

University of New South Wales Law Research Series

**PANDEMIC POP-UPS AND THE
PERFORMANCE OF LEGALITY**

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[2021] *UNSWLRS* 44

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Pandemic pop-ups and the performance of legality

Forthcoming in B Doucet, R van Melik and P Fillion (eds.) *Global Reflections on COVID-19 and Urban Inequalities* (Bristol University Press, 2021), pp. 25-35.

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Cities around the world have rushed to respond to the coronavirus pandemic by regulating public space to promote social distancing and stimulate economic recovery. The resulting decisions are what we term ‘pandemic pop-ups’ - hasty, real-time, and temporary changes to the use and regulation of public space. Focusing on Toronto, Canada and Sydney, Australia, we argue that pandemic pop-ups extend beyond immediate infrastructure needs to how cities govern generally. Pop-ups may replace cars with bikes or extend restaurants into streets, and for this they have been celebrated: for saving jobs, and for making streets safer and more enjoyable. Pandemic pop-ups are not universally positive, however. They also remove tent encampments, make racialized residents more vulnerable to sanctions, and rush through controversial infrastructure projects.

As we consider pandemic and post-pandemic cities, the governance of pop-ups demands critical scrutiny. The laws that regulate urban space are always open to multiple interpretations (Cover, 1983). The force of law 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. Through pop-ups, cities enact a particular form of legality – by which we mean not just legal texts, but the range of rules, practices and understandings through which those texts take effect in the world – that weakens democratic oversight and participatory processes. With an emphasis on speed over process, pop-ups have invariably been deployed without oversight or engagement, and rarely involving the voices of racialized or vulnerable people.

We recognize the value that pop-ups can bring to cities – socially, economically and environmentally – as well as the urgent challenges that make pandemic pop-ups critical. In this paper, however, we focus on more troubling aspects that have often been overlooked. To do this we challenge two features that are conventionally associated with pop-ups: their irregularity and their scope. First, most accounts describe pop-up planning as exceptional, a deviation from usual practices of decision-making. Yet in the time of COVID-19, pop-ups are the ‘new normal’. Second, we argue that pop-up infrastructure is broader than previously acknowledged, extending beyond bike lanes and patios to homeless encampments and policy proposals. Since pandemic pop-ups re-shape public space and the regulations through which it is governed, decisions must be made within a framework of inclusive and participatory decision-making.

What we think when we think about pop-ups

Pop-up planning is typically associated with small-scale, time-limited interventions in public space (Lydon & Garcia, 2015). Pop-ups can be used to “minimize costs, refine designs, and gain political, public, and financial support in the creation of people-oriented public spaces” (Peterson, 2012, p. 2). Celebrated examples emphasise sociability and sustainability: the plastic chairs that preceded the permanent pedestrianisation of Times Square in New York; the shipping container bars and disco washing machines that led post-earthquake rebuilding in Christchurch; the weekly closures of streets to cars in Bogotá that inspired Sunday Streets around the world.

Cities are increasingly using pop-ups as soft strategies to test and build support for change while engaging citizens in ways that are more participatory than standard forms of consultation. They provide nimble processes that can be useful in overcoming resistance, enabling the replacement of infrastructures that “have proven to be dysfunctional” (Peterson 2012: 1). But the promise of long-term change cannot be assumed, as pop-ups often remain small and experimental. Participation is also uneven, and may minimize – or even eliminate – public engagement. Among the celebratory rhetoric, pop-ups have thus attracted critiques: for the unevenness and precarity of interventions, and for their implication in processes of displacement, gentrification and state disinvestment (Thorpe, Moore, & Stickells, 2017).

The legalities of pandemic pop-ups

The COVID-19 pandemic has seen an explosion of pop-up infrastructure. After an initial focus on minimizing infection (allowing health and other key workers to avoid public transport by cycling to work; preventing crowds in outdoor recreation areas), the emphasis has increasingly been on enabling economic activity (allowing businesses to work with social distancing by extending their activities into public spaces).

The rapid reallocation of traffic space for walking, cycling and dining has generated much applause, with commentators celebrating these shifts as the start of long term change toward more livable, sustainable and inclusive cities (Martin et al, 2020). Yet, in the early haste to respond, some governments overlooked public participation altogether. For example, in the United Kingdom, some municipalities created cycling lanes and wider sidewalks using only technology-based data and without community engagement (Lovelace et al, 2020). In response to municipal efforts to alter public space in the time of COVID-19, critics have highlighted a lack of engagement with Black, Indigenous and People of Colour (BIPOC) communities, with attention focused on the needs of white, able-bodied and affluent residents rather than those living with disabilities or in overcrowded housing and boarding homes (Pitter, 2020; Eskyte et al, 2020).

In Toronto, the city government was admonished for the closing of parks, and its reluctance to expand the notoriously narrow sidewalks and slim cycling infrastructure network, illustrated by a viral video of a hula-hoop-wearing pedestrian showcasing the impossibility of complying with city bylaws (Spurr, 2020). By May 2020, pop-ups boomed, with the suspension of patio regulations and restrictions and “interim ways to create attractive space for pedestrians and to support COVID-19 recovery efforts for local businesses” (City Council, 2020b, p. 19). The City opted mainly for bike- and pedestrian-only street use on particular dates and times, mimicking other initiatives like “Car-Free Sundays” in certain neighbourhoods (City Council, 2020b). By July 2020, extensive powers were delegated to city staff, with sunset clauses ranging from six to eighteen months, to create pop-up patios and cycling lanes.

The extension of Toronto’s Bloor street cycling corridor is a striking example of the unique legalities of pandemic pop-ups. Between 2016 and 2017, the City piloted a separated bike lane along 2.4 kilometres of busy, central Bloor street, with extensive community engagement including all local businesses and neighbourhood associations, and dozens of staff reports before the lanes were finally implemented in 2019. By contrast, further along Bloor, staff received delegated authority to install 25 kilometres of new cycling infrastructure with flexibility based on changing traffic volumes, and the “evolving needs of residents and businesses in the wake of the

pandemic,” expiring in December 2021 and without engagement requirements (City Council, 2020b). The differences were noteworthy in relation to community engagement.

Pop-up bike lanes and public space restrictions were prominent features in Sydney too. Closures of beaches and playgrounds were grudgingly accepted, and car-free Sundays in major parks proved popular. Many councils waived permits and fees for outdoor dining, encouraging cafes, bars and restaurants to extend their operations onto public footpaths. In May, the state government invited councils to apply for \$15 million in grants to install temporary activation projects “to test and build the case for more permanent changes” (DPIE, 2020). This was followed in July by the launch of an ideas competition to “engage industry and the community on ideas to deliver new, better and more activated public space” (CFS & DPIE, 2020).

Haste, and the potential to exacerbate existing inequalities, was apparent in all of these decisions. When some public spaces were closed, the uneven distribution and accessibility of others were brought clearly into view. Differential access was apparent in racialized policing, with a disproportionate number of fines for violation of public health orders issued in areas largely populated by Indigenous and migrant Australians (Faruqi, 2020). As government staff noted in a briefing to councils, the rushed pace meant that grants for pop-ups were oriented less toward need and more toward areas with projects ready to go. This was further compounded by government inaction in other respects: enabling personal trainers and their paying clients to colonise public parks when private clubs were closed, and businesses to use social distancing markers as a way to stamp their brands onto public pavements. Unlike ‘regular’ patios and business activities in the public domain, these commodifications of public space were unregulated, avoiding processes of public scrutiny.

Beyond bike lanes

Pandemic pop-ups extend beyond cycling and dining spaces. Toronto is not just overlooking areas of disadvantage, but worsening them, by dismantling homeless encampments, restricting public spaces, and introducing fines that shape new social distancing regulations, disproportionately affecting vulnerable and marginalized communities (Luscombe & McLelland, 2020). By contrast, thousands of mainly white, affluent people who breached social distancing rules in a trendy Toronto park received only warnings (Van Wagner & Potamianos, 2020).

In the early days of the pandemic, Toronto grouped access to public space, cycling, and sidewalk use with the need for “permanent supportive and affordable housing opportunities” (City Council, 2020a). Toronto initially allocated emergency shelter spaces in community centres and schools, as well as provided rooms in hotels and interim housing for the most vulnerable (City Council, 2020c). But, unlike patios and cycling, approval for these pop-up spaces expired at the end of June 2020 without a plan or funding to address where people would go later. In May and June, the City cleared tent encampments from public spaces even without sufficient housing and shelter space, and high rates of COVID-19 in the housing provided, resulting in legal action by the Canadian Civil Liberties Association (Van Wagner & Potamianos, 2020).

In Sydney, there were numerous housing-related interventions, but not the increase in funding for the construction of social housing desperately needed after decades of disinvestment. The emphasis was instead on emergency measures: temporary accommodation (hotel rooms for 30 days) and outreach services for rough sleepers and, more controversially, cash grants of \$25,000 to encourage renovations by middle-class owner-occupiers “to help the residential construction market to bounce back” (Australian Government, 2020).

The planning process itself was another focus of pop-up activity. The state government explained: “We’ve brought forward immediate reforms to the planning system to support productivity, investment and jobs during COVID-19. Our plan will cut red tape and fast-track assessment processes to boost the construction pipeline” (DPIE, 2020). Introduced as part of an *Emergency Measures Bill* in March, these developer-friendly changes followed years of unsuccessful (and extremely unpopular) efforts to downgrade assessment and consultation processes in the planning system. The 2020 changes included increases to lapsing periods, existing use rights and appeal rights for applicants, significantly reducing the ability of local councils to regulate development. The Minister also gained new powers to authorise development “without the need for any approval under the Act or consent from any person” (DPIE, 2020). Within two months, fast tracked approvals were granted to 48 projects worth over \$13 billion. Only some changes to the planning process were time-limited. Legislative requirements to make development proposals publicly available in council offices and to place notifications in local newspapers, for example, have been permanently removed (despite an official acknowledgement of the equity implications of online-only notification and exhibition (DPIE, 2020)).

Pandemic legality: Towards a new conceptualization of pop-ups

Cover (1983) writes, “We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void” (p. 4). Pop-ups give physical form to particular understandings about rightfulness, lawfulness and validity, and in doing so they work to produce and preclude particular kinds of legality and precarity. Law provides the basis for multiple narratives through which ‘right’ and ‘wrong’ are produced and known; the success of particular narratives depends upon practices of compliance, rejection and adaptation.

Just as pop-ups can be understood as deviations from normal processes, pandemic pop-ups can be conceptualised as including new ways of enacting laws, such as delegating power for development proposals and fast-tracking long-term plans. In our view this is a central feature – and concern – of pandemic pop-ups. With pandemic pop-ups extending far beyond the usual bike lanes and patios to less convivial decisions on housing, tent encampments and participatory planning, this is a concern in urgent need of attention. The similarities between Toronto and Sydney are significant, indicative of the proliferation of pandemic pop-ups in western liberal democracies, and reflective of the increasing globalization of actors, processes and pressures on cities.

Cover reminds us that what is right or wrong is not merely an issue of formal law – legislation and judicial decisions – but is co-created by communities, in which a wide range of legal actors (elected officials, bureaucrats, citizens and others) may resist and recast state-sanctioned laws. Toronto’s decision to group together the public realm and housing, and then to abandon housing and destroy encampments, illustrates the continuous mish-mash of legalities and the state responsibilities they entail.

Pandemic pop-ups have significant implications for democratic urban governance, especially inclusive and participatory decision-making. As we move from short term health to longer term economic objectives, the importance of these issues is increasingly apparent. In limiting engagement, prioritizing particular pop-ups (patios to promote business activity, major project approvals to spur development) over others (housing for those in need), and treating vulnerable communities differently, pandemic pop-ups undermine the decades of hard work to make local decision-making more democratic, equitable, and inclusive. While pandemic pop-ups imply a limited temporality to respond to the crisis, the infrastructure prioritized in these ‘pilots’ sends a striking message as to which issues, and whose voices, matter. Pandemic pop-ups map a set of

laws that respond to only a subset of pandemic needs, and simultaneously produce gaps in democracy.

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