CUTTING THE CURB: DRIVEWAYS AND THE RIGHT OF ACCESS

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Driveways are central to American conceptions of private property ownership. Americans, who rely heavily on cars to get around, often consider the direct automobile access that driveways provide to be essential to their property rights. Responding to the accessibility expectations of car-reliant private property owners, local governments throughout the United States have not only allowed but in fact required off-street parking (and, by extension, driveways) in new developments.

In doing so, local governments have failed to address the negative externalities that driveways impose on the public, especially in cities. Driveways threaten the safety of surrounding road users. They contribute to the climate crisis by encouraging private automobile usage even in dense cities where other travel options are available. They even further economic inequality by removing curb space from public use and reserving it for wealthier property owners. As some municipalities finally remove off-street parking requirements from their zoning codes, they should also consider limiting new driveways and revoking existing ones in certain situations.

Given the ubiquity of off-street parking requirements, courts have had few opportunities to directly address the legality of driveway prohibitions or revocations. State courts have long held that property owners have a common-law right of access to adjacent public roads, but they carefully balance this right against the public interest. Case law suggests that local governments can legally reject or revoke driveways when the public interest requires it, as long as they adopt clear standards and procedures to govern such decisions.

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INTRODUCTION

In 2019, New York tabloids reported that West Village residents were up in arms about the sudden appearance of a strange sight: a fake driveway.[1] The billionaire owner of a large house on the block had installed a curb cut in front of the entrance along with signs warning drivers not to park there. When people tried, his household staff shooed them away. However, the city had no records of an application for a curb cut. Moreover, the curb cut did not appear to serve an off-street parking space, leading to a front door and windows rather than a garage. Instead, the curb cut appeared only to reserve an on-street parking space for the property owner.

The incident brought attention to a neglected area of local law and policy: the driveway. Driveways provide vehicular access between public right-of-way and off-street parking spaces on private property, representing a unique interface between the public and private realms. While driveways serve individual properties, they are located on public land and their impact on the public can be significant. In dense cities, where competition for on-street parking is fierce, driveways take pieces of the curb away from public use, reserving them for the fronting property owners. They can also foreclose non-parking uses of that curb space, from bus stops to cafe seating. Driveways can increase the risk of collisions by introducing dangerous conflict points between people driving, biking, and walking. By making

1. Esha Ray, Ennica Jacob, & Stephen Rex Brown, *Billionaire Insists He Has Legal Parking Spot on West Village Street, Infuriating Neighbors Who Say He Created a Fake Space for Himself*, N.Y. DAILY NEWS (July 9, 2019, 12:30 AM), https://www.nydailynews.com/new-york/ny-wealthy-curb-cutting-resident-20190709-bxtufzgiofeyhg6s2k72he6nge-story.html [https://perma.cc/8HGF-LYDG].

driving more convenient and thus more popular, they exacerbate the climate crisis. Driveway owners pay little, if anything, to the city for the privilege, even while enjoying higher property values. This dynamic raises fundamental equity concerns, as those who can afford a property with a driveway enjoy the benefits of a privatized space but do not pay the related costs incurred by the public.

This is not to say that driveways should be eliminated entirely. They are vital for many property owners. However, cities must strike a delicate balance between respecting this property right and protecting the public interest. As local governments across the United States work to create safer cities for people walking, biking, and driving and to encourage climate-friendly modes of transportation, they should more carefully consider their policies towards driveways in urban areas.

Under state common law, property owners have a right of access appurtenant to their property. In the United States, this right of access is often presumed to be by automobile. Depending on the use and context of the property, a right of access by automobile can indeed be inseparable from other property rights. For instance, a gas station cannot operate without driveways—it needs direct automobile access from the street to function. In rural areas with large lot sizes, property owners may need to drive a car to access far-flung parts of their property, and they need driveways to get there from the street.

However, in many situations direct automobile access is not critical to the use of property. In dense, urban neighborhoods, alternative modes of transportation are often available, from walking and bicycling to taking public transit. Street parking availability can reduce the need for direct automobile access by those who drive. And sometimes, driveways continue to exist even though there is nowhere to park a car on the property, such as where homeowners convert garages to storage or even additional living space. Nonetheless, the curb space in front of the driveway often remains restricted for the property owner's use.

To ensure safety and preserve public space for public use, cities should more actively regulate and, in some cases, prohibit driveways. However, this policy imperative can conflict with the property owner's right to access his or her land. This paper explores the legal and policy issues playing out around this conflict and proposes ways in which cities can effectively regulate driveways without running afoul of property rights or triggering takings claims. Section I outlines the legal doctrines developed by state and, occasionally, federal courts regarding the right of access and their application to driveway issues. Section II examines parking policy in the United States and the trade-

offs that driveways on city streets entail. Section III proposes and analyzes reforms that cities could undertake to limit the approval of new driveways and revoke permits for existing ones.

I.
Right of Access

State courts across the United States recognize a right of access appurtenant to property that abuts public streets. This common law right of access is often divided into two forms: the right of ingress and egress and the right to access "the entire system of roads" once on a public right-of-way.[2] The right of access underlies property owners' rights in their driveways. It can also encompass other means to access property, including pedestrian access from the sidewalk. State courts have differed in their determinations of whether the right of access provides an absolute right to a driveway or if pedestrian access is sufficient, but the question is largely unexplored.

Courts often describe the right of access as a type of implied easement.[3] Unlike a standard easement, the right of access exists regardless of whether it is written into the deed. In this respect, it is similar to an easement by necessity, which grants a landlocked property an implied easement over other private property to access public roads when both properties were once under common ownership.[4] The right of access instead operates like an easement over *public* property that allows private owners to access directly abutting streets.

The right of access can also be expressly included in a deed. For example, express provisions are often made when a public street is carved out of an existing piece of private property.[5] In some states, courts have ruled that abutting property owners own the land under the street by default and the public merely has an easement over it.[6] This

2. 8A Julius L. Sackman, Nichols on Eminent Domain § G16.03[2] (3d ed., rev. 2023).

3. *See, e.g.*, Carolina Chloride, Inc. v. S.C. Dep't of Transp., 706 S.E.2d 501, 504 (S.C. 2011) ("A property owner also has an easement for access to and from the public road system."); State v. Williams, 394 P.2d 693, 694 (Wash. 1964) ("The law is well established in this state that a property owner abutting a public street has a vested right to an easement for reasonable ingress and egress to his property.").

4. *See generally* Charles C. Marvel, Annotation, *What Constitutes Unity of Title or Ownership Sufficient for Creation of an Easement by Implication or Way of Necessity*, 94 A.L.R.3d 502 § 2[a] (1979).

5. *See* Jones Beach Boulevard Est., Inc. v. Moses, 197 N.E. 313, 314 (N.Y. 1935) (in which a property owner had deeded a portion of his property to the state for use as a highway but reserved the right to access that highway at several locations in the deed).

6. *See* Williams v. N.Y. Cent. R.R. Co., 16 N.Y. 97, 100 (1857).

rule, often known as the "centerline presumption," holds that property owners own a fee interest in land up to the center of any right-of-way which they border unless their deed explicitly says otherwise.[7] The presumption has little practical effect except when a right-of-way is abandoned and fronting property owners assert a reversionary interest in the right-of-way.[8]

A. Origins

The right of access originated in the "Elevated Railway Cases" handed down by the New York Court of Appeals in the late nineteenth century.[9] The cases began with *Story v. N.Y. Elevated R.R. Co.*, in which a property owner successfully sued a company building an elevated railroad along the street adjacent to his property.[10] The court held that even though the construction of the railroad had been authorized by the Legislature, it constituted a taking because it interfered with easements of access, light, and air that the fronting property owner held over the street.[11] Some courts still recognize this bundle of three easements possessed by abutters of public streets.[12]

The *Story* court based its holding on a covenant in the property's deed in which the City had granted a developer the right to subdivide and sell the land in the area. The covenant required the developer to build out a network of streets which "shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city."[13] The court determined that this covenant impliedly gave the property owner "the right and privilege of having the street forever kept open," forbidding the city from abandoning the street in the future.[14] While street improvements could

7. *See, e.g.*, Castillo v. United States, 952 F.3d 1311, 1314, 1320–21 (Fed. Cir. 2020) (describing Florida's version of the presumption and noting similar doctrines in many other states).

8. *See id.*

9. *See generally* Elizabeth Arens, *The Elevated Railroad Cases: Private Property and Mass Transit in Gilded Age New York*, 61 N.Y.U. ANN. SURV. AM. L. 629 (2006) (describing the New York Court of Appeals' line of cases establishing easements of light, air, and access).

10. Story v. N.Y. Elevated R.R. Co., 90 N.Y. 122 (1882).

11. *Id.* at 178–79.

12. *See, e.g.*, McNair v. McNulty, 295 A.D.2d 515, 515 (N.Y. App. Div. 2002) (noting that abutters have a right of light, air, and access); Palm Beach Cnty. v. Tessler, 538 So.2d 846, 848 (Fla. 1989) ("[E]ven when the fee of a street or highway is in a city or a public highway agency, the abutting owners have easements of access, light, and air from the street or highway appurtenant to their land . . . ." (quoting Benerofe v. State Road Dep't, 217 So.2d 838, 839 (Fla. 1969))).

13. *Story*, 90 N.Y. at 144 (quoting language from the plaintiff's deed).

14. *Id.* at 145.

be acceptable even if they might impair an abutter's access, the court found that a private elevated railway structure is "useless for general street purposes" and thus incompatible with the covenant.[15]

The Court of Appeals' decision in *Story* unleashed an "avalanche of cases" from property owners along the rapidly proliferating elevated railway routes across New York City.[16] Soon, the court expanded the implied easement from properties with written covenants like that at issue in *Story* to all properties adjacent to public streets.[17] Thus, a controversial case[18] quickly established the easement of access as a settled right of owners of street-abutting property under New York common law. The right of access soon came to be recognized throughout the nation, with state courts often establishing the property right under the common law and legislatures sometimes codifying the right in statutes as well.[19]

The exact nature of the right of access remains unclear. *Story* exemplifies courts' general confusion over ownership of public rights-of-way, with the New York Court of Appeals inventing an entirely new set of easements that fronting property owners hold over the public street.[20] The doctrine raises further questions in states with a strong centerline presumption: if the public street is an easement over the adjacent landowner's property, is the right of access an overlapping easement over one's own property? However, these questions appear to bear little relation to how state courts apply the law to individual right of access cases.

B. Police Power

Property owners generally assert their right of access when challenging government takings.[21] This assertion can occur either in re-

15. *Id.* at 156 (noting that a local government can change the grade of a street such that a property owner's access is impaired without paying compensation).

16. Arens, *supra* note 9, at 660 (quoting Frank H. Mackintosh, *Elevated Railroad Land-Damage Litigation*, 2 YALE L.J. 106, 106 (1893)).

17. *Id.* at 661.

18. *Id.* at 671 (arguing that *Story* broke significantly from precedent on the rights of property owners impacted by infrastructure projects).

19. *See* Sauer v. New York, 206 U.S. 536, 548 (1907) (noting that by 1907, the rights conceived of in the *Elevated Railway Cases* had become "a fruitful source of litigation in the courts of all the states," with decisions between and even within states being frequently inconsistent and legislatures often stepping in).

20. *Story*, 90 N.Y. at 143–44. The case was further complicated by the defendant's contention that, contrary to the centerline presumption, the City owned the street in fee as a remnant of Dutch law. *Id.* at 140.

21. In fact, the right of access appears to arise *only* in the context of takings claims, although public nuisance special injury actions by private individuals against people who obstruct the public right-of-way in a way that blocks access to the plaintiff's

sponse to a government agency action to confiscate property through eminent domain or when a property owner asserts that a government regulation in effect constitutes a taking. Although these cases generally arise under state law, they operate in the shadow of federal constitutional law, with the Fifth Amendment requiring that "private property [not] be taken for public use, without just compensation."[22]

Access takings cases often turn on the balance between property owners' inherent access rights and state and local governments' police power to regulate traffic. State courts tend to give substantial weight to agencies exercising their police power under the common law to ensure governments can carry out their duties.[23] While certain threads are common to state courts across the nation, the jurisprudence varies widely in many areas.

i. Circuitry of Travel

Courts tend to defer to governments' police power when abutting property owners challenge changes to traffic patterns on streets and highways that make it more difficult but not impossible to access their property.[24] One early such case—decided in 1935—involved the construction of a divided highway on Long Island which prevented left turns out of the plaintiff's driveways.[25] The new construction forced motorists to turn right and drive several additional miles on their commutes toward New York City.[26] The court held that such regulations were a valid exercise of the police power because they were "reasona-

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property are somewhat analogous. *See* 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 10.03[5][a] (3d ed., rev. 2023).

22. U.S. CONST. amend. V.

23. *See, e.g.*, Wood v. City of Richmond, 138 S.E. 560, 562 (Va. 1927) ("[T]he exercise of this right [of access] is subordinate to the right of the municipality, derived by legislative authority, to so control the use of the streets as to promote the safety, comfort, health and general welfare of the public."); Yegen v. City of Bismarck, 291 N.W.2d 422, 424 (N.D. 1980) ("The private right must give way to the public right, and unless the law specifically gives the right of recovery then no recovery can be had." (citations omitted)); Speight v. Lockhart, 524 S.W.2d 249, 254–55 (Tenn. Ct. App. 1975) ("The rights of abutting owners are subordinate to the right of the public to proper use of the highway.") (quoting 39 C.J.S. Highways § 141, pp. 1079 et seq.).

24. *See, e.g.,* Northern Lights Shopping Ctr. v. State, 247 N.Y.S.2d 333, 337 (App. Div. 1964) (holding that "the rights of the public to regulate access in the interest of safe and efficient transportation" outweigh the right of a shopping center to "unrestricted access"); State by Comm'r of Transp. v. Charles Inv. Corp., 363 A.2d 944, 945 (N.J. Super. Ct. Law Div. 1976) ("Where, by virtue of state action, access is limited but remains reasonable, there is no such denial of access as entitles the landowner to compensation.").

25. Jones Beach Boulevard Est., Inc. v. Moses, 197 N.E. 313 (N.Y. 1935).

26. *Id.* at 315.

bly adapted" to the needs of the public and were neutral, treating the plaintiff the same as everyone else.[27]

Similar cases have been brought over the course of the mid-twentieth century as state and local governments across the country built out a network of divided highways. Courts have consistently dismissed the issue as mere "circuitry" of travel, finding that abutters have no property interest in the flow of traffic outside their property.[28] In addition to medians restricting left turns out of driveways, many cases involve the replacement of direct highway access with frontage roads that lead to limited-access highways. Most courts uphold such frontage roads as valid exercises of the police power that do not give rise to compensation, as the owners still retain reasonable access to their properties.[29]

Courts have been idiosyncratic in determining how much access is reasonable. In one early case, the California Supreme Court held that property owners had a right to access the next intersecting street in each direction, awarding compensation to a property owner whose block was turned into a cul-de-sac with vehicle access remaining only in one direction.[30] However, the California courts soon retreated from this principle, finding that the creation of a cul-de-sac is merely one factor in determining whether access has been substantially impaired.[31]

A few state courts consider circuitry of travel to be compensable in certain circumstances. For instance, the Texas Supreme Court awarded compensation to a property owner after the local government built a viaduct in place of the street and provided access to the property only via a cul-de-sac.[32] The Florida Supreme Court similarly awarded compensation where the plaintiff's commercial property be-

27. *Id.* at 315–16.

28. *See, e.g.*, State Dep't of Highways v. Davis, 626 P.2d 661, 664 (Colo. 1981) (denying "compensation for limitation or loss of access manifested by circuity of route"); Dale Props. v. State, 638 N.W.2d 763, 767 (Minn. 2002); State v. HI Boise, LLC, 282 P.3d 595, 599–600 (Idaho 2012) ("[S]tate action that merely results in a change in traffic flow requiring traffic to reach property by a more circuitous route does not amount to a taking as a matter of law.").

29. *See, e.g.*, *Charles Inv. Corp*, 363 A.2d at 945 ("Where, by virtue of state action, access is limited but remains reasonable, there is no such denial of access as entitles the landowner to compensation."); *Davis*, 626 P.2d at 665 (finding that a frontage road did not destroy the plaintiff's reasonable ingress and egress).

30. Bacich v. Bd. of Control, 144 P.2d 818, 824 (Cal. 1943) (resting this conclusion partially on the provision in the California Constitution for compensation if property is "damaged" as well as "taken").

31. *See* Breidert v. S. Pac. Co., 394 P.2d 719, 723 (Cal. 1964).

32. DuPuy v. City of Waco, 396 S.W.2d 103 (Tex. 1965).

came accessible only via small residential streets.[33] An Illinois appellate court allowed compensation for a raised median that forced drivers exiting a storage facility to drive several miles out of their way to get back to the highway, but only because the same project also physically appropriated some of the property and closed another driveway that led directly onto the highway.[34]

The principle that abutters have no property interest in the flow of traffic outside their properties extends to parking regulations.[35] The Washington Supreme Court held that a state project to regrade the road outside the plaintiff's property and prohibit parking was a reasonable exercise of police power despite the plaintiff's claim that its business required trucks to use the curbside parking lane for loading.[36] Similarly, the North Dakota Supreme Court confirmed that the removal of on-street parking spaces that a grocery store owner claimed were necessary for customers did not impair the property's right of access.[37]

ii. Partial Restrictions of Access

State courts are split on the degree to which a partial denial of access can constitute a taking. Many maintain that as long as a property retains some reasonable access to and from a public street, the owner is not entitled to compensation.[38] For example, the Texas Supreme Court ruled that a city ordinance banning all driveways along a particular street in downtown San Antonio did not constitute a taking from the developer of a parking garage along the street in part because

33. Palm Beach Cnty. v. Tessler, 538 So.2d 846, 849 (Fla. 1989) (holding that property owners can be compensated for a mere reduction in access when access is "substantially diminished").

34. Dep't of Transp. v. Dalzell, 94 N.E.3d 1231 (Ill. App. Ct. 2018).

35. *But see* Breinig v. County of Allegheny, 2 A.2d 842, 845–46 (Pa. 1938) (holding that after land is taken for highway use, "the parking of automobiles in front of an owner's premises may be prevented by him, and police regulations permitting such parking will not preclude the owner from enforcing his right to remove the car.").

36. State v. Williams, 394 P.2d 693, 694 (Wash. 1964) ("Traffic regulations, including parking while loading and unloading, are police power regulations and are not a part of an abutting property owner's vested right of ingress and egress.").

37. Yegen v. City of Bismarck, 291 N.W.2d 422, 424 (N.D. 1980).

38. *See, e.g.*, Mueller v. N.J. Highway Auth., 158 A.2d 343, 349–50 (N.J. Super. Ct. App. Div. 1960) (finding that a "property owner is not entitled to access to his land at every point between it and the highway" but "is entitled to a direct outlet on the highway for each reasonably independent economic use unit thereof"); Aero Drive-In v. Town of Cheektowaga, 529 N.Y.S.2d 613, 613 (App. Div. 1988) (dismissing a theater's lawsuit after a city blocked off some streets providing additional access to the theater's parking lot but access from others remained).

the parking garage had access on other streets.[39] The New York Court of Appeals has taken a similar view and has permitted New York City to site bus stops in front of a gas station's driveways since any obstruction of access was only "minor and intermittent."[40] In contrast, other state courts recognize the government's right to regulate the precise configuration of a property owner's access but award compensation if a property's access is "substantially reduced" but not entirely eliminated.[41]

Courts have had few occasions to determine whether the preservation of pedestrian access to a property is sufficient when access to motorized vehicles is cut off. An early Pennsylvania case suggested that pedestrian access was more important for a takings analysis than vehicle access but also held that absolute denial of vehicular access to a property is a taking.[42] In Colorado, the creation of a pedestrian mall in Downtown Boulder did not constitute a taking of fronting property owners' access rights because the properties retained pedestrian access and the pedestrian mall allowed vehicle traffic at certain hours so that businesses could receive deliveries by truck.[43] In Nebraska, the periodic closure of the sidewalk in front of a building, in addition to the closure of the street and parking lot entrance, contributed to a determination of a taking.[44]

To determine whether a right of access has been impaired, courts often rely on contextual evidence such as pre-existing conditions. A California appellate court held that the construction of a rail line on the street directly in front of the plaintiff's building did not constitute a taking, even though guardrails had been installed between the prop-

39. City of San Antonio v. Pigeonhole Parking of Tex., 311 S.W.2d 218 (Tex. 1958).

40. Cities Serv. Oil Co. v. City of New York, 154 N.E.2d 814, 816 (N.Y. 1958) (allowing any "regulation . . . reasonably adapted to benefit the traveling public") (quoting Jones Beach Boulevard Est., Inc. v. Moses, 197 N.E. 313, 315 (N.Y. 1935)).

41. *See, e.g.*, State Highway Com. v. Raleigh Farmers Market, Inc., 139 S.E.2d 904, 907 (N.C. 1965) (finding that the denial of access to one of two roads abutting the property constitutes a taking and noting a specific statute supporting compensation for impairment of access when a road becomes a limited-access highway); *DuPuy*, 396 S.W.2d at 110 (holding that the replacement of direct access to a highway with access only to a cul-de-sac is a taking).

42. Breinig v. County of Allegheny, 2 A.2d 842, 847–48 (Pa. 1938) (holding that "a municipality cannot, without condemnation, completely shut off an abutting owner's access to his land, particularly pedestrian access" but also that "[t]he absolute prohibition of driveways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained").

43. Boulder v. Kahn's, Inc., 543 P.2d 711, 714 (Colo. 1975).

44. Maloley v. City of Lexington, 536 N.W.2d 916, 922–23 (Neb. App. 1995) (involving the closure of a street by a municipality during construction of a jail).

erty and the street.[45] The court looked at the prior conditions, finding that there was already practically no parking available along the building frontage and the owner did not have a property right in street parking regardless.[46] In addition, the court found that there could be no compensation for the loss of the potential to construct a driveway along that frontage in the future because the plaintiff admittedly had no plans to do so and there were procedures by which they could apply for permission to reconstruct the guardrails for a driveway in the future.[47]

Courts are generally reluctant to award compensation for only a temporary or intermittent loss of access. The Connecticut Supreme Court refused to prevent the City of Hartford from closing a street to traffic for three hours per day during the summer, finding that the closure was merely a minor inconvenience and did not rise to the level of a taking.[48] Similarly, the Texas Supreme Court reversed a lower court's award of damages to a business owner whose property had been intermittently obstructed during road work.[49] The court held that property owners can only receive compensation for temporary impairment of access when that impairment is total or when the work that caused the obstruction was not authorized by statute.[50] The Nebraska Court of Appeals suggested that courts may take into account the availability of pedestrian access when determining whether a temporary loss of access is total.[51]

C. Denial of Driveway Permits

Many right-of-access cases are brought by property owners who were denied governmental permission to construct driveways. The judicial inquiries in these cases are highly context specific. In an early influential case, the Virginia Supreme Court allowed the City of Rich-

45. Brumer v. Los Angeles Cnty. Metropolitan Transp. Auth., 43 Cal. Rptr. 2d 314, 320–21 (Cal. App. 1995).

46. *Id.*

47. *Id.* at 321.

48. Cohen v. City of Hartford, 710 A.2d 746, 755 (Conn. 1998) (finding that "some impairment of access rights and some diminution in the total value of property do not, without more, justify a conclusion that there has been an unconstitutional taking . . . ." (citations omitted)).

49. City of Austin v. Avenue Corp., 704 S.W.2d 11, 12 (Tex. 1986).

50. *Id.* at 13 ("[I]n order to show a material and substantial interference with access to one's property, it is necessary to show that there has been a total but temporary restriction of access; or a partial but permanent restriction of access; or a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed.").

51. *See* Maloley v. City of Lexington, 536 N.W.2d 916, 922–23 (Neb. App. 1995).

mond to revoke a gas station's permit for one of its two planned driveways.[52] The court affirmed that an abutter's "easement in the public road . . . is subordinate" to the local government's police power[53] and found that the decision to revoke the permit was justified based on the City's analysis of traffic and pedestrian safety impacts, as well as the presence of a bus stop in that location.[54]

Driveway permit denial cases sometimes hinge on the type of land use a driveway is intended to serve and whether the use was permitted by the local government.[55] The Minnesota Supreme Court allowed a city to deny a driveway permit to an auto parts business after the business's construction had been approved by local authorities.[56] However, the court overruled the case a few decades later, holding that cities cannot deny a driveway permit if the property's authorized land use requires vehicular access.[57] The Ohio Court of Appeals ruled that a developer was entitled to compensation for the denial of driveway permits along a highway because the government had previously approved the subdivision of the property such that some lots only abutted that highway.[58]

Courts have generally required that local governments set out criteria for evaluating driveway permit applications.[59] In *Pure Oil v. Northlake*, the Illinois Supreme Court rejected a municipality's attempt to require a property owner to get permission from nearby property owners and a discretionary permit from the City Council in order to build a driveway.[60] Similarly, the Pennsylvania Supreme Court rejected the Pennsylvania Department of Transportation's attempt to

52. Wood v. City of Richmond, 138 S.E. 560 (Va. 1927).

53. *Id.* at 562.

54. *Id.* at 563.

55. *See, e.g.*, Alexander Co. v. City of Owatonna, 24 N.W.2d 244 (Minn. 1946); Pure Oil Co. v. City of Northlake, 140 N.E.2d 289 (Ill. 1956); State *ex rel.* Eagle Inv. Co. v. Weir, 1981 Ohio App. LEXIS 12916 (Ohio App. 1981).

56. *Owatonna*, 24 N.W.2d at 251.

57. Johnson v. City of Plymouth, 263 N.W.2d 603, 608 (Minn. 1978).

58. *Weir*, 1981 Ohio App. LEXIS 12916 at *4 ("Had the regulation been in effect at the time of the platting of the property, denial of the permits would probably have been a valid exercise of police power. However, by approving the plan for the subdivision, respondent's permit department created in relator an interest in the land which respondent could not thereafter take away without just compensation.").

59. *See, e.g.*, *Pure Oil*, 140 N.E.2d 289; Salem Nat'l Bank v. City of Salem, 198 N.E.2d 137, 140 (Ill. App. 1964) (rejecting a bank's challenge to a driveway permit denial as untimely because the bank had not yet applied for building permits but noting that the City Council "does not have the power to deny in its absolute discretion, permission to construct or maintain any driveway across the sidewalk."); *see also* Warren v. City of Athens, 411 F.3d 697 (6th Cir. 2005) (evoking procedural due process concerns with the closure of a driveway).

60. *Pure Oil*, 140 N.E.2d at 291–92.

deny a driveway permit to a fast food restaurant when the denial was based on an individual engineer's determination that the traffic volume on the highway was too high.[61] The court held that while the state could theoretically deny all vehicular access on the basis of its police power, it must provide the property owner with an opportunity for a hearing.[62]

Courts generally allow state and local governments to reject driveway permit applications if the property already has other vehicular access.[63] However, governments must demonstrate that the denial of access along one street is reasonable and justified under their police power.[64]

D. Closure of Existing Driveways

Driveway closure cases present similar issues, with state courts basing decisions on the details of the closure and the property involved. Many courts are reluctant to find that a property has lost reasonable access when one of multiple driveways has been closed.[65] Other courts hold that such a closure is a taking because it interferes with a pre-existing property right.[66] The issue often turns on context: for example, the Texas Supreme Court held that the closure of one of an office complex's five driveways did not alone constitute a taking but that it could give rise to compensation because the same project impaired safety at the other remaining driveways.[67]

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61. Hardee's Food Sys. v. Dep't of Transp., 434 A.2d 1209, 1210 (Penn. 1981).

62. *Id.* at 1212.

63. *See, e.g.*, Wood v. City of Richmond, 138 S.E. 560, 561 (Va. 1927) (noting that the city only sought to revoke one of two driveways); *Pigeonhole Parking*, 311 S.W.2d at 219 (upholding a city ordinance prohibiting driveways along a particular street as applied to the owner of a garage that had multiple frontages); Breinig v. County of Allegheny, 2 A.2d 842, 847 (Pa. 1938).

64. *See, e.g.*, Oregon Inv. Co. v. Schrunk, 408 P.2d 89, 92–93 (Ore. 1965) (upholding the city's denial of driveway permits along one street to the owner of a parking lot because of the presence of a bus stop and busy sidewalk there but noting that the situation could be different if the property fronted only one street).

65. *See, e.g.*, Oliver v. State *ex rel.* Comm'r of Transp., 760 N.W.2d 912, 917 (Minn. App. 2009) (holding that the state's closure of a property owner's direct access to the highway was not in itself a denial of reasonable access when the property also had access to another public road but remanding for consideration of other issues); J&E Invs. LLC v. Div. of Hearings & Appeals, 835 N.W.2d 271, 278–79 (Wisc. App. 2013) (allowing the state to revoke a permit for a driveway along a busy street citing safety concerns when alternative access existed via an adjoining local street).

66. *See, e.g.*, Castrataro v. Lyndhurst, 1992 Ohio App. LEXIS 4352 at *9–11 (Ohio App. 1992) (finding that a city's closure of one of a strip mall's driveways was "substantial interference" with the right of access when "considered . . . in relation to the current improvements existing in the land.").

67. Interstate Northborough P'ship v. State, 66 S.W.3d 213, 224–25 (Tex. 2001).

Even if the closure of one of multiple driveways might not on its own constitute a taking of the right of access, the closure may be considered in determining compensation when it occurs as part of a larger project that also involves the taking of real property. For instance, a North Carolina appellate court allowed the jury to consider a gas station's loss in property value as a result of a street widening project that condemned some of the station's property and removed one of four driveways.[68]

If a property does not directly abut a public road, courts tend to give more deference to projects that merely close indirect access. In *Carolina Chloride v. Department of Transportation*, the South Carolina Department of Transportation had removed an at-grade crossing of a railroad track between the plaintiff's land and a public road.[69] The South Carolina Supreme Court held that the property owner did not necessarily have a right of access at the location where the grade crossing was removed because the property was separated from the public road by the railroad right-of-way and had access to the overall system of roads through other street frontage.[70]

The right of access does not depend on whether a driveway previously existed. In a case about the revocation of a discretionary permit for a driveway on a public right-of-way, the Georgia Court of Appeals held that the state could revoke that particular permit but could not eliminate the property owner's right to construct a new connection to the public right-of-way without paying compensation.[71]

In deciding whether the revocation of a driveway requires compensation, courts balance the validity of the government's exercise of the police power against the extent to which the property's access is substantially impaired. An early Pennsylvania Supreme Court case allowed the City of Reading to order the removal of driveways that had been mostly constructed but not yet opened.[72] The driveways would serve hundreds of cars per day and cross a very busy sidewalk along

68. City of Fayetteville v. M. M. Fowler, Inc., 470 S.E.2d 343, 345–46 (N.C. App. 1996).

69. Carolina Chloride, Inc. v. S.C. Dep't of Transp., 706 S.E.2d 501, 503 (S.C. 2011).

70. *Id.* at 504 ("A property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has additional access to and from another public road. A property owner also has an easement for access to and from the public road system. In cases addressing road re-configuration, the focus must be on a landowner's actual property interests; that is, his easements.").

71. Harper Invs. v. Dep't of Transp., 554 S.E.2d 619, 622–23 (Ga. App. 2001).

72. Farmers-Kissinger Market House v. City of Reading, 165 A. 398, 402 (Penn. 1933).

the primary commercial street in Downtown Reading, creating a "substantial interference" with motor vehicle and pedestrian traffic.[73] The court considered this interference and the fact that the plaintiff already had vehicle access to the garage from another fronting street in finding that the driveway closure was a valid exercise of the City's police power.[74]

In *Johnston v. Boise*, the Idaho Supreme Court allowed the City of Boise to revoke driveways when they were unnecessary for access. The owner of two lots in central Boise had challenged the City's attempt to eliminate existing driveways.[75] One of the properties was a car dealership that had multiple driveways, and the City was proposing to close one that had not been used in years.[76] The other was a residential rental property where the tenant did not own a car and used the driveway only very occasionally to receive deliveries.[77] The City justified its closure as addressing safety and cleanliness concerns, as well as the need to allow for more public street parking.[78] The *Johnston* court held that these factors constituted a reasonable justification for the City to remove the driveways under its police power.[79] It found that the lack of use of the car dealership driveway and the fact that the residential tenant could receive her occasional deliveries using street parking instead of the driveway further justified the City's actions.[80] The City's driveway revocations were valid because they bore "a reasonable relationship to the public health, safety, morals or general welfare."[81] Such an action would only be a taking if it "transgresses the bounds of reasonableness, or is arbitrary in result, . . . or . . . is a deprivation of property without due process of law."[82]

73. *Id.*
74. *Id.*
75. Johnston v. Boise City, 390 P.2d 291 (Idaho 1964).
76. *Id.* at 292–93.
77. *Id.*
78. *Id*.
79. *Id.* at 294 ("This right of access, however, may be regulated, for it is subservient to the primary rights of the public to the free use of the streets for travel and incidental purposes . . . . Parking of vehicles is one of the uses of a street incidental to travel thereon. Without provisions for parking of vehicles, the right to the use of city streets for travel would unduly restrict the benefit of the public.") (citations omitted).
80. *Id.* at 295–96.
81. *Id.* at 295.
82. *Id.* (citations omitted).

E. Other Driveway Regulations

Courts often refuse to grant compensation when a government project merely alters a driveway but does not remove it.[83] However, some states do require compensation when driveways are altered in a way that significantly affects property values. For instance, an Illinois appellate court granted compensation to a gas station owner who demonstrated that a project that narrowed the gas station's driveways led to lower sales.[84]

Whether the alteration of a driveway is compensable depends on the baseline condition against which the alterations are measured. A Texas owner of a storage facility sued after a highway project reconstructed the facility's driveway such that it was very difficult for large trucks to enter the property.[85] The court ruled that the storage facility owner could not receive compensation because those large trucks already could not legally access the property before the project; previously, they had only been able to enter the facility by driving over part of the state right-of-way that was not open to vehicular traffic.[86]

The extent to which a municipality can require property owners to pay for a driveway depends on whether the payment is characterized as a fee or tax. State law tends to prohibit local governments, including home rule cities, from levying general taxes without explicit state authorization, but local governments are usually permitted to enact user fees.[87] Thus, unless a state legislature were to authorize driveway taxes at a statewide level, municipalities can generally charge property owners for the right to maintain a driveway only on a cost-recovery basis.

The Colorado Supreme Court considered a municipality's authority to impose a driveway fee after the owner of an industrial property refused to pay and received a fine.[88] The court affirmed the local government's authority to regulate driveways but limited their authority to impose fees only to those necessary to cover the costs of administering the regulations.[89] The court found that, because the property's driveway had existed since before the enactment of the driveway fee and

83. *See, e.g.*, Chautauqua County. v. Swanson, 21 N.Y.S.2d 2, 4 (N.Y. App. Div. 1940) (denying compensation when a highway improvement project required rebuilding a small bridge that was part of a driveway).

84. Dep't of Transp. v. Shell Oil Co., 509 N.E.2d 596, 597, 600 (Ill. App. 1987).

85. R.B. Underwood Inc. v. State, 23 S.W.3d 468, 469 (Tex. App. 2000).

86. *Id*. at 471–72.

87. *See* Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1246–47 (2009) (describing the difference between taxes and non-revenue raising fees).

88. Heckendorf v. Town of Littleton, 286 P.2d 615, 616 (Colo. 1955).

89. *Id.* at 617.

the municipality incurred minimal expenses in inspecting it, the property owner did not have to pay the fee or fine.[90] The court cited the fact that the municipality derived approximately 5% of its general fund revenue from the driveway fee as evidence that the fee was in reality a revenue-raising measure and thus an impermissible tax.[91]

F. Federal Law

Most litigation regarding the right of access has occurred under state law because plaintiffs were historically required to exhaust state law remedies before bringing takings suits in federal court.[92] However, the Supreme Court recently overturned this exhaustion requirement, allowing plaintiffs to sue for takings directly under federal law.[93] This may lead to more federal right of access jurisprudence, although many plaintiffs are likely to continue to sue in state court as state law often provides stronger protections from eminent domain than the federal constitutional baseline.[94]

Perhaps the most thorough examination of the applicability of federal constitutional law to the right of access is the Sixth Circuit's opinion in *Warren v. City of Athens*.[95] The case arose after the owners of a local Dairy Queen franchise in Athens, Ohio, decided to add a drive-thru lane to improve the economic viability of their business.[96] The owners applied twice to the City for permission to build the drive-thru and were told that such a use was allowed as-of-right under the zoning.[97] But the City still denied the application because it claimed that the location of the proposed drive-thru lane was on a public right-of-way.[98] The owners determined that the City was incorrect about the location of the property line and decided to build the drive-thru regardless.[99] After receiving complaints from neighbors about traffic issues, the City took action, placing barricades to block access from the

90. *Id.*

91. *Id.* at 616.

92. *See* Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985) ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

93. Knick v. Township of Scott, 139 S. Ct. 2162, 2170 (2019).

94. *See generally* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997).

95. Warren v. City of Athens, 411 F.3d 697 (6th Cir. 2005).

96. *Id.* at 701.

97. *Id.*

98. *Id.*

99. *Id.* at 701–02.

street to the drive-thru.[100] The franchise owners immediately lost business and sued.[101]

The Sixth Circuit determined that the complaint primarily consisted of a substantive due process claim rather than a takings claim because the property owners were seeking an injunction against the placement of the barricades rather than compensation for damages.[102] It rejected the substantive due process theory, pointing to the Supreme Court's strong preference for other constitutional theories and its reluctance to sustain such challenges in takings-related cases.[103] It also rejected an equal protection class-of-one claim, finding that the City did have a rational basis for its actions and that the property owners had not proven the decision was based on ill will, despite some evidence for such a theory.[104]

However, the Sixth Circuit granted an injunction against the City's erection of barricades blocking the drive-thru entrance on procedural due process grounds.[105] In the first step of the procedural due process analysis, the Court found that the City had deprived the plaintiffs of a property interest in the form of a right of access.[106] It then held that the City's actions "contravened notions of due process" because the City did not conduct any sort of pre-deprivation hearing and there was no reason why such a hearing would have been impossible.[107]

State courts have been similarly reluctant to find takings in driveway cases when applying federal law. The Kansas Supreme Court also conducted an extensive analysis of federal takings law as applied to the right of access in *Frick v. City of Salina*.[108] In *Frick*, the City had imposed a moratorium on new driveways along the property owner's street until the completion of construction work.[109] Analogizing to the Supreme Court's holding in *Tahoe-Sierra* that a temporary morato-

100. *Id.* at 702.
101. *Id.*
102. *Id.* at 704–05 (also casting doubt on the success of a straight takings claim).
103. *Id.* at 706–07.
104. *Id.* at 711 (noting that the plaintiffs' son defeated the City Prosecutor in a recent election).
105. *Id.* at 708–10.
106. *Id.* at 708–09 (noting that for the purposes of this determination, "[p]roperty rights are created and defined not by the Constitution but by independent sources such as state law.").
107. *Id.*at 709–10.
108. Frick v. City of Salina, 235 P.3d 1211 (Kan. Ct. App. 2010).
109. *Id.* at 1217.

rium on development is not a *per se* taking,[110] the Court found that the City's actions did not constitute a regulatory taking.[111]

II.
The State of Driveway Policy

Cities across the United States have long required driveways at most new developments. Land use laws that require abundant off-street parking (with driveways to access that parking) and transportation policy that has focused on highway expansion have fostered auto-oriented development and car dependence throughout the country. However, in recent years, policymakers have become increasingly aware of the negative impacts that these policies can have on the built environment. Concerns have risen about the environmental and safety threats that cars pose, and innovative new alternative curb uses have become popular. As a result, cities are starting to rethink their policies towards off-street parking and driveways.

A. Permitting

Cities generally require property owners to obtain permits from various city departments to construct a new driveway. The Planning or Building Department usually must review the proposal to ensure it complies with planning or zoning codes, particularly when it comes to the design of the off-street parking space itself.[112] Applicants often must also seek permits from a Transportation or Public Works Department regarding the alterations that they must make on the public right-of-way to construct the curb cut.[113] Other departments are sometimes also involved; for instance, in New York City, curb cuts that impact street trees need approval from the Department of Parks and Recrea-

110. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002) (rejecting a regulatory takings claim against a protracted but temporary moratorium on new construction around Lake Tahoe).

111. *Frick*, 235 P.3d at 1223–24.

112. *See, e.g.*, San Francisco Plan. Dep't, Guidelines for Adding Garages and Curb Cuts, https://default.sfplanning.org/publications_reports/Guidelines_for_Adding_Garages_and_Curb%20Cuts.pdf [https://perma.cc/FK3D-RPJM]; *Curb Cuts*, NYC Bldgs., https://www1.nyc.gov/site/buildings/property-or-business-owner/curb-cuts.page [https://perma.cc/42LZ-84F3] (last visited May 18, 2023).

113. *See, e.g.*, N.Y.C. Dep't of Transp., Instructions for Filing Plans & Guidelines for the Design of Sidewalks, Curbs, Roadways, and Other Infrastructure Components 10–11 (July 22, 2010), https://www1.nyc.gov/html/dot/downloads/pdf/instfilingplan.pdf [https://perma.cc/6UPX-4TGC]; *Street Improvement*, San Francisco Pub. Works, https://sfpublicworks.org/services/permits/street-improvement [https://perma.cc/VC8B-A5CD] (last visited Mar. 26, 2023) (explaining that curb cuts are generally approved by the Planning Department after Public Works review, but wide driveways require an additional permit from Public Works).

tion and those in historic districts or landmarked buildings must be approved by the Landmarks Preservation Commission.[114]

These permitting agencies tend to have specific criteria for the siting and design of curb cuts and driveways relating to attributes such as width and distance from trees and utilities.[115] However, these criteria are often set out under the assumption that a driveway will be permitted, rather than as factors that determine whether a driveway can be installed at all. In certain situations, the approval of a driveway is discretionary. For instance, the New York City Zoning Resolution allows the Planning Department to permit curb cuts in the core of Manhattan only under certain limited circumstances and on a discretionary basis.[116] In San Francisco, proposed curb cuts along "transit preferential streets" or that may negatively impact transit, bicycles, and pedestrians must go to a planner for "further review" rather than being automatically approved.[117]

New York City also prescribes minimum lot width requirements for driveways, prohibiting them altogether on lots under forty feet in width in higher-density residential zones and requiring a minimum amount of uninterrupted curb space to be left in front of each lot in other zones.[118] These regulations ensure that blocks with many narrow lots cannot become lined entirely with driveways.

B. Design

Driveways provide vehicular access between the public right-of-way and private property. In built-up areas with sidewalks and curbs, driveways require curb cuts that lower the curb to street level to provide a ramp for vehicles to reach the level of the sidewalk.[119] Even in suburban or rural areas without curbs, the connection between a drive-

114. INSTRUCTIONS FOR FILING, *supra* note 113, at 10.

115. *See, e.g.*, *id.*; GUIDELINES FOR ADDING GARAGES, *supra* note 112, at 2.

116. N.Y.C. CITY PLANNING COMMISSION, ZONING RESOLUTION 13-441, https://zr.planning.nyc.gov/article-i/chapter-3/13-441 [https://perma.cc/Q6HC-GTKU]; *see also* Fred A. Bernstein, *Yikes! It's a Garage*, N.Y. TIMES (July 30, 2010), https://www.nytimes.com/2010/08/01/realestate/01cov.html [https://perma.cc/4HVC-ZZNL] (describing how some Manhattan property owners discovered a loophole allowing them to build driveways by right and the City Council moved quickly to amend the zoning resolution).

117. GUIDELINES FOR ADDING GARAGES, *supra* note 112, at 4.

118. N.Y.C. CITY PLANNING COMMISSION, ZONING RESOLUTION 25-631, https://zr.planning.nyc.gov/article-ii/chapter-5/25-631 [https://perma.cc/P9JK-48H7].

119. Transp. Rsch. Bd., *Report 659: Guide for the Geometric Design of Roadways*, Nat'l Cooperative Highway Rsch. Program 37–38 (2010).

way and the street must be carefully designed to accommodate drainage.[120]

The physical design of a driveway can vary widely depending on the circumstances. A driveway for a single-family home might require only a single narrow lane with a tight turning radius, while a driveway for a high-intensity commercial property like a shopping mall might require multiple lanes of both ingress and egress designed like a standard public street.[121] Driveways for industrial or agricultural properties, which are often located on curb-less streets, can use a simpler design but require a large turning radius for trucks and farm vehicles.[122]

C. The Need for Driveways

In some situations, a driveway can be so essential to a property that, without it, the property would be practically worthless. For instance, in rural areas with large tracts of land, getting between the parts of the property and reaching the public right-of-way may be very difficult without a motor vehicle. Agricultural and industrial properties must allow trucks and other vehicles to move between the property and the street to deliver goods. Car-oriented commercial businesses like auto repair shops, car dealerships, and drive-thru fast-food restaurants need driveways to function. In some wealthy suburbs, vehicles are prohibited from parking on the street overnight entirely, making driveways and off-street parking a necessity for residences.[123]

In many other situations, local laws mandate driveways regardless of whether they are necessary. Professor Donald Shoup of UCLA demonstrated in his influential book *The High Cost of Free Parking* that the very specific off-street parking requirements ubiquitous in zoning codes across the United States are often based on little, if any, empirical data.[124] The requirements instead often stem from casual surveys conducted decades ago.[125] As a result, such requirements tend

120. *Id.* at 72.
121. *See id.* at 40.
122. *Id.* at 39.
123. *See, e.g.*, CITY CODE OF SAN MARINO, CAL. § 15.07.23 (prohibiting parking between 2:00 AM and 5:00 AM on all but two city streets with very limited exceptions); VILLAGE OF VALLEY STREAM, N.Y. CODE § 93-27(B) (prohibiting all parking on public streets between 3:30 AM and 5:30 AM).
124. *See generally* DONALD SHOUP, THE HIGH COST OF FREE PARKING 21–65 (2005).
125. *Id.*

to significantly overestimate parking demand, which leads to a vast oversupply of off-street parking in most parts of the country.[126]

Still, the United States is incredibly reliant on cars: the Census Bureau estimates that in 2019, over 91% of American households had access to a vehicle and nearly 85% of workers drove alone or carpooled to work.[127] Professor Shoup argues that these parking requirements played a significant role in making the country so car-dependent by requiring everyone to subsidize the provision of abundant free parking.[128] Parking costs a substantial sum of money to build and maintain, and when it is provided for free, those costs are distributed among everyone whether they use it or not. This mandatory over-supply of parking has had many other negative impacts, including increasing the cost and reducing the supply of housing[129] and reducing the viability and attractiveness of central business districts.[130]

Given Americans' dependence on cars, most developers would still include off-street parking in their projects, although they would probably not provide quite as much.[131] Off-street parking can be quite financially valuable: one study in San Francisco in the 1990s found that homes with off-street parking sold for twelve to thirteen percent more than homes without it.[132] In 2020, the average price of an off-street parking space in New York City was $280,000.[133]

Residential and commercial developments with off-street parking require driveways to access them. However, there are some cases, particularly in dense cities, in which a development would not have any off-street parking but for local requirements. The New York City metropolitan area has by far the lowest percentage of car commuters[134]

126. *Id.* at 34–37.

127. *Selected Population Profile in the United States*, United States Census Bureau American Community Survey (2019), https://data.census.gov/cedsci/table?q=Commute&tid=ACSSPP1Y2019.S0201 [https://perma.cc/F9F4-ZEGN].

128. *See* SHOUP *supra* note 124, at 128–30.

129. *Id.* at 141–43.

130. *Id.* at 158–59.

131. *See id.* at 496 (hypothesizing that in the absence of parking requirements developers would build parking in accordance with actual demand).

132. Wenyu Jia & Martin Wachs, *Parking Requirements and Housing Affordability: Case Study of San Francisco*, 1685 TRANSP. RSCH. RECORD 156, 158 (1999).

133. Ronnie Koenig, *Parking So Prime, the Car Is Optional*, N.Y TIMES (Mar. 13, 2020), https://www.nytimes.com/2020/03/13/realestate/parking-so-prime-the-car-is-optional.html [https://perma.cc/WR8D-6F7Z].

134. Eric Jaffe, *How Americans Get to Work in Cities with the Lowest Car Commute Rates*, Bloomberg: CityLab (Aug. 18, 2015, 10:02 AM EDT), https://www.bloomberg.com/news/articles/2015-08-18/how-americans-get-to-work-in-the-15-u-s-cities-with-the-lowest-car-commute-rates [https://perma.cc/4P4M-RB97].

and the most extensive transit system in the country,[135] yet the city still requires most commercial and residential developments to include off-street parking.[136] Although these requirements do not apply to some central areas of the city or to certain land uses, parking continues to be required in new construction throughout most of the city, creating new curb cuts at each new development.[137]

In recent years, some American cities with relatively robust transit systems like San Francisco, Washington, D.C., Minneapolis, and Portland have entirely eliminated minimum parking requirements.[138] Even in cities that are less dense or transit-accessible, parking requirements can lead to unnecessary off-street parking and driveways where street parking or alternative off-street parking lots are available. And with the rise of Uber and Lyft, there has been a reduction in parking demand, even in parts of the country with historically few alternative transportation options.[139]

D. Alternative Uses

For a driveway to be usable, the street space in front of the driveway must be kept clear for entering and exiting vehicles. As a result, city and state laws prohibit the public from parking in front of driveways.[140] In areas where curbside parking is otherwise permitted, the presence of a driveway means that the street space in front of it is taken away from public parking for private use.

Many municipal codes do, however, permit property owners or renters to park in front of their own driveways.[141] In these cities, in

135. *See 2018 Public Transportation Factbook*, AM. PUB. TRANSP. ASS'N 24 (2018), https://www.apta.com/wp-content/uploads/Resources/resources/statistics/Documents/FactBook/2018-APTA-Fact-Book.pdf [https://perma.cc/27JS-NY9F].

136. N.Y.C. CITY PLANNING COMMISSION, ZONING RESOLUTION 36-21, https://zr.planning.nyc.gov/article-iii/chapter-6/36-21; N.Y.C. CITY PLANNING COMMISSION, ZONING RESOLUTION 36-31, https://zr.planning.nyc.gov/article-iii/chapter-6/36-31 [https://perma.cc/W7KJ-3HUU].

137. *See* Simon McDonnell & Josiah Madar, *The Unintended Consequences of New York City's Minimum Parking Requirements*, *in* PARKING IN THE CITY (Donald Shoup, ed. 2018).

138. *See* Daniel Herriges, *Announcing a New and Improved Map of Cities That Have Removed Parking Minimums*, STRONG TOWNS (Nov. 22, 2021), https://www.strongtowns.org/journal/2021/11/22/announcing-a-new-and-improved-map-of-cities-that-have-removed-parking-minimums [https://perma.cc/M9A7-8CAD].

139. Alejandro Henao & Wesley E. Marshall, *The Impact of Ride Hailing on Parking (And Vice Versa)*, 12(1) J. TRANSP. & LAND USE 127, 127 (2019).

140. *See, e.g.*, 34 RCNY § 4-08(f)(2) (2023); CAL. VEH. CODE § 22500(e)(1) (1959); PHILA., PA. CODE § 12-913(1)(b)(.1) (1989).

141. *See, e.g.*, 34 RCNY § 4-08(f)(2) (allowing the owner, lessor, or lessee to park in front of a driveway if the driveway serves just one or two residential units and the vehicle is registered to that address); S.F., CAL., TRANSP. CODE div. II § 1004 (2008)

addition to the parking spaces they have on their property, driveway owners retain an exclusive right to park for free on a section of the public street itself. Given that dedicated off-street parking is associated with significantly higher housing prices,[142] these policies create concerning inequities, granting people who own more expensive property a preference for public street space over poorer people who do not have the same entitlement.[143]

Transportation agencies and organizations across the country are working to reform policies regarding the use of curbside lanes along city streets, recognizing that there are many other potential uses for that space than just street parking.[144] These alternative uses include passenger and commercial loading. With the rise in ride-hailing service like Uber and Lyft, the need for passenger loading zones has increased significantly and their absence has led to frequent double parking and other illegal loading behavior.[145] Similar issues have occurred with freight loading, with the volume of freight deliveries increasing significantly due to the rise of e-commerce.[146] New delivery services like Uber Eats and DoorDash—which use personal vehicles rather than traditional delivery trucks—have introduced new pressures on the curb.[147]

(allowing parking in front of the driveways under the same conditions as the New York code); HOBOKEN, N.J., CITY CODE § 190-41.1 (2010) (allowing property owners to park in front of their driveways with a permit from the City).

142. *See* Jia & Wachs, *supra* note 132.

143. Fights over driveways' impact on the supply of street parking occasionally break out in the media. *See* Helen Klein, *Parking War! Ridgites Say City Must Attack Those Stealing Parking Spots*, BROOKLYN PAPER (Mar. 11, 2011), https://www.brooklynpaper.com/parking-war-ridgites-say-city-must-attack-those-stealing-parking-spots/ [https://perma.cc/U2JF-JZ6K].

144. *See, e.g. Curb Management Strategy,* SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY (2020), https://www.sfmta.com/sites/default/files/reports-and-documents/2020/02/curb_management_strategy_report.pdf [https://perma.cc/7CV5-HWWD]; *Curb Appeal: Curbside Management Strategies for Improving Transit Reliability*, NAT'L ASS'N OF CITY TRANSP. OFFICIALS (2017), https://nacto.org/wp-content/uploads/2017/11/NACTO-Curb-Appeal-Curbside-Management.pdf [https://perma.cc/YH9S-LM7M]; *Curbside Management Team 2019 Annual Report*, SEATTLE DEP'T OF TRANSP. (May 2020), https://www.seattle.gov/documents/Departments/SDOT/ParkingProgram/CurbsideManagementTeam_2019AnnualReport.pdf [https://perma.cc/A5PL-NZX7].

145. *See* Bruce Schaller, *Making the Most of the Curb*, SCHALLER CONSULTING 3-4 (2019), http://www.schallerconsult.com/rideservices/makingmostofcurb.pdf [https://perma.cc/XZV4-G9AN].

146. *See* Katharina Buchholz, *The Parcel Shipping Boom Continues*, STATISTA (Sept. 28, 2021), https://www.statista.com/chart/10922/parcel-shipping-volume-and-parcel-spend-in-selected-countries/ [https://perma.cc/7HV2-HF56].

147. *See* Katie Leonowitz, *Motus Report Reveals Food Delivery Services Surged 164% Over the Last Year, With 25% More Americans Using Food Delivery Apps*,

Some cities do allow stopping, but not standing or parking, across driveways.[148] This means that members of the public could technically conduct some loading across private driveways. For instance, the New York City code provides that vehicles can stop "temporarily for the purpose of and while actually engaged in expeditiously receiving or discharging passengers."[149] Other jurisdictions are more limited. For instance, the California Vehicle Code allows local jurisdictions to permit passenger loading across driveways, but only by "a bus engaged as a common carrier, school bus, or a taxicab."[150] None of these jurisdictions permit freight loading across driveways. Moreover, even where passenger or freight loading across driveways is allowed, drivers may prefer to double-park or stop illegally elsewhere to avoid conflict with driveway owners.[151]

American cities started introducing bike share systems with docking stations where users could check out and return bikes in 2007, and they have proliferated since then.[152] Bike share stations are generally located at the curb, often taking the place of spaces previously just used for private car parking.[153] Since 2018, "dockless" bike and scooter share systems have become popular throughout the country as well, with bicycles and electric scooters available to pick up and drop off anywhere.[154] Some cities, concerned with the clutter of shared bikes and scooters scattered around the sidewalk, have introduced designated parking areas for the vehicles on the street.[155] Many cities

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BUSINESSWIRE (Mar. 30, 2021, 9:00 AM), https://www.businesswire.com/news/home/20210330005019/en/Motus-Report-Reveals-Food-Delivery-Services-Surged-164-Over-the-Last-Year-with-25-More-Americans-Using-Food-Delivery-Apps [https://perma.cc/AFW3-C2D2].

148. *See, e.g.*, 34 RCNY § 4-08(f)(2); PHILA., PA., CODE § 12-913(1)(b)(1).

149. 34 RCNY § 4-08(a)(2).

150. CAL. VEH. CODE § 22500(e)(1).

151. Driveway parking conflicts can become violent. *See, e.g.,* Kerry Burke, John Annese, & Rocco Parascandola, *Video: Brooklyn Man Beaten in Furious Fight Over Shared Driveway*, N.Y. DAILY NEWS (Aug. 24, 2021, 10:42 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-parking-dispute-brooklyn-beating-20210825-rbwv4au34feupokrnho2hu2cwm-story.html [https://perma.cc/E7JW-X8PM].

152. Alissa Walker, *The Quiet Triumph of Bike Share*, CURBED (Dec. 16, 2019, 2:30 PM), https://archive.curbed.com/2019/12/16/20864145/bike-share-citi-bike-jump-uber.

153. Brad Aaron, *Bike Share Stations Don't Usurp Parking – They Are Parking*, STREETSBLOG NYC (Oct. 7, 2016), https://nyc.streetsblog.org/2016/10/07/bike-share-stations-dont-usurp-parking-they-are-parking/ [https://perma.cc/C4ZF-LNU3].

154. *Shared Micromobility in the U.S.: 2019*, NAT'L ASS'N CITY TRANSP. OFF., https://nacto.org/shared-micromobility-2019/ [https://perma.cc/A4E7-3YVY] (last updated Dec. 31, 2019).

155. *See, e.g.*, *Street Design Guide: Bicycles and Micro Mobility Parking*, CITY OF MINNEAPOLIS, https://sdg.minneapolismn.gov/design-guidance/boulevards-and-fur

install "bike corrals" on busy streets that give private bicycles a place to park.[156] All of these uses are precluded along curb space occupied by driveways and generally must be off-set by at least a couple feet from them.[157]

Another curb use, the parklet, converts space that had been used as curbside parking into small public spaces.[158] After an annual pop-up demonstration called PARK(ing) Day began in 2005, San Francisco started permitting permanent parklets, often in front of restaurants and cafes to provide additional outdoor seating for their customers and others.[159] The movement soon spread to other cities and has exploded in popularity during the COVID-19 pandemic, with cities across the country allowing restaurants to provide outdoor seating on what had been parking spaces and often extending the programs beyond the pandemic.[160] Parklets cannot use curb space taken up by driveways (although one San Francisco resident and bike activist did choose to install a parklet in front of his own driveway, taking it out of commission).[161]

E. Safety

Driveways can create safety issues by introducing conflicts between entering or exiting vehicles and other motor vehicles, bicycles, and pedestrians. Studies estimate that between eleven and nineteen percent of urban traffic collisions involve driveways.[162] Because driveways necessarily cross the sidewalk, they create additional interactions between vehicles and pedestrians. These interactions can be

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nishings/bicycle-and-micro-mobility-parking [https://perma.cc/5K8R-2QXN] (last visited May 20, 2023).

156. *See, e.g.*, *id.*; Stephen Fesler, *Why Install On-Street Bike Corrals?*, THE URBANIST (Sept. 8, 2016), https://www.theurbanist.org/2016/09/08/why-install-on-street-bike-corrals/ [https://perma.cc/L8YC-QYSR].

157. *See Bike Share Station Siting Guide*, NAT'L ASS'N OF CITY TRANSP. OFF. 21, https://nacto.org/wp-content/uploads/2016/04/NACTO-Bike-Share-Siting-Guide_FINAL.pdf [https://perma.cc/3LUZ-BDP2] (last visited Mar. 26, 2023).

158. *Urban Street Design Guide: Parklets*, NAT'L ASS'N OF CITY TRANSP. OFF., https://nacto.org/publication/urban-street-design-guide/interim-design-strategies/parklets/ [https://perma.cc/AM4S-ZWCE] (last visited Mar. 26, 2023).

159. Michelle Birdsall, *Parklets: Providing Space for People to Park. . .Themselves*, INST. TRANSP. ENG'RS J. 36, 36–37 (2013).

160. Amy McCarthy, *The Status of Outdoor Dining Across the Country*, EATER (Dec. 15, 2021, 10:18 AM), https://www.eater.com/22833407/pandemic-outdoor-dining-america-impact-neighborhoods [https://perma.cc/389S-LCB2].

161. Aaron Bialick, *The City's First Residential Parklet Springs to Life on Valencia Street*, STREETSBLOG SF (June 20, 2011), https://sf.streetsblog.org/2011/06/20/the-citys-first-residential-parklet-springs-to-life-on-valencia-street/ [https://perma.cc/Q4CF-C57W].

162. Transp. Rsch. Bd., *supra* note 119, at 2.

particularly risky for the elderly, children, and people with disabilities, and they can impair a city's overall accessibility.[163]

Conflicts between drivers and bicyclists around driveways are particularly concerning. Intersections and driveways comprise a disproportionate number of collisions between cars and bicycles, often "right hook" crashes in which a driver turns right across a bike lane directly in front of an approaching bicyclist and the bicyclist crashes into the side of the car.[164]

In recent years, many cities have begun installing "protected" bike lanes that place the bike lane directly adjacent to the curb and often leave floating vehicle parking on the other side of the lane next to traffic, sometimes with two-way bicycle traffic on one side of the street.[165] These separate bicyclists from traffic but can create additional difficulties at driveway entrances, where visibility is poor and drivers may not be expecting bicycles on the other side of the parking lane.[166] To mitigate this risk, guidelines recommend including wide buffer zones that remove additional parking around each driveway.[167]

F. Driveway Abandonment

Studies have found that up to one-third of residential off-street parking spaces are not in use.[168] These findings hold true even in dense areas like New York City and San Francisco's Mission District, where standalone parking spaces are very expensive.[169] This may be because space is both limited and expensive in these cities, making homeowners more likely to use their parking spaces for other purposes. For example, homeowners may use their parking spaces for

163. *See id.* at 30–32.

164. *See* DAVID HURWITZ ET AL., OREGON DEP'T OF TRANSP. & FED. HWY. ADMIN., TOWARDS EFFECTIVE DESIGN TREATMENT FOR RIGHT TURNS AT INTERSECTIONS WITH BICYCLE TRAFFIC xvii–xviii (Nov. 2015), https://www.oregon.gov/odot/Programs/ResearchDocuments/SPR767_FinalReport_070815.pdf [https://perma.cc/E6UU-GNS8] (finding that 74% of right-hook crashes in Oregon took place at intersections and 26% at driveways).

165. *See* Angie Schmitt, *The Rise of the North American Protected Bike Lane*, MOMENTUM MAG (July 31, 2013), https://momentummag.com/the-rise-of-the-north-american-protected-bike-lane/ [https://perma.cc/4G7Z-8936].

166. FED. HWY. ADMIN., PUB. NO. FHWA-HEP-15-025, SEPARATED BIKE LANE PLANNING AND DESIGN GUIDE 89 (May 2015), https://www.fhwa.dot.gov/environment/bicycle_pedestrian/publications/separated_bikelane_pdg/separatedbikelane_pdg.pdf [https://perma.cc/SFY3-T3EM].

167. *Id.* at 90–91.

168. *See* Catie Gould, *One in Three Garages Has No Car in It*, SIGHTLINE INST. (Apr. 27, 2022, 7:00 AM), https://www.sightline.org/2022/04/27/one-in-three-garages-has-no-car-in-it/ [https://perma.cc/SM2R-AT59].

169. *Id.*

storage[170] or convert them into additional living space.[171] Often, homeowners use such conversions as "accessory dwelling units" for rental income rather than simply extensions of the existing living space.[172]

In New York and San Francisco, these conversions come at no cost since both cities allow renters and property owners to park across their own residential driveways.[173] On properties with enough outdoor space, the driveway may itself become an off-street parking spot after a conversion. But if there is not enough space remaining for off-street parking, the driveway becomes obsolete, and the curb should theoretically be restored to public use. However, garage conversions are often made without permits, so the local government may not know that that driveway is no longer usable.[174] Moreover, it is unclear to what extent cities enforce the restoration of curbs when approving permitted garage conversions. Even if a driveway is no longer valid, members of the public may still avoid parking across it and enforcement officers may still cite vehicles parked across it.[175] In places where property owners or tenants have an exclusive right to park across their driveway, owners have a powerful incentive to leave their curb cut in place even if it does not provide access to off-street parking.

Cities often make a legal distinction between abandoned driveways and those in use. In New York City, the prohibition on parking across driveways (and the exemption for the owner or renter) does not apply to "driveways that have been rendered unusable due to the presence of a building or other fixed obstruction."[176] Los Angeles will not

170. *See* Jack Feuer, *The Clutter Culture*, UCLA MAGAZINE (July 1, 2012), https://newsroom.ucla.edu/magazine/center-everyday-lives-families-suburban-america [https://perma.cc/N2YW-VWAC] (describing a study that found that three out of four garages are too cluttered to fit a car).

171. *See* Wendy Helfenbaum, *Garage Conversion: Thinking of Converting Your Garage Into Living Space? Read This First*, REALTOR (Apr. 10, 2022), https://www.realtor.com/advice/home-improvement/garage-conversion-pros-cons/ [https://perma.cc/2U2W-6AWC].

172. *See* Alec Schierenbeck, *New York's Affordable Housing Solution Is Hidden in the Garage*, CITY & STATE NY (Jan. 15, 2020), https://www.cityandstateny.com/opinion/2020/01/new-yorks-affordable-housing-solution-is-hidden-in-the-garage/176518/ [https://perma.cc/6MSQ-69FZ].

173. 34 RCNY § 4-08(f)(2); S.F., CAL., TRANSP. CODE div. II § 1004.

174. *See* Conor Dougherty, *It's Been a Home for Decades, But Legal Only a Few Months*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/2021/12/18/business/economy/california-housing.html [https://perma.cc/KNQ4-TQHD].

175. *See* Klein, *supra* note 143 (noting that enforcement officers often do not know which driveways are legal and cite cars parked across illegal driveways).

176. 34 RCNY § 4-08(f)(2) (referencing the definition of "Driveway" in § 4-01(b) of that code, which defines the term as an entrance or exit "used by vehicular traffic to or from" private property).

approve permits for street construction until driveways or curb cuts that are "abandoned and no longer in use" are removed.[177]

While such policies do provide some mechanism for returning abandoned driveways to public use, they are essentially reactive. In New York, they arise only if someone decides to park across an abandoned driveway and receives a citation; in Los Angeles, only if a property owner applies for a permit to do construction work in the street. Neither city appears to publish standards for determining whether a driveway is unused or abandoned.

III.
Driveway Reform

Cities should rethink their policies towards driveways to better align with other city goals. Many have started lowering or eliminating minimum parking requirements, allowing new buildings to be constructed without driveways for the first time in decades. Next, cities should consider restricting new driveways in areas where cars are not necessary to get around. They should also implement programs to allow for the revocation of existing driveways where, for example, they create particular safety risks or have been abandoned. Such policies would tread new legal ground in many states, but they are defensible: the common law right of access—which arose long before the automobile—does not inherently require cities to grant public space to private property owners for driveways when other means of transportation are available.

A. Standards for Driveway Permit Denial

Cities should implement concrete policies for the denial of driveway permit applications based on the potential impact of the driveway on the public. A prerequisite for this is the removal of parking requirements for new development—if a city required off-street parking but rejected driveway permit applications, nothing could be built at all. Several cities have eliminated parking requirements entirely and many others have eliminated them in central parts of the city, so the trend appears to be moving in this direction.[178] More robust standards for rejecting applications for driveways would move cities even further in

177. *Construction "A" Permits Technical Procedures: Driveway Construction, Modification or Replacement*, L.A. Bureau of Eng'g (Aug. 20, 2021), https://engpermitmanual.lacity.org/construction-permits/technical-procedures/03-driveway-construction-modification-or-replacement [https://perma.cc/D552-GC6X].

178. *See* Herriges, *supra* note 138.

this direction by essentially prohibiting off-street parking altogether on certain lots.

Safety should be a primary factor in such determinations. In locations with high pedestrian traffic volumes on the sidewalk, driveways introduce conflicts and their installation should be minimized. For the same reason, driveway installation should be avoided whenever possible along streets with bike lanes, particularly protected bike lanes. Driveways can also introduce safety conflicts with other vehicle traffic, so cities should consider restricting driveways along streets with high vehicle traffic volumes, particularly those with frequent public transit routes.

Cities should also consider the opportunity cost of permitting a driveway, given the potential alternative uses of that space. In neighborhoods with a tight supply of street parking, the installation of a driveway takes parking space away from public use and reserves it for a particular property owner. Such situations already often lead to protests from neighbors.[179] While other uses should often take precedence over street parking, when the decision is between high-demand public street parking and a private driveway, cities should lean towards rejecting the privatization of public space.

Along commercial streets and on the side streets adjacent to them, driveways should be avoided when possible to ensure that space remains available for other curb uses. Passenger and commercial loading has become increasingly vital in commercial areas, and many cities are moving to install more loading zones.[180] Parklets, too, have become vital since 2020 in allowing restaurants and cafes to stay open and serve people safely during the COVID-19 pandemic.[181] On-street bike share stations and bike corrals provide access using alternative transportation modes. Even if these uses are not currently present on a given street, the installation of a driveway can preclude them from being implemented in the future.

Many state courts apply a robust nondelegation doctrine, holding that state and local legislative bodies cannot delegate their policymak-

179. *See* Jake Mooney, *The Politics of Curb Cuts and Driveways*, N.Y. TIMES: CITY ROOM (Apr. 25, 2008, 11:58 AM), https://cityroom.blogs.nytimes.com/2008/04/25/the-politics-of-curb-cuts-and-driveways/ [https://perma.cc/9N2W-878T].

180. *See, e.g.*, Gersh Kuntzmann, *Up Next for DOT: City Law Requires 500 New Loading Zones Every Year*, STREETSBLOG NYC (Jan. 14, 2022), https://nyc.streetsblog.org/2022/01/14/up-next-for-dot-city-law-requires-500-new-neighborhood-loading-zones-every-year/ [https://perma.cc/ANQ9-ZZ3S]; *Curb Management Strategy*, *supra* note 144 at 9–10 (prioritizing access for people and goods over parking in commercial areas in San Francisco).

181. *See* McCarthy, *supra* note 160.

ing functions to administrative agencies as this would violate separation of powers principles.[182] State courts have repeatedly rejected attempts by cities to deny driveway permits on an entirely discretionary basis as overstepping the authority granted to cities by the state, instead requiring that any driveway ordinance lay out "reasonable" standards.[183] To pass muster under state nondelegation standards, driveway legislation must provide very clear guidance to administrative agencies on when they can reject driveway permit applications.[184] Written standards and a hearing process can also help avoid procedural due process concerns at the federal constitutional level.[185]

Cities will need to strike a balance between precision and flexibility in such standards. Bright line criteria based on factors like traffic volumes and street parking occupancy can end up being arbitrary, as transportation modeling is notoriously unreliable and actual conditions can be influenced by any number of factors.[186] At the same time, standards need to be specific enough to ensure consistency and give property owners adequate notice of whether their driveway will be permitted. Regardless, private applicants should carry the burden of demonstrating that a driveway is safe and necessary, rather than benefitting from a presumption that all driveways will be approved.

B. Driveway Revocation

Cities should also implement concrete policies and procedures for the removal of driveways. Driveways are a fact of life in most of

182. *See generally* Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211 (2022) (discussing nondelegation doctrines espoused by courts in several states, despite the doctrine's stagnation at the federal level).

183. *See, e.g.*, Pure Oil Co. v. City of Northlake, 140 N.E.2d 289, 291–92 (Ill. 1956) (invalidating a city driveway ordinance because it "fails to spell out any reasonable standards which a property owner must meet as a condition precedent to acquiring a driveway [and] purports to authorize the outright denial of a permit in any situation, depending on the will of the city council"); Salem Nat'l Bank v. City of Salem, 198 N.E.2d 137, 14041 (Ill. App. 1964) (ruling that under the state's delegation of authority to cities, "the city does not have the power to deny in its absolute discretion, permission to construct or maintain any driveway across the sidewalk" and instead that the right to build a driveway can only "be restricted by ordinance in some reasonable manner consistent with the public good").

184. *See, e.g.*, Silver, *supra* note 182, at 1236 (noting a recent Pennsylvania Supreme Court decision that delegations to administrative bodies must have "definite standards, enforceable guidelines, or a realistic check against arbitrary decisionmaking") (citations omitted).

185. *See* Warren v. City of Athens, 411 F.3d 697, 710 (6th Cir. 2005).

186. David T. Hartgen, *Hubris or Humility? Accuracy Issues for the Next 50 Years of Travel Demand Modeling*, 40 TRANSP. 1133, 1133 (2013) (noting the dearth of empirical research on the accuracy of traffic modeling methods and evidence that they may be highly inaccurate).

the United States and the vast majority will remain. However, when safety issues arise or it becomes clear that a driveway is not actually being used to access a property, cities should have the ability to revoke the permit for that driveway and restore the street space in front of it to public use.

Cities should implement criteria for safety-based driveway revocation, similar to the criteria for driveway permit denial discussed above. These criteria should be codified to avoid revocation based solely on legislative or administrative discretion. In addition, cities should codify standards for determining when a driveway is abandoned based on factors such as the frequency of use and the presence of permanent or semi-permanent objects preventing vehicular use. San Francisco is already considering doing so, having adopted a Curb Management Strategy that recommends codifying a process for revoking abandoned or redundant driveways.[187]

While new permit application standards could establish a presumption against approval for driveways, rules for driveway revocation likely need to presume that the driveway can remain unless the city proves otherwise. Driveways are a valuable property interest, even when they conflict with important municipal goals, and cities will need to tread lightly in revoking them. While permits for new driveways should be denied where pitted against more efficient or equitable curb uses, the government's mere identification of a more efficient potential use of the space might not merit the drastic step of revocation.

A large percentage of driveways could be eligible for revocation under new standards that incorporate criteria like safety and lack of use. However, revocation would likely require extensive fact-finding to be legally sufficient and could often result in serious legal and political conflict. As a result, it will probably remain infeasible to proactively remove most driveways that meet the criteria.

The most likely situation in which a city would seek to revoke unsafe or abandoned driveways is when undertaking a street reconfiguration project such as a "road diet," in which the number of traffic lanes is reduced.[188] Road diets often replace the traffic lanes with bike lanes or wider sidewalks, which can increase the potential for conflicts between people driving, biking, and walking at driveways.[189] Curbside protected bike lanes can entail even more serious safety conflicts

187. *Curb Management Strategy*, *supra* note 144, at 85.
188. *See Road Diets (Roadway Configuration)*, FED. HWY. ADMIN.: SAFETY (July 29, 2016), https://safety.fhwa.dot.gov/road_diets/ [https://perma.cc/U9NB-JDLF].
189. *Id.*

between bicyclists and vehicles entering or exiting driveways.[190] Mitigating these safety risks requires creating large buffer zones around driveways, removing even more space from public use to accommodate each private driveway.[191]

The inclusion of driveway revocation in larger streetscape projects can enable better data collection and community engagement. Such projects usually involve extensive public outreach processes for presenting proposals to stakeholders and gathering public input.[192] Agencies also often collect extensive observational data on issues like safety, accessibility, equity, and traffic while designing streetscape projects.[193] These processes can direct planners and engineers to driveways that pose genuine safety problems or that are no longer in use and allow them to begin discussing potential revocation with property owners early in the process.

Any process for driveway revocation should include clear notice, hearings, and appeals procedures to ensure revocation actions comply with procedural due process requirements. Cities should also document that direct vehicular access onto the property is not essential and that alternative means of access remain available, whether in the form of street parking or other modes of transportation. When a driveway is the sole means of vehicular access to an auto-oriented business like a commercial parking lot, drive-thru restaurant, or auto body shop, revocation may destroy all access and constitute a taking.

Driveway revocation procedures could come with unintended negative consequences. For instance, a concrete definition of driveway abandonment could lead people to use their driveways more, which would lead to more conflicts with pedestrians and bicyclists and more driving overall, with all the negative safety and environmental consequences that that brings. Cities should carefully construct their criteria and use the power of revocation sparingly to minimize such impacts.

190. *Separated Bike Lane Planning*, *supra* note 166, at 89.

191. *Id.*

192. *See* AASHNA JAIN ET AL., RUTGERS UNIV. ALAN M. VOORHEES CTR., EVALUATING COMPLETE STREETS PUBLIC ENGAGEMENT PRACTICES: RESULTS OF A NATIONAL SURVEY (2020), https://njbikeped.org/wp-content/uploads/2022/09/CS-Report_03.12.pdf [https://perma.cc/79K2-WWEJ].

193. *See generally* BARBARA MOSIER ET AL., FED. HWY. ADMIN., PUB. NO. FHWA-SA-21-010, TRAFFIC ANALYSIS AND INTERSECTION CONSIDERATIONS TO INFORM BIKEWAY SELECTION (Feb. 2021), https://safety.fhwa.dot.gov/ped_bike/tools_solve/docs/FHWA-SA-21-010_Traffic_Analysis_Intersection_Considerations.pdf [https://perma.cc/B6HW-QH98].

C. State Law Prospects for Driveway Reform

The legal prospects of a policy denying some property owners direct vehicular access to their properties are not completely clear. Few courts have directly encountered the issue, perhaps because driveways have been not just permitted but in fact required across most of the country for decades. However, this issue is likely to arise more in the coming years as cities finally begin dismantling their off-street parking requirements and consider prohibiting parking in certain areas. State courts should uphold such policies when property owners fail to demonstrate that a driveway is essential for access to their property or that the denial of driveway access was unrelated to public health, safety, and welfare.

Cases regarding the denial of some, but not all, vehicular access provide clues as to how state courts might analyze such a policy. Courts tend to find that the right of access is subordinate to the local government's police power.[194] At the same time, even those cases upholding the rejection of some driveways at properties that have alternative vehicular access often suggest that the situation would be different if the property had no vehicular access at all.[195] States that award compensation for merely the substantial impairment of access, including the denial of driveway permits along some frontages when other access is still available, would be even more likely to require compensation for the wholesale denial of vehicular access.[196]

Nevertheless, right-of-access cases generally involve highly fact-specific inquiries. The viability of regulations denying driveway permits or revoking existing driveways may turn on the largely unresolved question of whether retaining pedestrian access can make up for the lack of direct vehicular access.[197] Some courts have explicitly taken the availability of pedestrian access into account when consider-

194. *See, e.g.*, Wood v. City of Richmond, 138 S.E. 560, 562 (Va. 1927); Yegen v. City of Bismarck, 291 N.W.2d 422, 424 (N.D. 1980); Speight v. Lockhart, 524 S.W.2d 249, 255 (Tenn. Ct. App. 1975) (quoting a statute saying that the right of access is subordinate to the public's right to travel along the street and subject to reasonable regulation).

195. *See, e.g.*, Mueller v. N.J. Highway Auth., 158 A.2d 343, 349–50 (N.J. Super. Ct. App. Div. 1960) (stating that every lot has a right to "a direct outlet on the highway"); Aero Drive-In v. Town of Cheektowaga, 529 N.Y.S.2d 613, 613 (App. Div. 1988) (rejecting a request to reopen driveways that provided "additional access").

196. *See, e.g.*, State Highway Com. v. Raleigh Farmers Market, Inc., 139 S.E.2d 904, 906 (N.C. 1965) (noting that property owners are entitled to compensation if they lose all "reasonable access"); *DuPuy*, 396 S.W.2d at 110 (awarding damages when the property owner was "deprived . . . of reasonable access").

197. *See infra* sec. I.B.

ing whether an infringement on the right of access has taken place.[198] The Colorado Supreme Court, for example, appeared to support such an analysis when it upheld the City of Boulder's creation of a pedestrian mall downtown.[199]

Likewise, the Idaho Supreme Court was particularly fact-sensitive in allowing the City of Boise to remove a house's driveway when the tenant at that house did not own a car and could receive deliveries over the sidewalk from the street.[200] The decision is somewhat odd in that it bases the existence of a property right on the characteristics of the person living there rather than of the land itself.[201] However, the fact that the tenant was able to live there without a car and receive deliveries from the street may demonstrate that a driveway is not essential for access in that part of Downtown Boise. As a result, the right of access did not trump the City's police power.

Driveway revocation could encounter additional legal issues under a nonconforming use doctrine. Some state courts hold that, as a general matter, local governments cannot force out nonconforming uses after zoning changes.[202] Others allow nonconforming uses to be shut down, at least if there is an amortization period giving the property owner time to transition the use out.[203] However, findings of safety issues particular to a specific driveway should lead courts to consider a driveway revocation to be a valid exercise of the police power rather than the phasing out of a nonconforming use, particularly if it takes place in the context of a wider streetscape project. In addition, courts tend to hold that a property owner forfeits the right to a nonconforming use if they abandon it.[204]

D. Federal Constitutionality of Driveway Reform

A challenge to a local or state government's denial of a driveway permit application under a pure Fifth Amendment takings claim would likely fail under the Supreme Court's current jurisprudence. Ever

198. *See, e.g.*, Breinig v. County of Allegheny, 2 A.2d 842, 847 (Pa. 1938); Maloley v. City of Lexington, 536 N.W.2d 916, 920 (Neb. App. 1995); Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 251 (Minn. 1946).

199. Boulder v. Kahn's, Inc., 543 P.2d 711, 714 (Colo. 1975).

200. Johnston v. Boise City, 390 P.2d 291, 296 (Idaho 1964).

201. *Cf.* Dexter v. Town Bd., 324 N.E.2d 870, 871 (N.Y. 1975) (holding that zoning must be based on the land rather than the identity of the owner).

202. *See, e.g.*, Pa. Nw. Distrib., Inc. v. Zoning Hearing Bd., 584 A.2d 1372, 1375 (Pa. 1991).

203. *See, e.g.*, Village of Valatie v. Smith, 632 N.E.2d 1264, 1266–67 (N.Y. 1994).

204. *See, e.g.*, Wash. Arcade Assoc. v. Zoning Bd. of Rev., 528 A.2d 736, 738 (R.I. 1987).

since it first upheld zoning laws in 1926, the Court has permitted far-reaching government regulation into property owners' use of their property, even if those regulations significantly diminish property values.[205]

Regulatory takings claims are typically analyzed under the *Penn Central* test, which instructs courts to analyze three factors to determine whether there has been a taking: the "economic impact of the regulation" on the property owner, the degree to which there was an interference with "distinct investment-backed expectations," and the "character of the governmental action."[206] The *Penn Central* decision also made clear that the analysis focuses on the impact on the property as a whole, rather than the impact on a specific interest associated with the property.[207]

The denial of a permit to construct a driveway would have an economic impact on a property owner, as the presence of off-street parking is valuable. But this impact would likely be small compared to the overall value of the property. If a driveway is not simply permitted as-of-right, the property owner would likely not have a "reasonable investment-backed expectation"[208] in a permit approval. As essentially a use restriction, the denial of a driveway permit would likely be upheld under the third *Penn Central* prong as long as the City provided sufficient justification for the action.

The revocation of a driveway permit could receive more scrutiny under *Penn Central*, but it would still probably be permitted in most situations. In *Penn Central*, the Supreme Court suggested that reasonable investment-backed expectations may at least encompass the ability to continue using property as it has been previously.[209] While the court did not outright prohibit the possibility of regulations that, for instance, require the phasing out of nonconforming uses, it could consider the revocation of a driveway to interfere too deeply in a property owner's expectations in situations in which the driveway is essential to the property.

The Supreme Court elaborated on its takings doctrine in *Lucas v. South Carolina Coastal Council*, holding that a regulation that precludes "all economically beneficial use" of a property requires com-

205. *See* Euclid v. Ambler Realty, 272 U.S. 365 (1926).

206. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

207. *Id.* at 130–31 (clarifying that the court does not consider air rights to be distinct from the property as a whole).

208. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (quoting *Penn Central*, 438 U.S. at 124).

209. *Penn Cent.*, 438 U.S. at 136.

pensation.[210] At first glance, the *Lucas* rule would not appear to prohibit the denial of driveway permits or revocation of existing driveways, as property owners could presumably still find uses for their property without direct vehicular access, even if those uses are significantly more limited.

The *Lucas* holding is complicated by the Court's decision in *Murr v. Wisconsin*, which delved into the proper unit of property that should be considered when determining whether a *Lucas* total taking has occurred. The Court introduced a multi-factor inquiry, looking at the "treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land" with the goal of "determin[ing] whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or, instead, as separate tracts."[211]

Under *Murr*, too, it appears that the denial of a driveway permit or the revocation of an existing driveway would be constitutional. Even in states that have a very strong conception of the right of access, that right is considered appurtenant to the land rather than a standalone piece of property.[212]

Other Supreme Court takings jurisprudence established that any permanent, physical invasion of property is a per se taking, no matter how small it is.[213] Because curb cuts are located on the public right-of-way and their prohibition or removal does not require the actual invasion of property, these developments in takings doctrine would likely not affect driveway regulations.

As illustrated in the Sixth Circuit's opinion in *Warren v. City of Athens*, an equal protection case against the denial of a driveway permit or the revocation of an existing driveway would be unlikely to succeed.[214] Courts will only strike down a regulation on equal protection grounds if there is no rational basis or the plaintiff shows evidence of actual animus against them motivating the decision.[215]

Conclusion

Driveways are a unique interface between private property and public right-of-way. In order to provide access to private property,

210. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).
211. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017).
212. *See, e.g.*, Palm Beach Cnty. v. Tessler, 538 So.2d 846, 848 (Fla. 1989).
213. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).
214. *See* Warren v. City of Athens, 411 F.3d 697, 711 (6th Cir. 2005).
215. *Id.*

driveways encroach onto the public street, taking away a portion of public space for purely private use. For some land uses, they are practically necessary to make a piece of property useful. Throughout almost the entire country, they are legally required by local minimum parking requirements for new development.

However, denser cities across the country are beginning to remove parking requirements from their zoning codes. As they do so, they have the opportunity to implement new policies that limit the number of new driveways constructed along their streets and allow for the removal of driveways when necessary for safety purposes or when they are no longer being used for their intended function.

Despite the extensive right of access doctrine that has developed in state courts throughout the country, the fate of such limitations on driveways in cities is unclear. While courts tend to uphold a strong local police power, many courts have cast doubt on the ability of state and local governments to entirely prohibit vehicular access at a property. However, those cases primarily involve zoning codes in suburban or rural areas that require properties to include off-street parking.

In urban neighborhoods with abundant alternative transportation options and fewer driveways, cities have a strong argument under state and federal law in favor of their authority to limit new driveways and remove some existing ones. If cities codify clear criteria for making decisions and include procedural protections for property owners, policies to prohibit and remove driveways are likely to be upheld. By enacting these policies, cities would be taking a significant step towards a safer, more equitable, and more environmentally friendly transportation system.