

# ONE CONDO, ONE VOTE: THE NEW YORK BID ACT AS A THREAT TO EQUAL PROTECTION AND DEMOCRATIC CONTROL

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## INTRODUCTION

The Hudson River Park Neighborhood Improvement District (HRP NID) was to be a solution to a failure of state and municipal government. The Hudson River Park, created along the west side of Manhattan in 1998 by an act of the New York State Legislature,<sup>1</sup>

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<sup>1</sup> Hudson River Park Act, N.Y. UNCONSOL. LAW § 1641-56 (McKinney 2014).

has faced serious funding problems.<sup>2</sup> Hurricanes Sandy and Irene exacerbated the problems, causing damage to the park and increasing the urgency of a funding solution.<sup>3</sup> Proponents of the park found an answer in New York's Business Improvement District (BID) Act: a BID would provide a dependable source of funds in the form of tax-like assessments from district property owners.<sup>4</sup> The funds could provide for park maintenance, district improvements, and additional services that the municipality might typically provide: street and sidewalk cleaning, sanitation services, and additional security.<sup>5</sup> The district residents could elect a governing board, with a guaranteed majority of property owners burdened by the assessment,<sup>6</sup> to control dispensation of the funds. Non-owning residents, including rental tenants, as well as the larger public, however, would have limited say under the BID structure.<sup>7</sup> As in other New York BIDs, property owners, through their power to elect a majority of the BID board, would effectively control the HRP NID, managing millions of dollars in assessment revenue.<sup>8</sup>

But the proposed HRP NID would not have been an ordinary BID. It was a potentially disturbing misuse of the New York BID Act, including a fundamental change and significant expansion of its purpose of "restoring and promoting business activity."<sup>9</sup> The story behind the HRP NID's formation and a description of its pro-

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<sup>2</sup> See, e.g., Charles V. Bagli & Lisa W. Foderaro, *Times and Tides Weigh on Hudson River Park*, N.Y. TIMES, Jan. 27, 2012, available at <http://www.nytimes.com/2012/01/28/nyregion/hudson-river-park-after-early-success-faces-new-challenges.html?page-wanted=all> (discussing funding problems and sources of those problems).

<sup>3</sup> See, e.g. Lisa W. Foderaro, *Lights Slowly Come Back in a Storm-Crippled Park*, N.Y. TIMES, Nov. 29, 2013, available at <http://www.nytimes.com/2013/11/30/nyregion/storm-crippled-lighting-system-in-hudson-river-park-is-making-a-comeback.html?src=recg> (estimating Sandy-related damage at \$31 million, and detailing efforts to repair the park).

<sup>4</sup> Business Improvement District Act, N.Y. GEN. MUN. LAW. § 980 *et seq.* (McKinney 2013); Hudson River Park Neighborhood Improvement District Draft District Plan 34-35 (Mar. 15, 2013) [hereinafter HRP NID Draft District Plan] (on file with the author) (describing sources of funding as assessments on various classes of property within the HRP NID).

<sup>5</sup> GEN. MUN. § 980-c; HRP NID Draft District Plan, *supra* note 4, at 29-33 (describing the proposed services of the HRP NID, including safety, beautification, and business and resource promotion).

<sup>6</sup> GEN. MUN. § 980-m(b).

<sup>7</sup> Tenants are allocated at least one seat on the board under the New York BID Act and four seats are reserved for political appointees. However, property owners must always constitute a majority with a statutory minimum of six members. *Id.* § 980-m.

<sup>8</sup> HRP NID Draft District Plan, *supra* note 4, at 36 (proposing a first-year budget of \$8,000,000).

<sup>9</sup> Business Improvement District Act, 1989 N.Y. Sess. Laws 282 (McKinney).

posed powers serve to illustrate the potential for expansion and misuse of the BID form, where a group of powerful economic interests could wrench the BID concept out of its intended context and create a risk of privatized municipal governance in districts where only property owners have control over privatized municipal services. Moreover, these developments raise the prospect of equal protection violations under the United States Supreme Court's one-person, one-vote doctrine. While the proposal sparked community resistance and supporters ultimately withdrew after the New York State Legislature acted to address the Hudson River Park funding problem,<sup>10</sup> the potential for misuse of the BID process remains.

BIDs are proliferating across the United States and in other countries.<sup>11</sup> Since 1984, seventy BIDs have been established throughout New York City alone.<sup>12</sup> BIDs allow for the privatization of the financing and the services of municipal governance. Property-owner control of a BID's broad array of services is a potentially serious cause for concern, especially in residential neighborhoods with many residential tenants. The HRP NID illustrates the concern: the circumstances behind its proposal, its purpose, and its planned size distinguish it from a typical BID. Although in the form of a BID, the HRP NID would be much larger in geographic area, incorporate several neighborhoods along the west side of Manhattan divided among multiple City Council and state legislative districts, and include a much larger percentage of residential property owners than other New York City BIDs.<sup>13</sup>

Although the HRP NID was presented as a solution to the funding problem of the Hudson River Park, the focus on residential properties suggests the possibility of an unintended expansion of the BID Act. Where the BID Act envisions a district of private businesses pooling resources to make the area attractive to shoppers, the HRP NID suggests a district of private property owners,

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<sup>10</sup> Dana Rubinstein, *Durst Abandons His Push for a Hudson River Park Tax*, CAPITAL NEW YORK, June 26, 2013, available at [www.capitalnewyork.com/article/politics/2013/06/8531314/durst-abandons-his-push-hudson-river-park-tax](http://www.capitalnewyork.com/article/politics/2013/06/8531314/durst-abandons-his-push-hudson-river-park-tax); Lisa W. Foderaro, *Law Says Hudson River Park Is Allowed to Sell Air Rights*, N.Y. TIMES, Nov. 14, 2013, available at <http://www.nytimes.com/2013/11/15/nyregion/law-allows-hudson-river-park-to-sell-air-rights.html> (describing a bill allowing Hudson River Park to sell air rights to raise funds).

<sup>11</sup> Lorlene Hoyt, *Planning Through Compulsory Commercial Clubs: Business Improvement Districts*, 25 ECONOMIC AFFAIRS 24, 25 (2005).

<sup>12</sup> *BID History*, NYC BID ASSOCIATION, <http://www.nycbidassociation.org/bid-history.html> (last visited Dec. 23, 2013).

<sup>13</sup> See *infra* Part III-A.

including a large percentage of residential property owners, pooling resources to fund a municipal park, as well as to increase their municipal services and, potentially, their property values. A rental tenant in the district would be left out of decision making almost entirely, but perhaps pay higher rent as a result of assessments or the gentrifying effect of increased property values. The fact that this is a “Neighborhood” and not a “Business” Improvement District hints at the creation of another form of public-private governance: the Residential Improvement District (RID).

A RID is similar to a BID, but situated in a residential neighborhood rather than a commercial area. Residential property owners would organize, create a plan, and fund improvements to their residential district with property owner assessments.<sup>14</sup> The RID could be governed by a non-profit corporation board of directors, elected by residential property owners.<sup>15</sup> RIDs, however, raise the specter of municipal governance by residential property owners. Particularly in a city like New York, with a very large renting population, the establishment of RID-like districts could lead to property-owner-controlled boards managing millions of dollars in assessment revenue and providing a variety of traditional municipal services or service enhancements. What effect might this have on the quality of municipal services across the city? In addition to the district itself, where rental tenants might lack an effective vote, one can also imagine a wealthy district and a low-income district with a vastly different set of services dependent solely on the economic resources available to local property owners. If wealthy property owners can band together to offer a higher scale of municipal services from private providers, what will happen to those living in districts that cannot organize, or do not have enough money to keep up? And in what sense would the municipality fulfill its general government functions?

Given its expansion of the BID Act’s intended function,<sup>16</sup> the HRP NID is not within the spirit of the BID Act even though its supporters attempted to use that process for its creation.<sup>17</sup> This suggests a need for the New York Legislature to address the provisions and availability of the BID formation procedures. Moreover,

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<sup>14</sup> Robert H. Nelson, Kyle R. McKenzie & Eileen Norcross, *From BIDs to RIDs: Creating Residential Improvement Districts*, 20 MERCATUS POLICY SERIES: POLICY COMMENT 1, 6 (2008), available at <http://mercatus.org/publication/bids-rids-creating-residential-improvement-districts>.

<sup>15</sup> *Id.*

<sup>16</sup> 1989 N.Y. Sess. Laws 282.

<sup>17</sup> See HRP NID Draft District Plan, *supra* note 4.

in light of the potential expansion of BIDs into residential neighborhoods and into the private provision of more typically municipal services, this paper will consider the possibility of equal protection challenges by non-property-owning BID residents to BID elections and governance under the doctrine of one-person, one-vote. If BIDs continue to expand, from business to residential, and involve a larger array of municipal services, the principles of democratic governance underlying the one-person, one-vote doctrine may provide a limit to this threat of increasing privatization of government.

The existing case law is not promising, but does provide would-be BID challengers with some guidance. Although the Second Circuit held in *Kessler v. Grand Central District Management Association* that BIDs fall within the special-purpose district exception to one-person, one-vote,<sup>18</sup> the Supreme Court's precedent in *City of Phoenix v. Kolodziejcki* and *Avery v. Midland County* present another way to approach the issue.<sup>19</sup> As BIDs expand into larger districts, appear in primarily residential neighborhoods, and take on more municipal functions, they may begin to look less like special-purpose districts and more like municipal subdivisions. A municipal subdivision with general government powers would require stricter scrutiny under the one-person, one-vote principle required by the Equal Protection Clause. At what point, then, does a BID transition from a special-purpose district to a general-government district?

This Note begins in Part I with a discussion of the concept and design of BIDs in the United States. Part II will discuss the New York BID Act, including the procedures for establishing a BID in New York City. Part III will consider the potential expansion of BID-like districts in New York City with a discussion of the proposed HRP NID, and compare that proposed district with the purposes of the BID Act and the RID concept. Part IV will examine the one-person, one-vote principle of the 14th Amendment Equal Protection Clause, particularly the contours of the special-purpose-district exception as applied in *Kessler v. Grand Central District Management Association, Inc.*, and consider the application of the *Kessler* rule to potential districts with expanding size and purpose as a way to combat the increasing privatization of municipal services.

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<sup>18</sup> 158 F.3d 92, 108 (2nd Cir. 1998).

<sup>19</sup> See *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968).

## I. BUSINESS IMPROVEMENT DISTRICTS: AN OVERVIEW

Like the HRP NID, BIDs are thought to be solutions to failures of municipal governance. BIDs can be viewed in light of the “urban renewal” projects of the 1970s.<sup>20</sup> Rather than government-led approaches like “slum clearance” or public housing, BIDs are, at least in theory, a grassroots community response to the problems of urban decay, focused on the needs of local small-business owners.<sup>21</sup> In this conception, BIDs are formed by groups of business owners in a limited, specific area who seek both a source of funding and power that might otherwise belong to the municipality.<sup>22</sup> The area business owners would then use those funds to “improve” the district by providing services and physical improvements beyond or in addition to those provided by the municipal government.<sup>23</sup>

State and local government scholar Richard Briffault describes the BID as a hybrid of two, earlier types of “special” government district: the special assessment and the special-purpose district.<sup>24</sup> BIDs borrow the concept of an independent source of revenue from the special assessment district.<sup>25</sup> An assessment is a tax-like levy imposed on private property owners, often burdening those owners in proportion to the value or size of their property.<sup>26</sup> Special assessment districts, typically located in newly developing areas, are funded by assessments collected from district property owners to pay for specific local improvements, such as constructing streetlights or connecting that area to the municipal sewer system.<sup>27</sup> Once the improvements are built, the assessment ends; this temporal limitation is a feature of the special assessment district.<sup>28</sup> The municipality or other local government can, in turn, avoid using general tax monies to pay for the improvements.<sup>29</sup> The private benefit accrued to the property owners through their new connection to municipal services is thought to justify the special assessment in only that area.<sup>30</sup>

Like special assessment districts, BIDs take an assessment,

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<sup>20</sup> Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 420 (1999)

<sup>21</sup> *Id.* at 422-23

<sup>22</sup> *Id.* at 369.

<sup>23</sup> *Id.* at 424.

<sup>24</sup> *Id.* at 414.

<sup>25</sup> *Id.* at 415-16.

<sup>26</sup> Briffault, *supra* note 21, at 415.

<sup>27</sup> *Id.* at 414-15.

<sup>28</sup> *Id.* at 416.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 415.

their independent revenue source, from property owners within the district and use that money for district-level improvements.<sup>31</sup> BIDs, however, are already fully developed urban areas, and the services they provide are not limited to a specific, permanent improvement (e.g., once the streetlights are built, the assessment will end).<sup>32</sup> To manage the funds, BIDs borrow a second concept from the special-purpose district.

Special-purpose districts lend to BIDs the concept of independent governance. Governments create these districts to “perform a single or a very small number of closely related functions.”<sup>33</sup> The justification for a special-purpose district is to allow “the state to create a government whose territory and powers are tailored to the scope of the problem to be addressed.”<sup>34</sup> Special-purpose districts are managed by a board that exists as a separate legal entity from the state or local government that created it,<sup>35</sup> an idea that is of key significance in the development and governance of BIDs. BIDs borrow from the special-purpose district this concept of a separate legal entity tailored to a specific problem to be addressed;<sup>36</sup> however, the problem to be addressed with a BID is not necessarily “a single or very small number of closely related functions.”<sup>37</sup> BIDs address, within a limited district, many improvements designed to “improve business” and combat “urban decay.”<sup>38</sup>

Combined with an independent and permanent revenue source from property assessments, the independent governing structure of a BID could potentially provide a wide array of traditional municipal services. Under the New York BID Act, a BID can also obtain the typically corporate attribute of perpetual life, particularly when it takes on a second revenue source, debt financing.<sup>39</sup> The establishment procedures, powers, and voting procedures created by the New York BID Act are discussed below.

## II. THE NEW YORK BID ACT

In 1989, the New York State Legislature instituted a formal process for the creation of business improvement districts, declar-

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<sup>31</sup> Briffault, *supra* note 21, at 416-17.

<sup>32</sup> *Id.* at 416.

<sup>33</sup> *Id.* at 418.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 418.

<sup>36</sup> Briffault, *supra* note 21, at 420.

<sup>37</sup> *Id.* at 418.

<sup>38</sup> *Id.* at 422-3.

<sup>39</sup> See *infra* section II.D.

ing the then-existing process to be “unduly cumbersome and complicated.”<sup>40</sup> The findings of the legislature in enacting the statute shed light on its purpose. First, the legislature found and declared “that the business districts within many municipalities in the state are in a deteriorated condition” and that “[t]his condition adversely affects the economic and general well-being of the people of the state.”<sup>41</sup> Second, the legislature declared that “the establishment of business improvement districts is an effective means for restoring and promoting business activity.”<sup>42</sup> The legislature further declared the intent of the state to provide a “more streamlined process of establishing and operating” the districts.<sup>43</sup> The BID Act prescribes procedures for BID establishment, judicial review, powers, dissolution, and governance. This section will discuss each of those statutory procedures, focusing on areas where the law specifically sets procedure for New York City.<sup>44</sup>

#### A. *BID Establishment*

##### i. The District Plan

Before a BID can be established, the group proposing the BID must present a district plan to the relevant city authorities.<sup>45</sup> The district plan is the initial governing document of the district. It is required to contain, among other things: a district map,<sup>46</sup> the “present and proposed uses” of the land within the proposed district,<sup>47</sup> and the “improvements proposed and the maximum cost thereof.”<sup>48</sup> It must describe “the total annual amount proposed to be expended for improvements, maintenance and operation”<sup>49</sup> and the “proposed source or sources of financing.”<sup>50</sup> The plan must also include “any proposed rules and regulations to be applicable to the district”<sup>51</sup> and identify the district management associ-

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<sup>40</sup> 1989 N.Y. Sess. Laws at 282.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g.*, GEN. MUN. § 980-c (describing processes related to the district plan, including different or additional processes for “any city having a population of one million or more” - New York City).

<sup>45</sup> GEN. MUN. §§ 980-d(c) (“the district plan shall first be submitted to the city planning commission which shall forward a copy within five days to the city council”).

<sup>46</sup> *Id.* § 980-a(a).

<sup>47</sup> *Id.* § 980-a(b)(2).

<sup>48</sup> *Id.* § 980-a(b)(3).

<sup>49</sup> GEN. MUN. § 980-a(b)(4).

<sup>50</sup> *Id.* § 980-a(b)(5).

<sup>51</sup> *Id.* § 980-a(b)(7).



ation that will govern the district.<sup>52</sup>

The district plan must also provide a list of all district properties that will benefit from the district and a “statement of the method or methods by which the expenses of a district will be imposed upon benefited real property, in proportion to the benefit received by such property . . . ”<sup>53</sup> This provision appears to place a BID within the special-purpose district exception to the one-person, one-vote principle of the Equal Protection Clause, requiring the district plan to identify those property owners charged and the benefit they receive in relation to that charge. This relationship between a burdened property owner and the benefit received in accordance with that burden is a hallmark of the special-purpose district exception.<sup>54</sup>

## ii. Establishment Procedure

Establishing a BID in New York City requires adherence to an extensive schedule of deadlines and hearings, culminating in a vote by the City Council and approval by the Mayor.<sup>55</sup> The BID Act requires the participation of the City Planning Commission, the relevant community boards and borough presidents, and the mayor.<sup>56</sup> The authorization process further requires that property owners within a district (presumably under the assumption that these are the people primarily affected) receive notification of the district.<sup>57</sup>

The BID Act further provides that a BID will not be established if the owners of at least 51% of the assessed valuation of district property or the owners of at least 51% of the individual district properties file their objections with the office of the municipal clerk within thirty days of the City Council’s finance committee hearing.<sup>58</sup> The 51% hurdle can be difficult to achieve, particularly in a BID of large size or where property owners may not pay attention, receive adequate notice, or be able to object in an organized fashion. Further, the owners of a few properties of particularly high

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<sup>52</sup> *Id.* § 980-a(b)(9).

<sup>53</sup> *Id.* § 980-a(b)(8).

<sup>54</sup> *See, e.g., Kessler v. Grand Cent. Dist. Mgmt. Ass’n, Inc.*, 158 F.3d at 107-8 (1998); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 731 (1973); *Ball v. James*, 451 U.S. 355, 367-8 (1981).

<sup>55</sup> *See* N.Y.C. DEP’T OF SMALL BUS. SERV., STARTING A BUSINESS IMPROVEMENT DISTRICT: A STEP-BY-STEP GUIDE 23 (2013).

<sup>56</sup> GEN. MUN. § 980-d(c).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* § 980-e(b) (for required percentages); N.Y.C. Dep’t of Small Bus. Serv., *supra* note 56, at 23 (for thirty-day requirement).

value could potentially control the process because of the statute's "assessed valuation" prong. Unless the objections of the 51% are filed with the municipal clerk,<sup>59</sup> the City Council can vote to establish the BID, which then becomes very difficult to dissolve, as discussed below. The Act provides for judicial review in the event of improper establishment procedure, although this option also presents substantial limitations.

### *B. Judicial Review*

Section 980-H of the BID Act provides that "[any] person aggrieved by any local law adopted pursuant to this article may seek judicial review of the local law in the manner provided by article seventy-eight of the civil practice law and rules."<sup>60</sup> Section 980-Q, however, provides for severance in the event a court finds invalid "any provision or any section" of the act or its application to "any person or circumstance."<sup>61</sup> Here, severance restricts the judgment of invalidity to "the controversy in which it was rendered" and the provision further declares that a judgment "shall not affect or invalidate the remainder of any provisions of any section" or apply to the application of "any other person or circumstance."<sup>62</sup> The potential for challenging BID governance under the one-person, one-vote principle of the Equal Protection Clause is described in Part V, below.

### *C. BID Powers*

BIDs focus on small-scale improvements and services. The statute specifically provides that a district may use its power in four broad areas: to provide "district improvements . . . which will restore or promote business activity in the district;" to provide for "the operation and maintenance of any district improvement;" to provide "additional maintenance or other additional services required for the enjoyment and protection of the public and the promotion and enhancement of the district whether or not in conjunction with improvements authorized by this section;" and to "enter into contracts to provide for the construction of accessibility improvements . . ." <sup>63</sup>

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<sup>59</sup> GEN. MUN. § 980-e(b).

<sup>60</sup> *Id.* § 980-h(c). (Proceedings must commence within thirty days "from the date of the publication of the copy or summary of the local law . . .").

<sup>61</sup> GEN. MUN. § 980-q.

<sup>62</sup> *Id.*

<sup>63</sup> GEN. MUN. § 980-c(a)-(d).

More specifically, with respect to district improvements, a BID may engage in:

- (1) construction and installation of landscaping, planting, and park areas;
- (2) construction of lighting and heating facilities;
- (3) construction of physically aesthetic and decorative safety fixtures, equipment and facilities;
- (4) construction of improvements to enhance security of persons and property within the district;
- (5) construction of pedestrian overpasses and underpasses and connections between buildings;
- (6) closing, opening, widening or narrowing of existing streets;
- (7) construction of ramps, sidewalks, plazas, and pedestrian malls;
- (8) rehabilitation or removal of existing structures as required;
- (9) removal and relocation of utilities and vaults as required;
- (10) construction of parking lot and parking garage facilities; and
- (11) construction of fixtures, equipment, facilities, and appurtenances as may enhance the movement, convenience and enjoyment of the public and be of economic benefit to the surrounding properties such as: bus stop shelters; benches and street furniture; booths, kiosks, display cases, and exhibits; signs; receptacles; canopies; pedestrian shelters and fountains.”<sup>64</sup>

And with respect to providing “additional maintenance or other additional services” under subsection (c), the district may provide:

- (1) enhanced sanitation services;
- (2) services promoting and advertising activities within the district;
- (3) marketing education for businesses within the district;
- (4) decorations and lighting for seasonal and holiday purposes; and
- (5) services to enhance the security of persons and property within the district.<sup>65</sup>

BIDs can provide a wide range of services and remain within this statutory grant. The services suggested for a proposed Corona-Jackson Heights BID in Queens are representative. In the area of “district improvements” and maintenance, the BID proposes to add improved streetlights, custom trash receptacles and newboxes, directional street signage, flower boxes, tree and flower plantings, tree pit maintenance, street and sidewalk cleaning, graffiti removal, and “pigeon poop mitigation.” As “additional services,” the BID would provide an array of business and marketing services, including commercial vacancy reduction, business mix improvement, assistance to small businesses and city agencies, special events, district public relations, promotional materials, and holiday decorations. Perhaps more controversially, the BID also proposes public and pedestrian safety services and coordination with law en-

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<sup>64</sup> *Id.* § 980-c(a)(1)-(11).

<sup>65</sup> *Id.* § 980-c(c)(1)-(5).

forcement.<sup>66</sup> Other BIDs, such as the Grand Central District Management Association (GCDMA) challenged in *Kessler*, employ their own security guards, raising the troubling issue of private security enforcing business district norms (whatever those may be) on “undesirable” residents in apparently public streets and spaces.<sup>67</sup>

#### D. *BID Dissolution*

New York allows its BIDs to achieve perpetual life, and BIDs are difficult for district residents to dissolve, unless the City Council can be moved to act. Dissolution, rather than being automatic or requiring reevaluation after some number of years,<sup>68</sup> requires affirmative steps from either the City Council or a large number of the BID property owners. Further, a BID that has acquired debt cannot be dissolved: “[a]ny district . . . where there is no indebtedness, outstanding and unpaid, incurred to accomplish any of the purposes of the district, may be dissolved by local law by the legislative body . . .” (emphasis added).<sup>69</sup>

There are two methods for dissolution: the City Council may dissolve a BID on its own or the Council may act on a written petition of “(1) the owners of at least fifty-one percent or more of the total assessed valuation of all benefited real property . . . and (2) at least fifty-one percent of the owners of benefited real property . . .” within the district (emphasis added).<sup>70</sup> This is an even higher burden than that required for opposition to the BID at formation, because both individual owners and those who own the most valuable properties must act together. Further, the district management association may make recommendations concerning the dissolution, which the City Council must consider if submitted within sixty days of the dissolution proposal.<sup>71</sup> As a further disincentive for district property owners, the City receives all of the district’s assets when it dissolves rather than the property owners.<sup>72</sup> Given the difficulty of both stopping BID establishment and dissolving an existing BID,

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<sup>66</sup> *Frequently Asked Questions*, JACKSON HEIGHTS-CORONA BUSINESS IMPROVEMENT DISTRICT, <http://jhcoronabid.org/faqs/> (last visited May 19, 2014).

<sup>67</sup> See, e.g., Briffault, *supra* note 21, at 402 - 03 (discussing accusations that Grand Central Partnership security acted as a “goon squad” to chase homeless people out of the district).

<sup>68</sup> *Id.* at 389 (discussing BID termination procedures in nationwide statutes, including time limits for the district, renewal, reauthorization, and time limits for assessments).

<sup>69</sup> GEN. MUN. § 980-o(a).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

the BID governance procedures and democratic control of the board gains greater importance.

### E. *BID Governance*

After the City Council passes and the mayor approves a new BID establishment law creating the district management association (DMA), the DMA, a non-profit corporation, controls the provision of BID services and the expenditure of the BID's assessment revenue as described in the district plan.<sup>73</sup> An elected board of directors governs the DMA; property owners within the district elect a majority of the directors, as required by the BID Act.<sup>74</sup> The Second Circuit Court of Appeals determined that this provision of the BID Act passed constitutional muster under the Equal Protection Clause in *Kessler v. Grand Central District Management Association, Inc.*, discussed in Part IV, below.

In addition to the required majority representing property owners, the remainder of the board must consist of one appointee of the mayor, one appointee of the city comptroller, one appointee of the relevant borough president, one appointee of the relevant city council member,<sup>75</sup> and at least one representative of "tenants of commercial space and dwelling units within the district."<sup>76</sup> A board meeting the statutory minimum would include six property owners, four political appointees, and one tenant representative. However, as with corporate boards, the BID's district plan may establish other board members and voting classes, so long as district property owners always constitute a majority. The proposed Jackson Heights-Corona BID, for example, plans to include residents, commercial tenants, and "civic non-profit groups."<sup>77</sup> The Grand Central BID at the time of *Kessler* included thirty-one property owners, sixteen commercial tenants, and one residential tenant.<sup>78</sup>

Voting in board elections is to be set forth in the DMA's certificate of incorporation or bylaws, and may include representation for both property owners and tenants.<sup>79</sup> Voting for property own-

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<sup>73</sup> *Id.* § 980-m(a).

<sup>74</sup> GEN. MUN. § 980-m(b).

<sup>75</sup> If a BID, such as the HRP NID, consists of more than one City Council district, the City Council Speaker will appoint the member representing the City Council after consulting with all of the City Council members in the district. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Steering Committee*, JACKSON HEIGHTS-CORONA BUSINESS IMPROVEMENT DISTRICT, <http://jhcoronabid.org/steering-committee/> (last visited May 19, 2014).

<sup>78</sup> *Kessler*, 158 F.3d at 97.

<sup>79</sup> GEN. MUN. § 980-m(a).

ers may also be weighted according to the planned assessment against their property, potentially giving more voting power to larger property owners.<sup>80</sup> Further, the district can use class voting, as did the GDCMA: residential tenants were eligible to vote for the Class C director, the one representative of residential tenants on the board.<sup>81</sup>

The majority voting power of propertied residents is among the most disturbing aspects of BIDs, especially in the context of ever larger and more numerous districts. While the DMA can provide for tenant voting and representation, it cannot provide for *equal* voting power for district tenants because property owners must always constitute a majority. The board, therefore, is controlled by a majority of property owners who govern the expenditure of assessed revenues in the exercise of BID powers. Further, if property owners fail to vote, small numbers of interested parties who do vote could easily capture a board controlling millions of dollars in assessments. A similar scenario forms part of the background of the *Kessler* litigation, to be discussed in Parts IV and V, below: one powerful person managed to capture the board of the Grand Central District Management Association and, through the board, controlled millions of dollars in district revenue.<sup>82</sup>

As BIDs grow larger, provide more extensive (or more exclusive) services, or deviate from their intended purpose, do they risk a broader privatization of municipal services controlled only by property-owning interests? To surface this potential problem, Part III will discuss the ways in which the HRP NID differs from the BID concept envisioned by the state legislature as indicated by the BID Act's legislative history.

### III. THE HUDSON RIVER PARK NEIGHBORHOOD IMPROVEMENT DISTRICT

The HRP NID is, despite its name, a proposed BID that would take an assessment from property within the proposed district, spend that money for improvements of the Hudson River Park and the district, and potentially take on debt for those projects. Although it seeks to make use of the BID process as outlined above, it differs from a traditional BID in three ways: it was not proposed by local business interests for the improvement of the district for busi-

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<sup>80</sup> *Id.*

<sup>81</sup> *Kessler*, 158 F.3d at 97.

<sup>82</sup> See Brian R. Hochleutner, *BIDs Fare Well: The Democratic Accountability of Business Improvement Districts*, 78 N.Y.U. L. Rev. 374, 401-2 (2003).

ness purposes; its district map is much more extensive; and it incorporates a larger percentage of residential property than other BIDs. The district plan offers some insight into what services the NID would have offered, how it would have been financed, and how it would have been governed. Although ultimately withdrawn, the HRP NID proposal remains a compelling example of potential future abuse of the BID concept and the purpose of the New York BID Act.

A. *The HRP NID Proposal*

The HRP NID was not proposed by a group of local business owners, nor even a group of local interests: of the twenty-three members of the steering committee that proposed the NID, ten members are representatives of “major real estate developers,” three are residential homeowners within the district, and the other ten are community board representatives and representatives of other organizations, including the Hudson River Park Trust and the Whitney Museum of American Art.<sup>83</sup> Further, and as previously mentioned, the BID is of extensive size, spanning multiple neighborhoods and city council districts.<sup>84</sup> The HRP NID would include 87 million square feet of built floor space,<sup>85</sup> compared to approximately 417 million square feet in *all* BIDs in New York City formed prior to 2003.<sup>86</sup> The HRP NID would be approximately 38% residential floor space,<sup>87</sup> compared to an average of 14.4% residential floor space in all other New York City BIDs formed prior to 2003.<sup>88</sup> The percentage of residential floor space is likely to increase: as the district plan acknowledges, new residential development is under construction throughout the district, for example, along the High Line in Chelsea and in the new Hudson Yards development.<sup>89</sup> In its description of the Hell’s Kitchen/Clinton section of the district, the plan notes that “a number of high-profile residen-

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<sup>83</sup> See *HRP NID Steering Committee*, HUDSON RIVER PARK, [www.hudsonriverpark.org/about-us/fohrp/neighborhood-improvement-district/steering-committee](http://www.hudsonriverpark.org/about-us/fohrp/neighborhood-improvement-district/steering-committee) (last visited Dec. 23, 2013) (for a list of members); Eileen Stukane, *Is NID Really Needed, and Who Asked for It Anyway?*, THE VILLAGER, Feb. 21, 2013, *available at* [thevillager.com/2013/02/21/is-nid-really-needed-and-who-asked-for-it-anyway](http://thevillager.com/2013/02/21/is-nid-really-needed-and-who-asked-for-it-anyway).

<sup>84</sup> See HRP NID Draft District Plan, *supra* note 4, at 4-5.

<sup>85</sup> *Id.* at 6.

<sup>86</sup> Ingrid Gould Ellen, Amy Ellen Schwartz & Ioan Voicu, *The Impact of Business Improvement Districts on Property Values: Evidence from New York City* table 2 (Furman Center for Real Estate & Urban Policy, N.Y.U., Working Paper No. 07-01, 2007).

<sup>87</sup> See HRP NID Draft District Plan, *supra* note 4, at 6.

<sup>88</sup> Ingrid Gould Ellen et al., *supra* note 89, table 2.

<sup>89</sup> HRP NID Draft District Plan, *supra* note 4, at 15.

tial projects have been designed with an emphasis on access to and views of the waterfront and the [Hudson River] Park.”<sup>90</sup>

The draft district plan proposes several specific services in the categories of safety, beautification, and business and resource promotion.<sup>91</sup> However, the plan authorizes a very broad potential array of activities: “any services required for the enjoyment, protection, and general welfare of the public, the promotion, and enhancement of the District, and [services] to meet needs identified by members of the District.”<sup>92</sup> The plan has a particular focus on park access, providing statistics for traffic safety and proposing various pedestrian bridges and other access improvements.<sup>93</sup>

To finance its services, the district plan proposes a variety of sources of funding.<sup>94</sup> Assessments would be divided into six classes, with lots containing 51% or more commercial space having the largest assessment and lots having 51% or less commercial space and which also contain residential space assessed at half the commercial rate.<sup>95</sup> Non-profit and “public purpose” lots are excluded, unless they agree to pay, and vacant lot owners pay a flat \$100 per tax lot.<sup>96</sup> The final assessment class, concerning areas within an undefined number of blocks from “undeveloped areas of the Park” (also undefined), is assessed at half the rate of commercial and residential properties.<sup>97</sup> The plan authorizes borrowing as a source of funding for both operations and improvements, including from private lending institutions, New York City, public entities, not-for-profit organizations, and individuals.<sup>98</sup>

The NID proposal sparked community resistance, including by Neighbors Against the NID, the members of which attempted to rally community opposition and attended community board meetings and hearings.<sup>99</sup> The NID proposal was ultimately withdrawn, however, when the New York State Legislature passed, and Governor Andrew Cuomo signed, legislation allowing the Hudson River Park Trust to sell its air rights and thus secure the funding the NID

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<sup>90</sup> *Id.* at 9

<sup>91</sup> *Id.* at 29-33.

<sup>92</sup> *Id.* at 29.

<sup>93</sup> *Id.* at 12 (describing and mapping “High Volume Crash Sites” in Hell’s Kitchen/Clinton); *id.* at 29 (describing safety improvements for park access).

<sup>94</sup> HRP NID Draft District Plan, *supra* note 4, at 34-35.

<sup>95</sup> *Id.* at 34.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 35.

<sup>98</sup> *Id.*

<sup>99</sup> Interview with Members of Neighbors Against the NID, in N.Y.C., N.Y. (Oct. 27, 2013) (the members prefer to be identified by their group name).



was designed to provide.<sup>100</sup> The story behind its formation and a description of its proposed powers serve to illustrate the potential for expansion and even misuse of the BID form.

*B. Toward a Residential Improvement District?*

While the HRP NID is presently withdrawn, its proposal suggests an expansion of the BID Act which the legislature did not intend: the creation of Residential Improvement Districts (RIDs). Because of its residential quality, the NID suggests an attempt to use the BID Act to create a RID, a theoretical cousin to the BID. In a RID, residential property owners would organize, create a plan, and fund improvements to their residential district with property owner assessments.<sup>101</sup> The RID would be governed by a non-profit corporation board, composed of residential property owners.<sup>102</sup> RIDs, however, raise the specter of municipal governance by residential property owners. Particularly in a city like New York, with a very large renting population, the establishment of RID-like districts, especially given the extent of BID creation, could lead to property-owning boards controlling the dispensation of municipal services.

Although the RID proposal envisions a semi-privatized governance structure to “improve” urban neighborhoods (similar to the legislative findings behind the New York BID Act),<sup>103</sup> it also suggests a way for real estate developers (along the lines of the HRP NID) or even local residents to use semi-municipal powers to gentrify neighborhoods. The effect on non-district areas is also of concern: if wealthy property owners can band together to offer a higher scale of municipal services from private providers, what will happen to those living in districts that cannot organize, or do not have enough money?

If RID-like proposals, such as the HRP NID, continue to appear, New York may have to reassess its BID Act and make clear that it is not to be used for this purpose, and only for its intended purpose: “restoring and promoting business activity.”<sup>104</sup> In addition, the establishment of RIDs that do raise serious concerns may still be challenged under the Equal Protection Clause, if plaintiffs can successfully avoid the special-purpose-district exception to the

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<sup>100</sup> Rubinstein, *supra* note 11; Foderaro, *supra* note 11.

<sup>101</sup> Nelson et al., *supra* note 15, at 6-7.

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.* at 1.

<sup>104</sup> 1989 N.Y. Sess. Laws at 282.

one-person, one-vote principle as applied in *Kessler*. This paper has so far presented the HRP NID as a potential abuse of the New York BID Act. Because of its differences from a typical BID, it (or perhaps a further expanded version of it) also suggests a potential new analysis under the Equal Protection Clause.

#### IV. EQUAL PROTECTION CHALLENGES TO BID GOVERNANCE

In *Kessler v. Grand Central District Management Association, Inc.*, the Second Circuit addressed the troubling issue of the New York BID Act's provision mandating a permanent board majority for district property owners.<sup>105</sup> Two residential tenants of the Grand Central BID, located around Grand Central Station, challenged the board majority provision under the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment.<sup>106</sup> The mandate did not trouble the court, however, which held that the Grand Central BID was a special limited purpose district with a disproportionate effect on property owners and no general government powers. This, according to the rule, means there must only be a "reasonable relationship" between the voting system chosen and the purposes of the special district. The court held that the New York legislature "could reasonably have concluded that property owners, unless given principal control over how the money is spent, would not have consented to having their property subject to the assessment."<sup>107</sup>

Yet, as BIDs increase in number and size, and potentially expand into other contexts, the district management association boards may wield increasing power over the allocation of services that have been, or should be, provided by the municipality. That power, in turn, is concentrated in the hands of the property-owning majority of the board, which is democratically accountable only to the property-owning voters of the district. The following is a brief explanation of one-person, one-vote and the special-purpose-district exception, intended to highlight the policy concerns animating these doctrines as they might apply to BIDs growing in size, power, and influence.

##### A. *One-Person, One-Vote*

The one-person, one-vote principle requires that voting power be apportioned equally on the basis of the population across elec-

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<sup>105</sup> *Kessler*, 158 F.3d at 97.

<sup>106</sup> *Id.* at 93.

<sup>107</sup> *Id.* at 108.

toral districts: one person's vote is equal to every other person's vote, and each districts' representatives represent approximately equal numbers of people.<sup>108</sup> In other words, "[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote."<sup>109</sup> The Supreme Court's description of the right at issue alludes to a possible application in the BID context: the fact that an individual lives "here"—in this BID or this rental apartment—as opposed to "there"—outside a BID or in that condominium unit—may result in a change to the power of that individual's vote.<sup>110</sup> The Supreme Court expanded the application of the doctrine from the federal government to state governments and to state subdivisions in the 1960s and early 1970s, and began to restrict it in the later 1970s in cases applying the special-purpose-district exception.

The Supreme Court applied the one-person, one-vote principle to state legislative districts in *Reynolds v. Sims* and to state political subdivisions, including county and city governments, in *Avery v. Midland County*. The Court in *Reynolds* held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."<sup>111</sup> In discussing the demands of the Equal Protection Clause in relation to the right to vote for state legislatures, the Court made the following observations: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests"<sup>112</sup> and "[o]verweighting and overvaluing of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there."<sup>113</sup>

The plaintiff in *Avery* challenged the electoral districts of the Midland County Commissioners Court, a five-member board with one County Judge elected at-large by all county voters and four Commissioners elected from four districts.<sup>114</sup> The central issue of

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<sup>108</sup> *Reynolds v. Sims*, 377 U.S. 533, 569 (1964).

<sup>109</sup> *Id.* at 567.

<sup>110</sup> *See id.* at 557-8 (quoting favorably *Gray v. Sanders*, 372 U.S. 368 (1963): "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet basic qualifications.").

<sup>111</sup> *Id.* at 568.

<sup>112</sup> *Id.* at 562.

<sup>113</sup> *Reynolds*, 377 U.S. at 563.

<sup>114</sup> *Avery*, 390 U.S. at 476.

the case concerned the apportionment of the four Commissioner's districts: at the time of the suit, one district contained 95% of the county's population, and the other three districts contained the remaining 5%.<sup>115</sup> The Supreme Court held that Avery had a right to vote for the Commissioners Court that was of "substantially equal weight" to the votes of all residents of the County<sup>116</sup> and that the Equal Protection Clause "forbids the election of local government officials from districts of disparate population."<sup>117</sup> The Court further held that the Equal Protection Clause requires the state, in delegating power to its subdivisions, to provide equal voting rights to the residents of those subdivisions.<sup>118</sup>

Of particular relevance here is the Court's discussion of the various powers of the Commissioners Court. Midland County, arguing against the application of one-person, one-vote, contended that the Commissioners Court was not "sufficiently 'legislative'" but was rather an "administrative" body. The Supreme Court describes the duties of the Commissioners Court as follows:

"the court is: the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments. The court is also authorized, among other responsibilities, to build and run a hospital, an airport, and libraries. It fixes boundaries of school districts within the county, may establish a regional housing authority, and determines the districts for election of its own members."<sup>119</sup>

In *Avery*, these government functions were enough to trigger heightened equal protection scrutiny. Whether a BID resident can successfully challenge its voting scheme will depend on that plaintiff's description of the breadth of the services rendered.

Despite what could be viewed as more expansive language in its analysis of the functions of the *Avery* Commissioners Court (at least as related to the equal protection issues of a BID), the Su-

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 478.

<sup>118</sup> *Id.* at 480.

<sup>119</sup> *Avery*, 390 U.S. at 476-7 (quoting the Texas constitution and various Texas statutes) (internal quotation marks and citations omitted).

preme Court qualified its holding after mentioning the possibility of a “special-purpose unit.” A different analysis might apply “[w]ere the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.”<sup>120</sup> The holding provides a constitutional “ground rule” for local government, requiring that “units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.”<sup>121</sup>

The Court also addressed one-person, one-vote in a situation relevant to the BID governance scheme in *City of Phoenix v. Kolodziejski*. In that case, the city of Phoenix, Arizona, allowed only voters who also paid property taxes to vote on general obligation bonds that were primarily serviced by those taxes.<sup>122</sup> The general obligation bonds provided funds for municipal improvements, with most of the money directed to “the city sewer system, parks and playgrounds, police and public safety buildings, and libraries.”<sup>123</sup> Plaintiff Kolodziejski, a Phoenix resident and voter, filed suit because, as a non-property owner, she was denied the right to vote on the general obligation bond.<sup>124</sup> The Court found an equal protection violation, holding that one-person, one-vote required an equal vote between property owners and non-property owners, even where the owners “have interests somewhat different from the interests of non-property owners” where the bonds, while primarily paid from property taxes, could be paid from other general taxes (especially in the event of economic collapse).<sup>125</sup> The result here is noteworthy, too, considering that New York BIDs may take on debt and that property owners may pass their assessment costs on to their tenants (or charge higher rents if a BID causes increased property values).

*City of Phoenix*, however, was among the last cases in the Court’s expansion of one-person, one-vote before President Nixon began to appoint more conservative justices in the 1970s. The *Avery* Court had mentioned the possibility of a “special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.”<sup>126</sup> *Avery*

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<sup>120</sup> *Id.* at 483-04.

<sup>121</sup> *Id.* at 485-06.

<sup>122</sup> *City of Phoenix*, 399 U.S. at 206.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 206-07.

<sup>125</sup> *Id.* at 212.

<sup>126</sup> *Avery*, 390 U.S. at 483-4.

planted the seed of the special-purpose-district exception, which would take root and grow in two water district cases: *Salyer Land Co. v. Tulare Lake Basin Water Storage District* and *Ball v. James*.

*B. The Special-Purpose-District Exception*

The Court revisited the special-purpose district in *Salyer Land*. The case signals a change in the Court's previously expansive application of the one-person, one-vote principle after *Reynolds*.<sup>127</sup> The challenge in this case involved a water storage district created under the California Water Storage District Act.<sup>128</sup> To distinguish the "special" nature of this district, Justice Rehnquist, writing for the majority, provides an extensive quotation from Justice Sutherland on the toils of pioneers in the West as they brought water to previously desert lands, noting the "necessary" involvement of federal and state governments in major water projects.<sup>129</sup> The water storage district was authorized to "plan projects and execute approved projects for the acquisition, appropriation, diversion, storage, conservation, and distribution of water,"<sup>130</sup> with a primary purpose of "[providing] for the acquisition, storage, and distribution of water for farming . . ." <sup>131</sup> The Court found that the district provided "no other general public services . . ." <sup>132</sup> As in a BID, property assessments funded the water storage district and a board of directors governed the district. Landowners elected the board, with votes "apportioned according to the assessed valuation of the land."<sup>133</sup>

The Court applied a rational basis standard to hold that the water district voting qualification did not violate the Equal Protection Clause,<sup>134</sup> declining to extend one-person, one-vote and an-

<sup>127</sup> See *Salyer Land*, 410 U.S. at 720.

<sup>128</sup> *Id.* at 721.

<sup>129</sup> See *id.* at 721-2. It is fitting that Justice Rehnquist, so instrumental in turning the Court back toward Lochner Era jurisprudence, begins this decision with a quote from Justice Sutherland, one of the conservative "four horsemen" of the pre-New Deal Era Court.

<sup>130</sup> *Id.* at 723 (quoting Calif. Water Code § 42200 et seq.) (internal quotation marks omitted).

<sup>131</sup> *Id.* at 728.

<sup>132</sup> *Salyer Land*, 410 U.S. at 728-29 ("It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains") (internal citations omitted).

<sup>133</sup> *Id.* at 725.

<sup>134</sup> *Id.* at 734-35.

swering the question posed in *Avery* regarding districts that give “greater influence to the citizens most affected by the organization’s functions.”<sup>135</sup> The Court held that the landowner-only voting qualification did not violate equal protection because the California Legislature could have rationally determined that landowners would “bear the entire burden of the district’s costs” and therefore should be dominant in its control.<sup>136</sup>

The Court applied and expanded the special-purpose-district exception in *Ball v. James*. Here, plaintiffs challenged the voting system of a larger, more comprehensive “water reclamation district” in Arizona, the Salt River Project Agricultural Improvement and Power District.<sup>137</sup> The statute at issue in the case gave the district power to allow only district property owners to vote, and to apportion their voting power according to the amount of land they owned.<sup>138</sup> As in *Salyer*, the Court took a historical approach, perhaps indicating that the Court will look first at the “primary and originating purpose” of a special-purpose district.<sup>139</sup> In reversing the Ninth Circuit’s application of *Salyer*, the Court deemphasized the lower court’s broad reading of the Salt River Project’s powers, instead focusing on the “relatively narrow” original powers.<sup>140</sup>

The Ninth Circuit had found, and the Court agreed (but found constitutionally irrelevant), that, although originally a water storage district similar to that in *Salyer*, the Salt River Project, “at least in its modern form,”<sup>141</sup> had grown into a major supplier of hydroelectric power that included almost half the population of Arizona.<sup>142</sup> The Supreme Court, however, focused narrowly on the “constitutionally relevant” fact that the Salt River Project distributed all of its water according to land ownership.<sup>143</sup> The Court also made clear that the Project did not have “the sort of governmental powers that invoke the strict demands of *Reynolds*.”<sup>144</sup> These powers include, as the Court notes: “ad valorem property and sales taxes . . . laws governing the conduct of citizens, . . . [and] such normal functions of government as the maintenance of streets, the opera-

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<sup>135</sup> *Avery*, 390 U.S. at 483-84.

<sup>136</sup> *Salyer Land*, 410 U.S. at 731.

<sup>137</sup> *Ball*, 451 U.S. at 357.

<sup>138</sup> *Id.* at 359.

<sup>139</sup> *Id.* at 367.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 361.

<sup>142</sup> *See Ball*, 451 U.S. at 365.

<sup>143</sup> *Id.* at 367.

<sup>144</sup> *Id.* at 366.

tion of schools, or sanitation, health, or welfare services.”<sup>145</sup> As the Court would have it, the Salt River Project, which the Ninth Circuit found to be a major supplier of hydroelectric power and water used in urban areas,<sup>146</sup> was, for equal protection purposes, a mere water storage and delivery service<sup>147</sup> that, while nominally public in character, was more like a “business enterprise[ ], created by and chiefly benefiting a specific group of landowners.”<sup>148</sup> Thus, rational basis scrutiny as applied to the special-purpose-district exception was well established when plaintiffs challenged the New York BID Act in the Second Circuit in the 1990s.

In *Kessler v. Grand Central District Management Association*, the Second Circuit dealt squarely with the issue of the New York BID Act’s property-owning majority requirement for every BID board.<sup>149</sup> Plaintiffs, both residents of the Grand Central Business Improvement District (GCBID), alleged that the BID’s governing non-profit, the Grand Central District Management Association (GCDMA), exercised “general governmental power” and thus should be subject to one-person, one-vote, requiring strict scrutiny under the Equal Protection Clause.<sup>150</sup> The Second Circuit disagreed, holding that the special-purpose-district exception applied, and that the BID “[has] a disproportionate effect on property owners[ ] and . . . has no primary responsibilities or general powers typical of a governmental entity.”<sup>151</sup>

The Second Circuit considered the BID’s powers in the areas of security, sanitation, and social services. The Court reached this conclusion because GCDMA’s “responsibility . . . is at most secondary to that of the City,” GCDMA provided quantitatively fewer services than the City, and GCDMA’s services were “qualitatively different.”<sup>152</sup> Considering the services provided by the City in the district in light of § 980-J(a),<sup>153</sup> the Court determined that GCDMA’s services were cosmetic or operated by referral to the City, and its responsibilities were “at most secondary to that of the City” (e.g., GCDMA guards patrolled, but called the City police for

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 361.

<sup>147</sup> *Ball*, 451 U.S. at 357.

<sup>148</sup> *Id.* at 368.

<sup>149</sup> *See Kessler*, 158 F.3d at 92.

<sup>150</sup> *Id.* at 93-94.

<sup>151</sup> *Id.* at 108.

<sup>152</sup> *Id.* at 105.

<sup>153</sup> GEN. MUN. § 980-J(a) (“the [district] plan must be in addition to or an enhancement of those provided by the municipality prior to the establishment of the district”).



law enforcement).<sup>154</sup>

C. *The One-Person, One-Vote Challenge to the Expanded BID*

Should BIDs continue to expand, and NID/RIDs become commonplace, future plaintiffs may still be able to bring an equal protection challenge in the Second Circuit. The *Kessler* Court focused on the purposes and limited powers of the GCDMA relative to the City. If a district were of extensive size and providing more comprehensive services, a court might be willing to distinguish *Kessler* and apply one-person, one vote. *Avery*, after all, speaks not of “secondary” responsibilities, as noted in *Kessler*,<sup>155</sup> but of powers delegated by states to their subdivisions.<sup>156</sup> Further, *Salyer* and *Ball* are easily distinguishable from BIDs on one point: both deal with management of a scarce natural resource, within a historical context of government experimentation with different forms of storage and distribution. If BIDs continue to grow and expand, a court may be willing to view them as a delegation of state power to private interests based on property ownership. Such a prospect implicates the democratic principles underlying one-person, one-vote, although members of the current Supreme Court may disagree.

*Kessler* found that the voting provision of the BID Act had a reasonable relationship with the purposes of the GCDMA, namely “to pool [property owners’] resources to accomplish mutually beneficial projects to increase the attractiveness of district property for commercial purposes.”<sup>157</sup> As described above, the HRP NID, on the other hand, pools property owners’ resources to accomplish other purposes, primarily as a funding source for the Hudson River Park, but also, one might speculate, as a way to increase residential property values in the rapidly developing district as a whole.<sup>158</sup> It pools the resources of more residential property owners than any other BID in New York City; does this meet the commercial purpose? At present, this reasonable relationship between the purpose of the NID and the BID Act’s mandated governance structure appears to be the doctrinal weak point, particularly compared to the legislative intent of the BID Act.<sup>159</sup> With a change from BID to NID, the analysis under *Kessler* might change, particularly if NID-

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<sup>154</sup> *Kessler*, 158 F.3d at 105.

<sup>155</sup> *Id.*

<sup>156</sup> *Avery*, 390 U.S. at 480.

<sup>157</sup> *Kessler*, 158 F.3d at 108.

<sup>158</sup> See Stukane, *supra* note 84.

<sup>159</sup> 1989 N.Y. Sess. Laws at 282.

like structures continue to grow and to privatize more municipal services.

#### CONCLUSION

The proposed HRP NID was a potentially disturbing misuse of the New York BID Act, including a fundamental change and significant expansion of its purpose of “restoring and promoting business activity.”<sup>160</sup> The HRP NID proposal is currently withdrawn, but the potential for abuse of the BID concept remains, particularly where public budgets are tight and moneyed private interests seek power over services that ought to be public and run by democratically accountable officials. Before another such proposal surfaces, the New York Legislature should reevaluate the intent and scope of its BID Act to address BID overreach before it is entrenched in debt-financed districts that are nearly impossible to dissolve. Should these districts consume more of our cities, plaintiffs should again attempt equal protection challenges, and the courts should apply the one-person, one-vote principle to ensure that all residents of a district have an equal voice in its actions.

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<sup>160</sup> *Id.*