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## **Prefigurative legality: transforming municipal jurisdiction**

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### **Abstract**

This paper argues that prefigurative legality plays an important role in crafting municipalist strategy. We explore the experience of the City of Sydney in relation to new municipalism, focusing on its trajectory as a ‘boundary case’ that generates incrementally accrued transformative potential under conditions of muted political partisanship. The paper argues that at least in a boundary case such as this, legality can be a key and underappreciated component of transformative strategy, particularly if its prefigurative potential is appreciated. Prefigurative legality as a component of strategy is less about reconfiguring forms of state practice and more a means of institutionalising substantive policies and state practices in ways that extend the connection between community and state. As such, prefigurative legality has a deeply ambivalent relationship with the state and is both more incremental and more inclined to be ‘merely progressive’ than the prefigurative politics of radical municipalism. Nonetheless, we argue that legality still acts as an important and underappreciated pivot between power and resistance, especially where legal pluralism and multi-scalar indeterminacy are salient. The paper makes this argument while tracking the City of Sydney’s engagement with three dimensions of legality – delegated jurisdiction, legal pluralism and multi-scalar indeterminacy – and the ways in which these trajectories intersect with state and national government responses. While the Sydney case may fall just outside the boundaries of ‘classic’ instances, the role of legality in this setting generates valuable insights for the longer-term trajectories of more radical versions of new municipalism.

### **Keywords**

legality, municipalism, jurisdiction, prefigurative practices

In the wake of the 2008 global financial crisis and ensuing fiscal austerity, there has been an upsurge in political resistance and experimentation with alternatives in the context of cities, notably the urban occupations of 2011 in Europe and the Middle East in particular – the ‘movements of the squares’. These developments created a groundswell for the global ‘new municipalist’ movement, spearheaded by Spanish citizen platforms such as

Barcelona en Comú and Ahora Madrid (Blanco, Salazar, & Bianchi, 2019; Janoschka & Mota, 2021; Rubio-Pueyo, 2017). New municipalist initiatives look to transform existing state institutions ‘from the inside’, focusing not solely on the function but also the form of the state itself, often pursuing the scaling up of forms of participatory and economic democracy (Thompson 2021).

Our paper explores the experience of the City of Sydney in relation to new municipalism, focusing on its trajectory as an instance of incrementally accrued transformative potential under conditions of muted political partisanship. The City of Sydney has been governed since 2004 by a progressive, independent Lord Mayor who has served longer than any other mayor of Sydney since the incorporation of the City in 1842. This extended leadership continues and deepens the rise of ‘community independents’ in governing at municipal level since at least the 1980s. The case illustrates, we argue, the salience of prefigurative legality in crafting distinctive aspects of municipalist strategy, and in so doing, operates as an important ‘boundary case’ for understanding new municipalism. The paper first elaborates how notions of prefigurative legality relate to strategy in the urban and municipalist context, drawing on critical socio-legal studies and legal pluralism. We identify three dimensions of legality as particularly salient: delegated jurisdiction, legal pluralism and multi-scalar indeterminacy. In part two we discuss municipal jurisdiction in Sydney, tracking the City’s engagement with law: first, a shift to make use of established jurisdiction in more activist, everyday and caring ways; second, a shift to expand jurisdiction, using prefigurative strategies to extend the City’s legal reach, pushing back against state actors at higher levels of government; and third, a shift which we explore as potentially more transformative, in which non-state actors engage with and develop plural forms of legality in dialogue with the municipal state.

In this final phase – temporally aligned with new municipalist activities in Spain and elsewhere – we ask whether the City might be understood not merely as extending municipal jurisdiction, but changing its nature. If the first two phases were ‘merely’ progressive – with policies distinguishable from both the conservative/reactionary and the radical – is something more significant now taking place? In part three we answer this with a qualified ‘yes’ by exploring the way these trajectories intersect with state and national government responses. While some push back against the City’s more activist direction, we see an overall confirmation of jurisdictional expansion – and with it, perhaps a recognition that the progressive purposes to which this expansion has been directed need not continue, as expanded jurisdiction could be used by other councils for different ends. Of course, this is precisely why new municipalism as a movement focuses on reconfiguring the form of state practices and not merely on promoting or advocating for progressive policies or orientations. This raises a question for our third phase, when jurisdiction is not simply expanded but negotiated in dialogue with non-state actors: what are the limits and constraints on the capacity of these strategies to challenge taken-for-granted assumptions about the scope and form of state practice?

## 1. Municipalist strategy and prefigurative legality

In arguing for greater attention to law in new municipalism, it is no accident that the case we draw on, that of Sydney, is not an obvious exemplar of new municipalism, but instead as we suggest, a boundary case. New municipalism as discussed in this special issue and in the broader literature is still an emergent phenomenon, a term that captures a fluid, diverse array of multiple modes of enacting municipal governance in fresh and systemically transformative ways. It is fair to say, however, that citizen-led collective action is almost always central in the theories of change underpinning new municipalism, at the core of which is “politics understood as popular self-government...[as well as] direct democracy and the rejection of representative democracy” (van Outryve d’Ydewalle, 2019: 57). While this people-centred energy is critical, various conceptions of new municipalism also allocate importance to a variety of semi-institutionalised pathways, as for example in “imagining new institutional formations that embody *urban* rather than state logics – be that through challenging traditional party politics with digitally-mediated citizen platforms; channelling economic development through non-state urban networks of anchor institutions and co-ops; or building autonomous federations of urban assemblies in place of the state” (Thompson, 2021: 318). Notably, in this vision, platforms, networks and federations stabilise and institutionalise collective energies and agencies, but all still in ways that are at least partially autonomous from the state, albeit to varying degrees.

Our distinctive focus on legality in this paper entails a greater tendency to engage with intra-state dynamics than much literature on municipalist strategy. We focus more on the way that the politics of the ‘urban everyday’ (Beveridge and Koch, 2019) catalyse shifts *inside* state institutions with transformative potential. We also engage more with the substance of policies than the more common emphasis on the procedural and constitutive dimensions of political democracy. Political democracy still figures in our argument, including particularly through the rising salience of ‘community independents’ at municipal political levels, especially in our case study of Sydney. But the link leads to more incremental, and less obviously ‘radical’ change than many studies of new municipalism document.

Our particular interest is in the way urban law, both formal and informal, figures in new municipalist strategy. We use the term legality to encompass not just legislation, judicial decisions and other legal texts, but also the norms and practices through which those texts take effect in the world. Legality is a rich site for *bridging* different trajectories of municipalist-focused change. Specifically, legality can be deployed as a pivot between power and resistance. Legal strategies can partially institutionalise and stabilise the political energies of ‘insurgent’ and ‘guerrilla’ urbanism (Iveson, 2013) or of activists claiming the right to the city or engaging in urban commoning (Bresnihan and Byrne,

2015; Cumbers, 2015). In doing so, of course, they risk taming, diluting and even co-opting those political energies, but we argue that legality can contribute to imaginative yet strategic work that shifts ‘how institutions think’, changing “the institutional a priori of what a collective of actors engaged in city-making knows, what it can articulate and how its members relate to each other” (Kornberger et al., 2021: 3329).

This is what we call prefigurative legality. Building on Davina Cooper’s examination of ways in which acting ‘as if’ might produce shifts in the state (Cooper, 2017), we use this term to highlight the potential to recast municipal jurisdiction by acting as if law were otherwise. While law is often portrayed as black and white, clear and rigidly fixed, it is more porous than is often assumed (Davies, 2017). Law does not do or say anything itself, and is reliant entirely on the people who obey, enforce, draft, redraft, ignore, disobey or otherwise engage with it. Legality should thus be understood as performative – social understandings about what is and isn’t legal, what a particular law or decision does or doesn’t require, where jurisdiction begins and ends – are performatively produced, again and again, through repetition, convergence, and rearticulation (Blomley, 2013; Butler, 1997; Davies, 2017; Thorpe, 2020).

The potential for prefigurative legality arises from this performativity. As Cooper explains (Cooper, 2017: 343), when the authority, legitimacy or normativity of particular laws are unclear, and there is no agreement on the authoritative source or procedures for determining which laws prevail, then space emerges for bodies to ‘give themselves the law’. Performativity describes the iterative, citational quality of legality, recognizing its dependence upon repetitive practices within particular social relations. Prefigurative legality goes beyond this, with performances that recognize and reference existing conditions, but also test alternatives, acting as if wished for goals were possible. As Margaret Davies explains, prefigurative legal practices “cross the divide between the legal present and our legal futures: they enact possible futures in the present and leave indelible traces of what is to come in the here and now” (Davies, 2017: 17).

The connection between community desires and institutional form is central to the *bridging* potential of prefigurative legality, and may matter distinctively in Anglophone municipal settings. In these settings, the intensity of neoliberal austerity programs and economic managerialism over a relatively long duration has eroded the capacity and legitimacy of direct state intervention and municipal ownership. But possibilities still exist for nudging the state to enable and support commons-based and community-embedded approaches to urban policy, and to link the substance of progressive urban policies to grassroots preferences. This is the space in which prefigurative legality, even while engaging with intra-state dynamics, nonetheless can potentially move those dynamics more in the direction of self-governing communities.

There are two detailed aspects to our argument: first, we contend that legality is a key and underappreciated component of transformative strategy, particularly if its prefigurative potential is appreciated. Second, we clarify that prefigurative legality as a component of strategy is quite distinctive from the horizontalist energies of radical municipalism. It is less about configuring ‘the people’ and more a means of institutionalising substantive policies and state practices in ways that extend the connection between community and state. As such, prefigurative legality has a deeply ambivalent relationship with the state and is both more incremental and more inclined to be ‘merely progressive’ than the prefigurative *politics* of radical municipalism. Nonetheless, we argue that legality still acts as an important and underappreciated pivot between power and resistance.

This position goes against the grain of the assumptions made about legality in much literature on new municipalism. Law is absent from much of this literature, but where it is discussed, it is typically as an external constraint, a command that blocks municipal action in no uncertain terms. For example, Janoschka and Mota (2021) in their exploration of new municipalism in Madrid emphasise the legal-administrative restraints on municipal strategy in very black and white terms, quoting an interviewee who stressed that where legal jurisdiction is lacking (such as in relation to compulsory property purchase to alleviate housing market pressure):

There is no possibility [for the municipality] to intervene in this sense. It is not even a possibility...there are certain processes that are not part of the local powers ... Hence, this cannot even be discussed.

From this perspective, law is presented in terms resonant with more Marxist-influenced accounts of “money, law, and the state as complementary economic, legal, and political forms of the power of capital” (Clarke 1988, cited by (O’Kane, 2020: 688), and as deeply in tension with the citizen-led collective action that characterises many accounts of new municipalism. But while we would agree with Janoschka and Mota that radical political change is often in *tension* with a “legal framework underpinning an economic model diametrically opposed to the aims of [new municipalists]” (Janoschka and Mota, 2021: 2822), we nonetheless advance a substantially different account of legality, and one that gives it a prefigurative character, embodied in a performative capacity to extend municipal jurisdiction – albeit incrementally and over time.

Importantly, however, the place of law in supporting transformative politics through new legal forms, concepts and principles is never secure. Prefigurative legal strategies can conflict with the deployment of mainstream legal frameworks and practices that suppress transformative possibilities. Prefigurative legality has limits and under certain conditions, state law has directly repressed municipal efforts to act ‘as if’ it retains the legal power to do so. In other words, Marxist-influenced critiques of law’s transformative potential do have some purchase where clear delegations of legality are concerned. However, as the case study will show, it is also striking that in the longer-term, several if not all of our

examples of state push-back have later resolved to a situation that *accommodates* the initial prefigurative push by the municipal authority. This may be linked to the observation that legal strategies within new municipalism can and are being deployed with more flexibility in relation to state power than traditions of municipal socialism, which are more likely to focus on ‘remunicipalisation’ of public goods and services (Cumbers and Becker, 2018; McDonald, 2018). Given the Anglophone context noted above, where decades of neoliberalism have significantly muted the viability of the full panoply of municipal socialism, contested legalities open up hybrid strategies beyond entity ownership, experimenting instead with planning, licensing, contract, procurement and other modes of legality to open up potentially transformative strategies. In short, we argue that legality is a fertile site of contestation whose exploration contributes to the question of how municipalist strategy is being developed to challenge, exploit or contend with the crisis of the state and its weakened capability to govern directly.

Overall, we suggest that the reworking of understandings about the City of Sydney’s jurisdiction have been significant in efforts to pursue progressive policies (particularly in areas like climate change and housing where higher levels of government have failed to respond to growing crises), and arguably to lay the foundations for more systemic transformation, both very different from the increasingly managerial and conservative approach of higher levels of government. Three dimensions of legality are particularly important: delegated jurisdiction, multi-scalar indeterminacy, and legal pluralism. We sketch each below.

Across these three domains, we find the scope of authority of the City growing through performative and prefigurative action – a mix of experimentation with formal law and recognition of more legally pluralistic practices. Law and jurisdiction provide fruitful lenses to think through what it means to institutionalise grassroots power and practices.

### **1.1 Delegated jurisdiction**

Delegated jurisdiction describes authority that is expressly given. Municipal authority in Australia is granted by and subject to the authority of the state government: in Sydney, this is the state of New South Wales (NSW). The Australian Constitution is based on the coming together of sovereign states at Federation; any authority not expressly delegated to the Federal government remains with the states. While attempts have been made to change this through referenda, the Australian Constitution remains silent on local government, meaning that council jurisdiction falls within that of the states. The Constitution of NSW provides expressly that local government is entirely subservient to the state.

Many matters controlled by councils in other countries are controlled by states in Australia, including housing, transport, education and police – there is a common refrain that councils manage little more than ‘roads, rates and rubbish’ (Butt et al., 2021). Even

jurisdiction over roads is curtailed, as demonstrated when the City installed a rainbow crossing for Mardi Gras in 2013. While hugely popular, it was installed on Oxford Street, a state road, enabling the conservative Minister for Transport to order its removal. The rainbow was eventually replaced in 2019: close to its previous location, but this time on a smaller, council-controlled road.

One area where Australian councils do have capacity is in planning. Councils are responsible under state planning legislation for preparing local planning schemes, and for assessing and approving development against them (Thorpe, 2013). Yet the express granting of authority to councils by the state means that authority is precisely bounded, with a clear framework through which authority can be withdrawn. In NSW, planning is regulated under the *Environmental Planning and Assessment Act 1979* which gives the state wide scope to recall its authority. Among others, this includes powers to direct councils as to how to perform their planning and assessment functions (economic benefits must be given priority over social and economic costs in determining mining applications, for example), and powers to remove functions from councils altogether. This might be temporary (e.g. by appointing administrators or by “calling-in” a matter for determination by the Minister or the Planning Department) or permanent (e.g. by creating new statutory bodies).

## **1.2 Multi-scalar indeterminacy**

While councils are legally subservient to state governments, the precise boundaries of jurisdiction are not always certain. Multi-scalar indeterminacy arises out of the many different and often overlapping forms of law that work together to structure cities. Beyond formal laws and judicial decisions, law must also be understood to encompass the much wider range of rules and practices through which cities are governed, from international treaties to local bylaws and everyday interpretations on the ground. Boaventura de Sousa Santos uses the term “interlegality” to express the way in which multiple legal orders are entwined (de Sousa Santos, 1987). By interlegality, Santos emphasises the degree to which social life is constituted by an intersection of different legal orders: across different scales, different interpretive standpoints or references, different formulations of issues and different privileging of interests. With respect to urban infrastructure and governance, law has an important constitutive role through formal rules but also the legal construction and translation of general policies and market dynamics at the urban level (Eller, 2020).

Sometimes the relationship between different forms and sources of law is well-defined; more often, it is not. It is frequently if not usually the case that it is not clear to city actors how different formal laws interact. The open-textured nature of these dynamics can create ways for city actors to counterbalance or sidestep the constraints of their localised authority. Thus, experimental efforts to use formal law to advance progressive programs at the city level may prefiguratively allow the municipal government to accrue authority.



### **1.3 Legal pluralism**

Like multi-scalar indeterminacy, legal pluralism arises because of the multiplicity and performativity of legality. Here, we use the term to describe examples in which unofficial, non-state actors can enact norms and rules that gain recognition on the ground, in terms of the legitimacy of authority and roles they imply.

Scholars of legal pluralism have argued that law is sustained by its social meaning far more than its connections to institutional state power, and that meaning is inherently unstable, with new interpretations always being produced (Cover, 1983; Kleinhans and Macdonald, 1997). The importance of social context and of the differential power resources held by various actors authorized to interpret legal obligations means that both ordinary citizens and urban officials working within the municipality can play a significant role in shaping the effects of legal dispensations of power (Thorpe, 2020). Law is therefore not external to or ‘outside’ or ‘above’ either the settings of municipal governance, or even the practices of ordinary citizens. Rather, it is embedded in and emerges from both.

The force of any one interpretation of law thus depends on its social context, on the ability of legal actors to give effect to their preferred interpretations and the lack (or inability) of others to challenge those interpretations. While some legal orders may be more powerful than others, no legal (or normative) order is ever truly sovereign in its field (Cover, 1983; Merry, 1988). Accordingly, conceptions of municipal jurisdiction draw their legitimacy from multiple sources, and this means that they could always be otherwise. By harnessing the ambiguities built into legal processes and criteria, local actors can expand the authority of state actors to open new policy trajectories, while still drawing on collective citizen energies and community preferences to give life and substance to those trajectories. We extend the notion of prefigurative state practices to encompass the practices of non-state actors: an approach that is also resonant with scholarship on legal consciousness, which highlights the multiple and diverse ways that cultural schemas about law circulate in the everyday lives of ordinary citizens, including practices unrelated to official formal-legal systems or decision-making procedures (Ewick and Silbey, 2014; Halliday and Morgan, 2013). In short, pluralistic ways of understanding legality illuminate how municipal authority is constituted as such through performance. The conditions under which that performativity creates potential for change are the focus of this paper.

## **2. Municipal jurisdiction in the City of Sydney**

Sydney is Australia’s largest city, and the capital of the state of NSW. The City of Sydney Council (the City) spans around 26 square kilometres, a small part of the much larger Greater Sydney region (covering more than 12,000 square kilometres, and governed at

the local level by 35 municipal councils). While relatively small, the City is the site of major political and cultural institutions, as well as icons like the Opera House and Harbour Bridge. It is Australia's financial hub, home to 21 percent of the nation's financial sector, including the Australian Stock Exchange (ASX) and 44 of its top 100 listed companies. The City's workforce is twice the size of its residential population, providing jobs for ten percent of the five million people residing in Greater Sydney.

Sydney's state and national significance makes the City a site of frequent intervention by both the NSW and federal governments. Sydney's standing also provides significant scope to pursue jurisdictional ambiguities, potentially reshaping the respective roles of states and cities. While the percentage of property values that councils can charge in rates is capped by state governments, and is generally far less than what is required to provide essential services (Australian Local Government Association, 2021), Sydney's very high property values create considerable scope for experimentation at the boundaries of jurisdiction. As Michele Acuto notes:

Many other authors have underlined how [the lack of an authority like the Greater London Council created an] institutional void [in which state government authorities] ... shaped Sydney to become a strategic globalizing site through an increasingly neoliberal agenda oriented towards regulatory flexibility and attempts to attract international elites... [Despite this, the City] is presently taking over core regulatory and service provision functions that presently sustain a conurbation far greater than its constitutional boundaries. ... thanks to its privileged location and proactive governance (Acuto, 2011: 542–543)

State and federal interventions focus on Sydney as a financial and employment centre. Yet the City is also home to 250,000 residents, a population that has doubled over the last decade and is younger, wealthier and more culturally and socially diverse than NSW or greater Sydney. While state and federal governments continue to focus on Sydney as the NSW capital and national financial centre, this increasing – and increasingly distinctive – population means the City's priorities are both smaller and larger in scale, with a much greater emphasis on local liveability and global responsibility.

The divergence between City priorities and those of higher levels of government is reflected in the composition of the council, with a notable presence of independent politicians. This is vastly different from most Sydney councils, which are filled with councillors from the two major parties that dominate Australian politics. While independent Lord Mayors are not unusual in Sydney, the high proportion of independent councillors is. Six out of Sydney's nine councillors are independents, diverse in age, gender, language and ethnicity, and with backgrounds including the arts, environment and community organising.

The City has developed its strategy since the election of Lord Mayor Clover Moore in 2004 in three phases, all occurring until very recently in a context of affluence and an economy relatively insulated from global austerity, with continuous growth (by traditional measures) for 29 years until the pandemic. As noted above, these phases can be distinguished by the way in which the City engages with legality: first, deploying delegated jurisdiction in more activist, everyday and caring ways; second, using prefigurative strategies to extend the City's legal reach; and third, a more plural approach in which non-state actors engage in a reconstitution of legality in dialogue with the municipal state. Each phase can be characterised also by the focus and scale of ambition: social, then environmental, and finally economic transformation; local, then regional, then societal shifts. The three phases incrementally introduced progressive strategies and policies that over time acquire transformative potential. This is particularly evident (yet also most emergent) in the third, still ongoing phase, which introduces community wealth-building and some engagement with commons narratives, with potential for the political agency of grassroots communities to rework assumed borders between economy, society and environment in ways that filter into urban policies. Our discussion focuses on this most recent phase.

The City's growing independence has been a concern for successive state governments, prompting interventions in particular projects (like Barangaroo, where former Prime Minister Paul Keating played a key role in the site's transformation from public docklands with a strong history of union and community organising, to some of the country's tallest, shiniest and most exclusive towers) but also interventions intended to shift the composition of council – from electoral reforms to the dismissal and replacement of entire councils (Dias, 2017). Thus we will see that law and legality can and sometimes do restrain municipalist trajectories in the manner assumed in much non-legally focused literature – but as we will argue, more open-textured understandings of how legality and jurisdiction interact with political power and state actors provide distinctive opportunities for incremental transformation. In particular, the performative potential of prefigurative legality can blunt the openly partisan nature of politics in productive ways, building a tentative bridge between municipal government represented by community-minded independents, and the more horizontal, inclusive, participatory and consensual decision-making processes that are the focus of radical municipalism. In short, while neither the City in general nor independent community-minded local politicians instantiate a radical version of 'the people', nonetheless the politics enabled in part by practices of prefigurative legality show evidence of an incremental opening up of a policy space.

## **2.1 Reorienting and expanding jurisdiction**

In this section, we show how the City of Sydney began by using jurisdiction in more everyday and caring ways, in contrast to the business focus of the major parties and the commercially-oriented aldermen that had previously dominated the council. In doing so,

the City laid the foundations for integrating social and environmental issues into a more holistic sense of a 'liveable' city. Once established, the approach moves beyond this reorientation to push jurisdiction, extending the scope of activities to pursue increasingly activist and progressive agendas at a more macro-level, with a particular focus on environmental issues especially as encapsulated in the Sustainable Sydney 2030 Strategy (City of Sydney, 2015). Taken together, these two phases lay the groundwork for a politics that is potentially more systemically transformative as we discuss in more detail in relation to the third phase

Moore was first elected to council in 1980, part of a new wave of independents focused on the everyday non-commercial life of the City. Moore and her new colleagues pursued a more caring agenda, with much greater attention to social issues, local liveability and environmental sustainability: playground upgrades, tree planting, street closures and traffic calming, heritage conservation and pedestrianisation projects, homelessness support services, and much deeper engagement and consultation with the local community (Hu, 2012). Local amenity and liveability improvements were often undertaken in ways that engaged in wider debates too. The City supported Pride parades along Oxford Street from the early 1980s, for example, when homosexuality remained a criminal offence and police brutality at the first Pride march in 1978 was still a fresh memory.

The City became more activist also in exercising its planning jurisdiction, responding to community concerns about gentrification and high rise development (Golder, 1995; Punter, 2005). Most controversially, the City used its planning powers to refuse consent for key elements of state and national economic and nation-building efforts in the lead up to the celebration of Australia's bicentenary in 1988.<sup>1</sup> Both major parties attacked the independents for being obsessively "representational", considering issues from the perspective of their constituents and ignoring the "big picture" of Sydney's development (Golder, 1995: 30). The clear legislative delineation of authority meant that this defiance was short-lived. The (then Labor) state government responded by using its call-in powers to take control of Darling Harbour (another waterfront redevelopment site) and, later, the central city site of a high rise development incorporating a station for the (now demolished) monorail to Darling Harbour. This was followed by the dismissal of the entire council and installation of commissioners. As Premier Barrie Unsworth explained, the aim was to distance the City from community politics:

"The [NSW] government wants... [to] ensure that the competing interests of the central business district of Australia's largest city and capital of the state are not impeded by the interests of those who reside in the city suburbs such as Redfern [and] Chippendale" (cited in Golder: 30-31).

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<sup>1</sup> The arrival of the first fleet of British convict ships at Sydney Harbour in 1788 was not universally celebrated, and the protests in 1988 were important in triggering debate about Aboriginal rights, history, identity and multiculturalism (Frost and Laing, 2013; George and Huynh, 2009).

When the City was reconstituted in 1988, it was without power to make statutory plans or determine any large developments. These powers were instead held by a new statutory body, with three City councillors and four state appointees (City of Sydney Act 1988). These changes “rendered the City Council more powerless in planning matters than any other local government in Australia” (Ashton, 1993: 116).

While the City’s delegated jurisdiction was thus curtailed, multi-scalar indeterminacy and legal pluralism provided alternative means for the independents to pursue their progressive agenda. Through ‘soft law’ tools deploying money flows, conditional approvals and partnerships, the City has been effective in a range of planning aims. The City made use of incentives, for instance, to encourage new residential developments in office dominated areas, helping to achieve the diversity necessary for a more vibrant city outside of office hours. Over time, some of these changes have also worked to reshape delegated jurisdiction, both by increasing the City’s authority and by directing the activities of the state and of other councils. Inclusionary zoning is one example. Concerned about the escalating housing crisis, the City began imposing conditions requiring the payment of levies to fund new affordable housing when granting consent for the (very profitable) redevelopment of former industrial areas. These were struck down when challenged in court by a property developer, but this prompted legislative amendments making affordable housing an explicit objective of state planning legislation, and providing the basis for inclusionary zoning at other sites around the City and beyond (Williams, 2015). In 2019, inclusionary zoning was made permissible in all councils across NSW. The City achieved similar success with respect to design quality, with design review panels and statutory design excellence controls now formalised, and extended beyond Sydney to all of NSW (Punter, 2005).

On environmental issues, the City also pursued a more activist and then more expanded role. As CEO Monica Barone explains (SmartCitiesWorld, 2022): “climate action is part of the business case of everything you do: every job is a green job”, giving the example of how childcare entails a range of environmentally salient choices over food, nappies, resources and so on, and stressing how when environmental action is understood as integral to the full range of everyday life, it generates a ‘repeatable business case’ that can underpin and justify a wide range of City policies. As well as local greening activities, the City used prefigurative strategies to reach beyond its boundaries, leading environmental initiatives across the region. Partnerships, financial contributions and resource-sharing – developing business cases for activities that could be repeatable by councils with less resources, for example – exploited multi-scalar indeterminacy and legal pluralism to persuade actors in other councils and in state government to adopt particular practices and exercise their own jurisdiction in particular ways. In transport, the City led the planning and then development of new infrastructure including light rail and cycling networks spanning several neighbouring councils. The City has been an active participant

in international networks such as C40 Cities and the Resilient Cities Network, and in doing so has worked to engage other Sydney councils. Pioneering activities like replacing City lights with LED globes and purchasing renewable energy have now been adopted across the Greater Sydney region. As with inclusionary zoning and design excellence, many of the City's activities have also prompted legislative changes at state level, including regulatory reform to enable large scale water recycling and stricter energy standards (City of Sydney, 2021b).

Multi-scalar indeterminacy can be seen also in the electoral process. The dismissal of the City council in 1987 was motivated not only by conflicts over development in Darling Harbour, but also by polls suggesting Moore was the favourite to become Sydney's first female Lord Mayor (Dias, 2017). Moore responded by running in state elections the following year, ousting the incumbent Liberal member to secure the electorate of Bligh (approximately half the current City area). When Moore was eventually re-elected to the re-constituted City council, these dual roles created new possibilities for jurisdictional leverage.

The City made effective use of these possibilities to overcome the dominance of large commercial entertainment venues and standardised retail. Moore's dual local and state roles enabled the passage of legislation that dramatically reduced the cost of liquor licences, enabling the development of small bars and music venues (Clennell, 2007). In 2014, the state pushed back with 'lock-out laws' that restricted the night-time economy, a move frequently covered by international media as undermining Sydney's status as a 'global city' – but here, as with other policy areas discussed in this paper, local control eventually returned with a reversal of this policy in 2020 and 2021. From the perspective of municipal strategy, jurisdictional expansion solidified while political backlashes come and go.

### **2.3 Phase 3: transformation, or still merely progressive?**

The City established an Economic Development Unit soon after Moore won office, with an explicit focus on "sustainable economic growth" (City of Sydney, 2006: 8). This was the same year that work began on Sustainable Sydney 2030, the framework underpinning this and many of the environmental projects summarised above. Kornberger and his colleagues argue that Sustainable Sydney 2030 provided a "new language for city-making" that was "propositional", inviting diverse stakeholders to debate the city in ways that were expressly contrasted to the "precise, overworked, jargonistic language" of planning as deployed by legal professionals (Kornberger et al., 2021: 3325). While they suggest a dichotomy between the "transformative pedagogy" initiated by the strategy on one hand, and the legality of planning on the other, we point instead to developments that *bridge* the two. In particular, a policy trajectory related to the commons and community

wealth-building, albeit nascent, provides space for legal creativity in expanding the City's jurisdictional authority, and – to varying degrees – in dialogue with collective citizen action.

Sydney Commons Lab is an early stage initiative that brings together individuals, organisations, practices and resources to support community-led initiatives for the common good for shared ownership or stewardship of resources, including digital platforms, and building local wealth. Members come from a wide range of backgrounds including digital enterprise, universities, social services, professional advisors, consultants and creatives. In 2019, they published a Commons Transition Plan as a living, revisable document (Sydney Commons Lab, 2019), with the first draft based on stakeholder interviews with grass-roots and community initiatives across the City.

Embedding commons entails more ownership or stewardship of resources by communities, rather than the state or the private sector, and is best encapsulated in a processual view of 'commoning'. Understood as a verb, commoning resonates with deep democratic self-governance: (Bollier and Helfrich, 2019: 4) define the commons as "a robust class of self-organised social practices for meeting needs in fair, inclusive ways" that are "mutually agreed upon". Commoning is the process of collaborating democratically to look after the commons for use now and by future generations. Sydney Commons Lab is particularly interested in commons-based approaches to enable access to essential needs, stressing the sharing of resources, shared ownership in governance, and a general emphasis on 'commoning' as process.

This approach aims to build links with both the legal and regulatory ecosystem for city governance, and with existing and emergent initiatives and projects. The 'draft' nature of the Commons Transition Plan symbolises its status as an open document subject to periodic updating, revisions and ever-extending inclusion. The August 2019 publication of the Plan took place in dialogue with the City's community consultation on its Sustainable Sydney 2050 Strategy, which established a Citizens Jury of 47 randomly selected residents, workers and citizens from across metropolitan Sydney to consider over 2,500 public submissions. The Sydney Commons Transition Plan was submitted as part of this community process, its influence can be seen in references to a regenerative ecosystem and of a new model of participatory governance as two of eight key concepts identified to guide the ongoing evolution of the strategy (City of Sydney, 2020b).

In July 2020 the City resolved unanimously (City of Sydney, 2020a) to consider incorporating community wealth-building into economic development, as part of an explicit shift to incorporate some of the lessons from its social and environmental strategy more directly into economic development. Community wealth-building is a "radical and intentional reorganisation of the local economy", focused on "five strategies for harnessing the power of anchor institutions to enable local economies to grow and

develop from within”(Centre for Local Economic Strategies, 2019). The strategies to “make wealth socially helpful by ensuring it is broadly held, owned and distributed” target plural ownership of economic enterprise, fair employment and just labour markets, progressive procurement of goods and services, socially just use of land and property, and ways to make financial power work for local places (Centre for Local Economic Strategies, 2019). In December 2021, the City published an extended discussion paper on community wealth-building.

Despite the resonance between policies proposed by advocates of community wealth-building and the more directly democratic energies of commoning, the City’s overall approach to community wealth-building does seem to reflect a more ‘managed’ than autonomist conception of municipalism (Thompson, 2021). Nonetheless, opportunities for leveraging some transformative space through dialogue with advocates of commoning do exist. As Sydney Commons Lab argued, there are both productive and provocative synergies between commons-based approaches and community wealth-building, echoing our broader argument that prefigurative legality can help bridge power and resistance in new municipalism. In particular, an emphasis on commons helps to broaden the conception of resources and practices that can be enrolled into community wealth-building – for example, broadening the meaning of ‘community wealth’ beyond financial measures. This creates space for legally pluralistic approaches to measuring economic benefits, which could potentially reshape grant evaluation procedures, or even broaden eligibility under municipal procurement programmes by valuing social assets alongside financial ones. For example, the City itself is beginning to reform formal procurement procedures to reflect community wealth-building goals (City of Sydney, 2020a: 2).

The City is also experimenting with redefining the wealth embodied in housing, via an Alternative Housing Ideas Challenge created to feed into Sustainable Sydney 2050. One shortlisted proposal was rooted in the creation of a metropolitan-wide community land trust, building a bridge between the dynamics of commoning and the City’s growing interest in community wealth-building. This proposes that the City transfer title over some of its landholdings to a Community Land Trust, either through longterm leasing or full transfer (Crabtree-Hayes and Twill 2019). This would then be held in perpetuity for affordable houses which could only ever be bought and sold via a legal process that decoupled the land value from the value of the house, a structural intervention with significant capacity to catalyse systemic change. The City has committed to progress this proposal, combined with a cooperative housing framework for ‘build-to-rent’ (City of Sydney 2021: 33). This is another instance of managed rather than autonomous municipalism but nonetheless an instance where dialogue with non-state actors has shifted municipal involvement along an arc of increasing jurisdictional involvement in housing. From the first phase, smallscale changes to liveability to the second stage of macro-level collaboration with the State government on inclusionary zoning and design



quality, we have here prefigurative legality reimagining the relationship between land, value and shelter.

### **3. Patterned legalities and community-minded independents: a pincer movement for a boundary case of new municipalism**

In these three phases, we see shifting patterns of strategic openings. Delegated jurisdiction can be associated with state pushback, pluralism with expansion of informal jurisdiction, and multi-scalar indeterminacy with expansion of formal jurisdiction. This suggests that the clear possession of formal power is more likely to lead to legality being an external barrier and hegemonic complicitor. But pluralism and multi-scalar indeterminacy are more common than many appreciate, and as we show have the potential to prise open opportunities for progressive change and even systemic transformation.

More attention should be paid to the significance of legality in new municipalism more broadly. We perceive valuable linkages between the deployment of legality and the kinds of citizen energies that animate new municipalism. Albeit in a more muted, less radical fashion than many of the signature cases, the political dynamics of ‘community independents’ in our narrative effectively act as a grassroots mandate to use legality in expansionist and even potentially transformative ways, at least as far as jurisdiction is concerned.

This capacity derives from the leverage created when the electoral dynamics generated by community independents energise the use of prefigurative legality. This interaction creates a pincer-like effect. In reflecting on how the City has acted to extend its jurisdiction, and how the state has intervened to curtail those activities, we note that the pushback has focused primarily on electoral reforms. Efforts to control the council have centred more on unseating independents than curtailing municipal jurisdiction. There are some notable exceptions – the development at Barangaroo, the dramatic midnight ripping-up of the rainbow crosswalk – but, in general, efforts to prefigure more expansive municipal jurisdiction appear to have been successful. Moreover, while media and state government perspectives often portray community politics as personality politics, this is on balance a mischaracterisation. The failure of efforts to “Get Clover” suggests that the link between community preferences and independent politicians at the City is real, even if not bottom-up or embedded in social movements. Of course critics exist at community level too, and indeed in the most recent 2021 re-election of Clover Moore, the strongest competition was a second ticket of community independents led by Wiradjuri woman Yvonne Weldon. Indeed, the overall salience of community independents as a powerful electoral force with the capacity to expand political debate from multiple directions has been amply demonstrated by the Australian federal election results of May 2022, where the election of 16 ‘cross-bench’ candidates not aligned to major parties caused a

significant realignment of pre-existing political patterns as well as a change of government.

For now, the paper has demonstrated affinities between the dominant inflection of the City's distinctive governing path (social, environmental and, more recently, economic aspects urban life) and the incremental expansion of jurisdiction. As we near our conclusion, we reiterate the importance of the rise in electorally resilient 'independent community' councillors in relation to these affinities between the City's jurisdictional path and its incremental expansion of jurisdiction. Moore explicitly links her preference for focusing on "the grassroots of electorates" to an identity as a "community representative" rather than a politician (*Sydney Morning Herald*, 2004). Her initial motivation in running for council in 1980 was the shortage of play space for her children: the only 'park' near her was an asphalt-covered space, often filled with needles and broken bottles. Frustrated by the major parties' lack of interest in local liveability, Moore ran for council to secure an upgrade to the park herself. This kind of frustration was increasingly widespread, several other independents were also elected in 1980 (Golder, 1995). Over time, differences between local and state priorities were made very explicit, as a result of conflict between the strong local support for social and environmental policies, and strong opposition at higher levels of government.

Despite Moore's emphasis on community politics and her collaboration with other independents and with City staff, the major parties (and media) have frequently portrayed the City's policies as driven by Moore's personal ideology. The dismissal of the council in 1987 was the first in a series of attempts to oust her. In 2007, Moore's seat of Bligh was abolished, replaced by a new electorate of Sydney, which Moore also won. In 2012, the newly-elected Liberal state government passed legislation preventing MPs from serving on councils, forcing Moore to choose between her roles as Lord Mayor and as MP for Sydney. Again, this failed to return Sydney to the major parties: Moore campaigned with another independent, Alex Greenwich, who was elected MP for Sydney in 2012 and remains in the seat. In 2014, voting rules were changed to make voting compulsory for businesses in the City, and to give each business two votes. As with previous reforms, this change failed to undermine community independents: Moore was re-elected and independents won five out of the nine seats on council. What unites the independents is not Moore's ideology, but a commitment to community politics. The emphasis of the state backlash on electoral reforms and on portraying progressive policies as personality-based can be read as an indicator of the City's success in expanding jurisdiction. Instead of responding to progressive policies by curtailing City capacity in areas like housing, transport, energy or economic development, the state's focus on outseating Moore allows the City's jurisdictional expansion to continue.

The rise of independent community politicians may signal something about the more general crisis of state capacity embodied by the persistence of neoliberal managerialism.

Read with the loss of faith in state capacity to directly own and provide municipal services, law emerges as notable in municipal strategy: instead of substantial direct fiscal input or municipal ownership, law is used to direct regulatory and informational strategies. These approaches can generate opportunities for community actors, especially where municipal authority, as here, indicates increasing interest in reworking assumptions of ‘economic’ *versus* ‘social and environmental’, and instead reworking the relationship in ways which might move away from the hegemony of the logic of capital. The increased salience of legality in new municipalism is allied, then, with the curtailed sense of governmental power into narratives of municipal change. It is less certain whether legality can unleash community agency to deliver not only on the promise of community-minded independent politics, but advance the strategic agenda of radical municipalism. But it is well worth investigating opportunities for legality to bridge community politics and shifting state practices.

## **Conclusion**

If prefigurative legality is part of a pincer movement working with the energy of ‘community independents’ in politics, strategic opportunities for transformation also depend critically on the deployment of official expertise in particular ways. This is an important but underdeveloped aspect of the case presented here. Certain kinds of knowledge networks build links between the bottom-up energies of legal pluralism and the more technical strategies made available by multi-scalar ambiguity. While further research would be needed to establish this point, it is significant that the City uses large consulting firms and standard corporate expertise far less in developing its policy proposals than state and federal government. Sydney has also been led at the professional level over more than a decade by staff with institutional knowledge and commitment to progressive policies (such as CEO, Monica Barone, and Director of Planning and Transport, Graham Jahn), helping to make laws work in a certain way. These resources and networks seem a crucial component of the ground-level leverage and technical knowledge that can generate policy trajectories that are not business-as-usual, but further research would be needed to establish their scope and identity more clearly. Knowing more about the role that knowledge networks play in bringing to life the energies of legal pluralism would be an additional element in understanding how leadership that is independent of political parties builds a bridge between everyday urban energies and preferences and the specificities of municipal governance.

Sydney politics are not nearly as polarized as the classic cases of Barcelona or Madrid. The representation outside of the political party system of everyday communities is, as noted earlier, a boundary case of new municipalism that sidesteps the more radical changes in state form that new municipalism often demonstrates. Instead, Sydney articulates the representation of non-commercial community through an ‘independent mayor’. While not usually catalysing systemic change, this does on occasion frustrate the

state and business enough for major pushback. However the pushback has largely been at the electoral level, and unsuccessful, while pushbacks in specific policy areas have often failed to stick. This combination is significant: pushback through electoral reforms can be read as an implicit acceptance of municipal jurisdiction, rejecting the use of authority in socially, economically and environmentally progressive ways, but not the authority itself.

Overall, Sydney shows that transformative potential can build slowly and incrementally, through accretion, deploying legality strategically to accrue jurisdictional authority, and developing knowledge networks outside of elite capital circuits that support the new policy directions. Theoretically Sydney also helps illustrate how legality is an important aspect of state theory, a source of both constraint and empowerment. Legality creates footholds for the slow accretion of alternative organizational forms and policy trajectories. When allied to new knowledge networks, it also potentially helps to build the social base for systemic change down the line – but even if the progress, as documented here, is essentially incremental, law is a form of power and resistance and a site for opening cracks.

Legality is a potentially fertile strategic site for building bridges between collective citizen action and city-level policy frameworks, and particularly so where the character of what is understood as ‘legal and regulatory’ is open and porous. Policy processes that carve out space and autonomy for the operation of informal processes can create synergy with formal-legal frameworks that leave open the possibility for creativity, emergence and risk. Together, these can incorporate pluralistic institutional experiments and policy directions that build around, rather than push back, the ways in which the crisis of the state typically precludes remunicipalisation or strong municipal socialism. Law and legality, then, should be considered a potentially significant element of new municipal strategy, capable under certain conditions of supporting open-textured and institutionally fragile practices for forging collective agency (Morgan et al., 2020: 205–206; Morgan and Thorpe, 2018).

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