

Making it Stick: Local Environmental Review Statutes

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I. INTRODUCTION

Newark, New Jersey, is a bustling city located on the Newark Bay, just outside of New York City. It is home to many large companies such as Prudential Insurance, Merck, and Zoetis and universities such as New Jersey Institute of

Technology, Rutgers University and Seton Hall University.¹ The city boasts New Jersey's only major professional sports team, the New Jersey Devils.² It is also extremely well connected to New York City by public transportation.³ However, this well-connected city with plenty of arts and cultural amenities is plagued with environmental problems. The air pollution within the city has led to one in four Newark children having asthma.⁴ High lead levels in the city's drinking water were detected in 2017,⁵ leading the city to provide drinking water filters to those affected.⁶ The city is bounded to the northeast by the Passaic River, which has suffered from heavy industrial pollution for the last century leaving behind mercury, dioxin, polychlorinated biphenyls and other toxic contaminants.⁷ All this environmental pollution affects a city that is 49.7% African American and 36.4% Hispanic or Latino.⁸ The disproportionate environmental effects upon these minority communities in Newark led the city to pass a first of its kind environmental justice ordinance in 2016.⁹ However, four years after the passage of the ordinance, has anything changed?

Environmental justice ordinances enacted at the municipal level are an important piece of the decentralization of environmental law. Cities and towns experience their local environmental conditions most directly and are therefore ideally suited to writing ordinances that address their communities' specific needs. However, communities who draft these ordinances need the power to enforce them. Without it, they lack the ability to enact real change to proposed and existing projects that might negatively impact the community. This paper presents an analysis of Newark, New Jersey's attempt to enact a Cumulative

¹ *Best Places for Business and Careers 2019: Newark, NJ*, FORBES, <https://www.forbes.com/places/nj/newark/> (last visited Mar. 31, 2020).

² NEW JERSEY DEVILS, <https://www.nhl.com/devils> (last visited Mar. 31, 2020).

³ See NJ TRANSIT RAIL MAP, https://www.njtransit.com/pdf/rail/Rail_System_Map.pdf (last visited Mar. 31, 2020); PORT AUTHORITY TRANS HUDSON (PATH) RAIL MAP, <https://old.panynj.gov/path/maps.html> (last visited Mar. 31, 2020).

⁴ Anthony Johnson, *Study: 1 in 4 Newark Children Has Asthma; EPA Steps in for Air Quality Testing*, ABC7 (Mar. 23, 2015), <https://abc7ny.com/health/study-1-in-4-newark-children-has-asthma;-epa-steps-in-for-air-quality-testing/569501/>.

⁵ CITY OF NEWARK, CITY OF NEWARK TO PROVIDE FILTERS TO PROTECT RESIDENTS WHOSE HOMES HAVE LEAD SERVICE LINES AND LEAD PLUMBING ELEMENTS WITH THE PEQUANNOCK WATER SYSTEM (Oct. 12, 2018), <https://www.newarknj.gov/news/city-of-newark-to-provide-filters-to-protect-residents-whose-homes-have-lead-service-lines>

⁶ CITY OF NEWARK, NJ, LEAD SERVICE LINE REPLACEMENT PROGRAM, <https://www.newarkleadservice.com/filters> (last visited Mar. 31, 2020).

⁷ *Urban Waters and the Passaic River/Newark (New Jersey)*, U.S. ENV'T. PROTECTION AGENCY, <https://www.epa.gov/urbanwaterspartners/urban-waters-and-passaic-rivernewark-new-jersey> (last visited Mar. 31, 2020).

⁸ *QuickFacts Newark City, New Jersey*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newarkcitynewjersey,US/RHI225218#RHI225218> (last visited Mar. 31, 2020).

⁹ *Newark Makes History with First-In-The-Nation Environmental Justice Ordinance*, CLEAN WATER ACTION (July 13, 2016), <https://www.cleanwateraction.org/features/newark-makes-history-first-nation-environmental-justice-ordinance>.

Impact Ordinance that addresses the severe impacts industry has on the city, arguing that the ordinance is not sufficiently enforceable to effect real change.

Part I of this paper will look at local environmental review statutes and important elements of review statutes that aid in their enforceability. Part II will look at why cities and towns should consider enacting environmental justice ordinances at the local level to tackle their specific environmental justice issues. This paper then concludes with Part III, a case study of Newark, New Jersey's environmental justice ordinance. I will argue that the ordinance has not effectuated any real change since its enactment. I will then propose some modifications to the ordinance that may help with its future enforceability.

II. LOCAL ENVIRONMENTAL REVIEW STATUTES

Municipalities are increasingly using traditional zoning and land use powers to incorporate environmental justice principles into their local rules.¹⁰ Municipalities derive these powers from state enabling acts that delegate, in a limited fashion, the ability of municipalities to regulate the health, safety, and welfare of the members of the town.¹¹ There are a number of ways that municipalities can use zoning and land use regulations to incorporate environmental justice, including: comprehensive planning, elimination of non-conforming uses, and utilization of environmental reviews or impact analysis.¹² Local environmental reviews and impact analyses will be the focus of this section.

A. Environmental Review Statutes

Environmental review statutes analyze effects of potential projects to assess whether or not they will have an impact on the environment. They often result in the production of an environmental impact statement.¹³ Environmental review statutes exist on multiple jurisdictional levels. Federally, the National Environmental Policy Act (NEPA) requires that proposals for legislation and major federal actions that significantly affect the quality of the human environment include detailed statements on the environmental impacts of proposed actions, adverse environmental effects, and alternatives to proposed actions.¹⁴ A number of states have adopted state environmental policy acts

¹⁰ ANA ISABEL BAPTISTA, LOCAL POLICIES FOR ENVIRONMENTAL JUSTICE: A NATIONAL SCAN 13-15 (Tishman Environment and Design Center, 2019).

¹¹ *E.g.*, *New Jersey Shore Builders Ass'n v. Twp. of Jackson*, 949 A.2d 312, 316 (N.J. Super. 2008).

¹² BAPTISTA, *supra* note 10, at 12.

¹³ *See* National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (2012), CAL. PUB. RES. CODE § 21002.1 (West 1994), 301 MASS. CODE REGS 11.07 (2020), N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 2006).

¹⁴ National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (2012).

(SEPA) that function as governing rules for state and local projects.¹⁵ For example, Washington has enacted a State Environmental Policy Act that is designed in a similar fashion to the federal NEPA.¹⁶ The Washington SEPA includes enabling provisions¹⁷ for public and municipal corporations to adopt their own ordinances in accordance with the SEPA¹⁸ or from model ordinances provided in the act.¹⁹

Municipalities are now incorporating their own environmental review ordinances into their planning and zoning processes.²⁰ This additional layer of local review can be inserted into a municipality's pre-existing planning and zoning boards that already have authority to review proposals for new projects.²¹ For municipalities looking for guidance on drafting environmental review ordinances, non-profit organizations and academic institutions have drafted model ordinances.²² These model ordinances contain ideal language that can help municipalities write ordinances with enforcement power.

B. Key Elements to Local Environmental Review Statutes

When drafting a local environmental justice ordinance, municipalities must include language that will give their ordinance enforcement power. An effective local ordinance will include the following: (i) express authority for the appropriate board to deny or modify proposed projects, (ii) language that is written in accordance with the state's zoning and land use enabling statute, and (iii) a requirement for a cumulative impact assessment for each project that includes a comparison to a baseline environmental index. Without these elements, local planning and zoning boards will not have the ability to effect change through their environmental justice ordinance.

1. Express authority to deny or modify projects

Express authority to deny or modify projects is an essential element to an environmental justice ordinance because it allows a municipality to request modifications to a proposed project or deny a proposed project on the grounds

¹⁵ Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 120 (2003). For an extended discussion of SEPA plans and their integration of environmental review statements. See generally Stuart Meck, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 12-1 (2002).

¹⁶ WASH. REV. CODE § 43.21C.010 (2009).

¹⁷ WASH. REV. CODE § 43.21C.135(1) (1976).

¹⁸ WASH. REV. CODE § 43.21C.135(1)(a) (1976).

¹⁹ WASH. REV. CODE § 43.21C.135(1)(b) (1976).

²⁰ BAPTISTA, *supra* note 10, at 19.

²¹ *Id.*

²² See, e.g., AN ORDINANCE TO PROTECT PUB. HEALTH AND THE ENV'T AND PROMOTE ENVTL. JUSTICE (N.J. ENVTL. JUSTICE ALL. 2011) [hereinafter NJEJA Ordinance]; MUNICIPAL ENVTL. JUSTICE POLICY – SUMMARY AND SUGGESTIONS FOR IMPROVEMENT (ARMINA PETRESCU-TUDOR AND PAIGE DOLCI 2017), <https://www.bu.edu/rccp/files/2017/04/EJ-Ordinance-Spring-2017.pdf>.

that it does not satisfy environmental justice criteria. The New Jersey Environmental Justice Alliance (NJEJA) model ordinance includes language that states:

A failure of the applicant or proponent to select an alternative which, as identified in the [Environmental Community Impact Statement], is practicable and feasible, reasonably affordable, and less harmful to the environmental and public health shall be a basis for rejection of the development application, if authorized by governing law.²³

This provision allows for denial of a project on the basis of an applicant failing to choose reasonable alternatives. A second enforcement provision in the NJEJA model ordinance allows the appropriate reviewing land use board or other agency to condition application approval based on the applicant's adoption of appropriate mitigation efforts.²⁴

In addition to having enforcement provisions embedded in the local ordinance, it can add to the authority of the zoning board to have enforcement language written into state enabling act language. For example, New York's State Environmental Quality Review Act gives local land use agencies independent authority to impose conditions on projects to mitigate adverse environmental impacts.²⁵ This additional authority to impose changes on projects can help a decision by zoning board withstand judicial review.

Without these enforcement provisions, an ordinance merely creates an environmental review that has become part of an official record. Creating an official record is important for judicial review of administrative decisions, such as those made by planning and zoning boards, however this only lengthens the process in creating change based on findings of the environmental review.

2. Written in Accordance with State Enabling Language

In order for an environmental review statute to be legally binding, a municipality must write its ordinance in accordance with its respective state's land use enabling statute. On its own, a municipality has no authority to make land use decisions.²⁶ The authority for local municipalities to make land use decisions comes from grants of power from state municipal land use enabling statutes.²⁷ State constitutions and statutory delegations of land use authority to municipalities are generally written broadly so as to grant express and implied

²³ NJEJA Ordinance 1.0-2(A)(11)(a), *supra* note 22, at 10.

²⁴ NJEJA Ordinance 1.0-2(A)(11)(a), *supra* note 22, at 10–11.

²⁵ N.Y. Evtl. Conserv. Law § 8–0109 (McKinney 2006).

²⁶ Kathryn C. Plunkett, *Local Environmental Impact Review: Integrating Land Use and Planning through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 237 (2003).

²⁷ MICHAEL A. ZIZKA, ET AL., STATE AND LOCAL GOVERNMENT LAND USE LIABILITY § 1:3, Westlaw (database updated Dec. 2019).

powers.²⁸ When a municipality acts outside of its delegated authority the action is described as *ultra vires*.²⁹

An ordinance written beyond the scope of the state's enabling statute or constitutional provisions is potentially subjected to *ultra vires* challenges, which can render the ordinance unenforceable. *Ultra vires* challenges can take the form of allegations of city officials acting in an *ultra vires* capacity in application of environmental land use ordinances.³⁰ They can also take the form of individuals challenging a township ordinance itself for being overbroad and outside the municipality's authority to enact.³¹ A well-crafted local ordinance will be able to survive statutory construction *ultra vires* challenges.

3. Cumulative Impact Assessment that is all encompassing and calls for establishment and comparison to a baseline.

A cumulative impact assessment combined with a comparison to an environmental baseline is an important tool for evaluation of proposed projects. NEPA defines cumulative impacts as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what . . . person undertakes such other actions."³² Further, "Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum."³³ Often, projects only incrementally add pollutants to the environment, but it is when all the pollutants from many projects are added together that the full scope of a project's cumulative impact can be determined.³⁴ This assessment can take the form of a detailed environmental checklist for applicants, an environmental impact statement, or a technical report on what impacts a proposed project is expected to have.

In addition to having a project cumulative impact assessment, it is important to have quantified existing environmental conditions with which to compare. This can take the form of an environmental baseline. This baseline should include existing environmental conditions, related public health concerns, area demographics, and land use features. The baseline serves as an important

²⁸ *Id.*

²⁹ 62 C.J.S. *Municipal Corporations* § 1203, Westlaw (database updated Feb. 2020).

³⁰ *Tabrizi v. City of Austin*, 551 S.W.3d 290 (Tex. App. 2018) (challenging unsuccessfully application of city environmental ordinance).

³¹ See *Manalapan Builders All., Inc. v. Twp. Comm. of Twp. of Manalapan*, 606 A.2d 1132 (N.J. Super. Ct. App. Div. 1992).

³² 40 C.F.R. § 1508.7 (2012).

³³ Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 41, 68 (2013).

³⁴ See OFFICE OF FED. ACTIVITIES, U.S. ENVTL. PROTECTION AGENCY, EPA 315-R-99-002, CONSIDERATION OF CUMULATIVE IMPACTS IN EPA REVIEW OF NEPA DOCUMENTS (1999).

reference point for subsequent project analysis.³⁵ The baseline continues to support subsequent stages of the environmental review by allowing planning and zoning board reviewers to predict impacts of proposed projects.³⁶ Specifically, local board members can directly measure the cumulative impact assessment against the environmental baseline.

Lastly, the baseline can alert board reviewers to any significant impacts that a proposed project may have. Significance of an impact is a key factor in environmental review.³⁷ “Significance” itself is a broad term, but a local ordinance can provide a tailored definition for it when calling for a comparison to the established baseline. When looking to define “significance” a municipality can look at federal guidance. For considerations of an impact’s significance, NEPA looks at both context and intensity.³⁸ The NEPA intensity element uses a wide range of considerations such as unique characteristics of the geographic area and whether an action is related to other actions with individually insignificant, but cumulatively significant impacts.³⁹ Interpreting the meaning of “significance” related to a NEPA action, Judge Mansfield in *Hanly v. Kleindienst* provided two relevant factors:

- (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.⁴⁰

Incorporating federal factors into a local definition can aid in the usefulness of baseline comparisons. Through use of a cumulative impact assessment with a comparison to a municipality’s environmental baseline, local board members can make informed decisions about impacts of potential projects.

III. GROUNDS FOR IMPLEMENTING LOCAL ENVIRONMENTAL JUSTICE ORDINANCES

Local environmental justice ordinances should be used as part of a comprehensive scheme to protect public health and the environment. Local ordinances contribute towards the decentralization of environmental regulation. They can be useful testing grounds for larger state action. Finally, local ordinances allow for more meaningful public participation which is a key component of environmental justice.

³⁵ DAVIDE GENELETTI, ECOLOGICAL EVALUATION FOR ENVIRONMENTAL IMPACT ASSESSMENT 30 (2002) https://webapps.itc.utwente.nl/librarywww/papers/phd_2002/geneletti.pdf.

³⁶ *Id.*

³⁷ Ramo, *supra* note 33, at 50.

³⁸ 40 C.F.R. § 1508.27 (1979).

³⁹ 40 C.F.R. § 1508.27(b) (1979).

⁴⁰ *Hanly v. Kleindienst*, 471 F.2d 823, 830–831 (2d Cir. 1972).

A. *Decentralization of environmental regulation*

In today's political climate environmental regulations are changing rapidly. Regulations implemented a few years ago have been rolled back by the following administration.⁴¹ For towns looking to protect their local environment, a local ordinance can be an excellent tool for ensuring what the town desires to protect is protected. This distribution of power to the local level is known as decentralization.⁴² Claims supporting decentralization include that decentralization is place specific, in that environmental problems tend to be localized problems changing from area to area.⁴³ Decentralization is flexible because it is not subject to a rigid chain-of-command, in contrast to traditional environmental regulations.⁴⁴ Lastly, a decentralized system is more likely to see innovation as municipalities can be testing grounds for innovative policies that may later be adopted at a higher level.⁴⁵

Local governments have been recognized as being particularly well-suited to address environmental justice.⁴⁶ Individuals that may have a difficult time being heard at the national level are more likely to get attention from local lawmakers.⁴⁷ This type of local action occurs in a decentralization power structure.

B. *Meaningful public participation*

Local environmental justice ordinances allow for more meaningful public participation. The United States Environmental Protection Agency (EPA) defines "environmental justice" as: "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."⁴⁸ Meaningful involvement now allows potentially affected community members to have an opportunity to participate in and

⁴¹ See CLIMATE DEREGULATION TRACKER, <https://climate.law.columbia.edu/climate-deregulation-tracker> (last visited Apr. 14, 2020); REGULATORY ROLLBACK TRACKER, <https://eelp.law.harvard.edu/regulatory-rollback-tracker/> (last visited Apr. 14, 2020); Nadja Popovich et al., *95 Environmental Rules Being Rolled Back Under Trump*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html> (last visited Apr. 14, 2020). See generally TRACKING DEREGULATION IN THE TRUMP ERA, <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> (last visited Apr. 14, 2020).

⁴² Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 239 (2000).

⁴³ *Id.* at 248.

⁴⁴ *Id.* at 245.

⁴⁵ *Id.*

⁴⁶ Emily G. Bergeron, *Local Justice: How Cities Can Protect and Promote Environmental Justice in a Hostile Environment*, 32 NAT. RESOURCES & ENV'T 8, 11 (2018).

⁴⁷ *Id.*

⁴⁸ U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014, 3 (2011).

influence regulatory decisions.⁴⁹ Community participation at the local level allows for participation to be accessible to community members.

Barriers impair accessibility and keep citizens from participating, particularly at the local level. These include “the perception that citizens are often apathetic, and lack trust in public officials.”⁵⁰ These barriers are able to be overcome when community involvement is viewed as a collaborative process that is beneficial to citizens and lawmakers.⁵¹ Through this collaborative process, the environmental justice definition of “meaningful involvement” becomes clearer.

Lawmakers have identified a number of ways to enhance meaningful involvement. These include: “soliciting public comments on environmental documents through community, social service or religious organizations, or through radio and television; holding meetings at community-friendly times in accessible locations; translating key documents into the language spoken by the affected community; establishing information repositories with documents about the proposed action; and providing technical assistance to interpret technical documents to help develop potential alternatives and mitigation measures.”⁵² An example of public participation requirements at the federal level is found in the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).⁵³ CERCLA requires publication of important plans and documents as well as a “reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue.”⁵⁴ All of these measures can be implemented into local ordinances and planning processes. Municipalities can utilize local public libraries as project information repositories. They can also take advantage of local community groups to help spread the word about planning meetings and utilize translation services to translate documents. While there is an additional burden on a municipality to include these measures, they have been shown to successfully enhance community outreach and participation.⁵⁵ With improved community outreach leading to meaningful citizenship participation, municipalities come closer to incorporating meaningful involvement as set out in the EPA definition of environmental justice.

IV. NEWARK, NEW JERSEY: A CLOSER LOOK AT A LOCAL ENVIRONMENTAL JUSTICE ORDINANCE

Newark, New Jersey furnishes a revealing example of an overburdened community that has taken action into its own hands by passing an environmental

⁴⁹ *Id.*

⁵⁰ Jyldyz Kasymova & Tia Sherèe Gaynor, *Effective Citizen Participation in Environmental Issues: What Can Local Governments Learn?*, 46 ST. & LOC. GOV'T REV. 138, 139 (2014).

⁵¹ *Id.*

⁵² Rechtschaffen, *supra* note 15, at 121–22.

⁵³ 42 U.S.C. § 9617 (2010).

⁵⁴ *Id.*

⁵⁵ Rechtschaffen, *supra* note 15, at 122.

justice review ordinance at the municipal level. This section will look at the long industrial history of Newark and its designation as an environmental justice community. It will then analyze the city's environmental review ordinance to determine if it has effected any change in the community, and if not, where the issues surrounding the ordinance might be arising.

A. Newark, New Jersey's Industrial Past

Traditionally, environmental justice communities are those who suffer disproportionately higher environmental risks as a result of industrial facilities being sited nearby. Construction of such facilities usually occurs after the community establishes itself. Newark, New Jersey is different. In Newark, industry has a long history that predates the establishment of the United States as a country.⁵⁶ Newark, New Jersey was originally inhabited by the Lenni-Lenape indigenous people.⁵⁷ Newark was then subsequently settled by seventeenth-century Puritans with a thrust for self-sufficiency.⁵⁸ The Puritan settlement encouraged merchants and artisans to visit and settle in the community.⁵⁹ This historical process shaped Newark into an important manufacturing hub.⁶⁰ The City grew to be well connected with New York and other cities through the growth of roads, rail roads, and a canal.⁶¹ Original industries of Newark included shoe-making, tanning, and cider brewing.⁶²

By the early 1800s, Newark conducted its first industrial census which showed the addition of heavier industry, such as cotton mills, iron and brass foundries, sheet metal shops, and grist mills.⁶³ In the 1900s, Newark was viewed as a manufacturing city, shipping thousands of products across the world.⁶⁴ Crucial to Newark's success as a manufacturing city was its major international seaport.⁶⁵

⁵⁶ Charles Cummings, *Historical Treat*, NEWARK PUB. LIBR. (Mar. 7, 1996), <https://knowingnewark.npl.org/historical-treat/>.

⁵⁷ *Id.*

⁵⁸ Charles Cummings, *Town of cottage industries becomes a manufacturing empire*, NEWARK PUB. LIBR. (Apr. 30, 1998), <https://knowingnewark.npl.org/town-of-cottage-industries-becomes-a-manufacturing-empire/>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ REPORT AND CATALOGUE OF THE FIRST EXHIBITION OF NEWARK INDUSTRIES, EXCLUSIVELY 8-9 (Holbrooks Steam Printery, 1872), <http://www.archive.org/stream/reportcatalogueo00newaiala/page/n7/mode/2up>.

⁶² HISTORIC NEWARK: A COLLECTION OF THE FACTS & TRADITIONS ABOUT THE MOST INTERESTING SITES STREETS AND BUILDINGS OF THE CITY 5 (Fidelity Trust Company, 1916), <http://www.archive.org/stream/historicnewarkco01fide#page/n5/mode/2up>.

⁶³ Cummings, *supra* note 58.

⁶⁴ *Id.*

⁶⁵ See generally Charles Cummings, *From Whalers to Warships Always a City of Seafarers*, NEWARK PUB. LIBR. (Dec. 31, 1998), <https://knowingnewark.npl.org/from-whalers-to-warships-always-a-city-of-seafarers/>.

Today, Newark's downtown is surrounded by a major international airport and seaport as well as numerous industrial sites.⁶⁶ Newark is experiencing a revival based upon its proximity to New York City, major cultural and entertainment developments, and interconnectedness provided by public transportation.⁶⁷ Major real estate development projects are revitalizing previously industrial buildings and aiming to create "transit-connected, urban live-work-play environments."⁶⁸ With Newark's revitalization comes the realization that its industrial past has left its mark. While proposals for new, high-rise buildings are being reviewed, the City is combatting the presence of lead in its drinking water and high levels of haloacetic acid at several different testing sites across the City.⁶⁹ These lingering environmental problems have led Newark to be designated as an environmental justice community.

B. Newark as an Environmental Justice Community

The EPA defines environmental justice communities as "overburdened communities" that experience disproportionate environmental harms and risks.⁷⁰ Newark is recognized by the EPA's Region 2 as an overburdened community.⁷¹ Additionally, Newark's Ironbound neighborhood has been the subject of EPA Geographic Targeting of Compliance Monitoring Sweeps.⁷² These environmental compliance sweeps are directed toward communities of concern identified using EPA EJ screening tools.⁷³ As part of the sweep, the EPA meets with community-based stakeholders to understand their specific environmental concerns.⁷⁴ A number of groups have sprung up to support their communities and to make sure their specific concerns are heard.⁷⁵ One of these groups, the Ironbound

⁶⁶ Map of downtown Newark, NJ, GOOGLE MAPS, <https://www.google.com/maps> (search downtown Newark, NJ).

⁶⁷ David Hartman & Barry Lewis, *A Walk Through Newark*, THIRTEEN, <https://www.thirteen.org/newark/history4.html> (last visited Feb. 16, 2020).

⁶⁸ Vince Baglivo, *Newark on the Rise*, N.J. BUS. (Sept. 6, 2018), <https://njbmagazine.com/special-sections/newark-growth-revitalization/newark-on-the-rise/>.

⁶⁹ Justin Davidson, *Newark's Revival Is Finally Real. So Is Its Latest Problem.*, N.Y. MAG. (Nov. 5, 2018), <https://nymag.com/intelligencer/2018/11/newarks-revival-is-finally-real-so-is-its-latest-problem.html>.

⁷⁰ U.S. ENVTL. PROT. AGENCY, EJ 2020 GLOSSARY, <https://www.epa.gov/environmentaljustice/ej-2020-glossary> (last visited Mar. 19, 2020).

⁷¹ See U.S. ENVTL. PROT. AGENCY REGION 2, ENVIRONMENTAL JUSTICE ACTION PLAN, 8 (2016), https://www.epa.gov/sites/production/files/2016-03/documents/region_2_environmental_justice_action_plan.pdf [hereinafter EJ Action Plan].

⁷² *Id.*

⁷³ See U.S. ENVTL. PROT. AGENCY REGION 2, ENVIRONMENTAL JUSTICE ACTION PLAN, 8 (2016), https://www.epa.gov/sites/production/files/2016-03/documents/region_2_environmental_justice_action_plan.pdf; U.S. ENVTL. PROT. AGENCY, EJSCEEN: EPA'S ENVIRONMENTAL JUSTICE SCREENING AND MAPPING TOOL (2019), <https://ejscreen.epa.gov/mapper/>.

⁷⁴ See EJ Action Plan, *supra* note 71, at 8.

⁷⁵ See generally GREATER NEWARK CONSERVANCY, <https://www.citybloom.org/> (last visited Apr. 14, 2020); IRONBOUND COMMUNITY CORPORATION, <https://ironboundcc.org/> (last visited Apr.

Community Corporation (ICC), has been particularly active representing their neighborhood's environmental concerns. The ICC has made it their mission to advocate for the health of their community, which is bound on all sides by an airport, major highways, rail lines and the heavily polluted Passaic River.⁷⁶ Through its designation as an overburdened community and its very active community groups, Newark has been able to shed light on its environmental issues.

C. Newark's Environmental Justice Ordinance

On July 7, 2016, the Newark Municipal Council passed the Environmental Justice and Cumulative Impact Ordinance.⁷⁷ The new ordinance requires the city to take into account development impacts on the local community.⁷⁸ The ordinance was touted as a "first of its kind" local environmental justice ordinance.⁷⁹ The ordinance calls for the creation of a baseline Natural Resources Index,⁸⁰ creation of an Environmental Review Checklist to be submitted with all new qualifying projects,⁸¹ and additional grants of review by the Newark Environmental Commission (NEC).⁸² This sweeping environmental ordinance took approximately ten years to come to fruition, from the early drafting phases, to the passage of the final ordinance.⁸³

1. Ordinance Language

The Newark Ordinance was written with the help of the NJEJA. The NJEJA developed a model ordinance that was used as a template for the Newark Ordinance.⁸⁴ The Newark Ordinance is unique because it was written with direct

14, 2020); NEW JERSEY ENVIRONMENTAL JUSTICE ALLIANCE, <http://www.njeja.org/> (last visited Apr. 14, 2020).

⁷⁶ IRONBOUND COMMUNITY CORPORATION, *Environmental Justice*, <https://ironboundcc.org/environmental-justice/> (last visited Mar. 19, 2020).

⁷⁷ CITY OF NEWARK MUN. COUNCIL, MEETING MINUTES – FINAL, (July 7, 2016), <https://newark.legistar.com/MeetingDetail.aspx?ID=494388&GUID=F1C7C555-185D-42FD-AC98-EA21C572CC07&Options=&Search=>.

⁷⁸ See NEWARK, N.J., ORDINANCE 16-0803 (2016).

⁷⁹ See generally Peter Fabris, *Newark passes nation's first 'environmental justice' ordinance* (BDC Network, July 18, 2016), <https://www.bdcnetwork.com/newark-passes-nation%E2%80%99s-first-%E2%80%98environmental-justice%E2%80%99-ordinance>; Jennifer Goodman, *Newark N.J., passes historic environmental ordinance* (Builder, July 13, 2016), https://www.builderonline.com/building/regulation-policy/newark-nj-passes-historic-environmental-ordinance_o; Clean Water Action, *supra* note 9.

⁸⁰ NEWARK, N.J., ORDINANCE 16-0803 § 1.2(f) (2016).

⁸¹ *Id.* § 1.2(e).

⁸² *Id.* § 1.1.

⁸³ Telephone Interview with Cynthia Mellon, Co-Chair, Newark Env'tl. Comm'n (Jan. 20, 2020).

⁸⁴ Telephone Interview with Molly Greenberg, Research Assistant, The New Sch. Univ. (Feb. 11, 2020).

input from community members.⁸⁵ The community expressed their concerns in the required environmental checklist citing specific callouts for high-concern items. Two of those concerns included reporting on proposed air pollution and truck trips.⁸⁶ By requiring proposed development projects to report increases in air emissions and the expected increase in the number of daily truck trips to and from a facility, the NEC is able to make meaningful suggestions about project modifications to the City's Central Planning Board.

The ordinance also includes a definition of environmental justice. This definition directly reflects the concerns of Newark citizens because it was written with their direct input.⁸⁷ It identifies a larger collection of protected groups than the current federal definition. The current federal definition for environmental justice calls for the "fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels."⁸⁸ The definition in Newark's ordinance expands upon this list to include "race, color, national origin, ethnicity, income, or other demographic or geographic characteristics."⁸⁹ The demographic and geographic characteristics listings in the ordinance allow for broader protections that ensure the people of Newark are adequately represented.

The ordinance definition of environmental justice also incorporates by reference Presidential Executive Order 12898, State of New Jersey Executive Order #96 (February 18, 2004), and State of New Jersey Executive Order #131 (February 5, 2009).⁹⁰ Inclusion of the Presidential Executive Order 12898 is significant because the Executive Order focused on environmental justice efforts directed towards minority and low-income populations,⁹¹ whereas the current EPA definition of environmental justice merely refers to "all people."⁹² The focus in the ordinance's definition on low-income communities is further bolstered by the inclusion of New Jersey Executive Order #96 (February 18, 2004), which officially recognizes the cumulative impact of exposure to environmental hazards

⁸⁵ *Id.*

⁸⁶ NEWARK, N.J., ORDINANCE 16-0803 §§ 2.3(A)(i), 2.3(A)(iv) (2016); N.J. DEP'T OF HEALTH, ASTHMA IN NEW JERSEY: ESSEX COUNTY ASTHMA PROFILE 1, 6 (2014), https://www.nj.gov/health/fhs/chronic/documents/asthma_profiles/essex.pdf. Children in Essex County, NJ, the county where Newark is located, suffer from asthma at a rate of 12.2% whereas the State of New Jersey average rate of asthma in children is 8.7%. The vast majority of children in this pool come from Newark, the county's largest city; John Herzfeld, *N.Y. – N.J. Port, Terminals Agree to Cut Diesel Idling*, BLOOMBERG ENV'T & ENERGY REP. (July 23, 2015), <https://news.bloomberglaw.com/environment-and-energy/ny-nj-port-terminals-agree-to-cut-diesel-idling>. Cuts in diesel truck idling emissions have been called "imperative" by the EPA Region 2 Administrator. The Port of Newark is the largest seaport on the East Coast and with large numbers of idling diesel trucks awaiting the arrival of container ships, air quality is significantly diminished.

⁸⁷ Molly Greenberg, *supra* note 84.

⁸⁸ EJ 2020 GLOSSARY, *supra* note 70.

⁸⁹ NEWARK, N.J., ORDINANCE 16-0803 § 1.3(c) (2016).

⁹⁰ *Id.*

⁹¹ Exec. Order No. 12898, 59 Fed. Reg. 32 (Feb. 16, 1994).

⁹² EJ 2020 GLOSSARY, *supra* note 70.

on those in low-income communities.⁹³ Lastly, while New Jersey Executive Order #131 (February 5, 2009) expands recognition of environmental justice issues to “all residents of the State of New Jersey,” it specifically acknowledges the disproportionate effects air pollution has on Black and Latino/Hispanic communities.⁹⁴

Woven throughout the language of the ordinance is the community’s concern regarding localized air pollution. Essex County, where Newark is located, is currently in designated moderate non-attainment status for 8-Hour Ozone (2015) and serious non-attainment status for 8-Hour Ozone (2008).⁹⁵ Essex County has previously been in non-attainment for carbon monoxide, PM-2.5, and a now revoked 1-hour ozone standard.⁹⁶ With a history of heavy industry and continuing air pollution problems, it was important for the citizens of Newark to ensure their environmental justice ordinance included a specific focus on the air pollution issues the city faces. By incorporating specific acknowledgements of the serious impacts of air pollution on the population through the state executive order, the ordinance works to address an issue that is specific to the city.

2. Ordinance Primer: The Flow of a Project

The Newark ordinance is embedded in the city’s current land use and zoning process. Newark’s zoning process does not differ substantially from that of the traditional zoning and planning processes.⁹⁷ Under the ordinance, a covered applicant (one who meets the criteria in §1.3(a) of the ordinance) submits their project application along with their completed Environmental Review Checklist (“checklist”) to the Central Planning Board or Zoning Board of Adjustment, depending on their specific building request.⁹⁸ At the same time, a copy of the checklist is submitted by the applicant to the Administrative Officer within the Newark Planning Office.⁹⁹ The Officer then forwards a copy of the checklist to a number of individuals involved in the zoning and land use process, including the Chair(s) of the NEC.¹⁰⁰ After receiving the checklist, the NEC reviews it and

⁹³ N.J. Exec. Order No. 96 Governor James E. McGreevey (Feb. 18, 2004), <https://nj.gov/infobank/circular/eom96.htm>.

⁹⁴ N.J. Exec. Order No. 131 Governor Jon S. Corzine (Feb. 5, 2009), <https://nj.gov/infobank/circular/eojsc131.htm>.

⁹⁵ U.S. ENVTL. PROT. AGENCY, GREEN BOOK: NEW JERSEY NONATTAINMENT/MAINTENANCE STATUS FOR EACH COUNTY BY YEAR FOR ALL CRITERIA POLLUTANTS, https://www3.epa.gov/airquality/greenbook/anayo_nj.html (last visited Mar. 20, 2020).

⁹⁶ *Id.*

⁹⁷ *Compare* NOLON ET AL., LAND USE AND SUSTAINABLE DEVELOPMENT LAW CASES AND MATERIALS 135–141 (W. Acad. Publ’g, 9th ed. 2017), *with* NEWARK, N.J., NEWARK ZONING & LAND USE REGULATIONS, 6 (2014), https://drive.google.com/file/d/1QOIceZHWTCaQUDE4RGz7Ax_Ff09c9rjw/view.

⁹⁸ NEWARK, N.J., ORDINANCE 16-0803 § 1.5(a) (2016).

⁹⁹ *Id.* § 1.5(c).

¹⁰⁰ *Id.* § 1.5(d).

writes an advisory opinion regarding the potential impacts of the project.¹⁰¹ The advisory opinion is then forwarded to the appropriate Board where it becomes an official part of the project's record.¹⁰² The respective Boards are to then take into account the input from the NEC to make decisions to "advanc[e] goals expressed in the Newark Master Plan and Sustainability Action Plan and improv[e] long-term planning."¹⁰³ If a covered applicant fails to submit a complete checklist, the application will be deemed incomplete.¹⁰⁴

D. *Ineffectual ordinance elicits no change*

As of this writing, the ordinance has been in effect for almost four years. According to one of the chairs of the NEC, the ordinance has not substantially affected any projects.¹⁰⁵ Advocates for the ordinance have struggled with its implementation.¹⁰⁶ The ordinance has project flow issues resulting from too many required steps before actual project review happens. The Central Planning Board does not feel they have the power to enforce the ordinance and the Zoning Board of Adjustment is hesitant to change any project designs. Lastly, with a primary goal of the ordinance to better inform the public of the projects occurring around them, the submitted checklists and NEC advisory opinions are extremely difficult to find.

1. Ordinance Flow of Work Issue

As described earlier in this paper, a proposed development project or modification follows a lengthy procedure to be approved by the city. This lengthy procedure includes the environmental review process. With an application and checklist needing to be passed to multiple people and departments, there is potential for roadblocks and mistakes to happen along the way. An example of a flow of work for an applicant is provided on the following page.

¹⁰¹ *Id.* § 1.5(e).

¹⁰² *Id.*

¹⁰³ *Id.* at recitals.

¹⁰⁴ *Id.* § 1.5(b).

¹⁰⁵ Cynthia Mellon, *supra* note 83.

¹⁰⁶ Charles Lee, *A Game Changer in the Making: Lessons from States Advancing Environmental Justice through Mapping and Cumulative Impact Strategies*, 50 ENVTL. L. REP. 10203, 10213 (2020).

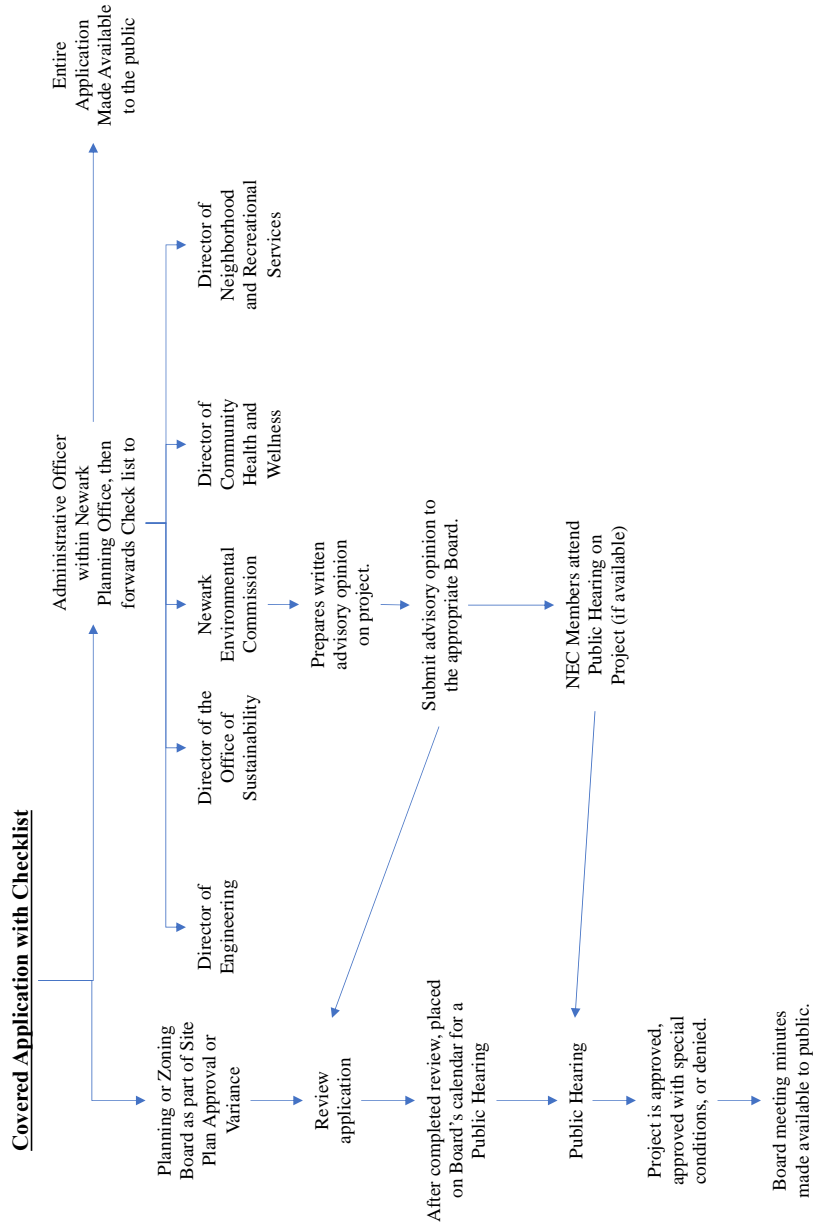


Figure 1: Checklist Project Flow

Issues with such a lengthy process include project applications not being passed to the NEC from other city offices.¹⁰⁷ The NEC is entirely reliant on the Administrative Officer within the Newark Planning Office to pass along applications for review. There is no alternative pipeline for applications to arrive at the NEC for review. If the NEC is unaware of applications submitted, they are unable to review projects. Additionally, as part of research for this paper, when this author called the Newark Planning Office to inquire about the workflow process for reviewing the submitted checklists, members of the office were not even aware there was such a requirement for a checklist to be submitted with certain project applications. Finally, if an application is submitted with a completed checklist, but not forwarded to the NEC and a hearing or proceeding is completed without an NEC advisory opinion, New Jersey Municipal Land Use Enabling Statutes state that “failure of the planning board or board of adjustment to make such informational copy [of an application for development] available to the environmental commission shall not invalidate any hearing or proceeding.”¹⁰⁸ Three factors led to a process that cannot substantially effectuate any change: the staff’s lack of knowledge in receiving initial applications, applications not being passed on to the NEC for review, and enabling language that allows proceedings to continue without environmental review.

2. Planning and Zoning Boards claim they have no power to enforce change

The Newark Central Planning Board and the Zoning Board of Adjustment (ZBA) are given limited delegated powers by the state. Per New Jersey enabling statutes, the Planning Board has limited review powers over project applications.¹⁰⁹ The Planning Board is limited to reviewing subdivisions, site plans, or conditional uses as long as none of these projects require a use variance.¹¹⁰ However, even with this limited review power, the Planning Board may be assigned other duties by ordinance or resolution of the governing body to aid and assist the governing body.¹¹¹ The ZBA has more review powers over projects. Along with an enumerated list of review powers,¹¹² the ZBA state enabling language includes a blanket statement that extends the ZBA’s powers to grant variances or other relief as long as it involves an “inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.”¹¹³ Despite having the

¹⁰⁷ Cynthia Mellon, *supra* note 83.

¹⁰⁸ N.J. STAT. ANN. § 40:55D-27(b) (West 1977).

¹⁰⁹ See N.J. STAT. ANN. § 40:55D-25(a) (West 1999).

¹¹⁰ NEWARK, N.J., NEWARK ZONING & LAND USE REGULATIONS, 40:11-5-3 (2014), https://drive.google.com/file/d/1QOtceZHWTCaQUDE4RGz7Ax_Ff09c9rjw/view.

¹¹¹ N.J. STAT. ANN. § 40:55D-25(b)(3) (West 1999).

¹¹² N.J. STAT. ANN. §§ 40:55D-70(a)–(c) (West 2007).

¹¹³ N.J. STAT. ANN. § 40:55D-70(d) (West 2007).

authority to make decisions regarding projects, the Boards, specifically the Planning Board, have cited that they cannot enact any of the suggestions recommended by the NEC in their advisory opinions because they lack the authority to do so.¹¹⁴

The Planning Board's apparent lack of authority to make changes to projects based on NEC recommendations could be mitigated by including of an additional grant of power in the ordinance. Per the state enabling language and the Newark Zoning and Land Use Regulations, additional powers can be assigned by ordinance or resolution by the Municipal Council.¹¹⁵ No such additional powers are assigned in the current ordinance. The NJEJA Model Ordinance does provide an example of how to provide statutory authority by giving the Environmental Impact Statement (the checklist equivalent) legal effect.¹¹⁶ As discussed above, the ZBA does have the power to require modifications to projects. The current ZBA has modified some projects based on NEC recommendations, but largely has not taken into consideration the vast majority of suggestions.¹¹⁷ Providing training and guidance to members of the ZBA could possibly aid them in understanding the extent of their statutory powers. As it stands, the ZBA is made up of seven residents of Newark who are appointed by the Municipal Council.¹¹⁸ There are no requirements that members of the ZBA be land use attorneys or experts otherwise, however the ZBA does have the authority to contract with such experts as it deems necessary.¹¹⁹ The ZBA should use this power to obtain the necessary guidance to delineate what their statutory powers are.

3. Citizens unable to review project and NEC documents

Despite the Newark Ordinance including sweeping provisions for increasing citizen access to project information, actually obtaining this information can be immensely difficult. The City of Newark maintains a website where the Planning Board and Board of Adjustment post their meeting agendas and meeting minutes; however, searching through each record and general navigation through the website is tedious and time consuming.¹²⁰ Additionally, detailed information about each project is unavailable within the posted meeting minutes and agendas.¹²¹ When this author submitted various New Jersey Open Public Records

¹¹⁴ Cynthia Mellon, *supra* note 83.

¹¹⁵ N.J. STAT. ANN. § 40:55D-25(b)(3) (West 1999).

¹¹⁶ NJEJA Ordinance, *supra* note 22, at recitals.

¹¹⁷ Cynthia Mellon, *supra* note 83.

¹¹⁸ NEWARK, N.J., NEWARK ZONING & LAND USE REGULATIONS, 40:12-1-1 (2014), https://drive.google.com/file/d/1QOtceZHWTCaQUDE4RGz7Ax_Ff09c9rjw/view.

¹¹⁹ NEWARK, N.J., NEWARK ZONING & LAND USE REGULATIONS, 40:12-4 (2014), https://drive.google.com/file/d/1QOtceZHWTCaQUDE4RGz7Ax_Ff09c9rjw/view.

¹²⁰ City of Newark, *Planning & Zoning Documents*, <https://newarkehd.com/planningzoning/home> (last visited Sept. 29, 2020).

¹²¹ *Id.*

Act (OPRA) requests in an attempt to view copies of submitted site plan applications and completed NEC advisory opinions, the requests were met with questions of the documents even existing.¹²² Follow-up phone calls to various city offices were met with individuals who did not know of the ordinance's existence. This author will note that due to extenuating circumstances, they were unable to physically go to the Newark Public Records Office and Newark Public Library to attempt to obtain the records in person. It is worth noting that even with extensive efforts, procuring documents that are "available to the public" has proven to be immensely difficult. For documents to be useful to the public, they need to be readily accessible. The NEC advisory opinions could contain extremely useful information for an individual or community group who want to be informed about a new project being built in their neighborhood. Without increasing accessibility of these documents, they will largely remain unreviewed and the community will continue to be ill-informed about the effects of future projects in their neighborhood.

E. Making the Ordinance Stick

The Newark Ordinance at present is not effectuating any real change. The project flow of work of the ordinance is lengthy and filled with gaps where individuals do not pass on necessary information. When changes to projects are suggested through NEC advisory opinions, the Planning Board and ZBA do not feel that they have the authority to change the respective projects. Finally, one of the underlying purposes of the ordinance was to increase public awareness about environmental impacts of projects in their neighborhoods. However, the public cannot access the necessary documents to find out about these impacts.

Improving a local ordinance to address these issues is no easy task, and there are a number of factors that will affect the likelihood of any improvements being implemented. Some of those factors include: the current political atmosphere of the town, the mayoral administration, willingness of the respective Boards to implement changes to their processes, and potential lobbying against stricter regulations by industry. The work flow issue could be addressed by reducing the number of times an application and checklist is passed around. When an applicant submits an application to the administrative officer of the zoning office, that officer should immediately distribute the respective documents to all parties. This may include training the administrative officer on this duty and recognizing that in order for certain applications to be complete, they need to include an environmental checklist. In order to better understand their granted authority, the Boards could use their granted power to hire outside experts and attorneys.¹²³

¹²² City of Newark, *OPRA Request Forms*, <https://www.newarknj.gov/viewer/opra-request-forms> (last visited Nov. 15, 2020).

¹²³ See NEWARK, N.J., NEWARK ZONING & LAND USE REGULATIONS, 40:11-3 and 40:12-4 (2014), https://drive.google.com/file/d/1QOtceZHWTcQUDE4RGz7Ax_Ff09c9rjw/view.

These individuals could then provide training and counsel to the Boards to help delineate the boundaries of their authority. Lastly, improving public access to project documents will help the City to achieve the purpose of informing the public about the respective environmental impacts of proposed projects.¹²⁴ Public access could be improved by making copies of the documents available through an online records database. Documents could also be made available for public viewing at the Newark Public Library. Additionally, helping records staff understand the existence of the ordinance would likely help the processing of OPRA requests.

Newark has made a monumental achievement through the passage of their environmental justice ordinance. Even the presence of such an ordinance speaks volumes about the powers municipalities have to regulate their local surroundings. The ordinance would not have been possible without the tireless work of concerned community members and organizations who were devoted to passing such an ordinance. Newark now owes it to its residents to implement this ordinance to the fullest extent possible and to make the needed revisions to ensure real change is happening.

V. CONCLUSION

Local environmental justice ordinances can be a powerful tool for a municipality to address their localized environmental concerns. Environmental regulation at the state and federal levels are important for setting the legal foundation for municipalities; however, a municipality is best situated to understand its specific environmental concerns. Local environmental justice ordinances allow a municipality to address any disproportionate environmental effects their city may be suffering from. Newark, New Jersey has put in place an environmental justice ordinance. The ordinance was tailored to the specific concerns of the community, specifically addressing concerns of air pollution stemming from the City's position as a major shipping port. The presence of the ordinance alone is an important accomplishment for Newark. However, the city now needs to address the "holes" in the ordinance to allow suggested changes by the NEC to have legal force and effect. By revising their current ordinance, Newark would be able to have an effective local environmental justice ordinance and be a model for other cities and towns across the country.

¹²⁴ NEWARK, N.J., ORDINANCE 16-0803, recitals (2016).