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As a strategy to make real estate development accountable to local neighborhoods, community coalitions and developers are increasingly signing Community Benefits Agreements (CBAs), legally binding contracts through which developers agree to provide benefits to affected communities in exchange for the coalition's support when a project reaches the local legislature for approval.¹ The CBA concept originated with the Los Angeles Alliance for a New Economy (LAANE) and has been used extensively in California.² Over time, CBAs have come to be used in other states and have incorporated various community benefits, including first source hiring, living wage agreements, affordable housing assistance, open space expansion and environmental improvements. In New York City, all but one of the CBAs have been negotiated by informal and unincorporated coalitions of community groups. This has been the norm in other states as well.

The one instance of creating a separately incorporated entity to negotiate a CBA brought to light a number of advantages to formally incorporating and structuring the negotiating entity. The purpose of the article is not to argue that a separate corporation is preferable in all instances but rather

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to encourage consideration of this approach and to examine and demystify some of the structuring issues.

I. Background: Unincorporated Coalitions and Separate Corporations

Many of the CBAs have been negotiated by coalitions that may represent dozens of groups. When construction of the Los Angeles Staples Center was proposed, for example, along with two hotels, two apartment buildings, a retail complex, a 7,000-seat theater and a 250,000-square foot expansion for the convention center, the CBA was negotiated by the Figueroa Corridor Coalition, which represented more than thirty community organizations, including environmental groups, church groups, health organizations, and immigrants' and tenants' rights groups.³ The coalition that responded to the expansion of LAX airport in Los Angeles claimed twenty-two community groups as members, including organizations representing community, religious, environmental, and labor interests as well as two school districts.⁴

Several of the CBAs devised in connection with New York City projects have been negotiated by relatively small numbers of groups and this has led to criticism. For example, the first New York CBA, completed in 2005 in connection with the Atlantic Yards basketball arena development, was negotiated by only eight community groups and has been alleged to be "inherently undemocratic" because organizations whose constituencies were citywide or statewide rather than community-based were the primary signers and some of them were receiving funds from the developer.⁵ The 2006 Bronx Terminal Market CBA, which allegedly did not involve any grass roots community organizations, was signed by only three groups.⁶ These criticisms highlight the importance of an inclusive and well organized group to pursue the negotiations. Structuring efforts early on can significantly bolster the credibility and perhaps the long-term success of the effort.

It was with those lessons in mind that Manhattan's Community Board 9⁷ began an effort, just after the Bronx Terminal Market agreement, to respond to a massive project to expand the Columbia University campus in West Harlem. It was decided that a separately incorporated entity, the West Harlem Local Development Corporation, would be formed to undertake the negotiation. One impetus for this was the desire to potentially involve government entities such as elected representatives and the community board who could not legally sign onto a CBA on their own. Another factor that encouraged the separate incorporation was a desire for the kind of credibility that the Brooklyn and Bronx efforts failed to achieve.

The West Harlem LDC has also been criticized,⁸ but the criticisms are not the result of using a corporate structure. In fact, the process of creating the corporate structure through detailed by-laws may make the group more resistant to criticism and perhaps more resilient and transparent because a great deal of attention was given to encouraging and structuring participation. In weekly meetings beginning in September 2006, the initial

board of the corporation spent part of nearly every meeting grappling with how to expand the board (defining categories of directors and considering recruitment), how the board and members should vote on important issues, and how to respond to input from the community members who attended the public portions of the meetings.

The board eventually expanded to twenty-five members and work by numerous subcommittees laid the groundwork for negotiations with Columbia. The denouement arrived more quickly than expected, however, and a detailed CBA was not signed. Instead, a memorandum of understanding (MOU) was signed by the West Harlem LDC and Columbia University on December 19, 2007, and the \$7 billion project was approved by the New York City Council the same day in a thirty-five acre rezoning decision. The MOU calls for Columbia to grant \$150 million to residents of the area during the next twelve years with \$76 million to a flexible benefit fund; \$50 million to in-kind services, including \$30 million toward a school for kindergarten through eighth grade; \$20 million for a housing fund; and \$4 million for legal services to help those displaced by the development.⁹ In late January, a West Harlem LDC board member is quoted as saying that "the LDC is in the process of drafting a full CBA,"¹⁰ but the absence of a full CBA at the time of the Council vote on the rezoning is a source of great concern for advocates of the CBA concept¹¹ in general and neighborhood residents in particular.¹² An MOU is not an enforceable document and, in addition, now that it is signed, the LDC may have less leverage to negotiate the details missing from this rather abbreviated document.

When CBAs are signed by the individual organizations making up a coalition, the agreement allows each signing organization to enforce it. As one commentator has indicated, this approach "makes clear to each organization the legal reality that it must live up to the CBA's commitments."¹³ Another concern is that:

few coalitions have structured systems for determining who are official members, and who can speak or act on their behalf. (Such systems would be set out in bylaws or similar documents.) This uncertainty could cause problems if an unincorporated coalition were the legal entity that signed a CBA.¹⁴

On the other hand, adopting carefully considered by-laws could eliminate this concern.

Of course, developing a structured system for decision-making through by-laws can be time-consuming and may distract energy from negotiating for the benefits. Depending on the timeframe for the project, this may be a huge consideration. However, credibility in the community and even with the developer may be enhanced by a clear and carefully considered decision-making structure. In addition, linking groups through a new entity and detailed by-laws may be a way of responding to the increasing concern that developers will "dilute or co-opt" CBA efforts by "peel[ing] off part of a community base."¹⁵ It also may make on-going monitoring of

the project during construction more effective. While community groups involved in a coalition may return to other business after the signing of a CBA, board members of a corporation that signs a CBA and afterwards has the sole purpose of monitoring it may be more effective in holding developers to their promises.

Therefore, if by-law models were available for incipient groups to review and structuring options were more easily accessible, the extent of the distraction could be minimized and the advantages of a separate entity might outweigh the disadvantages. To that end, the remainder of this article reviews the most difficult structuring issues and possible resolutions.

II. Types of Corporations

A not-for-profit corporation would be the appropriate vehicle for the separate entity and these may be easier to form in some states than others.¹⁶ Some states may also have special types of not-for-profit corporations that provide advantageous tax or other benefits. In New York, for example, the not-for-profit corporation law allows for a special type called a local development corporation, which may sell property more easily than other not-for-profits¹⁷ and may receive property from the city or county without appraisal, public notice, or public bidding.¹⁸ It is beyond the scope of this article to review the not-for-profit statutes or analyze possible federal tax exemption issues, but numerous commentators have done so outside of the CBA context.¹⁹

A. By-Laws

The content of by-laws may also vary from state to state, depending on restrictions in the local statute, but most of the issues will be universal and the statutory outlines will be very similar. The structuring issues that are particularly crucial to creating the impression that there is broad participation and fair balance of power in decision-making concern board composition and decision-making rules.

B. Boards of Directors

1. Who Selects the Board?

Most state statutes allow at least certain types of not-for-profit corporations the option of existing without members, sometimes referred to as optionality by not-for-profit law commentators.²⁰ The New York Not-for-Profit Corporation Law, for example, states that "a corporation shall have one or more classes of members or, in the case of a Type B corporation, may have no members...."²¹ The Type B corporation in New York is the typical "charitable, educational, religious" variety.²² The option to operate without members allows the corporation's organizers to select an initial board and provide in the by-laws for that board to select the next board, an approach which is referred to as the self-perpetuating board. This approach may make sense for a corporation providing a service to recipients who may not need or want to be involved in the governance of the organization, such as

those providing food or shelter to homeless people, but when community input is crucial to the success and mission of the organization, it seems clear that the board must be designated by someone other than the individuals currently serving on the board. In addition, some special types of corporations (like New York's local development corporations) may be required by statute to have members.²³ In the CBA context, having members can be a potent organizing tool because the by-laws can also provide that the members must ratify the CBA itself.

Once the corporation has decided that there must be members who will select the board and presumably have other powers as well, two tiers of power within the organization have been established and there are myriad options to consider. At the one extreme, the by-laws can provide that the members are the directors, which certainly minimizes the effect of having the two tiers because the same people or organizations are filling both roles. On the other end of the spectrum, every resident of a certain zip code could be considered a member. Although it seems appealing to mimic the democratic system and empower all residents, there are practical problems with this approach because such an approach may make it difficult to: (1) determine who is a member for the purpose of establishing a quorum, and (2) actually establish a quorum if members are not motivated to participate. Without a quorum, the corporation can be stymied in efforts to elect a board, amend by-laws, and take other significant corporate actions. A middle ground may be to designate certain interest groups and existing community groups as members who will nominate representatives for the board.

An organization can seek diverse input for its activities and decisions by establishing a large board of directors, a large pool of members, numerous committees, or all three. The goal, which is much easier said than done, should be to create a workable mix of these subgroups by avoiding: (1) boards that are too small to represent the community or too large to be manageable, (2) member bodies that are too small to have an impact or too big to keep track of and actually convene, and (3) too few committees to make the effort worthwhile or too many committees to monitor. In determining how big is unmanageable, it should be noted that unwieldy board sizes can be tempered somewhat by limiting numbers of meetings; thus, a large board may meet once every few months and may designate an executive committee to handle matters arising in the interim. In short, entities considering negotiation of a CBA should think carefully about using a membership structure creatively to maximize the organization's potential.

2. Board Composition—Representatives of Existing Organizations

Consistent involvement by the same individual directors is important, so if an organization is the member, it is optimal if the organization designates a representative who regularly attends board meetings. Alternates may be allowed,²⁴ but the advantages for the member organization must

be weighed against the impact on the board's cohesiveness. Put simply, re-explaining and re-discussing issues because new personalities are present may slow down the development of the CBA.

One of the big questions, of course, is which existing organizations to include and how many representatives they deserve. Some organizations may be significant enough in the community to warrant two representatives on the board of directors. Whether to allow politicians to designate representatives must also be considered carefully. Such representatives would be serving as part of their jobs and may have more time and resources to commit, but a corporation dominated by politicians may encounter criticism. The negotiation with Columbia, for example, was accused of removing the debate from "full control of the community, by people from the political sector getting involved."²⁵ Another article pointed out that of the fifteen signers on the MOU, seven are representatives of elected officials.²⁶ On the other hand, two are from the local community board, the most grass roots level of representation in the city, and the others are representatives of an array of city, state and federal officials who were elected by the voters and who may not all support the developer inherently. It is probably wise, though, at least to limit the numbers of elected official representatives to 20 percent of the board or less.

3. Board Composition—Representatives of Unorganized Groups

The organizers of the new entity may identify a need for input from community members concerned or especially knowledgeable about issues such as education, historic preservation, or environmental impacts, and there may not be an obvious organization that can adequately represent these interests. In theory, there should be a way for small groups or individuals with these interests to designate a representative, but in practice it can be very difficult to create a fair process. The West Harlem LDC arranged a nomination night for these unorganized groups that was publicized on its website, in newspapers, and via e-mail listservs. Careful thought must be given to how nominees are selected by their interest groups in such a one-night event. In particular, what proof can be required of alignment with the interest group? Will a list of potential nominees somehow be announced or narrowed beforehand? Will any absentee voting by petition, proxy, or conference phone be allowed? These questions could be answered in the by-laws, but it may be more practical not to incorporate such a level of detail in the by-laws in order to give the board some flexibility. On the other hand, the absence of written guidance on nominating these individuals may seem less transparent. One compromise is to insist that the board vote on a written resolution that details the nomination procedures.

Organizers may identify quite a number of specialty areas/unorganized interest groups as well as many organized groups whose involvement would be desirable but who will take some time to recruit. Therefore, an initial board of a respectable size should be identified in the certificate of incorporation, as most states require,²⁷ and the by-laws should provide for

an expansion mechanism. A supermajority vote for new directors may be important to avoid accusations that the initial board easily added their own friends and colleagues. The West Harlem LDC had twenty-five directors during the intense period of negotiation with Columbia and began with five. If there is concern about all directors changing at election time, terms can be staggered so that some directors end their board service in odd years and others in even years. This technique is a useful way to balance the need for continuity with the need for new input.

4. Voting Process

In drafting the by-laws, the types of actions on which the board and members will vote must be identified and careful consideration must be given to what percentage of members or directors must agree to each. In addition, the by-laws should be certain to clarify whether it is a percentage of all directors or members (including or excluding vacancies) or only those attending the meeting. The crucial decisions will be: (1) adding directors or filling vacancies, (2) amending the by-laws, (3) removing directors, and (4) approving the CBA or portions of it. These four categories warrant greater involvement in decision-making, which may mean that they should be member decisions or decisions of more than a majority of directors. Organizers should be wary, however, of setting too high of a quorum threshold, which could make it too difficult to hold meetings even to decide minor issues, such as setting meeting dates and designating subcommittees.²⁸

5. Meeting Notice

Generally, the by-laws may dispense with notice for board meetings if they occur on a set schedule.²⁹ If notice is given, the state statute is likely to allow a great deal of flexibility so that day-to-day operations are not impeded. In New York, for example the by-laws may prescribe the type of notice, which could be a phone call or an e-mail, and no particular number of days is specified.³⁰ As the board grows, however, the risk of alienating directors who did not receive notice increases and greater care should be taken. West Harlem LDC met every Tuesday at the same time and location for sixteen months, only notifying directors of cancellations and changes. This is a simple approach if the same location can be used and if few cancellations are expected.

Member meetings, which are expected to be less frequent, require better notice, generally in writing and at least ten days before the meeting.³¹ Member meetings, therefore, can become a tool for the corporation to use when it hopes for greater transparency and unassailability, as in adoption of the CBA.

6. Removal of Directors

Generally directors can be removed with or without cause but, in New York for example, removal without cause must be done by the members.³² Even if the state statute does not require such a provision, organizers of the

corporation may want to consider requiring in the by-laws that the director be given an opportunity to respond to the alleged reasons. Needless to say, these decisions can be complicated and rife with potential for criticism.

7. Committees

Because CBA's attempt to address such an assortment of community needs, subcommittees may be very important to encourage careful attention to and study of an issue. While it is tempting to organize these with one director and a number of nondirectors, it is worth considering whether this important work should be done by a subcommittee with a majority of board members.

As mentioned earlier in the context of board size, consideration should also be given to authorizing an executive committee to undertake some of the corporation's activities in between board meetings.

III. Conclusion

All these by-laws issues may be distilled to two questions: who should be involved in what decisions and how can their involvement be facilitated? In a CBA negotiation, the answers to these questions can be crucial both to the quality of the end product and to the support that is garnered in the community. It seems that some discussion of these decisions is essential and, if the discussion can be focused, by-laws and procedures can result. On the other hand, if existing community groups pursue a CBA negotiation without giving thought to creating a separate entity, the opportunity to tackle some of the balance of power issues at the outset may be lost. Therefore, when time allows, some consideration should be given to the notion of a separate entity and careful thought should be given to how to define the "community" to be benefited and how to make sure that their input can be facilitated.

1. See generally Goodjobsfirst.com, Community Benefits Agreement Victories, http://www.goodjobsfirst.org/accountable_development/community_benefit_vic.cfm (last visited Mar. 6, 2008) (for a more thorough overview of the CBA concept and links to more in-depth articles on particular issues that arise in the context of CBA-developer relations).

2. *Id.*

3. *Id.*

4. Patricia Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities, and Community Organizations*, UCLA J. ENV'T'L L. & POL'Y (forthcoming Spring 2008), available at http://papers.ssrn.com/5013/papers.cfm?abstract_id=1025724, at 3.

5. *Id.* at 4.

6. *Id.* at 5.

7. Community Board 9 encompasses an area in northwest Manhattan, from 110th St. to 155th St., between the Hudson River and St. Nicholas Avenues. Its members are volunteers, appointed by the president of the Borough of Manhattan, who serve in an advisory role with regard to zoning, municipal service

delivery, budget allocations, and other local matters of local interest. See <http://www.nyc.gov/html/cau/html/cb/main.shtml>.

8. See, e.g., Patrick Arden, *City's Brand of CBA Bad for Rest of the Nation?*, METRO N.Y., Jan. 14, 2008, available at http://ny.metro.us/metro/local/article/Citys_brand_of_CBA_bad_for_rest_of_the_nation/11409.html; Raymond Carlson & Victor Zapana, *In a New York Minute, Aid vs. Displacement*, YALE DAILY NEWS, Jan. 25, 2008, available at <http://www.yaledailynews.com/articles/view/23111>.

9. Timothy Williams & Ray Rivera, *\$7 Billion Columbia Expansion Gets Green Light*, N.Y. TIMES, Dec. 20, 2007, at A1.

10. Daniel Amzallag, *Community Benefit Specifics Remain Up in the Air*, COLUM. SPECTATOR ONLINE ED., Jan. 22, 2008, www.columbiaspectator.com/node/28669.

11. Arden, *supra* note 8.

12. Carlson & Zapana, *supra* note 8.

13. JULIAN GROSS WITH GREG LEROY & MADELINE JANIS-APARICIO, COMMUNITY BENEFIT AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 24 (2005), <http://goodjobsfirst.org/pdf/cba2005final.pdf>.

14. *Id.* at 23.

15. GREG LEROY & ANNA PURINTON, COMMUNITY BENEFITS AGREEMENTS: ENSURING THAT URBAN REDEVELOPMENT BENEFITS EVERYONE (2005), http://www.nfg.org/publications/community_benefits_agreements.pdf.

16. PENINA KESSLER LIEBER & DONALD R. LEVY, A COMPLETE GUIDE TO NONPROFIT ORGANIZATIONS, 1-69 (2005); James J. Fishman, *The Development of Nonprofit Corporation Law and An Agenda for Reform*, 34 EMORY L.J. 617, 659-668 (1985).

17. N.Y. NOT-FOR-PROFIT CORP. LAW § 1411(c) (McKinney 2005).

18. N.Y. NOT-FOR-PROFIT CORP. LAW § 1411(d) (McKinney 2005).

19. See, e.g., BRUCE R. HOPKINS, 650 ESSENTIAL NONPROFIT LAW QUESTIONS ANSWERED 40-65 (2005) (discussing the acquisition and maintenance of tax exempt status).

20. See, e.g., Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 843 (2003) (citing applicable state statutes and generally describing advantages and disadvantages of a membership structure in not-for-profits).

21. N.Y. NOT-FOR-PROFIT CORP. LAW § 601 (McKinney 2005).

22. N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (McKinney 2005).

23. N.Y. NOT-FOR-PROFIT CORP. LAW § 1411(b) (McKinney 2005) (designating them as Type C corporations which must have members pursuant to § 601).

24. N.Y. NOT-FOR-PROFIT CORP. LAW § 703(d) (McKinney 2005) (requiring that alternate members be chosen by the special district or membership section that elected or appointed the director).

25. Eliot Brown, *Butts on Columbia Expansion: Politicians 'Polluted' Negotiations on Community Benefits*, N.Y. OBSERVER, Dec. 5, 2007, www.observer.com/2007/rev-butts-community-organizers-offer-tough-reviews-cbas-columbia.

26. Arden, *supra* note 8.

27. E.g. N.Y. NOT-FOR-PROFIT CORP. LAW § 401 (McKinney 2005) (allowing nonprofit corporations to be formed by a single individual). But see N.Y. NOT-FOR-PROFIT CORP. LAW § 405 (McKinney 2005) (describing the activities to be conducted at the corporation's first organizational meeting in terms of multiple incorporators).

28. *Cf.* N.Y. NOT-FOR-PROFIT CORP. LAW § 707 (McKinney 2005) (requiring a minimum of half of the board of directors to constitute a quorum).

29. N.Y. NOT-FOR-PROFIT CORP. LAW § 711(a) (McKinney 2005).

30. N.Y. NOT-FOR-PROFIT CORP. LAW § 711(b) (McKinney 2005).

31. N.Y. NOT-FOR-PROFIT CORP. LAW § 605(a) (McKinney 2005) (requiring ten days to fifty days notice when in writing or in person).

32. N.Y. NOT-FOR-PROFIT CORP. LAW § 706(b) (McKinney 2005).