

<sup>33</sup> Briffault, *supra* note 1, at 394.

<sup>34</sup> See, e.g., City Ordinance to Target Stores' Signs, Banners, L.A. Times, July 1, 1997, at B4 (describing BID's work in helping to enforce "city ordinance designed to eliminate visual clutter" in Hollywood); Douglas Martin, Veterans Fighting for Right to Peddle in Midtown Once Again, N.Y. Times, June 6, 1995, at B3 (reporting that Midtown Manhattan BID successfully lobbied state legislature to eliminate merchandising on sidewalks); Niz Proskocil, Norfolk Struggles with Cruising Teens, Omaha World-Herald, Mar. 5, 1999, at 13 (discussing efforts of BID in Norfolk, Nebraska, to convince local elected officials to pass ordinance to reduce "unruly teen cruisers"); cf. *Fanelli v. City of Trenton*, 641 A.2d 541, 543-44 (N.J. 1994) (discussing local ordinance that banned "hawking, peddling, or vending" within BID but allowed such activity by BID area businesses).

<sup>35</sup> See, e.g., *Managing the Micropolis*, *supra* note 28, at 7-39 (discussing case studies of New York City BIDs).

<sup>36</sup> See Briffault, *supra* note 1, at 409 ("BID governance typically combines formal roles for both city hall and district landowners or firms.").

<sup>37</sup> See Mitchell, *supra* note 1, at 17 (stating that sixty-one percent of BIDs are operated by nonprofit organizations, thirteen percent by public agencies, and twenty-six percent by mixed public nonprofit partnerships). But see Briffault, *supra* note 1, at 409 (suggesting that most common BID scheme provides "that the governing body of the municipality shall be the governing authority of the BID, but then require[s] the creation of advisory boards or managing bodies dominated by representatives of property owners or businesses"). Under some BID models, the form of BID management entity is left to localities. See, e.g., Mo. Ann. Stat. § 67.1411 (West, WESTLAW through 2002 2d. Reg. Sess.) ("Each district shall be either a political subdivision of the state or a not for profit corporation.").

board of directors, often known as the BID board.<sup>38</sup> While most BID boards are appointed, many states provide for the election of board members.<sup>39</sup> In these elections, there are often several different classes of voters—i.e., business or property owners, local residents, and non-residents—but the groups responsible for funding the BID (whether property or business owners) generally are given weighted voting power so that those most directly burdened by BID assessments get the most say over BID governance.<sup>40</sup>

The BID board usually appoints a BID manager or executive to oversee day-to-day operations. While a significant amount of day-to-day decisionmaking power is exercised by BID staff in general and by the BID manager or executive in particular, the board is officially the principal decisionmaker in a BID's management structure, just as a corporate board of directors is in a more conventional nonprofit company.<sup>41</sup> The responsiveness of the BID board to the BID's various stakeholders or constituents will be the focus of Part III, but first those stakeholders are defined in Part II.

## II

### BID ACCOUNTABILITY DEFINED: HOW MUCH AND TO WHOM?

“Accountability” is difficult to define precisely.<sup>42</sup> In the context of local government, it is related to responsiveness and concerns the degree to which officials must report to—and be punished or re-

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<sup>38</sup> See *Houstoun*, supra note 16, at 93 (stating that BID boards can be either “quite active” or “little more than a rubber stamp for the BID director”). Board size varies. See *Mitchell*, supra note 1, at 18 (noting range of three to fifty-one members).

<sup>39</sup> See *Briffault*, supra note 1, at 413 (“BID boards may be appointed . . . or elected . . . with appointment the more common route. [But e]ven with appointed boards, state laws frequently require that all or most board members be landowners, businesses, or residents of the district.”).

<sup>40</sup> See *id.* at 412-13 (“Businesspeople, especially landowners, generally dominate the membership of [BID] boards, even when that is not required by state enabling legislation.”).

<sup>41</sup> See *id.* at 413-14 (stating that “the model for [a BID board] is that of the board of directors of a not-for-profit corporation” and discussing interaction between BID board and local government); see also *id.* at 410 (“Although a management entity and not a governing authority, the [BID's corporate body], in the view of those who work with BIDs, is responsible for the policy and fiduciary functions of the BID.”) (internal footnotes and quotations omitted); cf. *Mitchell*, supra note 1, at 7 (stating that BID managers must “understand how to work with a large governing board”).

<sup>42</sup> See generally Robert D. Behn, *Rethinking Democratic Accountability* (2001) (discussing many ways in which word “accountability” is used). *Webster's* defines accountable as “1: subject to giving an account: answerable;” and “2: capable of being accounted for: explainable.” *Webster's Ninth New Collegiate Dictionary* 50 (1988). *Black's* defines it as “[r]esponsible; answerable.” *Black's Law Dictionary* 19 (7th ed. 1999).

warded for their actions by—their constituents.<sup>43</sup> Making public officials accountable to their constituents helps improve the chances that the officials will act in ways that benefit those constituents.<sup>44</sup> There is, however, no agreed-upon standard by which to measure the accountability of BID officials (or any governmental officials for that matter), and different people would probably choose to hold BID officials accountable for different things.<sup>45</sup> This Part examines the scope of the BID accountability problem and to whom BID officials should be accountable.

### A. *Scope of the BID Accountability Problem*

Accountability is not an all-or-nothing concept, and BID accountability concerns are diminished by both the relatively small size of BIDs, which limits the number of BID stakeholders, and the limited scope of BID power.<sup>46</sup> These characteristics work to protect the interests of all potential BID stakeholders and make it more difficult for BID officials to abuse public power.<sup>47</sup>

Because the discretion of BID officials is constrained *ex ante* by limitations on BID power, the need for *ex post* accountability is diminished.<sup>48</sup> BIDs are created to serve a public purpose—improving

<sup>43</sup> See Hannah Arendt, *On Revolution* 238-39 (2d ed. 1965) (detailing theories behind, and problems with, holding representatives accountable); see also Behn, *supra* note 42, at 1-21, 62-81 (discussing various meanings of “accountability” in relation to democracy and public officials).

<sup>44</sup> See Behn, *supra* note 42, at 10 (arguing that public officials cannot be held accountable without “some kind of objective, goal, or target—a clear benchmark of performance. We need an explicit measure of how well the [official] has done against the expectations we have set for it”); cf. Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 *N.Y.U. L. Rev.* 477, 508-23 (1999) (discussing public choice theory).

<sup>45</sup> See Behn, *supra* note 42, at 6 (“The accountability environment . . . is a constellation of forces—legal, political, sociocultural, and economic—that place pressure on organizations and the people who work in them to engage in certain activities and refrain from engaging in others.” (internal quotations omitted)).

<sup>46</sup> See Manshel, *supra* note 21, at 105-06 (discussing ways in which “relatively small financial resources” and limited geographical scope of BIDs work together with significant oversight by local elected officials to constrain power of BID officials).

<sup>47</sup> See *id.* (“The existing structure of accountability allows all district constituents . . . to play key roles in BID policy and service delivery.”).

<sup>48</sup> See Catherine Wheatley, *Home-Made Sanctuaries*, *Est. Gazette*, Oct. 25, 1997, at 63 (“BID’s supporters say that the schemes work because, as a privately funded, independent, single-issue body, it can concentrate on its objectives instead of being side-tracked by politics and competition for resources.”). BIDs are legally subordinate to the states and localities that create them and only exercise powers that they are granted. Cf. 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations* §§ 237-239 (5th ed. 1911) (discussing state constitutional law doctrine which would become Dillon’s Rule, which requires that local governmental authority be derived from specific statutory grant from state); Gillette & Baker, *supra* note 30, at 275-304 (same).

business and enhancing the condition of commercial areas—that is chosen by elected legislatures, not by BID officials or any particular group of BID stakeholders.<sup>49</sup> BID officials are empowered *ex ante* by specific limited grants of authority found in state statutes and local ordinances that restrict BID power to improving the quantity and quality of commercial activity within the district.<sup>50</sup> These powers are further curtailed by limitations imposed as part of management contracts between those who run the BID and local officials. The officials who grant BIDs their limited power to promote local business and economic development can also take that power away.<sup>51</sup> Even within the limited sphere of business improvement, BIDs are not sovereigns.<sup>52</sup> In sum, less BID power means BID officials make fewer choices about fewer things; this means that BID officials need not be as accountable as more traditional public officials.<sup>53</sup>

To the extent that BIDs do exercise governmental power, their small size limits the number of the BID's constituents (again, *ex ante*) and makes it easier for those constituents to monitor BID activities, measure BID performance, and respond when BID officials act improperly.<sup>54</sup> A BID's reduced stakeholder pool will likely mean less

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<sup>49</sup> See, e.g., Ark. Code Ann. § 14-184-103(3) (Michie, WESTLAW through 2001 Reg. Sess.) (“The elimination of urban blight and decay and the modernization and general improvement of central business districts by governmental action are considered necessary to promote the public health, safety, and welfare of the communities . . . .”); Cal. Sts. & High. Code § 36601(b) (West, WESTLAW through 2002 3d. Extraordinary Sess. & Mar. Election) (“It is in the public interest to promote the economic revitalization and physical maintenance of the business districts of [California's] cities in order to create jobs, attract new businesses, and prevent the erosion of the business districts.”).

<sup>50</sup> See, e.g., N.Y. Gen. Mun. Law § 980-c(a) (McKinney 1999) (providing that BIDs may be established to “restore or promote business activity in the district”); see also *supra* note 49.

<sup>51</sup> See Manshel, *supra* note 21, at 104 (stating that contracts between municipality and BIDs “provide[] for continuous review of BID activities” by local officials and “commit . . . the BID to perform specified programs and functions” and provide reports of activities and finances, and that “[i]f the BID fails to fulfill its obligations under the contract, [local officials] may withhold assessment funds”). Many BIDs have sunset provisions that provide for the BID to expire unless reauthorized periodically. See *Houstoun*, *supra* note 16, at 91.

<sup>52</sup> While BIDs can act as district cheerleaders and influence city or state agencies, they have little direct power over the business activities that go on within the district. *Briffault*, *supra* note 1, at 407 (“BID efforts to shape the development of their districts rely on moral suasion; the provision of financial inducements . . . ; lobbying city hall; or joining in lawsuits to enforce regulations or defend municipal ordinances that advance BID-initiated policies.”).

<sup>53</sup> See *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 104 (2d Cir. 1998) (“[T]he promotion of business is a limited purpose. The [BID] . . . is not concerned with the provision of general public services such as schools, housing, hospitals, jails, fire fighting, transportation, utilities, or zoning.”).

<sup>54</sup> See Manshel, *supra* note 21, at 104-05 (stating that both “owners and tenants in the [BID] receive a great deal of information from the district and vice versa,” and that this

diverse stakeholder views about the choices that BID officials do make.<sup>55</sup> In a larger general-purpose government, it is often difficult to hold elected representatives accountable because voters can cast only one vote for only one candidate in a given election. Thus, a representative may take actions that deviate from stakeholder preferences on isolated occasions with relative impunity, knowing that it is unlikely that voters will punish her so long as she acts in concert with constituent preferences on most other occasions.<sup>56</sup> Since BID officials exercise narrow power over relatively few stakeholders, their actions are more likely to be monitored, making it less likely that these officials will act contrary to their constituents' preferences.<sup>57</sup> Thus, each stakeholder's inquiry is simplified because there are relatively few things to monitor, and a BID official's inquiry is simplified because the constituency is small and likely to be relatively homogeneous in its desire for enhanced district services.<sup>58</sup>

Smaller BIDs with fewer stakeholders mean that each stakeholder also has a greater opportunity to participate in BID affairs personally, increasing the chance that she will be enriched by taking part in the democratic process.<sup>59</sup> Active participation by constituents should facilitate accountability by increasing awareness of the BID officials.<sup>60</sup> In large general-purpose governments, stakeholders rarely have an incentive or opportunity to become personally involved in government; similarly, officials generally have little incentive or opportunity to care about the kinds of uniquely local issues that tend to be the focus of BID activities.<sup>61</sup> The BID model involves a subdivi-

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inevitably leads to "BIDs becom[ing] extremely consumer- and service-oriented with phone calls returned on a same-day basis and service needs addressed promptly").

<sup>55</sup> See Gillette, *supra* note 16, at 1195-96 ("The smaller the jurisdiction, the more homogeneous the population of the jurisdiction would tend to be, and the greater similarity we would expect to see in the preferences of [stakeholders].").

<sup>56</sup> See Arendt, *supra* note 43, at 239-40 (arguing that principles of popular sovereignty are "true only for the day of election").

<sup>57</sup> Cf. *id.* at 238-39 (noting inevitable breakdown in direct democracy when population is too large).

<sup>58</sup> See *id.* Disagreements do arise, of course. See, e.g., Thomas J. Lueck, *Business Districts Grow at Price of Accountability*, N.Y. Times, Nov. 20, 1994, at A1 (citing "bitter debate" over proposed BID for largely residential area of Manhattan's Upper East Side, complaints of business owners that they had not been given enough say in setting BID policy, and "warring factions of property owners" fighting for control over BID in Jamaica, Queens).

<sup>59</sup> See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 427 & n.348 (1990) (drawing correlation between small size and accountability).

<sup>60</sup> See *id.*; Houstoun, *supra* note 16, at 103 (arguing that assessments encourage stakeholders to get involved in BID management).

<sup>61</sup> See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 Minn. L. Rev. 503, 507 (1997).

sion of local government into more local jurisdictional units, each of which creates opportunities for individual participation in governance.<sup>62</sup> While a BID is not a full-fledged government and can hardly be called a comprehensive decentralization of government decision-making, it does represent “a departure from the traditional centralized big city.”<sup>63</sup>

Accountability concerns are also diminished insofar as small, decentralized units of local government promote competition between different neighborhoods and different public officials responsible for those neighborhoods.<sup>64</sup> It would not be efficient for residents, property owners, or business managers to “vote with their feet” every time a BID official does something they dislike, but the price of district real estate should reflect preferences for living in, working in, and owning land in the district.<sup>65</sup>

While BIDs’ small size and limited powers constrain BID officials and empower stakeholders to reduce accountability problems generally, these characteristics do not wholly solve such problems.<sup>66</sup> BID critics continue to argue that BIDs represent an attempt by city governments to delegate responsibility for (and control over) public spaces to the private sector<sup>67</sup> and that BIDs “have grown too powerful and too self-serving, and have assumed municipal duties without adequate oversight or accountability.”<sup>68</sup> In other words, the small size

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<sup>62</sup> As jurisdictions get smaller, direct democracy becomes increasingly plausible. See Arendt, *supra* note 43, at 238-39 (“[R]epresentation was meant to be a mere substitute for direct political action through the people themselves . . .”).

<sup>63</sup> Briffault, *supra* note 61, at 508 (internal quotations omitted). Whether or not constituents of a small governmental unit actually have a more effective voice, they are likely to think that their share of local power is greater. This sense of “citizen effectiveness” may lead to more participation, creating an increasing cycle of effectiveness and participation. See *id.* at 505.

<sup>64</sup> See Wheatley, *supra* note 48, at 63 (noting visible differences between districts where BIDs are effective and other city areas).

<sup>65</sup> Cf. Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 *J. Pol. Econ.* 416, 421-22 (1956) (discussing theoretical model in which residents move to and leave municipalities on basis of local government decisions).

<sup>66</sup> See, e.g., Emily DeNitto, BIDs Face Resistance to Explosive Growth, *Crain’s N.Y. Bus.*, June 12, 1995, at 3 (discussing criticisms of BIDs); Doug Lasdon & Sue Halpern, Editorial, When Neighborhoods Are Privatized, *N.Y. Times*, Nov. 30, 1995, at A29 (“Business improvement districts—quasi-governments supported by mandatory taxes on neighborhood property owners—ignore democratic principles and have furthered the class divisions in our cities.”).

<sup>67</sup> See, e.g., Marla Dickerson, Hot Revitalization Trend Has Some Merchants Bothered, *L.A. Times*, Jan. 20, 1999, at C1.

<sup>68</sup> Gabriel, *supra* note 12.

and limited scope of BIDs notwithstanding, concern that BID officials need be held more accountable remains.<sup>69</sup>

### B. *To Whom Should BIDs Be Accountable?*

Before it is possible to determine whether BID officials are sufficiently accountable, a basic question must be answered: accountable *to whom?*<sup>70</sup> Answering this question will help define a BID's constituents and establish a set of expectations with which to evaluate BID accountability mechanisms.<sup>71</sup> The identification of specific stakeholder groups is necessary because BID accountability cannot mean simultaneous and equal fidelity to everyone all the time.<sup>72</sup> Every unhappy stakeholder does not equal an accountability failure, because a BID official's decision to do something that one or more stakeholders dislike might amount to nothing more than a case of democracy (or accountability) at work.<sup>73</sup> Actions by BID officials, like those of more traditional public officials, produce winners and losers, even when the official does the right thing or acts in the relevant public's interest.<sup>74</sup>

#### 1. *Accountability, Residency, and One-Person—One-Vote*

Because BIDs are special-purpose governmental bodies dedicated to the improvement of district *business*, BIDs cannot be ac-

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<sup>69</sup> See, e.g., *Managing the Micropolis*, supra note 28, at 3-4 (recognizing that BIDs "have generally had a positive impact" but criticizing BIDs for lack of "disclosure regarding operations and services, and more importantly, the expenditure of assessments"); Dickerson, supra note 67; Gabriel, supra note 12; Tom Gallagher, *Trespasser on Main St. (You!)*, 261 *The Nation* 787, 790 (1995) ("BIDs make government function more like a business—without any responsibility to citizens."); Bruce Lambert, *Looking Back, Looking Ahead: After Rapid Growth, B.I.D.'s Enter a Time of Turmoil*, *N.Y. Times*, Dec. 31, 1995, § 13, at 6 (discussing increased scrutiny of New York BIDs); Lueck, supra note 58 (asserting that BIDs "have taken over municipal duties without sufficient oversight or public accountability").

<sup>70</sup> See generally Behn, supra note 42, at 62-80 (discussing questions that help frame accountability inquiry).

<sup>71</sup> See *id.* at 1-21 (discussing concept of accountability "holders" and "holdees"); *id.* at 7 ("You can't have accountability without expectations. If you want to hold people accountable, you have to be able to specify what you expect them to do and not do.").

<sup>72</sup> This is because there is inevitable tension between accountability and efficiency. See Behn, supra note 42, at 229 n.57; see also Garry Wills, *A Necessary Evil: A History of American Distrust of Government 15-22* (1999) (discussing how distrust of government leads to inefficiency).

<sup>73</sup> See *Houstoun*, supra note 16, at 99 (discussing democratic nature of political battles within BIDs). Democracy allows minority interests to be ignored by the majority. See Hamilton, supra note 44, at 487-88 (identifying "internal contradiction" in representative democracy that "elevates victorious interests over all others").

<sup>74</sup> See Hamilton, supra note 44, at 487-88. But see Briffault, supra note 1, at 457 (noting possibility that losers in BID will be victims of "the classic Madisonian possibility of tyranny by a majority faction").

countable solely to local residents. Normally, local government officials are held accountable through an electoral system in which, “[s]ince the reapportionment revolution of the 1960s, the only fully legitimate basis for political representation has been [residential] population” and the one-person—one-vote rule.<sup>75</sup> This traditional accountability scheme is not constitutionally required for BIDs, lifting what would otherwise be inflexible restrictions on the groups to which BID officials could be made accountable.<sup>76</sup>

One of the virtues of the one-person—one-vote rule, however, is its arithmetic simplicity (each person who resides in the relevant area gets an equal vote) and the ease with which it can be applied.<sup>77</sup> Once it is not required, determining to whom public officials should be accountable and designing a system that seems “fair” becomes quite difficult. The danger of perceived unfairness is amplified in the BID context: Because BIDs are created for the single purpose of improving business, it is important for BID officials to be accountable to local business interests, or rather to the *people* responsible for local businesses.<sup>78</sup>

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<sup>75</sup> David M. Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 653 (1986) (noting that “when other interests—economic, social, ethnic—seek access to the political process, they must do so in other ways than through direct representation”); see also Briffault, *supra* note 14, at 345 (stating that Supreme Court’s approach to one-person—one-vote in local government prevents greater representation for groups with greater interest in state action).

<sup>76</sup> See *supra* notes 14-16 and accompanying text (discussing *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92 (2d Cir. 1998)).

<sup>77</sup> See, e.g., *Wit v. Berman*, 306 F.3d 1256, 1261 (2d Cir. 2002) (suggesting that residency-based voting systems are adopted primarily for administrative convenience); John Hart Ely, *Democracy & Distrust: A Theory of Judicial Review* 121 (1980) (“[T]he ‘one person, one vote’ standard is certainly administrable. In fact administrability is its long suit, and the more troublesome question is what else it has to recommend it.”).

<sup>78</sup> See *infra* notes 95-100 and accompanying text (discussing fact that property and business owners are BIDs’ most likely stakeholders). The idea that BIDs should be accountable to local business leaders, while somewhat obvious, is nevertheless controversial, perhaps because a prohibition on allowing businesses (or property owners) to vote is implicit in the one-person—one-vote doctrine. See, for example, *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his [state].”) (emphasis added). The Supreme Court has stricken down voting schemes based on property ownership, even in elections of officials with limited powers. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 630, 633 (1969) (striking down state law that permitted nonresident land owners to vote in elections of school officials).

In evaluating the fairness of the BID model, however, it is important to note that BIDs are not formed exclusively in wealthy areas or even only in central business districts; the formation of a BID can just as easily constitute an investment in a poor neighborhood as a wealthy one. See, e.g., Davies, *supra* note 16, at 223 (arguing that “[e]mpowering neighborhoods through the formation of BIDs should disproportionately *help* the poor, both by reviving the urban city and thereby restoring a tax base to the city government, and by enabling collective action in poor neighborhoods which have the most to gain”);

Once it is recognized that a governmental body dedicated to business improvement should be directly accountable to representatives of local business, the plain vanilla one-person—one-vote residency-only system proves to be an inefficient and arbitrary way of holding BID officials accountable.<sup>79</sup> This is largely because of a BID's characteristic features, discussed above, of small size and limited scope.<sup>80</sup> With small size comes increasingly arbitrary distinctions between residency and nonresidency—as a district gets smaller (BIDs as small as one block have been formed),<sup>81</sup> the relationship between residency and interest in the outcome of a district election breaks down—and an increasing percentage of those impacted by the government are likely to be nonresidents.<sup>82</sup> Further, the wholesale exclusion of all nonresidents from any election, while perhaps desirable in other contexts, is indefensible when the officials being elected have a mandate that is limited (by officials elected by residents) to improving business.<sup>83</sup> Obviously, local business leaders are better positioned to hold BID officials accountable for fulfilling this mandate than are residents. A

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Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 *San Diego L. Rev.* 295, 307-08 (1999) (“Owing to a number of unexpected and seemingly miraculous successes . . . community development has become quite popular and today receives widespread, nearly universal, support.”); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 *Clinical L. Rev.* 217, 218 (1999) (“As an approach to dealing with urban poverty, community development programs have been supported under diverse political agendas.”).

<sup>79</sup> See *Wit*, 306 F.3d at 1261 (“Particularly in modern times, domicile is very often a poor proxy for a voter’s stake in electoral outcomes because many of an individual voter’s varied interests are affected by outcomes in elections in which they do not vote.”).

<sup>80</sup> See *supra* notes 46-53 and accompanying text (discussing limited power of BIDs).

<sup>81</sup> Mitchell, *supra* note 1, at 18. According to one survey, the median and average number of blocks in a BID is twenty. *Id.*

<sup>82</sup> Governmental action is likely to affect more nonresidents in a smaller city or jurisdiction than in a larger one for several reasons. First, “[a] city’s decisions inescapably affect individuals living immediately outside its borders,” *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978), and as the jurisdiction shrinks, the area immediately outside those borders becomes larger relative to the area within the borders. Second, although residency and land or business ownership are not tied one-to-one, they are related (because people tend to live near property or businesses they own or manage); the smaller a city gets, the greater the chance that its business and property owners will happen to live outside, rather than inside, its borders. Cf. Briffault, *supra* note 14, at 342 (noting that “due to the variety of local powers and the complexity of local structures, the effects of local government actions, even on residents, are not a simple binary matter of ‘impact/no impact,’” and stating that Supreme Court has “struggled with the relationship between jurisdiction and impact and the implications of this relationship for voting rights” in local government one-person—one-vote cases).

<sup>83</sup> See *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 106-07 (2d Cir. 1998) (noting that BID voting scheme provided for proportionality between voting power and effect because principal burden of BID activities fell directly on property owners rather than residents, and benefits from BID would accrue primarily in form of increased property values).

purely residence-based voting or accountability system is desirable for larger general-purpose governments<sup>84</sup> and might be desirable for a small district not devoted to business improvement; but it makes little sense for a BID.

## 2. *Accountability Unrestrained by Residency and One-Person—One-Vote*

In the absence of a one-person—one-vote residents-only rule, the BID model, to be fair and legitimate, must be faithful to the principle that democracy requires government by “consent of the governed.”<sup>85</sup> Under this premise, to the extent that BIDs do actually “govern,” BID officials must be made accountable or responsive to (so as to govern at the implied consent of) those they govern.<sup>86</sup> Put somewhat differently, to the extent that BID activities are governmental activities, and to the extent that BID activities affect a BID’s stakeholders, BID officials should be made accountable to those stakeholders.<sup>87</sup>

Including nonresidents in a BID accountability scheme, however, has created a problem: It is necessary to decide how to make BID officials accountable to both residents and nonresidents, and therefore how to compare apples (residents) to oranges (nonresidents).<sup>88</sup> Implicit in the premise of “consent of the governed” is that the need for “consent” is relative to whether (and thus to what extent) a person is

<sup>84</sup> See *Wit*, 306 F.3d at 1262 (stating that residential voting rules in general purpose election “almost always insure[] that a voter has *some* stake in the electoral outcome”).

<sup>85</sup> See The Declaration of Independence para. 2 (U.S. 1776).

<sup>86</sup> See Don Herzog, *Happy Slaves: A Critique of Consent Theory* 207 (1989) ([R]esponsiveness can serve as the core of a theory of legitimacy, obligation, and disobedience. It is also . . . at the core of the consent of the governed; it’s what people are most deeply gesturing toward when they invoke that phrase. It’s not that “responsiveness” itself explicates the concept of consent; it doesn’t. After all, one can always coherently ask if people have consented to live under a responsive state. Rather, it’s that if we draw up a list of regimes that we intuitively want to say rest on the consent of the governed, another list of those that don’t, the states on the first list turn out to be the responsive ones.)

<sup>87</sup> Cf. Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 *Harv. L. Rev.* 434, 454-56 (1998) (arguing against direct democracy on grounds that while all stakeholders may have “equal capacity for moral decisionmaking,” this does not necessarily lead to a requirement that each be given one equal vote—yes or no—as to every single governmental decision, but might instead be accommodated by allowing voters to reflect not merely their preferences, but intensity of their preferences); Hanna Fenichel Pitkin, *The Concept of Representation* 232 (1967) (“[R]epresentative government requires that there be machinery for the expression of wishes of the represented, and that the government respond to these wishes”).

<sup>88</sup> See *supra* notes 77-85 and accompanying text; cf. *Wit*, 306 F.3d at 1261 (“[T]he administrative problems that interests-based rules would cause for thousands of registrars of voters render those rules virtually unthinkable.”).

“governed.” While equal protection and fairness principles require that all residents be treated equally, they do not require that every resident be treated like every nonresident.<sup>89</sup> Instead, principles of fairness suggest that BID officials be made most accountable or responsive to the stakeholder group with the most at stake, and less accountable or responsive to other groups.<sup>90</sup> This approach—making the accountability of public officials to their constituents proportional to the interests those constituents have in governmental decisionmaking—has also been defended on utilitarian grounds, in that it would tend to further the public’s aggregated best interests.<sup>91</sup>

Measuring who is affected by a BID’s (or any government’s) activities is not easy, and this accountability calculus becomes even more complicated once it is recognized that a failure to take action can have just as much effect as official action itself.<sup>92</sup> Of course, if it were possible to measure the impact of BID activity (or inactivity) on every potential BID stakeholder, and if it were also possible to devise a voting system that gave each person impacted by BID actions (or inactions) a vote that was exactly proportional to the impact, it would be easy to make BID officials proportionately accountable to the various sets of stakeholders. Since this is impossible,<sup>93</sup> the best that can be attempted is to make BID officials accountable to those stakehold-

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<sup>89</sup> See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-70 (1978) (“[N]o one would suggest that nonresidents likely to be affected by . . . municipal action have a constitutional right to participate in the political processes bringing it about.”).

<sup>90</sup> See Clark, *supra* note 87, at 443-54 (arguing that democratic legitimacy requires that “each person’s voice should be heard as fully and accurately as possible,” and suggesting that “[b]y equating the preference of the majority with the will of the people, we fail to take into account that, for any particular issue, some individuals will care more—have more at stake—than will others”).

<sup>91</sup> Public choice theorists began formulating this argument more than forty years ago. See, e.g., Anthony Downs, *In Defense of Majority Voting*, 69 *J. Pol. Econ.* 192, 192 (1961) (“[T]he equal weighting of all votes can lead to undesirable results when voters do not have equally intense preferences. If a minority passionately desires some act which the majority just barely opposes, there is no way for the minority to express its great intensity in a simple once-for-all vote . . . .”); see also Hamilton, *supra* note 44, at 508-12 (summarizing various strains of public choice theory and how they treat the ideals of self-rule and representation). An examination of the various strains of public choice theory and the utilitarian arguments for proportional or intensity-of-interest-based representation is beyond the scope of this Note.

<sup>92</sup> See, e.g., Lisa E. Heinzerling, Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 *U. Chi. L. Rev.* 1048, 1051 (1986) (discussing circumstances under which courts have held that state actor’s failure to act deprived someone of constitutional rights).

<sup>93</sup> See Briffault, *supra* note 14, at 341 (discussing “knotty problems of determining exactly what a fair representation of groups differentially affected by a particular local government ought to be”).

ers who are most likely to be impacted by BID activities, to the extent that these stakeholders can be readily identified.<sup>94</sup>

### 3. *Identifying Likely BID Stakeholders*

Professor Richard Briffault, author of the most exhaustive analysis of BIDs to date, has suggested three primary groups on which to judge BID accountability: (1) the local property or business owners subject to BID assessments (Owners); (2) residents of the BID (BID Residents); and (3) residents of the municipality (City Residents).<sup>95</sup> While this list is not exhaustive or perfect, it does provide a starting point for an inquiry into BID accountability for two reasons: First, as discussed below, these three groups include the vast majority of BID stakeholders; and second, as discussed above, this Note does not seek to take on the impossible task of analyzing BID accountability in relation to every possible BID stakeholder; rather, it seeks to examine whether BID officials are adequately accountable to a BID's most likely or important stakeholders.<sup>96</sup>

For reasons that should be clear by now, a BID's likely impact on Owners is obvious and easily measured in clear monetary terms.<sup>97</sup> Owners pay for day-to-day BID activities by funding BID assess-

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<sup>94</sup> See *id.* at 342 (noting that general presumption of close nexus between residency within jurisdiction and impact of that jurisdiction's government is problematic when applied to "the complexity of local structures" of government).

<sup>95</sup> See Briffault, *supra* note 1, at 455-57. According to Briffault, BID accountability is "a real cause for concern," *id.* at 458, although he concludes that the extent of the problem remains unclear, *id.* at 462.

<sup>96</sup> An exhaustive analysis of BID stakeholders, in the abstract, would be pointless in light of the variations in BID characteristics (and thus also in likely stakeholders) from jurisdiction to jurisdiction. See *supra* note 4 and accompanying text. Even if an exhaustive inventory of BID stakeholders were possible, a *de minimis* exception would be needed because a BID's stakeholders would otherwise include anyone who has visited (or could visit) the BID, however briefly. But cf. *infra* note 137 (citing list of eight distinct classes of BID stakeholders).

<sup>97</sup> See *Houstoun*, *supra* note 16, at 103 (discussing assessment amounts and allocations). BID assessments are designed to represent a direct recapture of the value of benefits bestowed upon property owners within the district, even though these benefits are often difficult to measure. See, e.g., *City of Seattle v. Rogers Clothing for Men, Inc.*, 787 P.2d 39, 46 (Wash. 1990) (*en banc*) (finding that money raised for BID was assessment rather than tax because benefits provided by BID were "actual, physical and material as opposed to speculative or conjectural"). New York law requires not only that all property within a BID benefit from BID expenditures, but that every benefited property be included within the BID. N.Y. Gen. Mun. Law § 980-f (McKinney, WESTLAW through 2002 legislation). This requirement seems sensible from a fairness standpoint, but it requires that BID benefits fall neatly within district boundaries. Cf. *Wheatley*, *supra* note 48, at 63 ("Throughout Midtown Manhattan, it is clear where the BID boundaries lie: cross the street into the City-run zones and there is litter on the pavements and graffiti on the phone boxes.").

ments,<sup>98</sup> and a BID's power to assess is the most "governmental" or coercive of its powers because an Owner cannot opt out of paying the assessment.<sup>99</sup> While Owners are burdened by BIDs, Owners also benefit from BID activities: Improvement in local business is likely to lead to increases in local property and business values.<sup>100</sup>

The likelihood of BID activities impacting BID Residents is also high, although the impacts on these residents are not easily measured in monetary terms.<sup>101</sup> BID activities begin with the basic task of keeping the streets clean, and it is difficult to dispute that the lives of BID Residents are likely to be impacted by cleaner streets.<sup>102</sup> BID Residents are not, however, likely to be burdened in any real way by having to fund BID activities since (at least in most BIDs) residential properties are exempt from assessments.<sup>103</sup> Because they are likely to be directly benefited, but unlikely to be directly burdened, the accountability concerns implicated by BID Residents are significantly less than those implicated by Owners.<sup>104</sup>

Finally, BID activity certainly impacts many City Residents, although the effects are again likely to be less direct or significant than

<sup>98</sup> See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 107-08 (2d Cir. 1998) (discussing impact of BID assessments on property owners); see also *supra* notes 22-34 and accompanying text (same).

<sup>99</sup> See, e.g., Ala. Code § 11-54B-9 (LEXIS through 2002 Reg. Sess.). While some BID proponents stress the voluntary characteristics of BIDs, see George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 113 (1996) (describing BIDs as "private improvement districts . . . in which property owners voluntarily tax themselves"), assessments are not voluntary, and nonpayment can result in a lien on property, see, e.g., § 11-54B-9. Massachusetts is the only state where property owners can opt-out of paying BID assessments, Mass. Gen. Laws Ann. ch. 400, § 4 (West, WESTLAW through ch. 370 of 2002 2d. Ann. Sess.) (enabling property owners to opt out of duty to pay assessments), but this provision has been "a significant obstacle to the creation of BIDs in the state." Briffault, *supra* note 1, at 393 n.173.

<sup>100</sup> See *Houstoun*, *supra* note 16, at 116 ("[A]n increase in assessment should offer the prospect of at least a comparable increase in property value or some other quantifiable economic benefit to a business."). The likelihood that property owners will benefit weighs in favor of making BID officials accountable to them. See *supra* Part II.B.2 (discussing accountability as properly proportional to likely impacts of government).

<sup>101</sup> See, e.g., *Garodnick*, *supra* note 7, at 1763-65 (discussing effects that BIDs are likely to have on nonproperty-owning residents).

<sup>102</sup> See *Houstoun*, *supra* note 16, at 105 ("The characteristics that make a downtown a good place to visit resemble those that make it a great place to live."); see also *Kessler*, 158 F.3d at 122-24 (Weinstein, J., dissenting) (discussing possible BID impacts upon residents).

<sup>103</sup> See *supra* note 29 and accompanying text (noting nominal nature of BID assessments on nonproperty owners).

<sup>104</sup> Cf. *Houstoun*, *supra* note 16, at 103 (arguing that assessments are driving force behind involvement by property owners in BID management and that those—like residents—who are not assessed directly have less interest in success or failure of BID); E-mail from Carl Weisbrod, President, Alliance for Downtown New York Business Improvement District, to author (May 11, 2002, 08:09:02 EST) (on file with author) (stating that economic development plays important part in BID activity).

those felt by Owners.<sup>105</sup> City Residents, like BID Residents but unlike Owners, are not likely to be burdened by BID activities since they are not forced to pay assessments.<sup>106</sup> The impact of BID activities on City Residents differs largely in degree, rather than in kind, from the impact on BID Residents. Neither group is likely to be directly burdened, but both are likely to include people that benefit from BID activity insofar as they spend a significant amount of time traversing the sidewalks of the BID. Obviously, as a group, City Residents are somewhat less likely than BID Residents to be impacted by BID activities; nevertheless, BIDs are often located in central business districts that serve as regional hubs for commercial activity, and thus it is likely that many City Residents will be impacted by BID activities.<sup>107</sup> There is overlap—every BID Resident is also a City Resident—but since every BID Resident spends time living in the BID and many City Residents live far away and may not visit the BID at all, City Residents are (as a group) affected less by BID activities than BID Residents.

Obviously, one could think of other groups that might be impacted by BID activities. Some of these groups are extremely difficult or impossible to define with any certainty,<sup>108</sup> and most groups have interests that largely overlap with Owners, BID Residents, City Residents, or some combination thereof.<sup>109</sup> Rather than engage in anything approaching a comprehensive review of the particular groups potentially affected by BIDs and examining how each can or cannot hold BID officials accountable, this Note addresses the general question of BID accountability, acknowledging that local variations in stakeholders and BID structures will have to be examined more closely on a case-by-case basis. In any event, the inclusion of City Residents as a group ensures that the interests of a broad range of stakeholders will be considered in the analysis of BID accountability.

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<sup>105</sup> See Briffault, *supra* note 1, at 456 (discussing ways in which BIDs can affect entire city).

<sup>106</sup> See *supra* notes 22-29 and accompanying text (analyzing assessments).

<sup>107</sup> Cf. Kennedy, *supra* note 16, at 319 (arguing that BIDs negatively impact other city areas).

<sup>108</sup> See *supra* note 96 and accompanying text (discussing problems with defining all possible stakeholder groups).

<sup>109</sup> For example, everyone is likely to want clean sidewalks, one focus of BID activities. See Houston, *supra* note 16, at 106 (“In the past decade or so, the notion of clean sidewalks in heavily trafficked and littered business districts was so remarkable that it dominated virtually all discussions.”). See also *supra* notes 54-58 and accompanying text (discussing fact that interests of internal BID constituents are unlikely to be widely divergent).

### III

#### ACCOUNTABILITY MECHANISMS AND THE BID MODEL

This Part examines the ways in which BIDs and BID officials are made accountable to each of the three stakeholder groups identified in Part II—Owners, BID Residents, and City Residents (collectively “Residents”). Part A examines BID accountability to Owners, a BID’s most important stakeholder group. Part B examines BID accountability to BID Residents and City Residents. These two groups are examined together to avoid unnecessary repetition because their interests are similar and because the mechanisms through which BIDs and BID officials are made accountable to these two groups of stakeholders are generally the same.

#### A. *BID Accountability to Owners*

##### 1. *BID Formation Procedures*

Accountability to Owners begins before a BID is created, and Owners generally have the greatest voice in BID formation.<sup>110</sup> BIDs are born pursuant to a “district plan,” which is drafted by a sponsoring organization to provide the basic blueprint for the BID.<sup>111</sup> A district plan is akin to a BID’s constitution, but it is also “analogous to a corporation’s charter, bylaws and business plan.”<sup>112</sup> Local property owners generally form the nucleus of the entrepreneurial group that drafts the plan, and most states allow for and anticipate that the basic framework of the BID, including specific boundaries, assessment rates, and the mix of services to be provided, will be determined preliminarily by Owners.<sup>113</sup>

In addition to their input into the district plan, Owners also generally have the power to defeat BID formation: After development of the plan and before the local legislature can vote on BID formation, a sponsoring organization usually needs to demonstrate support from

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<sup>110</sup> See, e.g., Ind. Code Ann. § 36-9-38-8 (West, WESTLAW through 2002 1st Spec. Sess.) (allowing formation process to begin with approval of owners of twenty percent of affected property).

<sup>111</sup> See, e.g., N.Y. Gen. Mun. Law § 980-a (McKinney, WESTLAW through 2002 legislation). New York law does not stipulate who can qualify to draft a district plan. In practice, a group of Owners will usually prepare the plan and engage in initial outreach. See *Managing the Micropolis*, supra note 28, at 7-8 (noting that some property owners objected to BID proposal partly because of inadequate outreach).

<sup>112</sup> Manshel, supra note 21, at 103. BID enabling statutes generally require that district plans include boundaries, planned expenditures, and other components of the basic operating and financial structure of a BID. E.g., N.Y. Gen. Mun. Law § 980-a (McKinney, WESTLAW through 2002 legislation).

<sup>113</sup> See *Houstoun*, supra note 16, at 39-41 (discussing BID formation guides published by groups in New York and Philadelphia).

Owners.<sup>114</sup> BID statutes generally have strict notice requirements to ensure that Owners are fully informed,<sup>115</sup> and some states require that formation be approved by a supermajority of Owners.<sup>116</sup>

Owners are not always in agreement as to the need for a BID, and a BID proposal can prompt heated debates not only about whether a BID is needed, but also about the appropriate level of services to be provided and the assessment to be levied.<sup>117</sup> For this reason, boundaries of the proposed BID are often drawn to include, to the extent possible, only those properties with similar interests and concerns.<sup>118</sup>

In sum, BID formation procedures consist of a series of practical safeguards to ensure not only that Owners support the idea of BID formation, but that they have input into the delineation of district boundaries and the determination of the level of services provided by the BID. While these safeguards do not ensure that there will be una-

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<sup>114</sup> See *supra* note 20 and accompanying text. The level of support and methods for determining it vary. For example, New York allows a BID to be formed unless more than fifty percent of Owners object, although when a significant percentage (but less than fifty percent) have objected, formation has been delayed. See N.Y. City, N.Y., Administrative Code § 25-406(b) (LEXIS through 2001 legislation) (allowing also for owners of fifty-one percent of assessed property values to block BID formation); *Managing the Micropolis*, *supra* note 28, at 7-8, 42 (discussing statutory objection threshold as triggering “automatic disapproval,” but arguing that presumption of support “imposes an unfair and misplaced burden on those property owners in opposition to the establishment of the BID”). Los Angeles sets varying approval thresholds for the formation of different kinds of BIDs. While merchant-based BIDs (with assessments imposed on businesses) can be created if less than fifty percent of merchants object, property-based BIDs (with assessments imposed on property owners) can be established only if more than fifty percent of property owners sign petitions of support. See Office of the City Clerk, Citywide Business Improvement District Program: Frequently Asked Questions (and Answers), at <http://www.lacity.org/CLK/BIDS/bidfaq.cfm> (last visited Nov. 20, 2002).

<sup>115</sup> Some BID statutes actually mandate the form and content of petitions. See Mo. Ann. Stat. § 67.1421 (West, WESTLAW through 2002 Second Reg. Sess.) (requiring that petition include, *inter alia*, five-year plan for district).

<sup>116</sup> See, e.g., *McGowan v. Capital Ctr., Inc.*, 19 F. Supp. 2d 642, 644 (S.D. Miss. 1998) (noting unsuccessful effort to establish BID where significant majority—but less than required seventy percent—of property owners favored BID formation); cf. *Managing the Micropolis*, *supra* note 28, at 42 (proposing modification of New York’s BID approval process to require that supermajority of property owners explicitly approve BID formation).

<sup>117</sup> See *Briffault*, *supra* note 1, at 384 (noting that owners of large commercial buildings, who are often already providing supplemental services and who would pay large assessments if a BID were established, tend to oppose BID formation); see also *Managing the Micropolis*, *supra* note 28, at 8-9, 12-15 (describing opposition to formation of BIDs by Owners).

<sup>118</sup> *Manshel*, *supra* note 21, at 103. Unanimity among property owners is difficult to ensure, or even to measure. See, e.g., *Cities Within Cities*, *supra* note 21, at 75 tbl.2 (describing survey of Owners in which twenty-four percent indicated that they were unsure whether they were satisfied with BID assessment as investment).

nimity on any given issue, they are designed to encourage consensus-building generally.

## 2. *BID Corporate Governance and Oversight by Local Public Officials*

In BIDs that are managed by private nonprofit corporations, once the BID is formed, BID officials are held accountable to Owners through the corporate governance mechanisms of the BID, under which Owners vote in periodic elections to select members of the BID board.<sup>119</sup> Whether formally invested with power or labeled “advisory,” BID boards can exercise considerable influence over all but the most trivial of decisions affecting BID governance.<sup>120</sup> State law often guarantees Owners a weighted or even controlling interest.<sup>121</sup> For BIDs in which the BID board has been formally invested with power and where Owners exercise exclusive or enhanced voting rights, BID governance is analogous to governance of a for-profit corporation, with Owners likely to act very much like shareholders would—i.e., trying to maximize their profit.<sup>122</sup>

The success of the various mechanisms of BID corporate governance in practice, of course, will depend on a variety of factors, many of them relating to the willingness of local officials to police the BID board’s actions.<sup>123</sup> There have been few examinations of the operation of BID corporate governance in practice. Several recent audits conducted by the New York City Comptroller’s Office of a range of different BIDs in New York, however, suggest that BID boards, when supervised by local public officials, are accountable to Owners.<sup>124</sup> Of

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<sup>119</sup> See *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 97 (2d Cir. 1998) (describing BID governance scheme in which BID Board includes four classes of directors—owners, commercial tenants, residential tenants, and public officials—chosen at annual elections in which “each class of voters separately elects a specified number of directors”). New York City Comptroller Alan Hevesi, as part of his effort to review BID practices during a series of 1997 audits, discussed *infra*, recruited “corporate governance guru” Ira Millstein to “look at the way BIDs are structured.” Gabriel, *supra* note 12.

<sup>120</sup> See Manshel, *supra* note 21, at 104.

<sup>121</sup> See, e.g., N.Y. Gen. Mun. Law § 980-m (McKinney, WESTLAW through 2002 legislation).

<sup>122</sup> Cf. Pitkin, *supra* note 87, at 129 (“Accountability may be an important part of trusteeship, but accountability to the beneficiary of the trust is no part of it.”).

<sup>123</sup> See Briffault, *supra* note 1, at 460 (discussing “measures that can increase accountability to city government [including] annual reports, outside audits, conflict of interest rules and sunset and reauthorization requirements,” but stating that “[m]icromanagement of BID operations can be as damaging to urban governance as lax oversight and inadequate municipal control”).

<sup>124</sup> See Bureau of Mgmt. Audit, City of N.Y., Audit No. MH02-113A, Audit of the Internal Controls and Operating Practices of the Lower Eastside Business Improvement District (BID) 11, app. at A-1 (2002) [hereinafter LES Audit]; Bureau of Mgmt. Audit, City of

the three BID audits completed in 2002, two were overwhelmingly favorable: Audits of the Lower Eastside and Columbus/Amsterdam BIDs showed that the BID boards had been governing in accordance with the wishes of local property and business owners.<sup>125</sup> The third audit suggested a similar result had been achieved in the East Brooklyn Industrial Park BID, but only after an earlier audit had turned up problems and BID officials implemented reforms to improve corporate governance and successfully address concerns voiced by BID owners.<sup>126</sup> The inconclusiveness of any audits of particular BIDs notwithstanding, even BID critics have acknowledged the success of BIDs in responding to the needs of the local business community.<sup>127</sup>

### *B. Accountability to BID and City Residents*

This Section shows how BIDs are proportionally accountable to Residents. While it addresses BID accountability to both BID Residents and City Residents and largely treats the two groups together (BID Residents are, after all, also City Residents), it does differentiate where appropriate.

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N.Y., Audit No. MD02-058A, Audit Report on the Financial and Operating Practices of the Columbus/Amsterdam Business Improvement District 15 app. I at 2 (2002) [hereinafter Columbus Audit]; cf. Bureau of Mgmt. Audit, City of N.Y., Audit No. MD02-149F, Follow-Up Audit Report on the Financial and Operating Practices of the East Brooklyn Industrial Park Business Improvement District 15-19 (2002) [hereinafter East Brooklyn Audit]. Copies of these audits are available at [www.comptroller.nyc.gov](http://www.comptroller.nyc.gov) (last visited Feb. 18, 2003). The findings of an earlier (more critical) BID audit and the response of local public officials are discussed *infra* in notes 148-158 and accompanying text.

<sup>125</sup> See, e.g., LES Audit, *supra* note 124, at 11, app. at A-1 (noting that audit “did not find any weaknesses in any of the areas . . . related to the Board’s oversight and management of the BID,” and that eighty-three percent of surveyed merchants were satisfied with or had no opinion regarding BID management while only seventeen percent were dissatisfied); Columbus Audit, *supra* note 124, at 15 app. I at 2 (same, with ninety-five percent satisfied or having no opinion, and five percent dissatisfied).

<sup>126</sup> See East Brooklyn Audit, *supra* note 124, at 15-19 (noting that many earlier recommendations were fully or partially implemented and stating that “[t]he BID now ensures that important decisions are discussed at Board meetings and documented in minutes”). This audit does not, however, paint a completely rosy picture of BID corporate governance. While the auditors concluded that the “follow-up audit found that the East Brooklyn BID ha[d] improved its internal controls over its funds and operations,” *id.* at 3, they also were unable to confirm whether local businesses were satisfied with—or even aware of—BID programs, *id.* at 16-17, and stated that five recommendations in the earlier audit had not been addressed, including a recommendation that the BID reevaluate its programs to ensure that they address the needs and concerns of local businesses, *id.* at 3. Still, the second audit showed that BID management had made many improvements in response to earlier criticism. See *id.* at 1-3.

<sup>127</sup> See, e.g., Barr, *supra* note 16, at 396 (admitting that “[t]here is little question but that BIDs have been successful at their goal of assisting business communities” while arguing for § 1983 liability for BID policing activities as means for increasing BID accountability).

## 1. *BID Formation Procedures*

While Residents have less input than Owners into the formation of a BID, the procedures governing BID formation do provide safeguards to Residents' interests.<sup>128</sup> As opposed to property owners, Residents—and even commercial tenants in BIDs financed by property taxes—usually have little or no direct formal role in the BID formation process.<sup>129</sup> Still, Residents can voice their concerns during the crucial consensus-building stage of BID formulation, which generally takes many months and involves extensive public outreach by the BID's sponsors.<sup>130</sup> Both formal public hearings and informal outreach must take place to ensure a high level of support for the BID (or alternatively to provide notice to those opposed to BID formation), giving Residents ample opportunity to voice their concerns.<sup>131</sup> Due to their proximity if nothing else, BID Residents are likely to have more input into these public hearings than City Residents as a whole.

BID formation procedures also include a more formal safeguard to protect Residents who want to fight, or influence, BID formation: Even after extensive public review and the approval of local property owners or businesses, a BID plan cannot be implemented unless it is approved by the local elected legislative body.<sup>132</sup> Thus, while the BID's plan is often initially drafted and in large part shaped by local

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<sup>128</sup> See, e.g., N.Y. City, N.Y., Administrative Code § 25-407 (LEXIS through 2001 legislation) (requiring City Council to find, prior to BID formation, that formation is in public interest and that there was sufficient notice of public hearings); *Cities Within Cities*, supra note 21, at 7-10 (discussing requirement that BID have strong local support before approval by city and state governments).

<sup>129</sup> See Briffault, supra note 1, at 387 (noting that signatures of nonproperty owners often have no legal weight in petitions for or against BID formation).

<sup>130</sup> See id. at 383 (noting that BID formation in New York takes average of nearly three years, with one year of hearings, reviews, outreach, and opportunities for protest mandated by law, followed by two years of plan development and revision, documentation of necessary support, and review by city's Department of Business Services); cf. Vitullo-Martin, supra note 8 (noting that it took BID seven years to persuade New York City to grant lease to major city park).

<sup>131</sup> In New York City, for example, the City Planning Commission must review the district plan and send copies to the City Council and local community boards. See N.Y. Gen. Mun. Law § 980-d(c) (McKinney, WESTLAW through 2002 legislation). Community boards are responsible for providing public notice and will generally hold a public hearing on the BID. See N.Y. City, N.Y., Administrative Code § 25-405(c). Once a bill has been introduced for the formation of a BID, the Council holds an additional public hearing to hear arguments for and against the BID, followed by a thirty-day objection period. See *Managing the Micropolis*, supra note 28, at 7.

<sup>132</sup> See, e.g., Ala. Code § 11-54B-7 (LEXIS through 2002 Reg. Sess.) ("The municipality, upon review of the self-help business improvement district plan submitted, *may*, after public hearing, adopt an ordinance to designate, establish, and maintain the area described in the plan as a self-help business improvement district." (emphasis added)).

business leaders, the final product must be approved by officials who are directly accountable to resident voters.<sup>133</sup>

Once a BID is created, the involvement of local elected officials lessens but remains significant, as the intensive procedural safeguards associated with BID formation continue to act as a prerequisite to any significant change to the BID's structure.<sup>134</sup> After the intense public scrutiny associated with a BID's formation, a similar gauntlet must be run to alter the boundaries of an existing BID or to increase its capacity to issue debt.<sup>135</sup> Action by the local legislature is also required before a BID can increase the maximum assessment imposed on BID properties.<sup>136</sup>

## 2. *BID Corporate Governance and Oversight by Local Public Officials*

Typically, while BID boards are largely controlled by representatives of Owners, seats are apportioned among various classes of stakeholders. The interests of Residents are protected by these non-Owner board members.<sup>137</sup> BID corporate governance does not work in exactly the same way for BID Residents and City Residents; while the interests of both groups are typically safeguarded by the appointment of representatives of public officials to a BID board, BID Residents generally have their own additional, nongovernmental representative

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<sup>133</sup> The initial vote by local property owners or business is tentative and cannot on its own establish the BID. See Briffault, *supra* note 1, at 378-81 (noting that “[e]ven overwhelming private sector support within the proposed district cannot force the municipality to establish the BID”).

<sup>134</sup> See Manshel, *supra* note 21, at 103. But see Briffault, *supra* note 1, at 458-61 (stating that current levels of local government oversight may be insufficient to protect Residents' interests).

<sup>135</sup> *Id.* In addition, the total amount that a BID expends cannot be increased without legislative and executive approval. In New York, for example, the City Council controls the initial scope of BID activities and maintains control over the maximum size of its budget, see *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 106 (2d Cir. 1998), although “[t]he [BID] is not required to seek [annual re]approval . . . for its budgets provided that the total budget amount is equal to or less than that of the previous years,” *id.* at 111 (Weinstein, J., dissenting).

<sup>136</sup> *Kessler*, 158 F.3d at 106.

<sup>137</sup> See, e.g., N.Y. Gen. Mun. Law § 980-m(b) (McKinney, WESTLAW through 2002 legislation) (“The [BID board] shall be composed of representatives of owners *and tenants* within the district.” (emphasis added)). In some BIDs, balancing the interests of various local groups can lead to extremely complicated voting schemes. Cf. *Metrotech Bus. Improvement Dist., Board of Directors*, at <http://www.metrotechbid.org/board.html> (last visited Feb. 18, 2003) (listing members of BID board selected according to eight distinct classes of directors: (1) owners of commercial development property; (2) owners of other commercial property; (3) government and non-profit property owners; (4) tenants of commercial development property; (5) tenants of other commercial property; (6) residential tenants; (7) representatives of local government officials; and (8) “[i]nterested members of community-at-large”).

on the board. While outnumbered by representatives of Owners, the BID Residents on the board are nonetheless able to represent their own interests to the BID's decisionmaking body. To the extent that the board respects these representatives' views, the board will be accountable and responsive to BID Residents' interests.<sup>138</sup> At least one commentator—a General Counsel for several New York City BIDs—has stated that because BID board decisions “are almost always made by consensus, any one board member has leverage out of proportion to his or her one vote.”<sup>139</sup>

The interests of both City Residents and BID Residents are also furthered by the presence of public officials on the BID board. These representatives, who often include both citywide officials and district-specific representatives, help to ensure that any interests unique to BID Residents or City Residents are considered.<sup>140</sup> While outnumbered, the very presence of public officials (or their direct representatives) on BID boards helps to ensure that the interests of Residents are protected; because of their stature, elected officials may be given particular deference by other board members.<sup>141</sup>

Further, representatives of Owners on BID boards are unlikely to act in ways that are contrary to the interests of Residents, for Owners and Residents frequently have common interests.<sup>142</sup> Because the qualities that make a neighborhood great for consumers, employees, employers, and visitors also tend to make a neighborhood a nice place to live, the self-interests of Owners will only occasionally diverge from the interests of BID and City Residents.<sup>143</sup> Thus board members representing the Owners might provide BID and City Residents with a sort of “virtual” representation on BID boards,<sup>144</sup> with the Owners'

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<sup>138</sup> See Manshel, *supra* note 21, at 104.

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., § 980-m(b) (providing that BID boards in New York City must include at least four representatives of local elected officials: One member appointed by mayor, one appointed by city's chief financial officer, one representative of borough president, and one representative of local city council member(s)); Manshel, *supra* note 21, at 104 (stating that representatives of local elected officials “are, in fact, among [BID's] most active board members”).

<sup>141</sup> See Manshel, *supra* note 21, at 104.

<sup>142</sup> See Houstoun, *supra* note 16, at 105 (“The characteristics that make a downtown a good place to visit resemble those that make it a good place to live. Indeed, the two complement each other.”); *id.* at 105-06 (“Downtown residents' continued satisfaction with downtown's convenience and diversity represents an important marketing tool for visitor attraction.”).

<sup>143</sup> Cf. Siegel, *supra* note 10, at 37 (arguing that modern urban problems are relevant to city residents of all economic classes and ethnicities).

<sup>144</sup> Insofar as voting forms part of an accountability “right,” this sort of virtual representation cannot provide an adequate answer to the problem of BID accountability. See, e.g., Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 *U.S.F. L. Rev.* 1, 4-5

representatives acting as proxies to represent the interests of Residents.<sup>145</sup>

The accountability or responsiveness of the BID board to Residents depends somewhat (as it does for Owners) on the degree to which local government officials supervise the board. Most BIDs have formal contracts with local government, and ongoing supervision by municipal government of the contract is another important means by which BIDs are held accountable to Residents.<sup>146</sup> Intensity of supervision in practice is not a certainty and may depend on the level of local confidence in the BID, but this supervision generally includes, for example, regular audits.<sup>147</sup>

The results of one such audit, viewed in conjunction with the response of local elected officials to the auditor's findings, further supports the view that BID corporate governance and local government oversight do make BID officials accountable to Residents. In 1997, New York City's Comptroller conducted an audit of the Grand Central Partnership BID (GCP), one of the most controversial BIDs in the country and the subject of the *Kessler* litigation.<sup>148</sup> This audit found that the BID's internal controls "provided adequate accountability over funds" and that the BID had generally complied with applicable laws and regulations.<sup>149</sup> The GCP audit also identified several significant weaknesses in the BID board's supervision of the BID's

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(1987) (noting that right to vote "confirms an individual person's membership" in community).

<sup>145</sup> Representative democracy can itself be viewed as a proxy for self-rule. See Hamilton, *supra* note 44, 479-80 (describing scholarly attempts to view representation as proxy for self-rule as "emptying the concept of representation of any distinct content"). The approach of the BID Model—nonresidents represented as principals, residents represented by proxy—reverses the default position under one-person—one-vote. This is appropriate because of the BID's limited mandate to improve business, which gives nonresidents a stronger stake in the outcome than residents. See *supra* notes 78-84 and accompanying text (discussing reasons why one-person—one-vote is inappropriate for BIDs).

<sup>146</sup> See Briffault, *supra* note 1, at 456 (listing methods that local governments may utilize to control the activities of BIDs, but noting that "it is unclear how vigorously municipal governments actually oversee their BIDs").

<sup>147</sup> See *id.*; *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 96-97, 106-07 (2d Cir. 1998) (noting that contract between city and BID required BID to submit annual explanation for past year's expenditures and planned budget for upcoming year, and that city maintained right to withhold funds if BID failed to perform contractual duties).

<sup>148</sup> The Grand Central Partnership (GCP), covering seventy-five blocks in midtown Manhattan, is one of the nation's largest. It exercises tremendously broad powers, managing public events, marketing, and promotion for BID businesses, employing more than sixty security guards and thirty-eight street sweepers seven days a week. See *Kessler*, 960 F. Supp. at 764-65.

<sup>149</sup> See Bureau of Mgmt. Audit, City of N.Y., Audit No. MH96-055A, Audit Report on the Internal Controls and Operating Practices of the Grand Central Partnership Business Improvement District, at ES-4, 17-18 (1997) [hereinafter GCP Audit].

president and employees, pointing in particular to the board's policy allowing for outside employment of BID employees and to its failure to review certain contracts.<sup>150</sup> And while some aspects of the BID board's response were encouraging—the board agreed with many suggestions and immediately implemented new procedures to address some of the auditor's concerns—the BID took exception with other portions of the audit.<sup>151</sup> More importantly, the source of many of the irregularities identified in the audit—the fact that the GCP's president Daniel Biederman and his top staff also ran two other large midtown BIDs,<sup>152</sup> giving them abnormally outsized stature in relation to the GCP's board—remained.<sup>153</sup>

Ultimately, oversight by local public officials worked to eliminate this problem, in that the audit, combined with extensive press coverage of Biederman's power, led to a struggle between Biederman and New York City Mayor Rudolph Giuliani for control of the GCP.<sup>154</sup> Giuliani essentially held the BID hostage, using the mechanism of the BID's management contract to his advantage by refusing to renew the contract for another term—and withholding the assessments collected for the BID—until Biederman resigned.<sup>155</sup> After Biederman did step down as BID president, along with the BID's chairman, the remaining

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<sup>150</sup> *Id.* at 19-29.

<sup>151</sup> Compare *id.* at 35-40 (stating that BID agreed with certain audit recommendations and began instituting project management controls to improve accountability), with Gabriel, *supra* note 12, at 19 (noting that BID officials “took exception with the report, arguing that BIDs ‘should operate more like private companies than government agencies’”).

<sup>152</sup> See Editorial, *One BID's Hubris Could Undermine Efforts of Others*, *Crain's N.Y. Bus.*, Apr. 20, 1992, at 10 (saying Biederman's position was matter of concern, since “[n]o one wants an unelected, and potentially unresponsive, czar of midtown”); Lambert, *supra* note 69, at 6 (stating that “[t]he lightning rod for the anti-B.I.D. sentiment was the interlocking triumvirate” of Biederman's three BIDs and that “[c]ritics complained that the \$315,000 paid to Biederman as president of all three was excessive”). Biederman had often been credited with setting the standard that other BID presidents followed. See, e.g., Fred Kaplan, *Looks Count: When It Comes to Fighting Crime, Cleaning Up the Urban Landscape May Be the Most Effective Strategy*, *Boston Sunday Globe*, Jan. 19, 1997, at E1 (“The more inviting atmosphere—and genuinely safer streets—around . . . Manhattan these days are due, in large part, to the efforts of Biederman and other Business Improvement Districts that have followed his example.”); see also Heather MacDonald, *BIDs Really Do Work*, *City J.*, 29, 33 (Spring 1996) (noting GCP's “fanatical sense of mission” under leadership of “perfectionist” Biederman).

<sup>153</sup> See *GCP Audit*, *supra* note 149, at 26-29 (criticizing use of Tri-District Construction Committee to select and award construction contracts for GCP).

<sup>154</sup> See Christopher Swope, *Bidding for Power, Governing*, Oct. 1999, at 28, 30 (describing Giuliani's attack on Biederman).

<sup>155</sup> See Editorial, *This Was Not Rudy's Finest Hour*, *N.Y. Post*, Dec. 6, 1998, at 70 (accusing Giuliani of trying to eliminate private organizations that compete with government).

BID officials resigned rather than be ousted by the mayor's hand-picked replacement to run the GCP.<sup>156</sup>

While the local press was divided as to the propriety of Giuliani's actions,<sup>157</sup> the episode illustrates how the BID Model's various accountability mechanisms work together to make BID officials accountable. As the GCP grew more powerful because of factors related less to the structure of the GCP alone than to its president's power over other BIDs, it was criticized; an audit which followed (and the *Kessler* litigation) identified problems; the BID itself resolved many but not all of these problems; and the problems that the BID did not resolve were corrected by local public officials. This shows not that BIDs are inherently unaccountable, but rather that local elected officials can and will take on even the most powerful of BID leaders, and the oversight of BIDs by local government serves to reign in BIDs when problems arise.<sup>158</sup>

### CONCLUSION

BID critics charge that BIDs amount to an unsavory transfer of authority from politically accountable public officials to unaccountable private actors. This Note has sought to demonstrate that BID officials are, in fact, politically accountable to the BIDs' relevant public. It defined BIDs' likely stakeholders and showed that because of the small size and narrow purpose of BIDs, these stakeholders are few and the BIDs' powers over them limited, reducing accountability concerns. It then examined the BID model's accountability mechanisms, including BID formation, corporate governance procedures, and the oversight of local elected officials. It argued that these features work to make BID officials accountable to the BIDs' likeliest stakeholders in rough proportion to how much those stakeholders are impacted by BID activities.

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<sup>156</sup> Terry Pristin, Finance Commissioner to Head Grand Central Business Group, N.Y. Times, Jan. 21, 1999, at B7. In addition to insisting upon a change in BID leadership, Giuliani called for a review of the BID's accounting records. See Charles V. Bagli, Business Group Fails to Mollify Giuliani, N.Y. Times, Sept. 24, 1998, at B5.

<sup>157</sup> Compare Editorial, BIDDing Biederman Farewell, N.Y. Post, Sept. 24, 1998, at 36 ("Congratulations, Mr. Mayor—for nothing."), and Editorial, supra note 155 ("This Was Not [Giuliani's] Finest Hour"), with Editorial, The Grand Central B.I.D. War, N.Y. Times, Aug. 1, 1998, at A12 [hereinafter BID War] ("The Mayor's action seems drastic, but his position is not, on the whole, unreasonable.").

<sup>158</sup> See BID War, supra note 157 ("Mr. Giuliani's position appears to be based on a reasonable conviction that B.I.D.'s should stick to a limited agenda, and remain community-based and self-supporting."). The Giuliani administration did, however, quietly renew the contracts of Biederman's other two BIDs, the 34th Street Partnership and the Bryant Park Restoration Corporation. Emily DeNitto, Giuliani Nods to BID Leader, Crain's N.Y. Bus., June 4, 2001, at 6.

BIDs exist because they help keep the streets cleaner, but over the long term, the success of BIDs will depend as much on BID accountability as on anything else. Clean streets or dirty, BIDs must continue to be responsive to the varied stakeholders of America's shopping districts, commercial areas, and downtowns.