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# Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience

Martin S. Flaherty
*Fordham University School of Law*, mflaherty17@yahoo.com

# NEIGHBORHOOD LEGAL SERVICES AS HOUSE COUNSEL TO COMMUNITY-BASED EFFORTS TO ACHIEVE ECONOMIC JUSTICE: THE EAST BROOKLYN EXPERIENCE

BRIAN GLICK* WITH MATTHEW J. ROSSMAN**



* Brian Glick is a senior attorney at Brooklyn Legal Services Corporation A. The content and structure of the article reflect his analysis, based on his 11 years' experience as a community development lawyer in East Brooklyn and on his collaboration with his long-time colleagues and partners there, Paul J. Acinapura and Hillary Exter. Much of the article was written while he was Visiting Associate Professor at City University of New York Law School.

** Matthew J. Rossman is an associate at the New York office of Latham & Watkins and a 1996 graduate of the New York University School of Law. Initially one of this article's editors while a student at NYU, he assisted Brian Glick with the research, writing, and production of this article through its various stages of development. His primary responsibilities included collecting material contained in the case studies through research and interviews with Brooklyn A attorneys and members of the profiled organizations, writing the preliminary draft of the article in consultation with Brian Glick, and facilitating the production of the final version of the article.

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*[I]f it is really equal justice we are concerned about, then the use of law, the knowledge of law and the role of lawyers means more than simply the availability of a lawyer at the moment a legal defense is required or . . . [a] 'test case' is [sought]. Other major elements of the population do not so restrict the term 'legal aid' where they are themselves concerned.*

*Business[people], individually and in their corporate capacities, use lawyers in a multitude of ways to advance their immediate and long-range interests. Lawyers are prime tacticians and strategists for advancing economic goals of corporations. Lawyers are lobbyists and propagandists. Lawyers are negotiators and advocates in the truest and broadest sense of the term, and not merely when suit has been brought against the corporation.*

*. . . The same concept of legal assistance should apply to the poor. . . . The new legal aid lawyer's role should be defined by the broadest reaches of advocacy, just as is the role of the corporation lawyer and the labor lawyer and the real estate board lawyer. Central to the new legal aid lawyer's role is the task of helping to articulate and promote the hopes, the dreams, and the real possibility for the impoverished to make the social changes that they feel are needed, through whatever lawful methods are available.*

— Edward V. Sparer[1]

## INTRODUCTION

It has been more than thirty years since Ed Sparer issued this call. For the past two decades, Brooklyn Legal Services Corporation A has been putting Sparer's vision into practice in the predominantly low-income, African American and Latino/a eastern section of Brooklyn, New York. Brooklyn A serves as corporate house counsel to East Brooklyn community organizations pursuing a strategy of community-based economic development. Its experience provides an important and exciting model for public interest lawyers seeking to assist community-based efforts to achieve economic justice in the 1990s.

This introduction provides an overview of the nature and importance of community-based economic development (CED), the types of community groups involved in this process, the contributions that lawyers can make, and the significance of Brooklyn A's community development practice as a model of CED lawyering. Section I describes the context of the East Brooklyn experience through brief profiles of the East Brooklyn communities, Brooklyn A, its Community Development Unit, and the Unit's

1. Edward V. Sparer, *The New Legal Aid as an Instrument of Social Change*, 1965 U. ILL. L. FORUM 57, 59-60 (1965).

work. Section II describes Brooklyn A's house counsel approach and explains the rationale behind it. The main body of this article (Section III) examines the work of Brooklyn A's Community Development Unit through three detailed case studies. Section IV draws upon the case studies to assess the advantages and disadvantages of Brooklyn A's approach and the lessons its experience offers to other public interest lawyers and law offices.

### *A. Community-Based Economic Development and its Importance in the 1990s*

Community-based economic development is above all a response to the precipitous decline in blue collar jobs over the past three decades, combined with drastic cutbacks in government aid and services to low-income communities. The decimation of the U.S. industrial base and welfare state has left our inner cities, especially communities of color, in a state of dire poverty and physical deterioration.[2] CED attempts to address this crisis through "a community-oriented and community-controlled development strategy that utilizes the resources and implements the priorities of residents and institutions in low-income communities."[3] CED encompasses the self-organized efforts by residents of low-income communities to:

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2. For further discussion of the collapse of the U.S. industrial base and welfare state, and its effect on working and poor people and their communities, see Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty and America's Eroding Industrial Base*, 81 GEO. L.J. 1757 (1993); BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA (1988); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); Kimberly Christensen, *Determinants of Income Changes for African American Women and Men*, 24 REV. RADICAL POL. ECON. 52 (1992); Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 754-59 (1996-97).

3. NAT'L ECON. DEV. & L. CTR., REPORT 5 (Spring 1989) (on file with authors). *See also* MERCER L. SULLIVAN, MORE THAN HOUSING: HOW COMMUNITY DEVELOPMENT CORPORATIONS GO ABOUT CHANGING LIVES AND NEIGHBORHOODS 5 (1993) (defining CED as a strategy for combating problems in low-income and minority communities through self-help, cooperation, and resource transfer at the local level). Stewart Perry, a chronicler of the CDC movement, described the genesis of CED as follows:

> The conception was that being poor is not an individual affair but rather a systematic disease that afflicts whole communities. Deteriorated housing, impaired health, nonexistent or low wages, the welfare assault on self-respect, high crime rates, low tax base and reduced police and school services, child neglect and wife abuse, and always the continuing export of human and financial capital — all these feed on each other, . . . nest together to create the impoverished community. [Thus the need for] a community-based and comprehensive approach to improving the local economy rather than trying desperately somehow to rebuild each individual so she or he can leave the impoverishing conditions behind. . .

NEAL R. PIERCE & CAROL F. STEINBACH, CORRECTIVE CAPITALISM: THE RISE OF AMERICA'S COMMUNITY DEVELOPMENT CORPORATIONS 20-21 (1987) (quoting Stewart Perry). For a detailed explanation of the mechanics of community-based economic development, see CHRISTOPHER GUNN & HAZEL DAYTON GUNN, RECLAIMING CAPITAL: DEMOCRATIC INITIATIVES AND COMMUNITY DEVELOPMENT (1991); BRAD J. CAFTEL, NAT'L

- provide decent affordable housing, health care, childcare and other desperately needed services and facilities
- create jobs and business activity for and by local residents, helping to combat the perpetual economic depression in their neighborhoods; and
- gain a degree of community control over local institutions, resources, land and capital, as a base for resisting disinvestment and gentrification and for achieving some measure of economic security and independence.[4]

The modern CED movement emerged in the late 1960s from efforts by activists in low-income communities organizing for community empowerment and autonomy, and from the response of the federal government and the Ford Foundation to ghetto rebellion and increasingly militant Black and Latino/a activism.[5] CED expanded throughout the 1970s as inner-city neighborhoods further deteriorated. By the 1980s, with de-industrialization intensifying and public anti-poverty and social welfare efforts declining, CED became the predominant response to growing poverty and joblessness. All levels of government came to rely on community-based organizations (CBOs) to deliver what remained of publicly funded housing, services and job programs in low-income communities. Foundations and corporations increasingly channeled investment through CBOs. Local leaders and activists worked in and with CBOs in a last ditch effort to protect and revive their communities.

Today, as their last meager government supports are withdrawn, low-income communities have to rely more and more—for their survival and for any hope of transcending poverty—on self-help through their own organizations. As a result, grassroots advocacy and service groups across the country are rapidly transforming into the primary providers of affordable housing, health and child care, social services, and business development.

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ECON. & DEV. LAW CTR., COUNSELING ORGANIZATIONS IN COMMUNITY ECONOMIC DEVELOPMENT (1992).

4. *See* Ben Quinones, *Serving Clients in New Ways: Community Economic Development*, 27 CLEARINGHOUSE REV. 773, 773-74 (1993) (identifying affordable housing development, business enterprise development, and urban renewal as common areas of CED work). These activities reflect CED's emphasis on "building things," "channeling new kinds of investments and resources into poor areas," and "creating new kinds of communities, with strong local institutions and residents who are directly involved in planning for local needs." SULLIVAN, *supra* note 3, at 5.

5. *See* SULLIVAN, *supra* note 3, at 5 (citing the Ford Foundation's Gray Areas Program and the federal government's Special Impact Program enacted in 1966 as an amendment to the Economic Opportunity Act of 1964); ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY 211-38 (1969) (analyzing CED and Ford Foundation programs as part of an effort by "the white corporate elite" to use "the rhetoric of black nationalism in helping itself to establish neocolonial control of the black community").

The case studies presented in Section III of this article reveal some of the very real, though limited, successes these groups can attain.[6]

### B. *Community Groups Engaged in Community-Based Economic Development*

CED is mainly carried out by two types of community-based organizations: community development corporations (CDCs) and grassroots ownership entities. CDCs are larger, more stable nonprofit tax-exempt organizations that create and operate essential community facilities and services ranging from housing, health and childcare to commercial revitalization, revolving loan funds, credit unions and small businesses. They are governed by boards composed mainly of local residents and operated by paid staff, many of whom also live in the neighborhood. More than 2,200 such organizations were active across the country by the early 1990s.[7]

In addition, CED involves a multitude of smaller, lower-budget, volunteer groups formed to exercise grassroots ownership. Across the country, residents of apartment complexes in low-income communities have banded together in nonprofit membership corporations, limited equity co-ops, and mutual housing associations to take title to their buildings and make sure they remain in decent condition and affordable.[8] In some areas, local workers have organized employee-owned cooperatives to start small businesses or to keep in operation productive enterprises abandoned by retiring owners or by multi-national corporations that seek cheaper labor abroad.[9]

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6. *See* NAT'L CONGRESS FOR COMMUNITY ECON. DEV., TYING IT ALL TOGETHER: THE COMPREHENSIVE ACHIEVEMENTS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS 1, 11 (1995) (noting that such groups have been responsible for the development of over 400,000 units of affordable housing, the creation of at least 67,461 permanent jobs, and the construction or renovation of 23 million square feet of commercial and industrical space) [hereinafter NCCED, TYING IT ALL TOGETHER]; MARIO SALGADO & ANNA YEE, NAT'L ECON. DEV. & LAW CTR., BUILDING CAPACITY TO WORK IN COMMUNITY ECONOMIC DEVELOPMENT: A GUIDE FOR LEGAL SERVICES 12 (1995). For further discussion and "hard numbers" relating to the successes and shortcomings of community development corporations, see AVIS C. VIDAL, REBUILDING COMMUNITIES: A NATIONAL STUDY OF URBAN COMMUNITY DEVELOPMENT CORPORATIONS 85-107 (1992); Schill, *supra* note 2, at 777-780.

7. NCCED, TYING IT ALL TOGETHER, *supra* note 6, at 1; SALGADO & YEE, *supra* note 6, at 12. For further discussion of CDCs and their roles in community-based economic development, see Schill, *supra* note 2, at 766-72.

8. *See, e.g.*, Martha Taylor, *What is Mutual Housing?*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 131 (1997); David H. Kirkpatrick, *Cooperatives and Mutual Housing Associations*, 1-SPG J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 7 (1992).

9. *See* Kim Nauer, *Capital Gains*, CITY LIMITS, Aug.-Sept. 1995, at 18-24 (discussing worker-owned co-ops in low-income areas of New York City). For a discussion of the worker cooperative model as an alternative to the legal and social structure of the traditional business corporation, see David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441 (1982); Kerwin Tesdell, *New Incorporation Law for Worker Cooperatives*, N.Y.L.J., Aug. 27, 1985, at 1.

### C. *The Roles of Lawyers in Community-Based Economic Development*

Although CDCs and grassroots ownership entities pursue very different ends than for-profit business corporations, and operate in very different settings, they have the same basic need for reliable, creative legal assistance. In the private sector, corporate lawyers assist their clients in the "structur[ing] and maint[enance of] mutually beneficial economic relationships."[10] They serve as "tacticians and strategists for advancing economic goals . . . lobbyists and propagandists . . . negotiators and advocates in the truest and broadest sense of the term."[11] The same kinds of lawyering are essential to effective community-based economic development in low-income neighborhoods. CDCs and grassroots ownership entities need lawyers to help them with a broad range of corporate, tax, contract, real estate, licensing and other business, commercial, and regulatory matters. More and more often, CED projects require mastery of sophisticated financial transactions, such as tax credit syndication and tax-exempt bond financing. To structure effective deals, negotiate fair terms and protect community interests, neighborhood groups need ongoing access to lawyers who understand their particular needs and circumstances, respect their decisions, and have the expertise to deal with complex development projects.

As CED and lawyers' roles within it grow increasingly important, CED legal practice is coming to be viewed as a significant new area of public interest law. A number of law schools have developed CED courses and clinical programs.[12] The American Bar Association has initiated a Forum on Affordable Housing and Community Development, which sponsors educational conferences and publishes a quarterly journal.[13] The Ford Foundation and the federal Legal Services Corporation (prior to recent Congressional funding restrictions) have generously supported the work of the National Economic Development and Law Center in promoting CED lawyering and providing training and support to CED legal practitioners.

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10. Nat'l Econ. Dev. & Law Ctr. and John Little, *Practicing Community Corporate Law*, 23 CLEARINGHOUSE REV. 889, 889 (1989) [hereinafter NEDLC & Little].

11. Sparer, *supra* note 1, at 59-60.

12. *See* Peter Pitegoff, *Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L.J. 275 (1995) (reviewing clinical programs at Yale, SUNY-Buffalo, and Seton Hall); Jeffrey Lehman & Rochelle Lento, *Law School Support for Community-Based Economic Development in Low Income Urban Neighborhoods*, 42 WASH. U. J. URB. & CONTEMP. L. 65 (1994) (discussing the introduction of a new CED clinical program at the University of Michigan Law School); LESLIE NEWMAN, NAT'L ECON. DEV. & LAW CTR., LAW SCHOOLS AND COMMUNITY ECONOMIC DEVELOPMENT (1993) (surveying programs across the United States).

13. The *Journal of Affordable Housing and Community Development Law*, housed at SUNY Buffalo School of Law, draws upon the work of clinic students and faculty, and publishes brief articles on significant developments in affordable housing and community development law and practice.

### D. *The Significance of the East Brooklyn Approach to CED Legal Practice*

For lawyers interested in providing CED legal assistance, Brooklyn A's approach merits close attention for several reasons. First, it is one of a very few sustained and substantial efforts of its kind in the country. CBOs in low-income communities rarely can afford ongoing assistance from fee-charging private sector lawyers, and pro bono counsel is in scare supply. Until recently, very few Legal Services programs or other public interest law offices represented CDCs or grassroots ownership entities.[14] The East Brooklyn approach represents a significant departure from traditional emphases on individual representation and impact litigation.[15] Brooklyn A attorneys have provided ongoing counsel to East Brooklyn CBOs since the mid-1970s. For many years, individual Brooklyn A attorneys did this work in addition to a full docket of traditional poverty law cases. In 1986, Brooklyn A created a separate Community Development Unit (CDU), staffed with several attorneys, to focus exclusively on representation of community groups.

Second, Brooklyn A is virtually unique in providing its main CBO clients with full-scale "house counsel" services. CDCs and grassroots ownership entities represented by Brooklyn A receive the same ongoing, broad-ranging, multi-faceted assistance that private sector corporations routinely expect of their lawyers. In this respect, Brooklyn A offers a very different model from the discrete, project-by-project representation generally available to those CBOs that manage to secure services from pro bono counsel, fee-charging private law firms, or public interest law projects. Brooklyn A's house counsel approach is a central focus of this article, discussed in detail in sections II and III.

Third, the East Brooklyn experience highlights the significance of the context within which legal representation is provided to CBOs. Brooklyn

14. *See* NEDLC & Little, *supra* note 10, at 889 (citing the insufficient availability of legal resources to community based organizations). According to a funding proposal submitted by the National Economic and Development Law Center to the Ford Foundation in 1993, only 30 of the 324 Legal Services programs in the country devoted any staff or resources to community-based economic development, and only a handful of these 30 had allocated sufficient resources to undertake serious efforts, despite the fact that the number and size of community-based, nonprofit organizations was increasing at a rapid pace in the years leading up to the proposal. [hereinafter Proposal] (on file with authors). *See* SALGADO & YEE, *supra* note 6, at 14 (citing the same statistic).

15. For a discussion of the traditional emphases, see Ronald C. Slye, *Community Institution Building: A Response to the Limits of Litigation in Addressing the Problem of Homelessness*, 36 VILL. L. REV. 1035, 1054-56 (1991) (discussing the different roles required for lawyers engaged in litigation and those involved in community institution building); *see also*, Rachel D. Godsil & James S. Freeman, *Jobs, Trees and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 39 (1994) ("A majority of poor people's lawyers in the past have seen their role primarily as advocates in court room battles for rights").

A's Community Development Unit functions within the offices and organizational structure of a long-established Legal Services program which provides free legal advice and representation to low-income East Brooklyn residents on a broad range of civil matters. Moreover, Brooklyn A, like many of the early Legal Services programs, is located in the center of its constituency. Through thirty years of struggle alongside local leaders and activists, it has forged relationships of mutual respect and has developed a deep grasp of the needs and dynamics of the communities it serves. Brooklyn A's consistent work has made it a trusted consultant to local groups, an essential factor in fostering the house counsel relationship.

Brooklyn A's community development unit has been widely recognized as a model of effective CED legal assistance. The CDU was selected to serve as a mentor to other Legal Services programs in a special Ford Foundation funded program to promote CED legal practice.[16] Its preeminence was acknowledged by the City University of New York Law School, which asked Brooklyn A to design and staff the clinical program the Law School now offers in housing and community development. Leaders of New York's legal, business, and financial communities have formed the Public-Private Partnership for Community and Economic Development to raise public awareness of, and financial support for, Brooklyn A's CED work.

## I.
## THE CONTEXT OF THE EAST BROOKLYN EXPERIENCE

### *A. The East Brooklyn Communities*

#### *1. Profile*

East Brooklyn is made up of several communities in the eastern part of Kings County, New York, the part of Brooklyn which is furthest from New York City's business, financial, and commercial centers in Manhattan. It includes the entire neighborhoods of Oceanhill-Brownsville, East New York, and Cypress Hills, as well as the southeastern third of Bushwick and a portion of Bedford-Stuyvesant.

These neighborhoods are among the poorest in New York City. The percentage of residents below the national poverty line in these communities is nearly double the median percentage for New York City.[17] More

16. The NEDLC received funding from the Ford Foundation to assist five Legal Services programs in implementing CED law programs. As part of this "capacity-building" effort, the NEDLC invited Brooklyn A and four other Legal Services programs to serve as "mentors" to the new programs. SALGADO & YEE, *supra* note 6, at 31.

17. 19.3% of New York City residents are below the poverty line. The percentages for the neighborhoods in East Brooklyn are: Bushwick (40.5%), Bedford-Stuyvesant (35%), East New York and Cypress Hills (30.8%), and Oceanhill-Brownsville (41.4%). 1990 CENSUS SUMMARY TAPES FILE 3, SELECTED INCOME AND POVERTY CHARACTERISTICS 10 (New York City), 140 (Bedford-Stuyvesant), 146 (Bushwick), 152 (East New York and Cypress Hills), and 218 (Oceanhill-Brownsville).

than 40 percent of the residents receive public assistance.[18] Nearly one-quarter (22 percent) of East Brooklyn households earn less than $10,000 a year.[19]

Despite some significant recent improvements won through intense community struggle, physical and social conditions in East Brooklyn are generally typical of urban communities where widespread poverty is aggravated by racial discrimination. Drug abuse and crime rates are high. Access to medical services is limited, and, consequently, HIV/AIDS and infant mortality rates are very high.[20]

Housing in East Brooklyn is in a particularly bad state. The privately-owned housing stock has been ravaged by "landlord abandonment."[21] Absentee owners, concluding that certain buildings would no longer yield adequate profits, stopped investing in upkeep and repairs or stopped paying real estate taxes, but continued to collect rent from tenants.[22] Until recently, the City government took title to such abandoned buildings through real estate tax foreclosure (creating so-called "in rem" housing).[23] By that time, however, the buildings were greatly deteriorated and often

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18. DEP'T OF CITY PLANNING, THE CITY OF N.Y. OFFICE OF MANAGEMENT AND BUDGET, COMMUNITY DISTRICT NEEDS (BROOKLYN) 63, 83, 95, 321 (1996).

19. 1990 CENSUS HOUSEHOLD INCOME IN BROOKLYN A SERVICE AREA, BY ZIP CODE, TABLE 8, at 13.

20. *See infra* notes 49-51 and accompanying text (describing shortages of health services in Brownsville and providing statistics that demonstrate the adverse consequences of such shortages). The situation in Brownsville is indicative of the state of health and health care throughout East Brooklyn.

21. Eighteen of New York's 59 community districts, including the four districts which the CDU services, are high-risk areas for landlord abandonment because of high tax arrears and mortgage foreclosures. Percentages of buildings in tax arrears in districts in the CDU's service area are:

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|---|---|
| Bedford-Stuyvesant (Bk-3) | 13.8% |
| Bushwick (Bk-4) | 11.2% |
| East New York (Bk-5) | 9.3% |
| Oceanhill-Brownsville (Bk-16) | 11.8% |

VICTOR BACH & SHERECE Y. WEST, COMMUNITY SERV. SOC'Y OF N.Y., HOUSING ON THE BLOCK: DISINVESTMENT AND ABANDONMENT RISKS IN NEW YORK CITY NEIGHBORHOODS 46 (1993).

22. *See* EDWIN S. MILLS & BRUCE W. HAMILTON, URBAN ECONOMICS 224 (4th ed. 1989) (describing the bases on which landlords decide to abandon title).

23. N.Y.C. ADMIN. CODE § 11-400 (1986 & Supp. 1995). *See* TASK FORCE ON CITY OWNED PROPERTY, THE IN REM ORGANIZER'S SOURCEBOOK 1-2 (Michele Cotton ed., Jan. 1995) (explaining *in rem* procedure). Rudolph Guiliani, who was elected as mayor of New York in 1993, has since made it his administration's policy not to foreclose on any more buildings in an effort to reduce the city's housing stock. *See, e.g.*, MICHELE COTTON, SUSAN SAEGERT, & DAVID REISS, TASK FORCE ON CITY OWNED PROPERTY, NO MORE "HOUSING OF LAST RESORT" 5, 26-27 (1996) (observing that New York City is currently trying to get out of the business of taking property through *in rem* procedures, and is focusing on the disposition of the buildings it does own); David Reiss, *Housing Abandonment and New York City's Response*, 22 N.Y.U. REV. L. & SOC. CHANGE 783, 785-91 (1996-97) (evaluating New York City's changing policy toward vesting of deliquent properties).

vacant.[24] The main exceptions to the poor housing conditions in East Brooklyn are some of its many public housing projects, blocks of suburban tract style "Nehemiah" homes, which few residents can afford, and tax-foreclosed buildings that CDCs or organizations of building residents have acquired from the City and renovated primarily with public funds.[25]

Over the past fifty years, East Brooklyn has experienced a massive transformation in its ethnic and racial make-up.[26] During the first half of the century, Italian and East European Jewish immigrants occupied most of the area. In the 1940s and 1950s, African Americans and Puerto Ricans were drawn to East Brooklyn by jobs in war industries and the revitalized post-war economy. Post-war prosperity and federally-subsidized low-interest mortgages enabled white working families to move to homes in newly built suburbs from which families of color were largely excluded. As East Brooklyn's racial make-up began to shift, racist fears and opportunistic "block-busting" realtors accelerated the pace of the white exodus. By the mid-1960s, most of the area was African American or Latino/a. As of 1990, sixty percent of East Brooklyn residents were African American, twenty-two percent were Latino/a, and less than sixteen percent were white.[27]

### 2. *Community Activism*

An important dimension of East Brooklyn's history is its community organization and social action. Throughout the 1930s and 1940s, East Brooklyn factory workers and laborers actively participated in unions and in socialist and communist movements. Two decades later, recently-arrived African American and Latino/a residents vigorously sought a voice in local institutions and politics. Recognizing the increasing importance of education as a source of income and power, especially as the blue collar jobs which had supported earlier waves of immigrants began disappearing, they initially focused much of their attention on the schools. These efforts culminated in an effort to exercise community control of public schools in Oceanhill-Brownsville in the 1960s, a formative event for the contemporary

24. TASK FORCE ON CITY OWNED PROPERTY, *supra* note 23, at 2.

25. VICKI ANN OPPENHEIM & LUIS F. SIERRA, COMMUNITY SERV. SOC'Y OF N.Y., BUILDING BLOCKS: COMMUNITY-BASED STRATEGIES TO COUNTERACT HOUSING DISINVESTMENT AND ABANDONMENT IN NEW YORK CITY 51-52 (1994).

26. *See* ALTER F. LANDESMAN, BROWNSVILLE: THE BIRTH, DEVELOPMENT AND PASSING OF A JEWISH COMMUNITY IN NEW YORK 371 (1971) (describing the virtual disappearance of the Jewish community in Brownsville); HAROLD X. CONNOLLY, A GHETTO GROWS IN BROOKLYN 129-36 (1977) (describing the large increases in the African American and Latino/a populations); *see also*, GREG DONALDSON, THE VILLE: COPS AND KIDS IN URBAN AMERICA 2-4 (1993).

27. Arlen Sue Fox, BROOKLYN LEGAL SERVICES CORPORATION A: STATEMENT OF NEEDS 4 (1990). Latinos include all individuals of Hispanic origin, whether "Black" or "white." Only non-Hispanic individuals are considered African American. Most of the white minority live in the moderate- to middle-income Starret City housing project located on the edge of the area. *Id.*

history of East Brooklyn and other inner-city neighborhoods across the country.

Through the efforts of activist community groups and parents in Oceanhill-Brownsville, the neighborhood's school district became one of three "demonstration districts" in a nationally-publicized experiment transferring partial control of local schools to an elected community board.[28] Oceanhill-Brownsville's community school board hired the City's first African American district superintendent, Rhody McCoy, and launched major educational innovations, including curriculum reform.[29] While the board enjoyed broad community support, leaders of the predominantly white City-wide teachers' union, the United Federation of Teachers (UFT), resisted the demonstration districts and defied the authority of the elected community school board.[30]

Tensions between the UFT and the community school board made a confrontation inevitable. When McCoy and the Oceanhill-Brownsville board transferred recalcitrant union teachers from Junior High 271 to other districts (a measure routinely employed by district superintendents throughout New York City), the UFT initiated a city-wide teachers strike.[31] But the Oceanhill-Brownsville board refused to back down; it continued operating its schools with the support of a substantial portion of the district's teachers, including a number of the white teachers. Members of the Oceanhill-Brownsville community surrounded Junior High 271 and refused to allow striking teachers to reenter.[32] The union and its allies proved politically more powerful, however, and New York's City's mayor and board of education ordered the community board to let the teachers back into the school. When the board refused, the mayor disbanded it, despite neighborhood support manifested in large militant protests, and the experiment abruptly ended.

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28. *See* MARIO FANTINI, MARILYN GITTELL & RICHARD MAGAT, COMMUNITY CONTROL AND THE URBAN SCHOOL 141-72 (1970) (chronicling the history of the three demonstration districts). The experiment, jointly managed by New York City and the Ford Foundation, was approved by a new liberal "fusion" administration headed by Mayor John Lindsay. Lindsay originally envisioned decentralizing the entire New York city school system. The political history of the Oceanhill Brownsville School Experiment is well documented in the television series *Eyes on the Prize II* (Segment 3, "Power, 1967-68"), and in its written companion, HENRY HAMPTON, STEVE FAYER & SARAH FLYNN, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S (1990).

29. *Eyes on the Prize II*, *supra* note 28.

30. *See* FANTINI, GITTELL, & MAGAT, *supra* note 28, at 149 (explaining that the UFT joined a lawsuit against the districts, and was viewed as attempting to sabotage the project in other ways).

31. *See id.* at 159-60 (explaining that, while the issue underlying the strike was resistance to greater community participation in educational policy, the catalyst for the strike was the transfer of unwanted teachers out of the district).

32. *Eyes on the Prize II*, *supra* note 28.

This experience, along with struggles in the 1960s over welfare rights, the federal "War on Poverty", racial integration of local public housing projects, and the broader movements for civil rights and Black Power, forged a new generation of skilled and dedicated community activists in East Brooklyn. Two of Brooklyn A's main CBO clients—the Oceanhill-Brownsville Tenants Association and the Brownsville Community Development Corporation—grew directly out of the struggle for community control of the schools.

Throughout the 1970s, East Brooklyn activists continued to organize grassroots protests, from which emerged a stable core of established community groups. These groups focused their energy on protesting poor housing conditions, especially through rent strikes directed at absentee landlords who neglected properties and then abandoned them. Their experiences reinforced the lesson of the school struggle—that conditions in East Brooklyn, and the lives of its residents, could be significantly improved only if the community organized to develop, own, and control its own resources, facilities, and services. This led directly to a strategy of community-based economic development. By the 1980s, CED had become a primary focus in East Brooklyn, as in other low-income neighborhoods across the country.

### *B. Brooklyn Legal Services Corporation A*

Brooklyn A is a branch of the national Legal Services network,[33] and the primary provider of free legal services in civil matters to low-income individuals and groups throughout Northeast Brooklyn. It was incorporated in 1967 and presently employs forty-four staff members in two offices.[34] Brooklyn A is funded by the federal Legal Services Corporation (through a City-wide intermediary, Legal Services for New York City), New York State's Interest on Lawyers' Accounts program (IOLA),[35] State

33. Legal Services is a nationwide network of 324 nonprofit organizations that provide legal representation and counseling in civil matters to low-income people. Initially a part of the federal War on Poverty, Legal Services was created in the mid-1960s to provide legal assistance to low-income people. Since the early 1970s, the Legal Services Corporation, a national organization established by Congress and governed by a Board of Directors appointed by the President, has funded and regulated this network. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1994). For a history of the roots of the Legal Services Corporation, see EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1978).

34. The staff numbered 68 prior to 1994-95 cutbacks in federal funding for Legal Services.

35. IOLA is a program through which "qualified" client funds held by lawyers (i.e., funds "received by an attorney in a fiduciary capacity from a client . . . [which] are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client") are deposited into interest-bearing accounts, the proceeds of which are distributed to low-income legal assistance programs. N.Y. JUD. LAW § 497 (Consol. Supp. 1997). *See* N.Y. STATE FIN. LAW §97-v.3 (Consol. 1994) (providing for the administration of the IOLA program). For further discussion of the IOLA program, see Jonathan G.

and City contracts, and some foundation grants and corporate and individual donations.

At Brooklyn A, as in most Legal Services offices, the bulk of the work consists of providing legal assistance to individuals and families who cannot afford private lawyers. Services are wide-ranging and often include defending clients against impending eviction, the loss of child custody, or the denial of essential government benefits (e.g., public assistance, food stamps, Medicaid, Medicare, disability insurance, HIV-related aid). As in most programs, Brooklyn A has (until recent Congressional restrictions) also undertaken "impact litigation" to reform laws and institutional practices that adversely affect large numbers of poor people.

What distinguishes Brooklyn A from most other Legal Services offices is its extensive history of providing full-scale representation to community-based grassroots organizations. Brooklyn A's staff and board have deep roots in the community. The program director, as well as many staff and board members, live in the community. The current director and deputy director began, in the early 1970s, as staff lawyers, to represent and forge close relationships with community groups. Brooklyn A's Community Development Unit (CDU) is rooted in these earlier experiences. In 1986, Brooklyn A, joined by East and North Brooklyn CBOs and community leaders, persuaded the Brooklyn delegation to the State Assembly to provide "special item" funding for a new group representation project. The new funds enabled Brooklyn A to add three new attorneys to its East Brooklyn staff, forming the CDU under the leadership of deputy project director Paul Acinapura.[36]

### *C. Brooklyn A's Community Development Unit*

The CDU's official functions are: (i) representing community-based organizations in the East Brooklyn portion of Brooklyn A's service area; (ii) helping to structure and coordinate major development projects in which these CBOs are involved; and (iii) representing grass-roots efforts to change public and private practices that harm low-income residents of East Brooklyn. Having at one point expanded to a staff of five lawyers in East Brooklyn (including Acinapura), funding reductions have forced it to cut back to three, each with more than ten years' CED experience at Brooklyn

Blattmachr, *What Every Lawyer Should Know about IOLA*, 210 N.Y.L.J. 1 (1993); Risa I. Sackmary, *IOLA's Last Obstacle: Washington Legal Found. v. Massachusetts Bar Found.'s Faculty Analysis of Attorneys' First Amendment Rights*, 2 J. L. & POL'Y 187, 187 n.3 (1994).

36. The money appropriated by the State Assembly also funded three new lawyers in Brooklyn A's North Brooklyn office (serving the Williamsburg and Greenpoint neighborhoods and the northwestern two-thirds of Bushwick), where they mainly represent tenants associations in privately-owned housing.

A. Occasional pro bono support is provided by major corporate law firms, and bank or corporate legal departments.[37]

Though the attorneys who joined the Unit 1986 brought a strong commitment to community empowerment and years of diverse legal and political experience, they had little expertise in community development, business or real estate law. The requisite knowledge and skills were successfully acquired "on the job."[38] Within a few years, the new attorneys became experienced CED practitioners who were training law student interns and other lawyers.

State Assembly funding for the CDU has continued only intermittently, but other funds have been secured from Brooklyn A's IOLA allocation, and, to some extent, local foundations, trusts and corporations.[39] In addition, client organizations routinely transfer to the CDU funds earmarked for "legal costs" in debt and equity financing budgets for housing and other development projects. While Brooklyn A does not charge any legal fee that a group client would have to pay from its discretionary funds, it does accept funds that groups receive exclusively for legal expenses. Over time these funds have grown sufficient to cover a substantial portion of the CDU's operating costs.

### *D. Brooklyn A's Work with East Brooklyn Community Organizations*

The CDU's clients include a broad range of nonprofit organizations rooted in East Brooklyn that are working towards the long-term improvement of their neighborhoods. The type and sophistication of the legal services provided by the CDU varies greatly with the needs of the particular organization being served. The CDU has assisted dozens of small start-up CBOs on a limited basis, helping with basic tasks such as corporate formation and obtaining tax exemption. The CDU also provides ongoing representation to ad hoc community coalitions formed to challenge or change public and corporate practices that have adversely impacted East Brooklyn. The majority of the CDU's work, however, and the focus of this article, flows from its role as "house counsel" to community development corporations and grassroots ownership entities. This representation, described at length in the next two sections, often includes technical assistance and sophisticated legal advice, and requires the representation of a

37. They serve as co-counsel in some discrete cases (mainly litigation against a CBO-client), counsel for CDU clients entering into business or real estate transactions with other CDU clients, and consultants on complex transactions, particularly regarding issues of first impression.

38. Resources for new attorneys included treatises and training sessions, consultation with experienced lawyers in private practice, assistance from the National Economic Development and Law Center, and the guidance of unit supervisor, Paul Acinapura, who had learned "on the job" years earlier.

39. Federal Legal Services Corporation funds have not been used to support the CDU. *See infra* Section IV.C.3.

wide array of clients, from housing cooperatives to community health centers to worker-owned businesses.

## II.
## THE HOUSE COUNSEL APPROACH

In helping their clients to structure beneficial economic relationships and transactions, business lawyers perform a variety of services including: real estate closings, business venture "structuring," tax advising, syndications, contract negotiations, dispute resolution, creation of trusts, and representation before regulatory and administrative agencies.[40] Business lawyers are also used as tacticians and key members of management strategy teams, advising commercial clients on means of achieving short-term and long-term economic objectives, and helping them to avoid potential legal pitfalls.[41] As interpreters, they guide clients through the complex intricacies and intersections of corporate, contract, administrative, real estate, regulatory, and tax law, all of which underlie business transactions. Before third parties, business lawyers advocate on behalf of their clients as lobbyists and propagandists, facilitators and negotiators.[42] Since the resurgence of community-based economic development in the 1960s, legal aid lawyers have been urged to provide corporate law services to community groups in low-income communities.[43] Essential to this work is a grasp of basic corporate, tax, contract, and real estate law, and the capacity to foster mutually beneficial relationships between a CDC and any number of outside parties. Like any private sector corporate law firm or in-house corporate legal department, the CDU is available to its client for (A) full-scope formal legal representation and, (B) informal practical and tactical services which arise from an ongoing collaborative relationship between attorney and client.

### *A. Formal Representation on (Almost) All Legal Matters*

As house counsel, the CDU represents client-CBOs in almost all of their legal matters. This representation typically covers:

- *Basic corporate and organizational matters*: assisting with the formation, incorporation, and management of CBOs and their nonprofit and business corporation subsidiaries, limited liability

40. NEDLC & Little, *supra* note 10, at 889.
41. *Id.*
42. Sparer, *supra* note 1, at 59-60.
43. *See, e.g.*, Godsil & Freeman, *supra* note 15, at 38 ("For the same reason that companies need in-house counsel, and for some reasons specific to CED, community organizations need lawyers, and lawyers have a significant role to play in CED"); Quinones, *supra* note 4, at 773 (emphasizing the importance of attorneys' recognizing the need for a "broader vision of effective services"); Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession*, 79 YALE L.J. 1005, 1024 (1970).

companies, joint ventures, and limited partnerships as well as various forms of grassroots ownership entities;
- *Tax matters*: especially obtaining and keeping exemption from federal income tax, state sales tax, and local real property tax;
- *Contract matters*: negotiating, drafting, and interpreting myriad forms of business and real estate agreements such as supply and service contracts, property management agreements, and architectural and construction contracts;
- *Real estate matters*: counseling, negotiating, and drafting of documents regarding financing, mortgages, title insurance, contracts of sale, option agreements, leases, and license agreements, as well as obtaining zoning variances, doing title and loan closings, and preparing residential co-op plans;
- *Administrative, regulatory and licensing matters*;
- *Employment law*, especially personnel practices; and
- *Litigation matters other than evictions*:[44] enforcing contracts and defending contract, personal injury, and other claims, or monitoring the defense provided by insurance company counsel.

### *B. Informal Legal Counseling*

Like any business lawyer, the CDU is also involved in activities beyond formal legal representation. The CDU acts as facilitator, counselor, and strategist on a broad range of community-based projects. It poses choices and develops and assesses alternative approaches and structures for the consideration of clients contemplating various types of development ventures. Depending on the circumstances, this work might include:

- *Pre-development consultation*: assisting a CDC in identifying, defining, and selecting projects, and helping it to develop alternative ways of structuring a venture and to assess the feasibility of various options and the relative benefits and costs (financial, social and political);
- *Formation of project teams*: assessing a CDC's need for other professional or technical assistance providers, defining these

44. As a matter of policy, Brooklyn A does not represent landlords, even CBOs, against tenants. Though fully cognizant that CBOs managing residential property sometimes must evict (e.g., when tenants sell drugs or repeatedly refuse to pay rent), the CDU will not assist in any legal effort to deprive a person of her dwelling. CDU clients are advised, at the outset of their relationship with Brooklyn A, that outside counsel must be obtained in such situations.

Brooklyn A is barred, under legal ethics standards restricting the representation of clients whose interests conflict, from assisting a tenant in an action by or against a CBO represented by the CDU. N.Y. JUD. LAW, APPX., CODE PROF. RESPONSIBILITY DR 5-105(A) (Consol. 1983 & Supp. 1997). Such tenants are referred to other Brooklyn-based Legal Services providers or to the local bar association's pro bono panel.

roles, identifying and recruiting providers, and negotiating their agreements with the CDC;

- *Project coordination and troubleshooting*: helping to establish a plan of action for a particular project, to prepare for potential problems and resolve unanticipated problems, and to coordinate the work of CDC staff and outside providers of specialized services;
- *Funding*: identifying funding options, preparing grant and loan applications and investment prospectuses, negotiating the terms of funding, and coordinating compliance and reporting;
- *Interfacing*: "translating" and negotiating between CDCs and funding and regulatory institutions to provide essential information, to promote mutual understanding of needs and resources, and to explain and resolve problems;
- *Providing a resource base* for new or under-resourced CDCs that lack key equipment, technology and staff; and
- *Networking* among groups in adjoining neighborhoods: as house counsel to CBOs that share common interests and engage in similar activities in adjoining neighborhoods, the CDU is able to facilitate the ongoing exchange of information, the sharing of resources, and the coordination of activity.

## III.
## HOUSE COUNSEL IN ACTION: THREE CASE STUDIES

Brooklyn A currently serves as "house counsel" to eight major East Brooklyn CDCs and their myriad subsidiaries, partnerships, affiliates, and other ventures, as well as a growing number of grassroots ownership entities. This section presents detailed case studies of Brooklyn A's reprensentation of three such clients.

Much of Brooklyn A's work involves helping established CDCs to improve, expand, and diversify. The main recipients of such services have been the Cypress Hills Local Development Corporation,[45] the Oceanhill-

45. CHLDC has been cited as a national model for its strong women's leadership, democratic processes, and the active participation of staff members and community residents. MARILYN GITTELL ET AL., BUILDING CIVIC CAPACITY: THE BEST CDC PRACTICES (1995); MARILYN GITTEL ET AL., THE DIFFERENCE GENDER MAKES: WOMEN IN NEIGHBORHOOD ORGANIZATIONS (1994).

The CDU has helped CHLDC to develop and operate a variety of programs. These include not only low-income housing, commercial revitalization, and social services, but also a large after-school program, intergenerational activities, a childcare center, a network of family day care providers, and a thrift shop designed to provide training in job skills and entrepreneurship. The CDU also assists community campaigns organized by CHLDC and others to reform lending practices of financial institutions, reduce mortgage foreclosure and abandonment in privately-owned housing, develop and operate a new alternative public elementary school, and assure construction of desperately needed new community school buildings and other facilities.

Brownsville Tenants Association, Inc.,[46] and the Brownsville Community Development Corporation ("BCDC"). Our first case study details Brooklyn A's role in BCDC's expansion and diversification. Initially an outgrowth of the struggle for community control of the Oceanville-Brownsville public schools, BCDC has evolved—with the CDU's ongoing representation and support—from an anti-poverty service agency in the 1970's to a community-based health center that provides primary care to many thousands of local residents. Brooklyn A has helped BCDC to: (i) become the first primary care diagnostic and treatment center in New York State to secure tax-exempt bond financing for development of a new vastly expanded facility; and (ii) make the difficult transition to Medicaid managed care while maintaining high quality services.

Brooklyn A plays somewhat different roles as house counsel to new CDCs. It has helped several such groups to launch successful initial projects which provide the base of staff, experience, contacts, and internal organization required for effective future work in the community. Our second case study examines Brooklyn A's work with one such group, the Northeast Brooklyn Housing Development Corporation (NBHDCo). It shows how Brooklyn A helped this relatively new CDC, which had no prior development experience, to package, coordinate, and administer its first low-income housing project, and, in so doing, gained for the CDC: (i) a new storefront office space; (ii) staff with the expertise to design and administer significant subsequent projects; and (iii) the track record needed to get sites and funds for those projects.

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46. OHBTA emerged from the 1960s' struggle for community control of the schools. During the 1970s, it served as a center for training tenant leaders residing in deteriorating privately-owned rental housing. OHBTA helped those leaders to organize tenants associations and to use their legal rights and economic power to win substantial repairs and significantly improve living conditions in their buildings. When landlords responded by abandoning their buildings, OHBTA filled the vacuum by taking responsibility for repairing, maintaining, and operating much of the neighborhood's housing.

OHBTA steadily grew through the 1980s, with the CDU's help and collaboration, into a major CDC. With an annual budget of over $3 million and a staff of over 100, OHBTA has been responsible for rehabilitating and managing close to 2,000 units of low-income housing. In the 1990s, the CDU has played a central role in OHBTA's launching of a bold new program to: (i) start local businesses that keep capital from OHBTA's own and other development projects within the community and help local residents develop marketable skills and find jobs in construction and other industries; (ii) incubate these enterprises until stable and profitable; and (iii) gradually bring company employees into cooperative co-ownership with OHBTA.

The CDU early on identified an excellent nonprofit technical assistance provider and business consultant, the ICA Group (formerly Industrial Cooperative Association), brokered its involvement, structured its relationship with OHBTA, and served as liaison between the groups. The CDU helped to form and structure the worker- and OHBTA-owned business entities, first as corporations and subsequently as limited liability companies, and oversaw their compliance with regulatory and licensing requirements. It also played a central role in initial fund-raising, and in preparing the first cohort of workers to assume the complex rights and responsibilities of co-ownership.

Finally, we examine the CDU's work, in close collaboration with other staff of Brooklyn A, on behalf of a very important new type of grassroots ownership entity. In the first in a growing series of such efforts, Brooklyn A recently helped a tenants' association in a large, low-income housing project to: (i) oust a private owner who had pocketed huge federal subsidies intended for the buildings, while allowing the buildings to deteriorate into a near slum; (ii) win essential repairs; and (iii) take title and exercise control over the project. The CDU played a key role in preparing the organization for ownership and helping it to exercise its new authority effectively.

Each case study tells a part of the organization's story, highlights the type of assistance provided by the CDU, and evaluates the impact of this assistance on the community.

### *A. Helping an Established Community Development Corporation to Shift Focus, Thrive, and Expand*[47]

The Brownsville Multi-Service Family Health Center (BMS) is a neighborhood-based provider of primary health care. It offers medical, dental, HIV/AIDS, substance abuse, nutritional, and health education services in a previously severely medically underserved community. The health center is operated by the Brownsville Community Development Corporation (BCDC), an organization with roots in the federal government's 1960s' "War on Poverty,"[48] and a long-time client of Brooklyn A.

During the 1970s, BCDC provided a wide range of services to Brownsville residents, including tenant education, summer youth employment, and preparation for obtaining a General Education Degree (GED). The results of a community needs analysis in 1979-80, however, prompted the organization to reconsider its focus. The analysis revealed a complete absence of quality health care services in Brownsville. The lack of such services left Brownsville residents with two dangerous options. They could wait until their health problems became very serious and then go to public hospital emergency rooms, which often turned them away. Alternatively, they

47. Material for this case study, except where otherwise noted, was compiled from interviews with Paul Acinapura, Brooklyn A Legal Services Deputy Project Director and from materials located at the offices of Brooklyn Legal Services Corporation A. *See also* Paul J. Acinapura, *The B.M.S. Family Health Center in Brownsville*, BROOKLYN A NEWS, Fall 1994, at 3. (on file with authors).

48. BCDC was incorporated in 1974 as the successor to the Brownsville Community Council, which was initially funded through the "War on Poverty." *See* Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C.) (providing for a number of programs designed to expunge poverty). *See also* PIERCE & STEINBACH, *supra* note 3, at 20 (describing the Special Impact Program, created by an amendment to the 1964 Economic Opportunity Act, which provided direct federal support for community development centers). The Brownsville Community Council served as the conduit for all of the anti-poverty funds that were earmarked for the provision of social services, employment training, and other programs in the Oceanhill-Brownsville community.

could rely upon slipshod care from local doctors' offices known as "medicaid mills" because of their superficial, assembly-line services. The combination of insufficient health services and poverty had dire long-term consequences: very high rates of illness and disease,[49] high incidence of prenatal and birth-related problems,[50] and extended hospitalizations for conditions made more serious by late detection.[51]

To address this desperate community need, BCDC decided to reorganize to provide decent health care in Brownsville. In 1979 it began planning to convert from a multi-service CDC into a community health care provider. Paul Acinapura, then a Brooklyn A staff lawyer, now the Deputy Project Director at Brooklyn A, represented BCDC in this process. Since that time, Brooklyn A has worked closely with BCDC as its general counsel, guiding it through the establishment of its health center and helping it to expand and continue to provide affordable, high-quality health services in the new environment of managed care.

### *1. Getting the Health Center Started*

Although BCDC made the decision to shift its focus in 1980, it was not able to re-open as a neighborhood health center until 1982. During the interim, BCDC and Brooklyn A worked together to complete the laborious and complex process of converting the multi-purpose, not-for-profit corporation into a state-approved "diagnostic and treatment" center.

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49. The Brownsville community is still afflicted by high illness and disease rates attributable either in part or solely to problems endemic to high-density low-income populations, and to problems related to the lack of health care services. 1991 statistics show that:

- Brownsville residents had a death rate for drug dependency and accidental drug poisoning (23.3 deaths per 100,000) nearly three times as high as the rates for Brooklyn (8.9 deaths per 100,000) and New York City (9.8 deaths per 100,000).
- AIDS and AIDS-related death rate among Brownsville residents (88.2 deaths per 100,000) was significantly higher than the rate for all of Brooklyn (59.7 deaths per 100,000).
- The rate of hospital admissions for tuberculosis among Brownsville residents (144 admissions per 100,000) was more than double the rates for New York City (68 admissions per 100,000) and Brooklyn (63 admissions per 100,000).

BROWNSVILLE COMMUNITY DEV. CORP., PROGRAM GUIDE 11-12 (on file with authors).

50. According to 1991 statistics, Brownsville, as compared with Brooklyn and New York, had higher rates of low birthweight, higher infant mortality rates, higher rates of births to teenage mothers, and greater frequency of late or no prenatal care. *Id.* at 18 (citing New York City Health Service Agency, July 1993).

51. The New York City Health Systems Agency has developed an Ambulatory Care Sensitive (ACS) Index based on hospital admissions for conditions that can be managed on an ambulatory (i.e. "walk-in") basis. A high ACS Index shows a lack of primary care services in the area.

The Adult ACS Index for BMS's service area is almost 50% higher than the indices for Brooklyn and New York City. Specifically, admissions for diabetes, pelvic inflammatory disease, adult bronchitis and asthma, and congestive heart failure are twice as high in BMS's service area as in the rest of Brooklyn and New York City. Children between the ages of 0 and 4 years are admitted for pediatric bronchitis, asthma, otitis media, and upper respiratory infections at a rate 50% higher than for all of Brooklyn and New York City. *Id.* at 10.

The most important and arduous task in this process involved gaining State approval for the new center. New York carefully regulates the corporate practice of medicine under Article 28 of the State Public Health Law. To open a community health center, BCDC needed the approval of the New York State Public Health Council to amend the purposes and powers clauses of its certificate of incorporation.[52] In addition, the New York State Department of Health (DOH) had to issue an operating certificate authorizing BCDC to provide specified medical services at a particular location.[53]

In practice, the two agencies based their decisions on a single application known as a "certificate of need" (CON). The application had to demonstrate: a public need for a particular service in a particular area, the competence of the applicant to provide that service, the financial feasibility of its plans, and the adequacy of its proposed premises, personnel, equipment, services, and standards of medical care.[54] The application was also reviewed by the local health systems agency, which provided an advisory recommendation.[55]

BCDC's effort to obtain these approvals, which took nearly two years, was managed and coordinated by Brooklyn A. In assembling the application, Brooklyn A worked closely with BCDC to develop detailed financial projections, compile precise descriptions of the services to be offered, and conduct a demographic analysis of Brownsville that demonstrated the lack of adequate primary health care services. All of this was set forth in a detailed submission to the reviewing agencies. Once approved by the DOH and the New York City Health Systems Agency, the application was still subject to review by the State boards that regulate each specialty area of practice BCDC proposed to provide, and finally by the Public Health Council.

At each level, "getting approval" required far more than filing the papers and waiting for a rubber stamp. Brooklyn A and BCDC had to go before each decision-making board and agency, secure a place on its agenda, defend the submission under rigorous scrutiny, and negotiate modifications and supplementary submissions.

Ultimately, diligence and perseverance paid off, and BCDC was licensed to operate a community-based health facility which provided a

52. N.Y. PUB. HEALTH LAW § 2801-a.1 (Consol. 1987).

53. N.Y. PUB. HEALTH LAW § 2805.1 (Consol. 1987).

54. N.Y. PUB. HEALTH LAW § 2801-a.3, 2805.2(b) (Consol. 1987). *See also* Matter of Roman Catholic Diocese v. N.Y. State Dept. of Health, 109 A.D.2d 140, 141 (N.Y. 1985), *rev'd on other grounds*, 489 N.E.2d 749 (N.Y. App. Div. 1985) (stating the requirements of federal and state law for approving the expansion of an existing, licensed health clinic).

55. Health systems agencies are regionally-based not-for-profit corporations established and authorized by the state to perform a number of functions, including advising state agencies on planning issues related to the delivery of health care services. N.Y. PUB. HEALTH LAW § 2904-b (Consol. 1987). The Public Health Council, as part of its determination of a "public need" for a proposed hospital, considers the recommendation of the local health services agency. N.Y. PUB. HEALTH LAW § 2801-a.2 (Consol. 1987).

number of specialized family medical services including pediatrics, gerontology, prenatal care, and nutritional counseling. In August 1982, the health center, staffed by four administrators and two doctors provided by the National Health Service Corps, opened its doors.

*2. Developing a House Counsel Relationship*

Working closely together to open the health center strengthened the bond between BCDC and Brooklyn A. Acinapura became a trusted consultant to BCDC. His advice was sought on a broad range of planning and policy decisions. He, and later the CDU, played a broad range of crucial roles during the health center's formative years. Apinacura and the CDU:

- monitored BCDC's compliance with New York's extensive regulations governing the operation of a diagnostic and treatment center;
- helped BCDC apply for and obtain authorization to add several important new areas of health services, including dentistry, podiatry, and substance abuse treatment;
- structured, negotiated, drafted, and reviewed affiliation and back-up agreements with local hospitals, as well as joint venture agreements with specialty medical care providers;
- dealt with a range of legal issues involving contracts, personnel, insurance and taxes;[56]
- represented BCDC in litigation and monitored the representation provided in other cases by lawyers retained by liability insurers;
- formed BCDC subsidiaries to implement various projects and programs, and obtained and maintained the subsidiaries' exemption from federal and state taxes; and
- reviewed documents and financing for real estate acquisition and renovation, and provided representation at title and loan closings.

Perhaps most importantly, Acinapura and the CDU provided crucial assistance in preparing and presenting BCDC's annual submissions to the

56. BCDC executive director Maurice Reid offers an example of Brooklyn A's successful representation of BCDC on financial matters that threatened to put it out of business. Through the early 1980s, New York City agencies gave "net grants" to community groups, and made income tax withholding payments for employees hired under the grants directly to the state and federal governments. After a mix-up concerning the start date for the City's coverage of BCDC's withholding, the IRS came to the group's door demanding some $85,000 in back taxes. BCDC did not have the money, and its board and staff did not have the tax background necessary for dealing with the IRS. Brooklyn A stepped in, and, through negotiations with the IRS, reduced the amount owed to $10,000. ARLEN SUE FOX, BROOKLYN LEGAL SERVS. CORP. A, COMMUNITY HOUSING AND DEVELOPMENT LEGAL SUPPORT PROJECT: A MODEL FOR LEGAL SERVICES IN SUPPORT OF COMMUNITY SELF-HELP EFFORTS 6-9 (1991) [hereinafter FOX, LEGAL SUPPORT PROJECT].

officials who set its Medicaid reimbursement rate. Securing adequate Medicaid rates was key to the center's survival and growth. When BCDC first decided to reorganize to provide health services, the federal government was providing general operating support for community health centers. By 1982, when BCDC was finally able to start providing healthcare, the Reagan administration had virtually eliminated such funding.[57] By 1984, the National Health Service Corps, which provided the Center's first medical staff, had been disbanded, and no direct support for community health centers was available from any level of government. Consequently, BCDC's survival depended almost exclusively on reimbursement for the services it provided to Medicaid recipients, who have consistently accounted for the vast majority of the center's patients.

Under the Medicaid program as then administered, the New York State Department of Social Services (DSS) reimbursed each hospital or health center for each covered service which that provider rendered to a Medicaid recipient.[58] Reimbursement was based on the provider's single, all-inclusive fee-for-services rate. That rate was set by the DOH, subject to the approval of State budget officials. Each provider was required to submit annually to the DOH a detailed report documenting its costs of providing medical services. The DOH set the provider's rate by processing these data through a maze of rules and regulations governing allowable costs, trends in costs, and caps on certain categories of costs. The department would issue an initial finding and rate, which were subject to appeal within the DOH.

For a health center serving an almost exclusively Medicaid clientele, the fee-for-services rate was the primary determinant of annual income and, ultimately, of financial viability.[59] Maintaining an adequate rate required a sophisticated grasp of the rate-setting process and regulations, coordination of a vast staff effort, mastery of detail, assembly and packaging of complex information, effective advocacy, and shrewd negotiation.

57. Reagan's policy of "New Federalism" resulted not only in a shift in authority over health and social welfare programs to the state level, but also in major reductions in the flow of federal funds to these programs. *See, e.g.*, Kenneth R. Wing, *The Impact of Reagan-Era Politics on the Federal Medicaid Program*, 33 CATH. U. L. REV. 1, 48-50, nn. 169-84 (1983) (discussing the effect of the final reconciliation bill on specific regulatory programs).

58. *See* N.Y. PUB. HEALTH LAW § 2807-c (Consol. ed. 1987) (addressing past reimbursement procedures for medical services providers that rendered services to Medicaid recipients).

59. Approximately 75% of the center's visits have been covered by Medicaid. An additional 20% or so have not been covered by any form of medical insurance. Though the center did receive some partial reimbursement for services to uninsured patients, that reimbursement was also based on the center's Medicaid reimbursement rate. DSS paid each provider 40-60% of its Medicaid fee-for-services rate to partially reimburse the provider's services to medically uninsured patients. The proportion of the Medicaid rate paid for uninsured services each year depended on the size of the pool of funds raised for this purpose from the fees collected from medically insured patients as part of the State Health and Hospital Bad Debt and Charity Care reimbursement program then in effect. N.Y. PUB. HEALTH LAW § 2807-c(14-a) (Consol. ed. 1987).

Brooklyn A played a central role in these processes. The reports it helped prepare, as well as its advocacy and negotiating, helped BCDC to obtain a Medicaid reimbursement rate sufficient to enable it to survive and provide an expanding range of high-quality services.

*3. Expanding the Health Center to Meet the Community's Needs*

By the end of the 1980s, BMS had become a local success story, providing full-scale primary medical care in over 16,000 medical/dental visits a year. However, even with its staff having expanded from six to thirty, it lacked the capacity to serve the full needs of a community of 85,000 mainly low-income people who had virtually no other resource for decent quality health care. The center clearly had outgrown the 4,000-foot space that BCDC had been renting since 1982. It was time for BCDC to build its own much larger facility.

In 1989 BCDC and Brooklyn A identified a potential site, an abandoned two-story building in an area with the highest concentration of public housing in New York City. A Brooklyn A community group client that was in the process of dissolving had obtained the property from the City of New York and no longer needed it. Brooklyn A brought the two groups together and, since the buyer and seller were both Brooklyn A clients, arranged for pro bono counsel to represent each party in negotiating a contract of sale. It also helped the groups obtain City officials' consent to the sale, which was required by the seller's deed from the City.

But how was BCDC to finance such a costly transaction? Though the building was relatively inexpensive, transforming it into a medical facility required $7 million in renovation. This was money that no bank would lend to a health center in a very low-income community. Brooklyn A's most innovative and pioneering work with BCDC involved devising a plan to finance the health center's expansion.

The solution to the funding problem began with a careful reading of New York State's Public Health Law by Brooklyn A attorney Paul Acinapura. Article 28 of that Law authorized State financing of DOH-approved hospital construction through the sale of tax-exempt bonds by the New York State Medical Care Facilities Finance Agency (MCFFA), a public benefit corporation which has since been merged into the New York State Dormitory Authority.[60] An examination of the Public Health Law convinced Acinapura that the word "hospital" in Article 28 covered a range of corporate health care providers, including diagnostic and treatment centers like the Brownsville Multi-Service Family Health Center. If

60. Hospitals may, subject to the approval of the health commissioner, borrow from MCFFA or the New York State Housing Finance Agency, funds for construction and/or modernization projects secured by bonds or by a note and mortgage. N.Y. PUB. HEALTH LAW §§ 2870-83 (Consol. 1987). MCFFA, previously authorized by the New York State Medical Facilities Act, was merged into the New York State Dormitory Authority. N.Y. PUB. AUTH. LAW §§ 1699-d to -j (Consol. Supp. 1997).

this reading was correct, MCFFA could sell bonds to finance acquisition and construction of the new facility.

Acinapura contacted the DOH and was told that the statute applied only to in-patient hospitals. He did, however, get the DOH to set a meeting. This meeting began ten months of discussions, submissions, and negotiations during which Acinapura had to convince the DOH not only that his reading of the law was correct, but also—since Article 28 created only a funding mechanism, not an entitlement to funds—that expansion of the Brownsville health center was an important project for the State to support. The latter task required many of the same types of submissions, market analyses, and negotiations that Acinapura had helped BCDC develop in order to obtain and amend its operating certificate.

Brooklyn A arranged for BCDC to contract with Healthscope, an experienced health care market research group, to conduct a feasibility study, and Acinapura and BCDC negotiated continuously with the DOH. State officials finally were persuaded in principle. A major point of contention then became the size of the new facility. Although BCDC needed a 30,000-35,000-square- foot center to meet projected community needs, DOH initially approved MCFFA funding for a facility of only 10,000 square feet. BCDC and Brooklyn A showed that a 10,000-square-foot center would be overcrowded from the moment it opened.

In November 1990, after many months of discussions, the DOH finally agreed to authorize MCFFA to sell bonds to finance renovation of a 27,000-square-foot facility. As part of the package, the DOH increased the center's Medicaid reimbursement rate to cover the cost of debt service on its MCFFA loan. With agreement on this plan, BCDC's application for an operating certificate for the new facility was completed and processed relatively quickly.

Acinapura then recruited an experienced project manager who worked full-time for BCDC from Brooklyn A's East Brooklyn offices to coordinate all aspects of the expansion project. Brooklyn A also began working closely with MCFFA to prepare for the bond sale. A tax-exempt bond sale requires extensive public disclosure to inform potential buyers about the nature of the investment. In order to make proper disclosure, MCFFA needed to familiarize itself with community health centers. MCFFA also needed advice from the investment bankers who would broker the bond sales (or, if need be, purchase the bonds themselves), in order to determine what structured arrangement would be marketable.

Brooklyn A played an active role in all of these discussions. In addition, when the bankers made it clear that the bonds could not be sold without "credit enhancement," Acinapura took the lead in persuading the State

of New York Mortgage Agency to provide mortgage insurance for the project.[61] Though MCFFA is a state agency, the bonds it sells are not general obligations of the State. Potential buyers would be hesitant to invest heavily in bonds secured only by the assets and income of BCDC. Convincing the State mortgage agency to guarantee repayment (at an additional cost to BCDC) involved another round of extensive submissions and negotiations. By August 1992, participation of all the essential parties had been assured, book-length documents had been drafted, reviewed, revised, and fine-tuned, and the bonds could finally be sold.

On behalf of BCDC, Brooklyn A had previously negotiated and drafted architectural and construction contracts for the project, including commitments to employ local sub-contractors and workers insofar as possible. Throughout the fifteen-month construction period, Brooklyn A played a key trouble-shooter role. It helped BCDC work through a variety of snags, snafus, and potential disasters to bring the new center into being.

In November 1993, the new health center opened its doors. The new space has enabled BMS to expand its services from 16,000 to 55,000 medical and dental visits per year. Its staff has grown from thirty to 140, most of whom, especially non-professionals, are from the community. The health center continues to provide HIV/AIDS, substance abuse, and other "specialty services" from the location it originally rented. It has also opened a halfway house with twenty-one beds for recovering alcohol and drug abusers and a 100-slot program of outpatient counseling. It is in the process of developing a birthing center and other new community-based health facilities and programs.

Brooklyn A's creative lawyering opened the door for other community health centers to access tax-exempt bond financing for the first time in New York State history. Based upon the Brooklyn A/BCDC model of health care facility financing, New York City has established its own tax-exempt bonding program, administered by a new Primary Care Development Corporation that arranges tax-exempt bond financing for community-based primary health care facilities. The CDU currently represents several other community-based health centers in medically-underserved communities undertaking projects similar to BCDC's. It is also helping to staff a BCDC subsidiary that functions as a consultant to community groups seeking to develop or expand community-based health care in other low-income neighborhoods throughout New York City.

61. The State of New York Mortgage Agency Act, ch. 612, 1970 N.Y. Laws 1330, as amended, authorizes SONYMA, a public benefit corporation, to enter into commitments to insure mortgages and contracts of mortgage insurance. In 1989 the SONYMA Act was amended to authorize SONYMA to provide insurance for a loan or pool of loans when, among other things, the property would provide a community service facility that would not otherwise be provided.

*4. Coping with the Shift to Medicaid Managed Care*

BCDC's capacity to repay the state (and thus the state's capacity to repay the bondholders) was predicated on BCDC's Medicaid reimbursement rate being increased by an amount sufficient to cover its new debt service. Such "capital pass through" has traditionally been used under New York's Medicaid fee-for-services system to support hospital construction and expansion. Repayment of construction debt has simply been included as one of the allowable reimbursed costs of providing medical and dental services to Medicaid recipients.

Starting in 1993, however, New York, like most other states, began to shift its compensation of Medicaid providers from a fee-for-services system to managed care.[62] By 1997, more than half of the Brownsville health center's Medicaid-reimbursed services (40% of total BMS medical/dental visits) were compensated under managed care arrangements. If, as expected, New York State is granted its pending request for a waiver of federal Medicaid rules, all BMS Medicaid-covered services will be compensated under the new system by the end of 1998. New York's Medicaid managed care system does not provide for any capital pass through, and it poses many other serious problems for community-based health centers and their clients. Brooklyn A has been playing an active role in helping BCDC cope with this new environment.

Under managed care, health care providers, e.g., doctors, dentists, hospitals, and community health centers, are no longer directly reimbursed for services to Medicaid recipients. Instead, Medicaid recipients enroll in insurance plans offered by intermediary organizations, e.g., Health Maintenance Organizations, which contract with doctors, health care centers, hospitals, etc., to provide services to their enrollees.[63] The system is structured to reward those intermediaries and providers who render the fewest services to their patients. The state pays intermediaries, and the intermediaries in turn pay providers, not on the basis of the number and type of services provided to Medicaid recipients ("fee for services"), but on the basis of the number of individuals enrolled, regardless of what services they receive ("capitation"). The State is substantially reducing its Medicaid appropriations on the theory that the new system will yield significant savings

62. *See* Kristina Hanson & Diane Rowland, *Medicaid: Moving to Managed Care*, HEALTH AFFAIRS, Fall 1996, at 150-52 (citing a report by the Health Care Financing Administration, Office of Managed Care, which found that by 1995, "11.6 million Medicaid beneficiaries nationwide—nearly one-third of all beneficiaries—were enrolled in managed care arrangements"). *See also* Penelope Lemov, *Looking After Managed Care*, GOVERNING MAGAZINE, Apr. 1996, at 38 (discussing New York's efforts to push Medicaid recipients into managed care programs, and assessing the consumer law problems that accompanied this "statewide enrollment drive").

63. *See* N.Y. PUB. HEALTH LAW § 2807-c (McKinney 1993 & Supp. 1997) (setting forth the new reimbursement procedures).

by reducing use of medical resources.[64] For the intermediaries to cover their overhead and administrative costs, maintain reserves, and pay dividends to their shareholders, they have to dramatically reduce their payments to health care providers. They drive the hardest bargains they can, leaving providers with much less income than they received under the old system.

BCDC cannot hope to amass the capital required by the New York State Department of Insurance to obtain a license to operate its own health care intermediary under the managed care system. If it is to receive any funds for treating the bulk of its clients, it has no choice but to contract with one or more of the existing managed care intermediaries. Brooklyn A has represented BCDC in negotiating contracts with several of the commercial, for-profit HMOs that dominate the managed care market in New York. Although the HMOs typically have great bargaining power, BCDC, as the preeminent provider of health care services in Brownsville, does have some leverage. Acinapura has used this leverage to obtain higher per-patient rates from the HMOs.

In addition to for-profit HMOs, New York's Medicaid managed care system authorizes the DSS to compensate Prepaid Health Services Plans ("PHSPs").[65] These are nonprofit intermediaries that are allowed to enroll only Medicaid recipients. Under no pressure to return dividends to shareholders, and allowed to operate with smaller capital reserves, PHSPs are in a position to pay higher rates to providers.

BCDC and another community health center client of Brooklyn A have joined a PHSP formed and controlled by a group of nonprofit hospitals. The CDU has helped each center to obtain a seat on the PHSP Board of Directors and to negotiate with the PHSP a capitation rate that is more equitable and remunerative than any offered by a for-profit HMO. As the state continues to ratchet down its capitation rates to intermediaries, however, and as the hospitals that own the PHSP face increasing pressure to tap every available financial resource, even this sympathetic PHSP has begun to squeeze its providers. The PHSP recently notified BCDC and the other community health center of substantial reductions in their capitation rates, pushing those fees down toward the market rate set by the dominant HMOs.

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64. *See* Frank Bruni, *Some of What Lawmakers and Pataki Agreed On*, N.Y. TIMES, July 15, 1996, at B5 (discussing "a bill authorizing the state to require Medicaid patients to enter managed care programs in an effort to cut costs," which extended a similar, recently expired law). *See also* Lemov, *supra* note 62, at 38 (citing cost reduction as the motivation for New York State's conversion to managed care for Medicaid recipients). Appropriations for uninsured medical services will also be reduced under a new system that no longer pegs a provider's compensation to its Medicaid fee-for-service rate.

65. Not-for-profit corporations that serve as intermediaries for Medicaid recipients are authorized to operate health services plans upon acquisition of a "special purpose certificate of authority." N.Y. PUB. HEALTH LAW § 4403-a (Consol. 1987).

Brooklyn A is currently helping BCDC to negotiate with a broad range of PHSPs and HMOs in pursuit of better rates for its clients. BCDC and Brooklyn A are also meeting with a coalition of community health centers which is attempting to determine if it can accumulate the capital to form and operate its own PHSP. The current reality, however, is that community health centers must adapt to reduced compensation for their services. In this context, Brooklyn A is helping its health center clients to formulate new measures to reduce their costs. At BCDC, new personnel have been hired to introduce and administer new cost accounting systems. Preventive care—always a staple of the health center's work—has been further expanded in an effort to stop serious long term health problems from developing, or to treat and arrest them in their early stages.

*5. Conclusion*

Surmounting all of these difficulties and obstacles, BCDC continues to provide top-quality health care to the people of Brownsville through expanded and upgraded services, staff, and facilities. Brooklyn A's contribution to this success is incalculable. Maurice Reid, BCDC's executive director, speaks of Brooklyn A as "our attorney," and credits much of the health center's survival and growth to its relationship with Brooklyn A:

> Part of the problem with a lot of the anti-poverty programs was that they did not have that kind of legal advice, and they made mistakes that eventually caused them to lose services. We're fortunate. We're able to go to an attorney [before we take action] and say, 'This is what's happening, what do you think about this? What advice can you give us?' Or, 'This is a problem, we just want to run it by you.' Things you'd never [be able to pay] a private attorney for.
> . . . When you're operating at a deficit as we did through most of our existence, you [usually] have to make choices between services and legal fees. You [Brooklyn A] provide the service. We're fortunate that we've never had to make that choice.[66]

### *B. Helping a Community Based Organization Transform into a Community Development Corporation*[67]

In addition to representing BCDC and other established CDCs with extensive development experience, Brooklyn A also serves as house counsel to newer organizations. It has helped several groups to make the transition from small, informal grassroots service and advocacy work to the more

66. FOX, LEGAL SUPPORT PROJECT, *supra* note 56, at 9.

67. Material for this case study, except where otherwise noted, was compiled from the experiences of Brian Glick as legal counsel to the Northeast Brooklyn Housing Development Corp., and from interviews with Jeffrey Dunston, former Associate Director of NBHDCo, and Joseph Holley, Executive Director of NBHDCo.

structured, complex business-like work of community-based economic development. One such group is the Northeast Brooklyn Housing Development Corporation (NBHDCo). NBHDCo came to Brooklyn A in 1987, two years after its formation, with a tiny budget, a staff of mainly volunteers, a one-room rented office, no 501(c)(3) tax exemption, and no prior experience in housing or economic development. Today it is an established tax-exempt CDC with twenty-one full-time paid staff and a portfolio of forty-seven fully renovated buildings with 383 low-rent apartments and seventeen commercial and community spaces, with more in the pipeline.

Brooklyn A made this transition possible through its central role in the initial housing development project that gave NBHDCo its start. For that project, the CDU performed at various times the functions of lawyer, consultant, technical assistance provider, and project coordinator. The project involved the acquisition of four dilapidated buildings in the Bedford Stuyvesant section of Central Brooklyn and their renovation into a modern sixteen-unit low-income residential co-op. From this initial endeavor, NBHDCo gained paid staff with the expertise to coordinate and administer subsequent projects, and the track record needed to get sites and funds for those projects. It also acquired a long-term lease on a large, centrally-located office space owned by a NBHDCo subsidiary.

### 1. *The Genesis of Northeast Brooklyn Housing Development Corporation*

NBHDCo arose from community concern over the increasing presence of boarded up and abandoned buildings in the northeast corner of Bedford Stuyvesant, near Brownsville.[68] Neighborhood residents organized, and lobbied local officials to address this issue. In 1985, with the help of Assemblyman William Boyland, they received a multi-year start-up grant from the New York State Division of Housing and Community Renewal to form NBHDCo as a "Neighborhood Preservation Company."[69] The start-up grant barely paid for rent in a church hall and a part-time secretary; NBHDCo's executive director worked full-time as an unpaid volunteer.[70] In its early years, the group organized block associations and

68. Landlord abandonment of private apartment buildings is a chronic problem in low-income areas in New York, including the communities served by the CDU. At the time of NBHDCo's founding, its executive director, Joseph Holley, estimates that 200 buildings in Eastern Brooklyn were vacant. *See also* BACH & WEST, *supra* note 21, at 41 (listing several communities in East Brooklyn as "high risk" areas for building abandonment).

69. The Commissioner of the State Division of Housing and Community Renewal designates certain not-for-profit corporations that are engaged in the construction, maintenance, preservation, repair, and restoration, or rehabilitation of residential dwelling accommodations in low-income areas or other "neighborhood preservation activities" as "neighborhood preservation companies." The Commissioner is authorized to provide funding in support of these activities, as well as technical services and assistance. N.Y. PRIV. HOUS. FIN. LAW §§ 901-909 (Consol. 1988 & Supp. 1997).

70. FOX, LEGAL SUPPORT PROJECT, *supra* note 56, at 31.

community events, and promoted commercial revitalization. It also helped local residents to find housing, resolve landlord-tenant problems, and obtain rent subsidies, weatherization grants, and other government benefits.

From the beginning, however, NBHDCo's aspiration was to renovate abandoned housing.[71] In 1987 the group took its first step in this direction by retaining the Pratt Institute Center for Community and Environmental Development[72] to conduct a feasibility study. The study identified as a potential site four contiguous, vacant, City-owned buildings with ground-floor storefront spaces on the corner of Hancock Street and Ralph Avenue in Bedford-Stuyvesant. The buildings stood at the intersection of a commercial strip being revitalized under NBHDCo's leadership, and a well-kept residential street lined with lovely old owner-occupied brownstones. Pratt and NBHDCo agreed that renovation of these buildings could make a major contribution to the neighborhood preservation efforts already underway.

### 2. *Brooklyn A Becomes Counsel to NBHDCo*

It was at this time that NBHDCo became a client of the CDU. The CDU's first tasks were to amend NBHDCo's certificate of incorporation and bylaws in order to correct mistakes made by a privately retained lawyer that were blocking the group from obtaining exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code.[73] To qualify NBHDCo for "c3" status, the CDU rewrote its bylaws and amended its certificate of incorporation, reclassifying it as a "Type B" not-for-profit corporation under New York law[74] and adding certain standard provisions required by the IRS. The CDU then drafted NBHDCo's application for tax exemption and persuaded IRS to grant it c3 status.[75]

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71. *Id.*

72. The Pratt Institute Center for Community and Environmental Development offers training and architectural and urban planning-based technical assistance to CED practitioners and their constituencies.

73. NBHDCo was eligible for federal tax exemption pursuant to § 501(a) of the Internal Revenue Code as an organization meeting the qualifications of § 501(c)(3). I.R.C. §§ 501(a), 501(c)(3) (1996). NHBDCo qualified as a corporation organized and operated exclusively for "charitable purposes" as defined under the Code because its objectives were and are to develop and provide permanent affordable housing to low-income people in its community.

74. NBHDCo had been classified as a Type C corporation under the New York Not-For-Profit Corporation Law as "a not-for-profit . . . formed for any lawful business purpose to achieve a lawful public or quasi-public objective." N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (Consol. Supp. 1997). For a New York nonprofit, acquiring federal tax exempt status is easier if it is classified as a Type B corporation (i.e., "a not-for-profit corporation . . . formed for . . . charitable [purposes]"). *Id. See* LAWYERS ALLIANCE FOR NEW YORK, GETTING ORGANIZED 26-27 (Allen R. Bromberger & Livia D. Thompson eds., 1993) (an excellent resource for organizations seeking to apply for 501(c)(3) status or to incorporate under the New York Not-for-Profit Corportion Law).

75. Tax-exempt status is required for participation in many government, foundation, and corporate CED programs. Even when not formally required, it is essential because

In 1988 two events brought about a qualitative change in NBHDCo's relationship with Brooklyn A. First, New York City's Department of Housing Preservation and Development (HPD), which had obtained title to the land and buildings at Hancock and Ralph through real estate tax foreclosure, awarded "site control" to NBHDCo. This meant that HPD would sell the site to NBHDCo, at a below-market rate (ultimately, only $1 per building), if the group obtained from other sources a commitment of funds sufficient to renovate the buildings. Second, the New York State Housing Trust Fund Corporation[76] agreed to provide most of the renovation funds through a $1.5 million, interest-free, thirty-year loan; repayment would be deferred until the thirtieth year and then forgiven, provided the project met State guidelines (e.g., residency restricted to, and affordable by, low-income households). The New York State Division of Housing and Community Renewal (DHCR) provided an additional $375,000 grant.

NBHDCo was ready to launch its first major housing development project, which came to be known as "Hancock Manor." There was only one problem. Although NBHDCo possessed many essential ingredients—strong motivation, community support, control of an excellent site, and firm funding commitments—it lacked one crucial element: the experience and staff needed to combine these ingredients to create a housing project. The CDU stepped in to fill this gap. Its mission was to structure NBHDCo's first project in a way which would enable the group to carry out subsequent projects on its own.

### 3. *Coordinating the Predevelopment Phase*

The visible phases of a housing development project—acquiring, constructing, occupying, and operating the buildings—depend on the successful completion of an often lengthy, complex and less visible "predevelopment phase." During this phase, a development team is organized, financing is negotiated, regulatory approvals are obtained, and the construction and operation of the project are carefully planned. Only after completing these steps could NBHDCo obtain ownership of the project site and the funds required to renovate it.

Once it obtained title and rehabilitation financing, NBHDCo could receive as part of its loan a "developer fee" to reimburse it for the time and money expended to plan and implement the project. At that point, it could also obtain its DHCR grant. Together, the developer fee and the grant would enable NBHDCo to hire full-time, in-house staff to direct its remaining work on Hancock Manor and subsequent projects. The CDU's job was

government agencies, foundations, banks, and investors view its absence as an indication that a CDC lacks the capacity to do business in a serious, competent, and professional manner.

76. The New York State Housing Trust Fund Corporation was created in 1986. It is a public benefit corporation which is a subsidiary of the New York State's Housing Finance Agency. N.Y. PRIV. HOUS. FIN. LAW § 45-a.1 (Consol. 1988).

to move the project through the myriad steps required by the City and State agencies before they would convey the site and issue the loan.

The CDU staff had little more experience as a housing developer than NBHDCo. What it did have, however, were its lawyers' status and credentials, the will and ability to learn quickly, and access to a CDC client, Oceanhill-Brownsville Tenants Association, Inc. (OHBTA), that had been through the process and was willing to help out, provided the CDU did the legwork. These resources proved more than adequate.

Drawing on OHBTA's expertise, the CDU's first step was to help NBHDCo put together a formidable "development team."[77] An experienced Brooklyn-based African American architect signed on to prepare plans and specifications for the renovation. A general contractor whose work was known to OHBTA agreed to rehabilitate the buildings, using qualified local sub-contractors and workers identified by NBHDCo and OHBTA. OHBTA itself, an experienced manager of low-income housing, took responsibility for managing the completed project; it agreed to delegate some functions (e.g., resident selection and rent collection) to NBHDCo, to pay NBHDCo a portion of the managing agent's fee, and to provide NBHDCo staff with on-the-job training in residential property management. Qualified professionals were engaged to provide other predevelopment requisites, such as a survey of the property, an environmental assessment, title search and title insurance, fire and liability insurance, and an application for a twenty-year abatement of municipal real estate taxes.[78]

As project attorney, the CDU drafted and negotiated the architectural and construction contracts and property management agreements, including an agreement between OHBTA and NBHDCo dividing post-construction property management responsibilities and fees. It analyzed conveyance and loan documents prepared by HPD and the Housing Trust Fund Corporation (HTFC), negotiating revisions to protect NBHDCo's interests. It also prepared corporate resolutions and other documents for the title and loan closing, arranged for title insurance, and represented NBHDCo at the closing.

77. *See* BENNET L. HECHT, DEVELOPING AFFORDABLE HOUSING: A PRACTICAL GUIDE FOR NONPROFITS 17 (1994). Hecht addresses in substantial detail the role of the development team and the importance of contracting out for services that cannot reasonably be expected to be performed in-house until the development organization gains experience and in-house capacity. Hecht also notes that an inexperienced housing developer may need to piggyback on the successful track record of its development team members in order to convince lenders, government officials, and other interested parties that the project will be a success. *Id.*

78. *See* N.Y.C. ADMIN. CODE § 11-243 (1986 & Supp. 1995) (providing for an abatement of real estate taxes for a period of twenty years for any multiple dwelling which is altered, improved, or increased in value with the aid of a loan provided by the City of New York).

The CDU's predevelopment role, however, extended far beyond these traditional lawyer functions. The CDU also coordinated the work of the development team to ensure that the myriad documents required by government funding and regulatory agencies and by other team members were completed timely and accurately, and were submitted in proper form. It served as NBHDCo's liaison with the government agencies. It prepared many of the required submissions, revising them and negotiating with the agencies until the submissions were acceptable.[79] When HTFC's funds ran short and HPD stepped in as co-lender and "lead agency," a whole new round of submissions and negotiations was required.[80]

At key points, the CDU involved itself directly in the design process. It developed with NBHDCo a plan for using the Hancock Manor storefronts as the group's office and a community space, instead of renting them to commercial tenants, and it obtained HPD and HTFC consent to this arrangement. The CDU also helped NBHDCo merge three of the Hancock Manor buildings into a single structure that replaced the pre-existing narrow, straight-line "railroad flats" with larger, more convenient and attractive apartments.

### *4. Structuring A Creative Solution for Ownership and Management*

Some entity had to serve as the long-term owner of the buildings. NBHDCo was reluctant to transfer the rehabilitated property to a private owner, given private landlords' pattern of neglecting and abandoning buildings in East and Central Brooklyn, including these very buildings.[81] One alternative was for NBHDCo to retain Hancock Manor and operate it as a low-income rental property. The group could protect its other future assets by forming a wholly-owned nonprofit subsidiary to own and operate the project.

Looking up the street, however, NBHDCo saw a row of well-kept, resident-owned townhouses. It believed that giving residents of Hancock Manor an ownership interest in their apartments would help the the project fit in better with its neighbors and give the residents a greater stake in making the project work. The CDU suggested converting the building into a co-op.

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79. These submissions included: plans for selecting residents and managing the property; a development budget (showing how acquisition, construction, administrative, and professional costs would be met); and an operating budget (showing that once the project was occupied, its income would cover its expenses plus adequate reserves).

80. HPD's loan required repayment over 30 years with 1% annual interest. Among other things, HPD added a requirement that two of the project's 15 units be set aside for homeless households referred by the New York City Department of Social Services. The homeless households' rent could be no more than their public assistance "shelter allowances," so long as they were on welfare.

81. *See supra* note 68 and accompanying text.

While very much drawn to the co-op concept, NBHDCo was committed to keeping the housing affordable for low-income households. Concerned with potential gentrification, it was not about to enable Hancock Manor residents to re-sell ("flip") their renovated apartments and buildings to higher-income households, investors, or speculators. The CDU explained that a co-op could readily be structured to meet these concerns. In a residential co-op, the entire property is owned by a single, building-wide corporation in which each resident owns shares or a membership that entitle the resident to long-term occupancy of an apartment in the building.[82] The CDU knew of successful efforts to use a corporation's power to restrict re-sale of its shares or memberships as the basis for a type of affordable low-income housing known as a "limited equity" co-op. Under the charter and bylaws of a limited equity co-op, a resident may transfer her shares or membership (and thereby her apartment) only to another low-income household and only at a price which limits the seller's equity to her original purchase price (usually adjusted for inflation, improvements, etc.). The HTFC and HPD were familiar with this approach and supported it; indeed, New York law required that a specific limited equity formula be enforced in any co-op housing developed with HTFC funds.[83]

Under these circumstances, NBHDCo, HTFC, and HPD readily agreed with the CDU's proposal that Hancock Manor be a limited equity co-op. A number of important issues, however, remained to be resolved. Generally, the developer or sponsor of a co-op would form a new co-op corporation and sell prospective co-op residents shares or memberships in that corporation. It would then turn the co-op corporation over to its new shareholders or members and deed the property to the corporation. This arrangement, however, would not readily accommodate NBHDCo's plans for Hancock Manor. At the CDU's suggestion, NBHDCo planned to rent the Hancock Manor storefronts as its new, expanded organizational offices. The CDU warned NBHDCo of the risks involved in vesting ownership of its office space in a corporation it did not control. Moreover, it advised, sale of the building to a co-op corporation could not be structured in a way that assured Hancock Manor's permanent affordability to low-income households. Though HPD and HTFC required that the co-op be low-income and limited-equity, those restrictions would expire at the close of the thirty-year loan term. Longer-term restrictions could be set forth in the deed conveying Hancock Manor to a co-op corporation, but courts are reluctant to enforce such restrictive covenants.[84]

82. Residents own shares if the co-op is organized as a business corporation. They are granted membership if the co-op is organized as a not-for-profit corporation.

83. N.Y. PRIV. HOUS. FIN. LAW § 1102.3(d) (Consol. 1988 & Supp. 1997).

84. New York courts subject restraints on the alienation of real property to a reasonableness test. Witt v. Disque, 79 A.D.2d 419 (N.Y. App. Div. 1981); Anderson v. 50 East 72nd St. Condominium, 492 N.Y.S.2d 989 (N.Y. Sup. Ct. 1985), *aff'd*, 119 A.D.2d 73 (N.Y. App. Div. 1986).

To address these concerns, the CDU crafted a solution adapted from the "community land trust" model for ensuring permanent affordability. Instead of selling Hancock Manor to a new co-op corporation, NBHDCo's subsidiary would retain title to the property, leasing the residential portion to the co-op corporation and the storefronts to NBHDCo. Lease restrictions on re-sale are fully enforceable since leases are governed by the law of contracts (rather than real property), and since the party imposing resale restrictions continues, as lessor, to maintain a substantial legal interest in the property.[85] NBHDCo accepted this proposal, and the CDU obtained HTFC and HPD consent.

With this structural concept in place, several legal tasks remained. The CDU proceeded to:

- form a new not-for-profit tax-exempt subsidiary of NBHDC, "Northeast Brooklyn Community Land Corporation," to acquire and renovate the property;
- draft the subsidiary's bylaws and obtain 501(c)(3) tax exempt status for it;
- prepare two agreements between NBHDCo and its subsidiary: a thirty-year commercial lease for the storefront office space (at a rent representing the going rate for similar space in the neighborhood), and a contract for administrative services, under which the subsidiary pays NBHDCo to operate the subsidiary;
- form a new not-for-profit "housing development fund corporation" ("Hancock Manor HDFC") to serve as the co-op corporation;[86] and
- prepare a detailed agreement under which the HDFC obtained a ninety-nine-year renewable net lease of the residential portion of the property.[87]

85. INST. FOR COMMUNITY ECONOMICS, THE COMMUNITY LAND TRUST LEGAL MANUAL 3-7 (1994); Dina Schlossberg, *Community Land Trusts*, 6 ECON. DEV. & L. REP., June 1994, at 99. Community land trusts generally retain title only to the land and sell the building to a resident-owned co-op. The same result is achieved by retaining title to the land and building, and leasing both to the co-op.

86. HPD required, as a condition of its property sale and construction loan, that the co-op be formed as an HDFC. An HDFC is a low-income housing corporation formed under the New York Public Housing Finance Law, Article 11, and regulated by a City or State agency. An HDFC can be a business or not-for-profit corporation. NBHDCo chose a non-profit form to reinforce residents' understanding of the low-income, limited-equity character of the co-op.

87. Hancock Manor HDFC (the co-op corporation) agreed, inter alia, to:
(a) comply with all HTFC and HPD regulatory agreements and other government requirements;
(b) keep up the residential portion of the property;
(c) retain OHBTA (assisted by NBHDCo) as property manager for at least five years (unless dismissed for good cause) at the standard fee, under an agreement which grants the co-op the option of paying reduced fees if it shares management responsibilities in years three through five;

*5. Forming the Co-op*

The decision to lease the residential portion of Hancock Manor to a low-income, limited equity co-op marked only the first step in the co-op process. A number of questions remained to be addressed: How would "low-income" be defined? How much would it cost to join the co-op? How would re-sale of co-op memberships be regulated? How would monthly charges be kept affordable? Would co-op voting be structured on a one-household one-vote basis, or would votes be weighted in proportion to monthly charges, apartment size, or some other variable? The CDU focused NBHDCo's attention on these questions, provided information on options developed and attempted elsewhere, and helped NBHDCo make intelligent decisions for the circumstances of Hancock Manor.

a. *Income Guidelines*: At the CDU's suggestion, NBHDCo permanently retained, through its subsidiary's lease agreement with the co-op corporation, the low-income guidelines required by HPD and HTFC during the term of their loans. Under these rules, two units are reserved for homeless public assistance recipients and the other 13 units may be purchased only by households that earn less than 80% of the median income for the metropolitan area.[88] Once a household purchases a co-op membership, it can stay in occupancy and remain a member no matter how much income it earns. The only requirements are that each member household pay its monthly charges, comply with other co-op rules, and use its apartment as its "primary residence."

The 80% guideline is considerably more generous than the standard used in some other affordable housing projects. Federal low-income housing tax credits, for example, are available only for units rented to households earning under 50-60% of median income.[89] The 80% guideline provided a better fit with the immediately surrounding area, however. Moreover, it improved the project's financial prospects by including households capable of paying a somewhat higher purchase price and monthly charge.

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(d) pay rent to NBHDCo's subsidiary under a formula designed to provide, when added to NBHDCo's rent for the office space, sufficient funds to repay the HPD mortgage;

(e) not assign the lease to any other entity without the approval of NBHDCo's subsidiary; and

(f) remain permanently an affordable low-income, limited-equity resident-owned nonprofit HDFC co-op.

88. The co-op contained 15 units, plus one unit reserved for the building superintendent.

89. A low-income housing credit is available to owners of residential rental property used for low-income housing. I.R.C. § 42 (1996). The low-income credit is available only to "qualified" housing projects. A project is "qualified" if 20% or more of the residential units in the project are both rent-restricted and occupied by residents whose income is 50% or less than the area median gross income, or if 40% of the residential units in the project are both rent-restricted and occupied by residents whose income is 60% or less than the area median gross income. 26 U.S.C. § 42(g)(1)(A)-(B) (1994).

b. *Purchase Price*: Through consultation with Brooklyn A's government benefits unit, the CDU confirmed that the New York City Department of Social Services would issue a special grant of up to $2,500 to enable a public assistance recipient to purchase a co-op membership. The CDU verified with the Department's counsel that such grants would be available for recipients selected to live in Hancock Manor. It also identified an organization that would offer a low-interest loan to enable working poor families to pay a purchase price of $2,500.

In this context, NBHDCo, HPD, and HTFC agreed to set the purchase price at $2,500. The $37,500 thus collected ($2,500 for each of fifteen units) would form NBHDCo's equity contribution to the project. Nearly $10,000 of that contribution would be used to capitalize an operating reserve to cover unexpected losses suffered by the co-op corporation.

c. *Re-sale Restrictions*: New York law specified a detailed formula for determining the maximum re-sale price of a membership in a co-op that was built or renovated with HTFC funding.[90] NBHDCo accepted the CDU's recommendation that its subsidiary's lease agreement with the co-op corporation make this formula permanent. Most co-ops enforce such restrictions by prohibiting re-sale without the consent of the co-op board. For Hancock Manor the CDU recommended, and NBHDCo adopted, a more foolproof procedure. Under this procedure, a co-op member can sell its membership only to the co-op corporation for the price determined by the statutory formula. The co-op corporation re-sells the membership for that amount plus any expenses incurred in the buying and re-selling process. To assure that the new member qualifies under the low-income guidelines, each proposed re-sale must be approved by NBHDCo's subsidiary before it can take effect.

d. *Monthly Charges*: HPD and HTFC set co-op members' initial monthly charges in an amount which would be affordable to low-income households and would enable the co-op corporation to generate enough income to meet its projected operating expenses.[91] On the CDU's advice, the lease agreement between NBHDCo's subsidiary and the co-op corporation allows the co-op to increase residents' monthly charges only if the subsidiary demonstrates that the proposed increase is both essential and affordable.

e. *Members' Voting Rights*: Market-rate co-ops generally allocate shares and votes in proportion to the value of each member's apartment. Such apportionment is required under the Internal Revenue Code for a

90. N.Y. PRIV. HOUS. FIN. LAW § 1102.3(d) (Consol. 1988 & Supp. 1997). During the term of an HTFC loan, the re-sale price is limited to the original purchase price plus the cost of any improvements authorized by the co-op board and any contribution to building-wide improvements or mortgage amortization. *Id.*

91. HPD required that for the first 15 years of the project, monthly charges for the two units occupied by formerly homeless residents receiving public assistance be limited to the part of the residents' monthly grant designated for rent ("shelter allowance").

member to deduct from taxable federal income her share of the co-op's interest charges and real estate taxes.[92] In a market-rate co-op the procedure also has a certain quality of fairness, since each member of such a co-op pays a purchase price roughly proportionate to the value of her apartment.

The CDU pointed out that the Hancock Manor co-op is quite different. Each of its members would pay the same purchase price. No tax deductions would be available for the first twenty years since the co-op would pay no interest or real estate taxes during that period. Most importantly, few (if any) co-op members would earn income sufficient to make use of such tax deductions. Acknowledging these circumstances, and hoping to promote a more democratic, cooperative atmosphere, NBHDCo agreed to have one membership and vote be allocated to each apartment.

The CDU codified these decisions in the lease agreement between NBHDCo's subsidiary and Hancock Manor HDFC, and in the co-op corporation's internal operating documents. It drafted: (i) membership certificates that expressly set forth all re-sale restrictions; (ii) corporate bylaws that set forth re-sale restrictions, defined voting rights, and established the process for setting monthly charges; and (iii) proprietary leases that entitled each member to occupy a particular apartment upon payment of monthly charges and compliance with other terms of the lease.

Due to the volume of local co-op conversions in New York, the large amounts of money involved, and the risk that co-op purchasers will be defrauded, the State regulates the process to protect consumers. New York's Martin Act[93] invalidates the formation of a residential co-op, and the purchase of any interest in such a co-op, unless they conform to a detailed offering plan prepared by the sponsor and submitted to each prospective purchaser after approval by the State Department of Law. While the Law Department is not authorized to evaluate the fairness of a co-op plan, it is mandated to review each plan carefully to ensure that it meets very detailed requirements designed to guarantee full and honest disclosure.[94]

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92. I.R.C. § 216 (1996).

93. N.Y. GEN. BUS. LAW § 352-eee (Consol. 1980 & Supp. 1997).

94. The plan must include, *inter alia*,

(i) the co-op's deed or lease to the property;

(ii) detailed engineering reports on the condition of the property;

(iii) all internal co-op operating documents;

(iv) all agreements assumed or entered into by the co-op, e.g., mortgages and management agreements;

(v) detailed financial information, including purchase prices, real estate tax abatements, projected operating budgets and monthly maintenance charges; and

(vi) the procedure to purchase, including: (a) the required downpayment, (b) a subscription agreement by which prospective members agree to pay the remainder within 30 days, and (c) an escrow agreement under which subscribers' payments are held by an attorney and returned to subscribers if the co-op plan is not implemented within a specified time. Purchasers' payments are transmitted to the co-op sponsor upon issuance of a Buildings

The CDU drafted all of the internal co-op documents and a detailed co-op offering plan, supported by several hundred pages of exhibits. It negotiated with the Department of Law, repeatedly revising the plan until it finally was accepted. The CDU also:

- arranged for Brooklyn A to hold the subscribers' downpayments as escrow agent, without charge to NBHDCo's subsidiary or to the co-op corporation;
- responded to a special supplemental Law Department questionnaire for leasehold co-ops;
- obtained for NBHDCo's subsidiary a waiver of all Department of Law co-op sponsor filing fees; and
- filed all papers required by New York City Department of Social Services and obtained from it full payment of the $2,500 purchase price for the two formerly homeless, public assistance recipient co-op members.

Finally, the CDU played an important role in orienting prospective members before they moved into Hancock Manor, through plain English (and Spanish) written materials as well as through seminars designed to explain the co-op structure and the roles and operation of the co-op board.

*6. Conclusion*

In June 1991, having completed all of the predevelopment requirements, NBHDCo's subsidiary obtained title to Hancock Manor and directed its general contractor to begin renovating the property. This entitled NBHDCo to collect its developer fee and its DHCR grant. These funds enabled NBHDCo to hire a full-time development director to take over the CDU's coordination responsibilities for the remaining stages of the Hancock Manor project and to direct all stages of subsequent projects. The CDU remained consultants and trouble-shooters as well as attorneys, but no longer was needed to coordinate and manage NBHDCo's projects.

Hancock Manor was occupied in October 1992. In its nearly five years of operation, the project has proved a substantial success. It has operated at full occupancy as a low-income, limited-equity cooperative. The co-op

Department certificate of occupancy and execution of a sufficient number of subscription agreements (eight of 15 in Hancock Manor).

Regulations governing the content of the offering plan are set forth in N.Y. COMP. CODES R. & REGS. tit. 13, § 19.1 (1995).

and NBHDCo's storefront offices have fostered stability in the neighborhood. In the area surrounding Hancock Manor, several residential buildings and commercial strips are undergoing renovation or construction with assistance from various government and private funds.[95]

Hancock Manor established NBHDCo as a fully functioning, stable and successful CDC. This one project provided the group with: (i) a new storefront office; (ii) the funds to hire a staff capable of coordinating and administering subsequent housing development projects; and (iii) the track record required to obtain sites and financing for future projects. It also fostered a solid relationship between Brooklyn A and NBHDCo.

As of Spring 1997, Brooklyn A had helped NBHDCo to renovate another thirty-two vacant, dilapidated buildings in northeastern Bedford Stuyvesant. These projects created nearly 242 new apartments for low-income and formerly homeless households. The renovation of these buildings also provided decent remunerative work for numerous local residents. Maintenance and management of these buildings, and of another eleven (126 additional units) renovated by the City and turned over to NBHDCo, has created additional, longer-term jobs. NBHDCo has also hired local residents to provide social services to building residents, to promote commercial revitalization in the area, and to administer the organization's internal affairs. Recently, it joined with a local church to begin the process of building on a vacant neighborhood lot forty-three new federally-funded units of housing for elderly community residents. Each project has generated more business and income for the community.

### *C. Helping Tenants Take and Exercise Ownership of a Large, Low-Income Housing Project*[96]

One advantage of being part of a Legal Services program is the CDU's ability to work with the program's other specialized units to provide full-scale representation to community groups. Such collaboration has proven especially effective in helping tenants associations in privately-owned housing to win repairs and rent reductions and, in some cases, to take ownership of their buildings. The most dramatic cases have involved tenants of the large, federally-subsidized projects that make up so much of the housing stock in East New York, Brownsville, and similar neighborhoods across the country. In February 1995, one such set of tenants represented by Brooklyn A won a nationally-publicized landmark victory.

95. *See* Diana Shaman, *About Real Estate; Blighted Block in Bedford-Stuyvesant is Revitalized*, N.Y. TIMES, Sept. 23, 1994, at A28 (reporting on several recent housing development projects involving NBHDCo, other CBOs, and city and state programs on Hancock Street and Saratoga Avenue).

96. Material for this case study, except where otherwise noted, was compiled from interviews with Richard Wagner, Litigation Director, and Hillary Exter, Senior Staff Attorney, Brooklyn Legal Services Corporation A, and Dorothy Jones, President, Elva McZeal Tenants Association.

At a time when federal officials were complaining loudly about the terrible conditions and rampant corruption in federally-subsidized low-income housing but doing nothing to change them, the Elva McZeal Tenants Association and Brooklyn A showed that self-organized tenants with effective legal assistance can do the job themselves. They won court appointment of a receiver to take fiscal and operational control of the Elva McZeal houses. Within fifteen months, they had ousted the corrupt absentee owners of the project and taken title to their 143-unit low-income apartment complex.

With continuing assistance from Brooklyn A, the McZeal tenants have been able to exercise ownership effectively and develop valuable new educational and social programs and facilities. The project's physical condition has improved significantly. Even more dramatic has been the turnaround in residents' lives. Tenants work together now, helping one another. A tenant youth patrol has virtually eliminated crime and graffiti from the project. The school attendance records and math and reading scores of the students who live in the building have increased dramatically. In basement rooms once filled with rats and garbage, the tenants have installed a computer learning center which offers project residents intensive training and the possibility of decent, paid jobs.

### *1. A Brief History: The Elva McZeal Houses and the HUD Scandal of the 1980s*

In the early 1970s, a local nonprofit organization secured federal assistance to build the McZeal project on the Brownsville edge of East New York. Construction was financed by a $5 million bank loan at a very low rate of interest subsidized by the U.S. Department of Housing and Urban Development (HUD), which also insured the bank's mortgage.[97] In 1974, the bank declared the project's loan in default, collected its insurance, and assigned the McZeal mortgage to HUD. HUD subsequently commenced foreclosure proceedings, and in 1981 took ownership of the property with more than $4 million still outstanding on the original loan.

Initially, HUD retained a private management company to operate the project. In 1983 HUD sold the buildings to a partnership formed by the owner of that management company. The "sale" was a virtual gift. The price for this decently maintained, ten-year-old $5 million project was a

97. Section 236 of the National Housing Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (codified at 12 U.S.C. § 1715z-1) (1994), provided federal interest subsidies and mortgage insurance to private institutions lending to low income housing construction projects, in accord with the federal government's determination that 26 million newly constructed and rehabilitated housing units were necessary to meet the demands of the housing market. Randi Lyn Engel, *Critical Housing Needs and the Emergency Low Income Housing Preservation Act of 1987: A Short-Term Solution to a Long-Term Problem*, 40 EMORY L.J. 163 (1991).

mere $150,000.[98] The partnership obtained title free and clear of any mortgage or other encumbrance. In addition, HUD contracted to pay directly to the new owner, for the next fifteen years, nearly $1 million a year in Section 8 rent subsidies.[99]

Within months, the partnership re-sold the building for $275,000 to a closely-held for-profit corporation controlled by the owner and manager of several New York City luxury apartment buildings.[100] HUD consented to the for-profit's purchase of the project and its assumption of the project's Section 8 rent subsidy contract. During the following years, HUD continued to provide full rent subsidies even though the for-profit dramatically reduced basic services, maintenance, and repairs, in flagrant violation of federal housing law[101] and the project's Section 8 contract.[102]

The giveaway and subsequent pillage of the McZeal project was not an isolated incident. A Congressional investigating committee later found that "[d]uring much of the 1980's, HUD was enveloped by influence peddling, favoritism, abuse, greed, fraud, embezzlement and theft. In many programs . . . '[d]iscretionary' became a buzzword for 'giveaway.'"[103]

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98. The nonprofit had by all accounts done an exemplary job in managing the project. *See* Affidavit of Mary Joyner submitted in support of Plaintiffs' motion for appointment of a receiver *pendente lite*, in Elva McZeal Tenants Ass'n v. William & Georgia Corp., E.D.N.Y. 93 Civ. 2827 (EHN), Nov. 1993, at 2 [hereinafter Joyner Aff.]:

> [During the 1970s] Elva McZeal was a wonderful place to live. The apartments were new and well maintained. Tenants participated with the not-for-profit owner in project affairs. . . . The community rooms were always available for tenant and community meetings, as play spaces for children. . . . Elva McZeal was a resource for the entire neighborhood.

*See also* Affidavit of Nathaniel Mitchell submitted in support of Plaintiffs' motion for appointment of a receiver *pendente lite*, in Elva McZeal Tenants Ass'n, E.D.N.Y. 93 Civ. 2827, at 2 (expressing similar sentiments); Affidavit of Mary Bowles, submitted in support of Plaintiffs' motion for appointment of a receiver *pendente lite*, in Elva McZeal Tenants Ass'n, E.D.N.Y. 93 Civ. 2827 (EHN), at 2 (expressing similar sentiments) [hereinafter Bowles Aff.].

99. Under the Section 8 program, the federal government helps low-income tenants to rent privately-owned housing in "decent safe and sanitary condition" by paying to the owner the difference between an affordable rent paid by the tenant (roughly 30% of gross income) and the apartment's fair market value as determined by HUD. 42 U.S.C. § 1437 (1994). Section 8 subsidies are available to owners of suitable housing rented by qualified individuals who receive from local housing agencies certificates which entitle them to subsidies upon their rental of such housing ("Existing Housing Program"). Section 8 subsidies are also provided to owners of specified categories of low-income housing projects who contract with HUD to receive rent subsidies for all eligible residents of the project ("project-based section 8"). HUD provided project-based subsidies to the for-profit owners of the McZeal project under the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects. 24 C.F.R. §§ 886.301-38 (1996).

100. Richard Wagner, the Brooklyn A litigation director, believes that the partnership purchased the project as a nominee for the for-profit, receiving what amounts to a $125,000 finder's fee.

101. 24 C.F.R. § 886.307 (1996).

102. Housing Assistance Payment (HAP) Contract (between HUD and the for-profit owner receiving project-based Section 8 rent subsidies), § 2.5 (on file with authors).

103. H.R. Rep. No. 101-977, at 3 (1990) [hereinafter House Report].

Prominent figures in the Reagan administration and other Washington insiders exercised their influence with pliable HUD ppolitical appointees to open the door for their political allies and campaign contributors to apply for and receive federal housing subsidies.[104] Their cronies pocketed the funds instead of spending them on the buildings, in effect looting and destroying the projects. One of the scandals exposed by the Congressional investigating committee involved the Property Disposition Program under which the for-profit owner of the McZeal project received Section 8 rent subsidies. "HUD's attempt at privatization," the Committee reported, "ended up becoming 'piratization.'"[105]

The 1980s' de-regulation, theft and destruction of Section 8 housing created the dire conditions which are now cited as "proof" that government housing programs do not work and must be eliminated.[106] For the residents of Elva McZeal the consequences were devastating. The for-profit owners "gorged themselves" on residents' rent payments and Section 8 subsidies while completely ignoring upkeep of the project.[107] The buildings became "dangerous, difficult and depressing places" on the brink of physical collapse.[108]

> There were cascading water leaks, rats big enough to mug a German shepherd, inadequate and intermittent heat and hot water, elevators that had not worked in years, so that the elderly on the upstairs floors were virtual hostages in their apartments who would have starved if their neighbors had not brought them food. There were lobby doors that had been entirely missing for years

104. Dozens of former government officials received millions of dollars in consulting fees for persuading Samuel Pierce, Ronald Reagan's HUD Secretary, and his top aides to approve Federal subsidies and other support for their clients' projects. Others apparently used connections to secure HUD subsidies for their own projects. *The Many Paths of the HUD Investigation*, N.Y. TIMES, Aug. 13, 1989, at E3 (cataloguing the wide array of programs and Washington insiders cited in the Congressional Report as involved in the scandals).

For further commentary on the "HUD Scandal," see IRVIN WELFELD, HUD SCANDALS: HOWLING HEADLINES AND SILENT FIASCOES 85-106 (1992); Michael Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545, 553-67 (1991); Peter Dreier, *Affordable Housing Without Profit or Scandal*, NAT'L HOUSING INST. WORKING PAPERS FOR AFFORDABLE HOUSING REP. NO. 11, at 3.

105. House Report, *supra* note 103, at 6.

106. Commentators have noted the hypocrisy of upper level Reagan officials' battering HUD in the public domain as wasteful government when their names later showed up as "consultants" who connected developers to HUD officials in exchange for political contributions or personal fees. Representative Bruce A. Morrison (D-Conn) stated that Reaganites upon "'failing to cancel [HUD,] ripped it off.'" *See* Dreier, *supra* note 104, at 6 (quoting Rep. Morrison).

107. Telephone Interview with Richard Wagner, Litigation Director, Brooklyn Legal Services Corporation A (May 24, 1996).

108. Joyner Aff., *supra* note 98, at 1.

> and mailboxes torn out of the walls, so that people had to get their mail in the post office.[109]

Drug dealers and addicts entered the project freely, turning its stairwells and rooftops into crack dens littered with vials and garbage.[110] Residents who complained met with silence or retaliation.

### 2. *The Tenants Win Appointment of a Receiver to Take Over the Project*

In 1993 five McZeal tenants decided to take action. Together they revived the Tenants Association and wrote to local officials seeking assistance. When the owners retaliated by moving to evict them, the five sought Brooklyn A's representation in housing court. They ended up getting that and quite a bit more.

Representing the Tenants Association gradually became a collaborative effort involving the CDU and Brooklyn A's Litigation Director, Richard Wagner, as well as the office's housing unit. Wagner and the housing unit stopped the evictions,[111] and then focused on obtaining essential repairs and restitution of stolen subsidies. The units worked together to devise a strategy that would eventually compel the owners to transfer title to the tenants.

After initial meetings with Wagner and housing unit lawyers, the tenants decided that they could not afford to wait for HUD to respond to their complaints. Advised of their legal right to withhold rent,[112] they initiated a rent strike which soon snowballed to sixty participants. The tenants then sued in state court to:

- enforce statutory, regulatory, and contractual requirements that the project be kept in "decent, safe and sanitary condition" (claiming standing as third party beneficiaries of the Section 8 contract between HUD and the for-profit owner);[113]
- have a receiver appointed to take operational and fiscal control of the project and use its rent and rent subsidies to remedy conditions "dangerous to life, health or safety;"[114]

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109. Margo Nash, *Racketeering Law New Weapon Against Slumlords*, 26 TENANT 1 (1996) (quoting Richard Wagner).

110. Bowles Aff., *supra* note 98, at 2.

111. Wagner relied on N.Y. REAL PROP. LAW §223-b (McKinney 1989 & Supp. 1997) (prohibiting a landlord from retaliating against a tenant who complains to a government authority or taking other action concerning housing conditions, including participation in a tenant organiztion).

112. N.Y. REAL PROP. LAW § 235-b (McKinney 1989 & Supp. 1997).

113. First Amended Complaint, at ¶ 41, Elva McZeal Tenants Ass'n, E.D.N.Y. 93 Civ. 2827 [hereinafter First Amended Complaint].

114. First Amended Complaint, *supra* note 113, at ¶ 42. *See* N.Y. REAL PROP. ACTS. LAW § 769 (Consol. 1981 & Supp. 1997) (authorizing the filing of a special proceeding "for a judgment directing the deposit of rents into court and their use for the purpose of remedying conditions dangerous to life, health or safety"). *See also* Salzman v. Brown, 324 N.Y.S.2d 358 (N.Y. Civ. Ct. 1971) (stating that "Article 7-A [of the Real Property Actions

- impose a constructive trust on "all monies that would have been necessary to ensure the proper maintenance of the project and all property obtained with said monies";[115] and
- have the for-profit owner dissolved and its principals barred from future involvement in federally-subsidized housing, under the Racketeer Influenced Corrupt Organizations ("RICO") Act.[116]

The defendants included the for-profit owner, its management company, the principals of both corporations, and HUD. Naming HUD emphasized the agency's responsibility for the condition of the buildings. The tenants and lawyers recognized that the federal agency was not only "complicit, but indispensable in the devastation of Elva McZeal."[117] The for-profit owner had operated the complex under the supposedly watchful eyes of HUD. HUD had repeatedly judged it "below average."[118] Yet, HUD had accepted ten years of false assurances and fraudulent certifications without any effort to exercise its legal right to foreclose on its mortgage or to otherwise enforce the for-profit's contractual and statutory obligations to keep the project in decent condition.

Naming HUD as a defendant also enabled the agency to exercise its statutory option to remove the case to the U.S. District Court.[119] Once the case was before a federal judge, the tenants moved for appointment of a receiver *pendente lite.* They produced municipal records showing 519 uncorrected violations of the New York City Housing Maintenance Code, seventy of which were classified as "immediately hazardous" and 354 as "hazardous."[120] The court found that the apartments "suffer from every listed ailment that gives rise to a claim under [New York State's housing receivership law]."[121] It appointed a reputable management company experienced at operating low-income housing in inner city areas as receiver, with full control over project funds, books, and records.

The receiver promptly hired a tenants' association leader as building manager and initiated major repairs. Scaffolding went up around Elva

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and Proceedings Law] was intended to provide a means by which one-third or more of the tenants of a multiple dwelling in New York City, containing hazardous conditions, could cause the rents to be channeled into court to be used exclusively to repair and improve the building").

115. First Amended Complaint, *supra* note 113, at ¶ 45.

116. First Amended Complaint, *supra* note 113, at ¶ 53. The claim brought under the RICO Act, 18 U.S.C. §§ 1961-68 (1994), was based on the for-profit's pattern of using the U.S. mail to file fraudulent certifications of the project's compliance with federal housing quality standards requiring "safe, decent, and sanitary" conditions. Such compliance is a condition precedent to receipt of each month's Section 8 rent subsidies.

117. Susan Ling, *The Best Landlord Around; Projects Tenants Win Ownership*, NEWSDAY (Brooklyn ed.), Feb. 24, 1995, at B13.

118. First Amended Complaint, *supra* note 113, at ¶ 29.

119. 28 U.S.C. § 1442 (1994).

120. First Amended Complaint, *supra* note 113, at ¶ 32.

121. Elva McZeal Tenants Ass'n, E.D.N.Y. 93 Civ. 2827, at 5.

McZeal immediately, and improvements have continued ever since. Increased security and locks on the doors drove out the drug dealers. A new roof and boilers were installed, elevators repaired, leaks plugged, and appliances replaced.

### 3. *The Tenants Decide to Seek Ownership*

Receivership could at best provide only temporary relief. The for-profit remained owner and would be restored to operational control once the buildings were repaired and the violations corrected. Even if the for-profit were eventually ousted by HUD or dissolved by the court, who would then take over? Was there any reason to expect a new owner to be significantly better?

As this dilemma took focus in the tenants' meetings with Brooklyn A, the discussion turned more and more to the tenants themselves taking over the project. Brooklyn A thought it could persuade the owners of the for-profit to transfer title, at no cost to the tenants, as part of a settlement of the lawsuit. Federal officials investigating possible criminal indictment of the for-profit owner's principals had indicated they would look favorably on such a conveyance to the tenants. Due to the receivership, the owner could take no more money from the project for the foreseeable future. Under the tenants' RICO claim, the owner's principals might have to give back some what they had extracted. Another possible incentive depended on the tenants taking title through a tax-exempt organization; the owner's principals might then attempt to treat the conveyance as a donation, and deduct the value of the project from their taxable income.[122]

The CDU helped the tenants to weigh carefully the advantages and risks of ownership. The tenants were understandably hesitant. They had no experience owning their own homes or businesses, let alone managing a 143-unit complex with a million-dollar budget. The CDU had discovered that the project owed more than $500,000 in municipal property taxes and that its rent subsidy contract was due to expire in 1998, with no guarantee of renewal given that Congress was threatening to end project-based Section 8 assistance.[123] Even with Section 8 subsidies, the project's income

122. In what is known as a "bargain sale," a taxpayer who sells property for less than market value to an entity which is exempt from federal income tax under section 501(c)(3) can treat the difference between market value and sale price as a charitable donation. 26 U.S.C. § 1011(b) (1994). As an S Corporation (a closely-held corporation that qualifies for federal income taxation as a partnership), the for-profit could pass this benefit through to its shareholders. See 26 U.S.C. § 1362 (1994) for provisions governing Subchapter S Corporations.

123. In the summer of 1995, Congress froze new commitments for Section 8 subsidies. *See, e.g.*, Alan S. Oser, *Housing Programs Strained as Cutbacks Take Hold*, N.Y. TIMES, Mar. 24, 1996, Sec. 9, at 1 (discussing the potential impact of Section 8 cutbacks on low-income recipients). As Congressional debate continues, the Clinton Administration has funded only short-term renewal of Section 8 contracts, mainly through program "reforms."

was not sufficient to cover many of the major repairs that were required after so many years of neglect.

While making sure the tenants grasped the seriousness of these problems, the CDU also suggested some approaches to resolving or coping with them:

- Following the standard practice in New York City for owners of large apartment buildings, the tenants could have an experienced property management company oversee maintenance and repairs, rent collection, purchasing, personnel, submissions to public agencies, etc., in exchange for a percentage of the rents it collected.
- If the tenants took ownership as a housing development fund company ("HDFC"), the City would have legal authority to reduce or waive the project's tax debt and lower its future property tax rate.[124] Though the City government had rarely exercised this discretion, it might have difficulty rejecting a request from new low-income owners who were not responsible for the prior tax evasion and were trying to repair their buildings on a tight budget.
- Tenant owners might be able to negotiate an extension of the project's Section 8 contract. Even if Congress eliminated project-based Section 8 subsidies, it would likely be replaced by rent vouchers that entitle resident households to comparable subsidies. Given tenant ownership of the McZeal project, and its improved condition, it seemed reasonable to expect that a majority of residents would stay at McZeal under a voucher system, and that it would be easy to attract new vouchered or employed tenants to fill any vacancies.
- With a substantially repaired project as collateral, the tenants might be able to finance further repairs and improvements through a government or bank loan that could be repaid from rent and rent subsidies, especially if the project's property taxes were reduced.[125]

These suggestions only pointed to possibilities. There was no guarantee they would work. Tax relief, Section 8 renewal, voucher allocation, and rehabilitation financing all were discretionary; the tenants and CDU would

*See, e.g.*, *Federal Housing Policy '97: The Road Ahead*, SHELTER FORCE, Jan.-Feb. 1997, at 22.

124. *See generally* N.Y. PRIV. HOUS. FIN. LAW §§ 577, 606 (Consol. 1988 & Supp. 1997).

125. As an HDFC, the tenants would also pay reduced closing costs on such a rehabilitation loan. HDFCs are exempt from the substantial tax charged in New York for recording a building loan mortgage. N.Y. PRIV. HOUS. FIN. LAW § 577(2) (Consol. 1988).

have to negotiate and struggle for them. Moreover, even with a management company, the tenants would need training and support to choose an appropriate company, supervise its work and evaluate its performance. Fully cognizant of the burdens and dangers involved, the tenants decided they had no choice but to push ahead. They were unwilling to take the greater risk that they and their children might again be subjected to the "plantation rule" of a greedy absentee landlord.

*4. Laying the Groundwork for Tenant Ownership*

Instructed by the tenants to pursue a settlement, Brooklyn A convinced the for-profit owner that the best option was to transfer title and assign the project's Section 8 contract to the Tenants Association for no consideration other than assumption of the property's tax debts. It then won HUD's consent to the transfer.[126] The agency required, as a condition, that the receiver remain in place for at least another year while tenant leaders received training in property management.

The CDU then laid the legal foundation for effective tenant ownership. The CDU:

- amended the Tenants Association's certificate of incorporation to make it an HDFC and to qualify it for 501(c)(3) tax exemption;[127]
- prepared successful applications to exempt the Tenant Association HDFC from federal income and state sales tax;
- worked with tenant leaders to develop comprehensive by-laws that structured and codified a clear set of internal procedures;
- helped the Association to organize and conduct its first formal elections; and
- began to sit in on the Association's board meetings to answer questions and provide information on the new rights and responsibilities involved in ownership.

With this foundation in place, the CDU ordered a title report and prepared the documents required for title closing. In the course of this work, it was able to have the property credited with tax payments that had not been properly recorded, and to persuade city officials to remove it from the list of properties whose tax liens were slated for sale to private purchasers. Finally, the CDU represented the Tenants Association at title closing.

126. The for-profit owner's deed and Section 8 contract prohibited the transfer without HUD's consent.

127. *See supra* note 75 (discussing standards for 501(c)(3) qualification and the importance of qualification for a nonprofit organization).

*5. From Tenants to Owners*

On February 1, 1995, the Tenants Association became the owner of the McZeal project. A gala celebration was organized, complete with cameras from a major TV network and reporters from city-wide daily newspapers.[128] Taking title, however, marked only the beginning of the Tenants Association's work and its relationship with Brooklyn A, which has continued to serve as its house counsel.

Brooklyn A's first step was to help the Tenants Association obtain effective training and assistance in property management and organizational development. The CDU persuaded the receiver to include the expense of purchasing such services in the project's operating budget. The CDU then prepared and circulated a request for proposals. After an extended interview process, the tenants selected the Urban Homesteaders Assistance Board (UHAB), an experienced local nonprofit group with a track record of helping low-income tenants make the transition to effective ownership. UHAB has helped the tenants learn about building systems (electric, plumbing, heating, etc.), financial records, and other key aspects of residential property management. It has also helped it to operate more effectively as an organization, with a committee structure, agendas, and well-chaired meetings.

As the tenants have grown more capable and confident, they have sought a greater role in running the buildings. Brooklyn A has worked with them and the receiver toward a gradual transition in the allocation of responsibilities. As the HUD-mandated period of continuing receivership drew to a close, the CDU began helping the Tenants Association to structure a new contractual relationship with the receiver. The receiver will continue as managing agent while the Association exercises fundamental authority as owner.

Meanwhile, the CDU has been working to obtain property tax reductions and rehabilitation financing for the project. Soon after the tenants took title, the CDU joined with the receiver's lawyers to prepare and submit a detailed request for tax relief. After much advocacy, the request has been favorably received, although it has not yet been acted upon.

The CDU has also assisted the Tenants Association in identifying funding sources for some aspects of project renovation. A commitment of funds to offset some of the cost of new windows has been obtained from the New York State Department of Energy. A proposal is pending before the Mayor's Office for money from the United Cerebral Palsy Fund to make the buildings accessible by wheelchair. Other proposals seek grants to reclaim and equip an interior park and playground.

128. The story was covered by the television newsmagazine *Dateline NBC* on March 31, 1995. *See also* Ling, *supra* note 117.

At the same time, the CDU has been working to help the Tenants Association obtain a $1 million bank loan for major repairs and improvements, including the remaining cost of the new windows. It has been effective in reassuring lenders of the project's long-term solvency. A loan commitment is anticipated once the Association has been able to substantially reduce or eliminate its property tax arrears.

With the CDU's help, the Tenants Association is beginning to develop on-site facilities and services for project residents. In the basement, rooms once filled with garbage, or locked up for the private use of the for-profit owner's site manager, have undergone a complete transformation. The area has been refurbished into an informal community center for project residents. One room is used for childcare and an after-school reading program stocked with more than 2,000 books donated to the Tenants Association. Another room was recently equipped with ten high-powered computers purchased with a special grant from HUD. Chocolate Chips, a community-based nonprofit organization selected by the tenants, provides instruction for student residents and teaches their parents new marketable computer skills which offer the prospect of decent jobs.[129] New initiatives on the drawing board include recreational programs (hopefully to be funded by the City's Department of Youth Services), GED training, a senior citizen program, and workshops on domestic issues.

As the tenants gain control over their immediate environment, a new spirit and quality of life has developed. Tenants work together now. The holiday season features elaborate innovate displays mounted by the residents of each project floor. A youth patrol organized by the tenants has virtually eliminated crime and graffiti from the project. The school attendance records and math and reading scores of the students who live there have improved dramatically. Gradually more tenants are becoming active in project governance, community affairs, and tenant advocacy organizations, such as the New York State Tenants and Neighbors Coalition.

### 6. *McZeal as Model: Other Projects Take Up the Struggle*

In 1996 the tenants of Noble Drew Ali Plaza retained Brooklyn A to bring similar litigation against the private owners of their 385-unit Section 8 project in nearby Brownsville.[130] Documenting more than 1,600 uncorrected violations of the New York City Housing Maintenance Code, they won appointment of a receiver (the same one as in McZeal), who recaptured for project use over $1 million that had been stolen from project accounts.

129. Austin Evans Fenner, *Residents Caught Up in the Web*, N.Y. DAILY NEWS (Brooklyn ed.), Oct. 30, 1996, at 1.

130. For a revealing review of this project's sordid history, complete with three larcenous owners and HUD's continuing complicity, see Greg Donaldson, *Open Season*, BROOKLYN BRIDGE, 1996, at 52.

Impressed and embarrassed by McZeal, HUD took a more cooperative tack in the Noble Drew litigation. Brooklyn A was able to negotiate a settlement under which the owners would give up title to HUD and the agency would use federal funds to finance major repairs before transferring title to the Tenants Association. When the tenants declined to take ownership, HUD sold the project—at a nominal price, with a substantial rehabilitation budget and no mortgage—to the Oceanhill-Brownsville Tenants Association, an experienced community-based manager of low-income housing.[131]

In February 1997, Brooklyn A filed its third Section 8 RICO receivership suit, this time on behalf of the tenants of Gates Avenue Houses, a Section 8 project in the Bedford-Stuyvesant section of Brooklyn. Municipal records show 695 uncorrected violations of the New York City Housing Maintenance Code in this 160-unit project, ninety of them "immediately hazardous" and 466 "hazardous." The project's initial owner, a community-based nonprofit, had defaulted on its HUD-insured construction loan and mortgage. An out-of-state for-profit corporation controlled by a real estate speculator who owns and operates more than 150 HUD-subsidized projects across the country took the Gates Avenue Houses over in the mid-1980s. It proceeded to misappropriate more than $1 million in project rents and rent subsidies while the buildings deteriorated drastically.

Brooklyn A learned of the situation from the community-based nonprofit, which was alarmed by the project's deterioration but believed that it had given up the legal power to do anything about it. The CDU determined that the out-of-state for-profit corporation had never completed the transfer of title to the project. It had misled the nonprofit and was operating the project as *de facto* owner.

Upon learning from Brooklyn A that it still held title, the nonprofit agreed to sever relations with the out-of-state for-profit, dismiss its managing agent, and give HUD a deed in lieu of foreclosure. The plan is for HUD to repair the buildings and then convey unencumbered title to the Gates Avenue Tenants Association, re-organized as a tax-exempt HDFC. Meanwhile, Brooklyn A and the tenants are pursuing federal litigation against the *de facto* owner and its management company in an effort to recapture some of the monies extracted from the project and to shut the speculator's companies down as yet another set of racketeering enterprises. In April 1997, HUD announced it had suspended all contracts involving the owner of the out-of-state nonprofit and was "considering debarring" him from future contracts.[132]

131. Since Brooklyn A represents the Noble Drew Tenants Association, it could not also represent OHBTA, which retained private counsel in this matter.

132. Micheal Janofsky, *HUD Suspends Lax Landlord of Thousands*, N.Y. TIMES, April 25, 1997, at A16; *see also* Thomas Galvin & Austin Fenner, *Feds Evict Slumlord*, N.Y. DAILY NEWS, April 25, 1997, at 6.

Learning from the McZeal and Noble Drew experiences, Brooklyn A and Gates Avenue tenant leaders have joined forces from the outset with experienced tenant organizers and technical assistance providers. Organizers from the community-based Longlife Information and Referral Services[133] and resident management consultants from the Community Service Society of New York's Ownership Transfer Project[134] have been working closely with tenant leaders. They are helping the tenants build a strong, stable, deeply-rooted tenants association which will have the capacity, with CDU assistance, to act effectively and responsibly as owner of the project.

Inspired by McZeal, tenants of Section 8 projects all across Brooklyn are coming forward with similar stories and plans. Some have used the threat of litigation and criminal complaints to extract substantial concessions from their landlords. Others are cued up, waiting for Brooklyn A's small cadre of overworked lawyers to get to their cases. As tenants associations take ownership of more and more projects in East Brooklyn, they will be in position to begin working together to further improve their lives and become a force for broader social change.

## IV.
## LESSONS FROM THE EAST BROOKLYN EXPERIENCE

What can we learn from this history? Does the East Brooklyn experience offer a useful model for other communities? To address these issues, this section will examine the essential features of the East Brooklyn approach, its advantages and achievements and its limitations.

### *A. Defining Features of the East Brooklyn Approach*

The East Brooklyn approach has six basic features:

1. *A specialized CED unit* (a relatively stable group that works together over many years in an exclusively CED practice as counsel to low-income CBOs, mainly CDCs and grassroots ownership entities)

2. *within a Legal Services or other public interest law office* (part of a larger entity that provides legal assistance in a broad range of matters to the low-income community residents that participate in and are served by the Unit's CBO clients)

3. *that serves a specific set of adjoining, predominantly low-income neighborhoods,*

133. Longlife Information and Referral Services is a Brooklyn-based not-for-profit organization that provides organizational counseling to citizens' groups. It has helped the Gates Avenue Tenants Association to form an effective organization with broad tenant participation, evaluate ownership options, and work with its attorneys.

134. The Ownership Transfer Project assists tenants attempting to become the owners of their buildings. The Project assists with purchase negotiations, financing, training in preparation for assuming ownership, and contracts with building management companies.

4. *is based in those communities*, (the CED unit and the legal assistance program are physically located in the neighborhoods they serve; they are accountable to a board of directors drawn primarily from those communities; they work continuously, over many years, as counsel to, and in coalition with, community leaders, activists, and organizations)

5. *and provides full-scale house counsel services* (offering its CBO clients ongoing, long-term legal representation which encompasses not only (almost) all traditional lawyering but also the full range of practical and strategic services which private sector corporations routinely expect of their counsel)

6. *without charging any fees* (although accepting from client groups any funds the groups receive that are specifically earmarked for legal services).

### *B. Advantages of the East Brooklyn Approach*

These features have enabled Brooklyn A's community development unit to make many important contributions to community-based economic development in East Brooklyn:

- The CDU helps client groups to identify issues and problems, clarify alternative approaches and make constructive choices, e.g., BCDC's multi-faceted response to Medicaid managed care; NBHDCo's structuring of the Hancock Manor co-op; the Elva McZeal Tenants Association's decision to seek ownership of its housing project.
- The CDU develops innovative legal options adapted to the particular needs and circumstances of client groups and projects, e.g., tax exempt bond financing of BCDC's new health center; NHBDCo leasing the residential portion of Hancock Manor to a low-income limited equity co-op while retaining control of its office space; a 501(c)(3) bargain sale (as inducement to the private owners) and HDFC-based property tax relief for the Elva McZeal Tenants Association.
- The CDU helps client groups to develop successful strategies and tactics, and to implement them through effective advocacy and negotiation, winning essential consent and support from regulatory and funding agencies, e.g., MCFFA bond issuance and New York State mortgage insurance for the BCDC health center; BCDC's Medicaid reimbursement and managed care capitation rates; multi-agency approval of the Hancock Manor co-op plan; HUD consent to tenant ownership of the McZeal and Gates Avenue projects; New York City property tax relief and commercial rehabilitation loans for McZeal.
- The CDU facilitates coordination, cooperation, and mutual aid among community group clients, e.g., BCDC's acquisition of its health center site from another CDU group client; OHBTA's

technical assistance in developing and managing Hancock Manor and other early NBHDCo projects.

- The CDU helps client groups to identify and recruit other effective service and technical assistance providers and build constructive relationships with them, e.g., Healthscope's contribution to BCDC's CON applications; the Hancock Manor development team; UHAB, Longlife and Community Service Society assistance to the McZeal and Gates Avenue Tenants Associations.
- The CDU directly coordinates key projects of client groups to enable them to get on with their work or build their capacity to administer subsequent projects, e.g., financing and construction of the BCDC health center; the pre-development phase of Hancock Manor.
- The CDU works in collaboration with other Brooklyn A staff to mount coordinated, multi-faceted legal campaigns, e.g., combining litigation, tenant advocacy and organizational representation, and capacity-building on behalf of the McZeal, Noble Drew, and Gates Avenue tenants associations.

### *C. Limitations of the East Brooklyn Approach*

#### *1. Conflict of Interest When One Group Client Does Business with Another*

This is an issue routinely addressed by law firms that represent private sector corporations. A law firm (whether public interest or private) can represent multiple clients in a joint venture, if it fully discloses its relationships with all parties and the parties agree on the limited roles the firm will play and how it will deal with its duties of confidentiality and loyalty.[135] Alternatively, and any time clients' interests are or could easily become hostile or competitive, each party can retain other counsel, as BCDC did when it acquired its health center site. The East Brooklyn experience is that the burdens and difficulties from such conflicts of interest are relatively minor. These downsides are more than outweighed by the advantages that the community gains from Brooklyn A's ability to facilitate linkages and networking across neighborhood lines.

#### *2. Conflict of Interest When a Client Group Acts as Landlord*

As a matter of policy, Brooklyn A does not represent any client group in a legal action in which it attempts to evict a tenant.[136] The policy does

135. N.Y. JUD. LAW, APPX., CODE PROF. RESPONSIBILITY DR 5-105(C) (Consol. 1983 & Supp. 1997).

136. *See supra* note 44.

little harm since client groups can afford to pay private firms for eviction representation.

As a matter of legal ethics, Brooklyn A cannot defend a tenant against eviction by a client group or represent a tenant in in any other legal action to which a client group is a party.[137] This bar poses a serious problem given Legal Services' mission and mandate to represent community residents who cannot afford private counsel. Brooklyn A is fortunately able to refer tenants of CBO-owned housing to other Brooklyn-based providers of free legal services. While New York's system of multiple Legal Services programs is unusual, similar referral resources are available in many areas in the form of law school clinics, Bar Association pro bono panels, and non-Legal Services poverty law programs. The latter type of entity has been formed in many cities to continue important poverty law work which federally-funded Legal Services programs can no longer undertake. CED work could be housed in such new entities while the local Legal Services program continues to represent all eligible low-income tenants. Where there is no appropriate referral resource, more creative measures will be required to insure that low-income communities have full access to both tenant and CED representation.[138]

### 3. *Federal Legal Services Funding Restrictions*

Historically, the federal Legal Services Corporation (LSC) has restricted Legal Services programs' use of federal funds for representation of community groups. In the early years of Legal Services, federal funds could be used to represent any group that was primarily composed of eligible individuals or was unable to retain private counsel. Starting in the 1980s, a group had to meet both tests.[139] Although the CDU's clients clearly qualify under these rules, Brooklyn A decided against diverting resources (its own and CBOs') to the burdensome process of documenting client group eligibility. It chose instead to fund East Brooklyn CED work from non-federal sources, mainly IOLA and State Assembly "special item" appropriations. Legal services programs that use LSC funds to support CED work should carefully evaluate each client group's continuing eligibility under LSC regulations. A program whose group clients may not qualify under LSC rules would be best advised to obtain non-LSC funds for its CED work.[140]

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137. *See supra* note 44.

138. CED lawyers might, for example, form an autonomous corporation which subcontracts with Legal Services or operates entirely independently.

139. *See* 45 C.F.R. § 1611.5(c) (1996).

140. Starting in fiscal year 1996, Congress also restricted Legal Services programs' use of non-LSC funds. 45 C.F.R. § 1610 (1996). These restrictions, however, do not apply to determination of financial eligibility for legal services. A program may use non-LSC funds to assist a client who is not financially eligible under LSC rules, provided neither the type of client nor the form of representation are otherwise prohibited. 45 C.F.R. 1610.4(c). Note that the constitutionality of Congressional restriction of Legal Services programs' use of

*4. Reduction of Other Legal Services*

Despite intensive fund raising and despite receipt from client groups of funds earmarked in their budgets for specific legal projects, the CDU has not yet been able to fully support itself. Each year, a substantial portion of its budget is covered by Brooklyn A's IOLA grant. Using such unrestricted funds for CED reduces the money available for other important legal assistance to low-income residents of East Brooklyn.

Neither Brooklyn A nor other Legal Services programs have ever received sufficient funds to meet the legal needs of all or even most eligible clients. Federal appropriations, adjusted for inflation, declined throughout the 1980s. In the past two years, they have been cut drastically.[141] IOLA grants, derived from interest on lawyers' escrow accounts, have also declined.[142]

Under these circumstances, serving as house counsel to CDCs and grassroots ownership entities means representing fewer needy individuals and families. Such an allocation of scarce resources can be justified in light of CED's multiplier effect. As the case studies show, CED lawyering enables CBOs to add significantly to the supply of affordable housing, accessible services and decent paying jobs. This boosts the local economy and helps low-income communities gain a degree of control over local land and resources.

Insofar as possible, the distribution of limited Legal Services funds—how much will be spent on representing individuals and families, how much for impact litigation and how much for CED—should be determined by the affected communities.[143] Many communities will judge CED-generated gains in jobs and housing to be well worth the opportunity cost of reduced representation in public assistance and eviction cases. East Brooklyn's community leaders and grassroots activists have made their support of this choice resoundingly clear in their statements at Brooklyn A board and

non-federal funds is far from settled, with litigation pending at the time this article went to press.

141. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.A.A.N. (110 Stat.) 1321, appropriated $278 million to LSC in fiscal year 1996, reducing spending from 1995 by approximately a third. Congress threatened to make further cuts during the next year. The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.A.A.N. (110 Stat.) 3009, ultimately allocated $283 million for fiscal year 1997. *See* David Barringer, *Downsized*, A.B.A. J., July 1996, at 60 (explaining the devastating impact of recent and proposed cuts to LSC funding, as well as recent Congressional restrictions placed on the activities of LSC); Somini Sengupta, *Legal Aid Agencies Have a New Cause, Their Own Survival*, N.Y. TIMES, July 28, 1996, at B8 (describing how cuts to LSC funding have eviscerated the capacity of Legal Services to challenge some significant injustices).

142. *See supra* note 35 (explaining the nature of the IOLA program).

143. For an extended discussion of Legal Services triage and community participation, see Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 U.C.L.A. L. REV. 1101 (1990),

community meetings and in their strong ongoing support for the work of the CDU.

## CONCLUSION

The primary lesson of the East Brooklyn experience is that Ed Sparer's call for full-scale legal representation of low-income communities is even more relevant today than ever before. The case studies show that effective legal assistance can make a crucial difference in the ability of CDCs and grassroots ownership entities to protect and revive their neighborhoods under the difficult conditions of the 1990s.

Not only is CED legal work socially very useful, the East Brooklyn experience shows that it can also be intellectually stimulating and professionally challenging. And it offers to creative public interest lawyers the all too rare satisfaction of being able to see and touch the fruits of their labors.

Lawyers who have mainly ligitation experience—e.g., in Legal Services, civil rights or other public interest law—need not be intimidated by the business law background and transactional skills required for effective CED lawyering. The East Brooklyn experience shows that these can readily be learned on the job. The only requirements are a dedication to the work, respect for the community, and basic professional competence and responsiblity.

While the East Brooklyn approach provides optimal support for CDCs and grassroots ownership entities, it is not the only option. Brooklyn A did not start out providing anything close to its current intensive level of CED legal assistance. Nor is it realistic to expect new efforts to begin on such a scale. In the many low-income communities that have no CED legal support, any reliable, respectful help would be appreciated.

Legal aid lawyers can begin by adding CED projects to their regular caseloads, as Paul Acinapura did in the early years of CED lawyering at Brooklyn A; they can then join with client CBOs in persuading the program to devote more resources to this work. Staff lawyers at civil rights, environmental, and other public interest law organizations can do the same. Law firms can encourage their partners and associates to work pro bono on CED projects. Law school faculty and students can contribute to this work through CED clinics and field work externship programs. In cities in which there are many CED projects with funds earmarked for legal services, some lawyers have managed to support private CED practices.

For lawyers interested in providing legal assistance to CDCs and grassroots ownership entities, the key is to take the first steps. Make yourself available to a community group and help it design and implement a CED project. A broader relationship will gradually emerge from the work. The time to begin is now.