

The Baltimore Development Corporation:
A Case Study of Economic Development Corporations, Shadow Government,
and the Fight for Public Transparency and Accountability

Maximilian Tondro
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Professor Garrett Power
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Introduction

This paper explores the limited public accountability of local quasi-public development corporations in negotiating and implementing public redevelopment projects by examining the history of the Baltimore Development Corporation (BDC). For most of its two-decade existence the BDC has strenuously resisted all public inquiry and oversight, a tradition inherited from its predecessors that originated as private business-led entities performing tasks under contract with Baltimore City (City). Like other similar quasi-public local development corporations, the BDC justified its need for secrecy as necessary to ensure the BDC's effectiveness and efficiency in negotiating with private businesses on redevelopment projects. This assertion that a business-like model with limited transparency or public oversight was critical to achieve successful redevelopment projects dates back to the Progressive Era's good government reform movements, which ironically also pushed for government transparency and accountability. Springing from these Progressive roots, quasi-public entities modeled on private businesses and insulated from direct political control became the primary entities responsible for urban redevelopment in parallel with the growth of professional city planning, another offspring of Progressivism.

Although this concentration of power in these quasi-public development corporations led to accusations and examples of despotic power grabs and corruption, these quasi-public entities remained entrenched, largely resisting attempts to increase transparency and public oversight by asserting that successful redevelopment required secrecy and autonomy in negotiations with private partners who required quick action and flexibility of their counterparts. This argument has had success not only with legislatures, but also with the courts (both federal and Maryland), which have accepted that transparency and accountability must be balanced against the efficiency and effectiveness of these quasi-public development corporations.

As this paper illustrates, courts have therefore been reluctant to interfere too intrusively in the operation of these local development corporations by upholding the public's right to know how these quasi-public entities have spent public funds and used the uniquely public power of eminent domain in redevelopment projects. Both the Supreme Court and the Maryland Court of Appeals have fastened on the nominal and

perfunctory approval by legislatures of the quasi-public development corporations' operations as providing sufficient public accountability, despite evidence that the BDC and similar entities effectively controlled the redevelopment process with minimal public oversight. The courts did recognize the potential for these quasi-public entities to abuse public powers if completely autonomous, but nevertheless accepted the notion of a Faustian bargain in which effectiveness required less accountability, a concept derived from Progressivism and its elitist preference for professional, technically-expert bureaucrats over the madding crowd that Progressives identified as supporting political bossism.

This paper begins with an analysis of how the Supreme Court, in *Kelo v. New London*, 545 U.S. 469 (2005), relied on the public planning process to hold the local development corporation accountable in its exercise of eminent domain power delegated by the municipality for a major redevelopment project. This belief by the majority of the court that the planning process was truly public, and that the municipal government had significant control over the redevelopment project or its implementation, contrasts sharply with the actual interaction between the quasi-public development corporation and the municipal government. This contrast serves as a point of departure to explore the court's problematic reliance on the formal approval by the municipal government of the redevelopment project drawn up and implemented by the development corporation as rendering the project a sufficiently "public purpose" to justify the use of eminent domain delegated to the development corporation. Lurking behind the majority's opinion lay the concern to weigh the effectiveness of the redevelopment project against the accountability of the development corporation to the public in whose name it operated.

The paper then traces the evolution of quasi-public government corporations and of public planning that began separately in the Progressive Era but which increasingly intersected with each other over the middle of the last century. These interactions led to the current domination of urban redevelopment projects by quasi-public development corporations like the BDC, despite concerted attempts to restrain and curtail the autonomy of these quasi-public entities and to require greater transparency. These efforts to ensure public accountability, which also traced its roots to the good government reform movement of the Progressive Era, failed to overcome the concern that oversight and

transparency represented obstacles to successful redevelopment, with some accountability the price to “get things done.”

The next section turns to Baltimore and the BDC, in particular to two recent decisions in which the Court of Appeals balanced efforts to subject the BDC to transparency requirements under Maryland law against the claims of the BDC and City that effective and efficient redevelopment required autonomy from accountability requirements that covered public entities. In *City of Baltimore Development Corporation v. Carmel Realty Associates*, 359 Md. 299 (2006), the court declared that the BDC was a “public body” subject to the transparency requirements of Maryland law in a unanimous opinion that appeared to express frustration with the tortuous interpretations by which the BDC and City sought to avoid compliance with these public information laws. The paper then explores the backstory to this decision, and to the court’s apparent annoyance, in the cat-and-mouse efforts of transparency advocates and the BDC and City over the role the BDC played in city government, whether a private contractor or public agency.

The final section turns to another unanimous decision by the Court of Appeals this April, *120 West Fayette Street, L.L.P. v. Mayor and City Council of Baltimore*, 413 Md. 309 (2010), where the court appeared to retreat from its *Carmel* stance favoring subjecting the BDC to public accountability. Growing out of the same redevelopment project that inspired *Carmel*, the plaintiffs in *120 West Fayette Street* claimed that the BDC, as a non-public entity, lacked the authority to structure and implement the project on behalf of the City, and that the project was a “public work” subject to competitive bidding requirements. The court rejected both claims, holding that the BDC was a “public body” under *Carmel* and so did not exceed its authority, but that the redevelopment project was not a “public work” because the public benefit was merely incidental to that of the private developer. The paper illustrates how the court carefully cherry-picked facts and precedents to ensure that the redevelopment project, a decade in the making, was not further stalled. Like the Supreme Court in *Kelo*, the Court of Appeals in *120 West Fayette Street* relied on the formal procedural oversight by the City Board of Estimates (Board), despite evidence that this oversight was nominal and that significant gaps existed in the chain of authority between the Board and the BDC. In declaring the redevelopment project not a “public work,” the court selectively cited cases based on

significantly different legal principles and varied governing statutes depending on the foreign jurisdiction. Moreover the court's exclusion of land acquisition from the redevelopment contract enabled it to avoid addressing the contradiction inherent in its ruling: if the redevelopment project was not a "public work" because it was insufficiently "public," then how could the City obtain the property to be sold to the developer under the contract by eminent domain, which required a "public purpose"? In the view of this paper, the court intentionally ignored these claims that the BDC, and the City, exceeded its authority by avoiding public accountability requirements because the court fell back on the Progressive idea of a balance between accountability and effectiveness, accepting the BDC's argument that autonomy from oversight was required to foster successful redevelopment in Baltimore – in sum, that the ends justified the means.

The paper concludes that the BDC, and other quasi-public local development corporations, have been granted excessive autonomy from public accountability, especially by courts too much influenced by the Progressive mantra that effective governance requires government to become more business-like. This view ignores the powerful role that these quasi-public entities play in reshaping cities courtesy of their control of the uniquely public power of eminent domain (the threat is almost as powerful as its actual exercise) and public financing. The limited, perfunctory review by elected bodies, like the Board, of the planning, negotiating and implementing of redevelopment projects performed by these quasi-public entities is not sufficient to ensure that the public approves the projects done in their name and with their funds. With enhanced powers should come increased responsibilities, whereas the BDC is permitted to inhabit a shadowy netherworld, neither fish nor fowl, with tremendous power to reshape Baltimore on behalf of the public but without any obligation to explain its actions or any direct accountability to Baltimore's electorate. This paper examines how the BDC has been permitted to accrue such power.

I: Defining the Problem: How “Public” Are Public Redevelopment Entities?

Kelo v. New London

In his majority opinion in *Kelo v. New London*, Justice Stevens held that the plan to redevelop New London’s Fort Trumbull neighborhood “unquestionably serve[d] a *public* purpose, [and so] satisf[ied] the *public* use requirement of the Fifth Amendment.” 545 U.S. at 484 [*emphases added*]. To support his ruling, Justice Stevens specifically cited the “comprehensive character of the plan [and] the *thorough deliberation* that preceded its adoption,” and asserted that “[t]he *City carefully formulated* an economic plan that *it believes* will provide appreciable benefits to the community.” *Id.* at 483 [*emphases added*]. In concurring, Justice Kennedy echoed Justice Stevens’s focus on the “comprehensive development plan” and the city’s involvement in the planning process: “The city complied with *elaborate procedural requirements* that facilitate review of the record and *inquiry* into the *city’s purposes*.” *Id.* at 493 (Kennedy, J., concurring) [*italics added*].

Neither justice, however, questioned the “public” nature of the planning process, even though Justice Stevens described the entity that created the plan and that controlled the negotiations to purchase or condemn properties in order to implement the plan, the New London Development Corporation (NLDC), as a “private nonprofit entity.” *Id.* at 473. Justice Stevens emphasized that the City first approved the development plan prepared by NLDC and then designated NLDC the City’s development agent to implement the plan. *Id.* at 473, 475. After this initial discussion, Justice Stevens explicitly treated the City and NLDC as the same (with the exception of a subsequent footnote). *Id.* at 475 n. 3, 476 n. 4. Justice Kennedy never referred to NLDC, clearly viewing it as identical to the City and sharing the same goals and constituencies. *Id.* at 490-93 (Kennedy, J., concurring).

Justice O’Connor, in dissent, did call attention to NLDC’s lack of public accountability: “[NLDC] is not elected by popular vote, and its directors and employees are privately appointed.” *Id.* at 495 (O’Connor, J., dissenting). Justice O’Connor also criticized Justices Stevens and Kennedy for relying on the “relatively careful deliberative process” and “integrated plan” to uphold the takings. *Id.* at 503-04. Nevertheless, Justice O’Connor failed to link this criticism to the private nature of NLDC, and throughout her

dissent Justice O'Connor echoed Justices Stevens and Kennedy in eliding NLDC with the City as a single entity under the rubric of the "sovereign." *Id.* at 504 (O'Connor, J., dissenting). Instead of raising the question of the degree to which the planning and development process was "public" and how accurately the process represented the "public purpose," Justice O'Connor focused on limiting the authority of the legislature to determine that a taking had a "public purpose." Only in passing did Justice O'Connor refer to the potential conflicts of interest raised by the dominant role of NLDC, a private entity, to plan the development on behalf of the public: "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Id.* at 505 (O'Connor, J., dissenting).

Justice O'Connor's decision to not address this conflict between a private entity planning on behalf of the public may be due to the City's approval of NLDC's plans and its delegation of eminent domain power to NLDC under a Connecticut statute that specifically authorized a municipality to designate a nonprofit development corporation as the municipality's development agent, as Justice Stevens had cited to support his opinion. *Kelo* at 475, citing C.G.S. §8-193 (definition of development agent in C.G.S. §8-188). The statute's purpose finds support from a quotation used by Justice Stevens from *Berman v. Parker*: "The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress [or relevant legislature – here the City] might conclude." *Kelo* at 486 (quoting *Berman*, 348 U.S. 26, 33-34 (1954)). Although Justice Stevens used this quotation to support his focus on the legislature's authority to determine the "public purpose" of a takings instead of investigating the identity of the ultimate owner (the "results" of the planned development), he probably would also apply the quotation to the *Kelo* circumstances, where the legislature determined that a private entity would best represent the public in a redevelopment project (the "process" of planning the development).

Yet why should the judiciary defer to the legislature's decision to privatize the preparation and implementation of a redevelopment plan, and hence to frame the "public purpose" justifying the use of eminent domain, as serving the "public end?" The *Berman* quotation referred to a public entity opting to use private entities to build on land the

public entity condemned and in accordance with a redevelopment plan prepared by the public entity. In *Kelo*, however, the plan itself – the expression of the “public purpose” – was outsourced to a private entity, which also oversaw the implementation of both the condemnation and redevelopment. Should the legislature’s approval *after* the plan has been finalized by a private entity be sufficient to establish that the plan represents a “public purpose?” Given the weight that Justice Stevens placed on the “thorough deliberation” and “careful formulation” of the plan, should judicial review stop with the legislature’s approval of the final plan, especially if the preparation was done by a private entity with the legislature only voting on the final result? *Id.* at 483.

Justice Kennedy’s focus on the “elaborate procedural requirements” reflected a concern with both the transparency and accountability of the legislature – but does this square with the scenario where the plan was prepared by a private entity that does not have to comply with public record laws? *Id.* at 493 (Kennedy, J., concurring). Although he recognized the possibility of circumstances where the “procedures employed [are] so prone to abuse” for which a higher standard of scrutiny would be appropriate, Justice Kennedy stated that the *Kelo* facts did not fit this category. *Id.* His refusal to further define the test of what constitutes sufficiently abusive procedures to trigger higher scrutiny, suggesting that a pro forma procedure would suffice – or in Justice O’Connor’s words, that “it is difficult to envision anyone but the “stupid staff[er]” failing it.” *Id.* at 502 (O’Connor, J., dissenting) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025-26, n. 12 (1992)). At what point does the role of a private entity in deciding the parameters of a plan become so prominent that the purpose of the plan shifts from “public” to “private” or a mixture of the two? Justice O’Connor highlighted the likelihood of the latter: “The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.” *Id.* at 502 (O’Connor, J., dissenting). Should a legislature’s approval after the planning process cleanse any suggestion of an “impermissible private purpose?” *Id.* at 493 (Kennedy, J., concurring).

Kelo's Backstory

The facts of *Kelo* bear out these concerns. Justice Stevens's description of NLDC's involvement ("established some years earlier to assist the City in planning economic development, was reactivated") failed to identify who revived NLDC and implied that the revived NLDC continued the original mission of the entity. Yet NLDC was created in a different era of urban revitalization, in 1978, and appears to have been dormant for most of the twenty years between its creation and revival.¹ The catalyst for the reactivation came not from the City, but instead from the state Commissioner of Economic and Community Development, Peter Ellef, who as political advisor and later co-chief of staff to Governor John Rowland pushed major urban development initiatives in heavily Democratic cities to gain political advantage for the Republican governor in a Democratic state.² Ellef and Rowland followed the suggestion of a prominent state lobbyist (and former New London mayor and state representative) to revive NLDC and to select Claire Gaudiani, the president of New London's private Connecticut College, as the leader of that initiative.³ Gaudiani revived NLDC, hand-selected the other NLDC board members, who duly elected her president.⁴ NLDC only reached out to the City after finalizing discussions with the state and Pfizer, which agreed to build a new research and development facility to New London provided the adjacent Fort Trumbull area was redeveloped in accordance to a "vision statement" and sketch prepared by Pfizer's architect.⁵ Most importantly, the state, through Ellef's agency, provided \$8

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¹ Articles of Incorporation filed June 5, 1978, filing # 626989, v. 9390, p. 842; the Articles of Organization were filed two months later, August 1, 1978, filing # 626990, v. 9440, p. 931; apart from Articles of Amendment filed Jan. 29, 1982, filing # 626991, v. 9960, p. 2669, no reports or amendments were filed until "reactivated" in 1997, when reports for 1994, 1996, and 1997 were filed simultaneously September 10, 1997, v. 145, pp. 1839, 1843, 1871; from Connecticut Secretary of State, Commercial Recording Division, available at <http://www.concord-sots.ct.gov/CONCORD/online?eid=99&sn=InquiryServlet>. A study available on the personal website of Claire Gaudiani, the then-president of NLDC, stated that NLDC had been dormant since the "mid-90s," without any reference: Peggy Cosgrove, "New London Development Corporation Case Study" at 2 (prepared for The American Assembly), stored at www.clairegaudiani.com (but unobtainable through searching that site: instead by a Google.com search under "Claire Gaudiani Peggy Cosgrove").

² Cosgrove, *supra* n. 1 at 1; Morgan McGinley, "Rowland's Tarnished Legacy At Fort Trumbull," *The [New London] Day*, August 14, 2005.

³ Cosgrove, *supra*, n. 1 at 1; McGinley, "Rowland's Tarnished Legacy," *supra*, n. 2; Ted Mann, "Pfizer's Fingerprints On Fort Trumbull Plan – wired in at birth," *The Day*, October 16, 2005.

⁴ Cosgrove, *supra* n. 1 at 2-3.

⁵ Mann, "Pfizer's Fingerprints," *supra* n. 3. The New London City Manager, Richard Brown, declared in October 1997: "We should be consulted now, not after a deal has been arrived at." Kate Moran, "A Question of Leadership: New London Debates How It Does Business," *The Day*, October 17, 2004.

million in state bonds for the initial planning of the redevelopment directly to NLDC, without any participation by the City.

The City Council, with reservations and discontent, did eventually approve NLDC's role in planning the redevelopment as well as the plan itself, but only under recognition that state funding of the project – eventually totaling \$120 million – depended on NLDC controlling the project.⁶ The then-mayor stated that Gaudiani, the then-president of the NLDC, showed him the plan for the redevelopment as a fait-accompli: “We were told what we were going to do. It was state-run from the start.”⁷ When the City Council in 2004 sought to exercise its limited influence on the implementation of the redevelopment plan by withholding city-issued bonds (a paltry \$4 million or 1/30 of the state contribution), the state threatened future economic development aid to the City.⁸ Even when the City Council threatened to use the “nuclear option” of revoking delegation of municipal authority to NLDC in order to change NLDC's leadership in the aftermath of the *Kelo* decision, only state intervention delivered the departure of the chief operating officer. Even so, the City Council was forced to back down on its insistence that NLDC's president be removed as well.⁹ The state's financial support for NLDC effectively neutered the City Council's power to influence the redevelopment plan, and so prevented New London residents from being able to hold NLDC accountable for its decisions that profoundly impacted the city. At the same time the state's use of NLDC to run the project permitted plausible deniability, and so reduced the likelihood of discontent with the New London redevelopment becoming a statewide political issue – as a state official put it: “[NLDC and the City] have taken all of the missile attacks.... That's the beauty of distance.”¹⁰

The lack of accountability derived partly from the lack of transparency: NLDC asserted that as a private entity it did not have to release its records.¹¹ Although

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⁶ Moran, “A Question of Leadership,” *supra* n. 5.

⁷ Cindy Anderson, “A House Divided: Eminent Domain in Connecticut,” *Yankee Magazine*, January/February 2007, available at <http://www.yankeemagazine.com/issues/2007-01/features/housedivided/all>.

⁸ Moran, “A Question of Leadership,” *supra* n. 5; McGinley, “Rowland's Tarnished Legacy,” *supra* n. 2.

⁹ Ted Mann, “Council Votes to Cut Ties with NLDC,” *The Day*, October 18, 2005; Ted Mann, “New London Councilors Rescind Vote to Cut NLDC Ties,” *The Day*, October 22, 2005.

¹⁰ Mann, “Pfizer's Fingerprints,” *supra* n. 3.

¹¹ Cosgrove, *supra* n. 1 at 10.

complaints led Governor Rowland eventually to order NLDC to comply with state open records laws, documents remained hidden for years with the aid of stonewalling by state and NLDC officials.¹² The lack of transparency by NLDC permitted potential conflicts-of-interest by the individuals involved, especially the president and board members of NLDC who often were chosen on the basis of their expertise based on their activities outside of NLDC. Thus Gaudiani served simultaneously as president of NLDC and Connecticut College, whose funds Gaudiani used to buy buildings to be used by NLDC's real estate arm.¹³ Gaudiani's role as NLDC head permitted her to use New London as a laboratory for her academic work, and elevated her media exposure as a dynamic leader of a liberal arts college, both useful for her future career advancement.¹⁴ Gaudiani's ties to Pfizer ran deep – her husband was a Pfizer executive and she chose a Pfizer vice president and trustee for Connecticut College to serve on NLDC's board (he resigned to lead Pfizer's involvement, once it was made public).¹⁵ Gaudiani's successor, Michael Joplin, a builder from a town 25 miles away from New London, joined NLDC's board partly due to his real estate investments in New London, which he continued as NLDC president – buying two of the properties Connecticut College had purchased under Gaudiani's leadership at the auction winding down NLDC's real estate arm, raising conflict of interest issues.¹⁶ Although Gaudiani and Joplin brought expertise and contacts to the development process, NLDC's lack of transparency and accountability created the opportunity for hidden deals between the state and Pfizer to which the City was not privy.¹⁷ NLDC's role as a private intermediary linking government and private interests created a smokescreen that led Justice Kennedy to assert, apparently incorrectly, that no

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¹² Cosgrove, *supra* n. 1 at 10; Mann, "Pfizer's Fingerprints," *supra* n. 3.

¹³ Kenton Robinson, "Development Group Auctions Downtown Buildings Bought by Connecticut College," *The Day*, June 7, 2002.

¹⁴ Robert A. Hamilton, "In New London, Creating Jobs, Building a Buzz for Revival," *New York Times*, May 9, 1999. Although Gaudiani's career started as a college professor of French, she has successfully transitioned herself into an academic expert on philanthropy, with her NLDC role featuring prominently on her website, www.clairegaudiania.com (follow "Short Bio" link).

¹⁵ Cosgrove, *supra* n. 1 at 2-5; Laura Mansnerus, "New London Memo: All Politics is Local, and Sadly, Sometime Permanent," *New York Times*, July 3, 2005; Ted Mann, "A 'wrong turn': From giddy optimism to stunning disappointment," *The Day*, November 11, 2009

¹⁶ Robinson, "Development Group Auctions Downtown Buildings," *supra* n. 13; Kathleen Edgecombe, "Leader to be Chosen for New London, Connecticut Development Group," *The Day*, February 8, 2002; Lisa Prevost, "Condo Developers Change Tack," *New York Times*, November 7, 2008.

¹⁷ Mann, "Pfizer's Fingerprints," *supra* n. 3; Ted Mann, "Bringing Pfizer to New London came at a heavy cost to taxpayers," *New London Day*, November 21, 2009.

private beneficiaries of the redevelopment plan had been identified at the time the state committed its funds and so the “public purpose” of the redevelopment was not tainted by “undetected impermissible favoritism of private parties.” *Kelo*, 545 U.S. at 493.

NLDC’s involvement did not keep politics out of the planning process, but instead shielded political decisions and actions from public view, while preventing New London voters from intervening through the political process. Governor Rowland and Ellef used NLDC as an element of their political campaign against Democrats, and their subsequent convictions for corruption in public contracts raise additional concerns about their involvement in NLDC and the Fort Trumbull redevelopment.¹⁸ At the local level, Joplin responded to the City Council’s balking at issuing city bonds for the Fort Trumbull project in an attempt to influence NLDC’s actions by using his position as NLDC president to call for charter reform to create a strong mayor system instead of the current council-manager form.¹⁹ This move had significant political implications as the local Republican party supported charter reform at least in part to limit the local Democratic party’s control of the City Council, and so represented NLDC acting as an interest group intervening in government administration instead of functioning as an element of the municipal government.²⁰ Thus NLDC’s private status did not insulate it from political scheming and favoritism involving both external and internal actors.

In light of these facts and concerns, should the City’s approval of NLDC’s redevelopment plan only *after* it had been finalized be sufficient to whitewash the previously private process by transforming it into a “public” planning process? The City Council effectively was coerced into approving the plan and designating NLDC to implement the plan, at the risk of losing state aid for both this and future projects. Was NLDC’s private status really consistent with determining the “public purpose” necessary to justify condemnation, especially since private negotiations formed the basis for the plan – negotiations from which the City was excluded? Had NLDC been the City’s Planning Department, the City Council and the public would have been able to inform themselves of the details of the plan, and seek to influence the details, before the City

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¹⁸ Alison Leigh Cowan, “Connecticut Official and State Contractor Are Each Sentenced to 30 Months in Prison,” *New York Times*, April 26, 2006; McGinley, “Rowland’s Tarnished Legacy,” *supra* n. 2.

¹⁹ Moran, “A Question of Leadership,” *supra* n. 5.

²⁰ Morgan McGinley, “Editorial: GOP in NL Understands City’s Need for Elected Mayor,” *The Day*, October 21, 2007.

Council acted on it, instead of having to wait to comment until an up-or-down vote on the final plan. Moreover, had the City Council retained more control over the implementation of the plan, it would have been able to respond to changing circumstances and to the public's concerns, instead of being hamstrung by NLDC's autonomy.

Finally, what justifies the delegation of public powers to a private entity, effectively masquerading as a public agency, while simultaneously permitting the private entity to assert its private status to shield it from compliance with the requirements of public agencies, whether open records laws, employment decisions or bidding procedures? The exercise of eminent domain represents the most dramatic example of this "privatization" of public planning, the fundamental concerns raised by outsourcing public planning without retaining public transparency and accountability requirements equally apply to all aspects of planning. Although public planning agencies may not have the skills and resources to perform all required tasks and so will need to hire on occasion private entities to perform planning services, the autonomy enjoyed by NLDC made a mockery of the "public" planning process. There is a world of difference between a public agency hiring private entities to carry out a redevelopment plan made by the agency and the agency instead delegating to private entities the responsibility to determine and implement public policy.

Notwithstanding these criticisms, private entities like NLDC - whether "public authorities," "nonprofit organizations" or "government corporations" - perform "public" functions, especially urban redevelopment and planning "on behalf of" governments across the nation.²¹ The widespread use of these pseudo-private/quasi-public organizations, and their association with the circumvention of political accountability and

²¹ Jerry Mitchell, "Policy Functions and Issue for Public Authorities," in PUBLIC AUTHORITIES AND PUBLIC POLICY: THE BUSINESS OF GOVERNMENT 1 (Jerry Mitchell, ed. 1992); Jerry Mitchell, THE AMERICAN EXPERIMENT WITH GOVERNMENT CORPORATIONS 15 (1999) (citing research that at least 66% of government corporations were involved in redevelopment and planning activities: 45% in housing and community development, 14% in economic development; 7% in building and operating public-use facilities; while the remaining 34% included transportation and municipal infrastructure activities linked to planning and redevelopment). Although significant differences can be identified between various types of quasi-public entities (see Robert J. Eger, III, "Casting Light on Shadow Government: A Typological Approach," 16 *Journal of Public Administration Research and Theory* 125 (2006)), this paper discusses all such public-private hybrid entities under the rubric "government corporation," the term used in the seminal work on the subject, Annmarie Hauck Walsh, THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS (1978).

transparency – echoing the criticisms of NLDC – led to they earned the moniker “the shadow government” or “Fourth Branch of Government.”²² Yet ironically the roots of these pseudo-private/quasi-public organizations lie in Progressive Era political reforms that sought to improve government and forestall corrupt backroom political deals.

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²² Donald Axelrod, SHADOW GOVERNMENT: THE HIDDEN WORLD OF PUBLIC AUTHORITIES – AND HOW THEY CONTROL OVER \$1 TRILLION OF YOUR MONEY (1992); Scott Fein, “Introduction: Public Authority Reform,” 11 *NYSBA Government, Law and Policy Journal* 5 (Fall 2009).

II. Evolution of Quasi-Public Entities for Public Redevelopment

Progressive Era Reformers' Celebration of Private Business as Model for Government

The origins of both city planning and the use of government corporations like NLDC and the BDC to perform public policy tasks in America lie in the Progressive Era at the turn of the twentieth century. Progressive reformers attacked the “bossism” that typified most American cities, which in the reformers’ view prioritized political patronage over effective administration, with the results manifested in the unhealthy, primitive and ugly physical shape of cities.²³ Although the Progressive movement fought to reform all levels of government, it “reached its zenith in city halls” because the exponential growth in American cities over the nineteenth century had overwhelmed the existing governmental organization of the pre-industrial era, leading to the rise of political machines that sold city services and jobs.²⁴ The Progressive reforms that laid the groundwork for government corporations focused on improving the effectiveness and efficiency of public administration by reducing the power of politicians, particularly that of political machines and bosses, on government administration, and by importing professional techniques from the business world to improve government performance. These twin goals recognized that defeat of boss politicians and the election of Progressive reformers to office would not be sufficient to address the municipal crisis unless the bureaucracy was also reformed to remove politically-connected incompetents and to attract expert professionals from the business world.²⁵ Progressives and their predecessors therefore pushed for a career civil service system that insulated government bureaucrats from politically-motivated hiring and firing, and for the creation of independent regulatory commissions, like the Interstate Commerce Commission (1887) and Federal Trade Commission (1914), with members appointed on a non-partisan basis with overlapping terms.²⁶

As important as rooting out patronage was the application of new management techniques to “straighten the paths of government, to make its business less

²³ Robert A. Caro, *THE POWER BROKER* 59 (1974).

²⁴ Caro, *POWER BROKER*, *supra* n. 23 at 60.

²⁵ *Id.* at 61.

²⁶ Jameson W. Doig, “‘If I See a Murderous Fellow Sharpening a Knife Cleverly ...’: The Wilsonian Dichotomy and the Public Authority Tradition,” *Public Administration Review* 292, 293 (July/August 1983); Jameson W. Doig, *EMPIRE ON THE HUDSON: ENTREPRENEURIAL VISION AND POLITICAL POWER AT THE PORT OF NEW YORK AUTHORITY* 6 (2001).

unbusinesslike, to strengthen and purify its organization.”²⁷ This emphasis on business methods reflected the recognition of the improvements in efficiency achieved by the railroads and other industrial corporations by “scientifically” analyzing operations to maximize performance and minimize costs – the “scientific management” espoused by Frederick Winslow Taylor.²⁸ Progressives believed that applying scientific accounting techniques, data collection and analysis and other management methods from both business and the European administrative state would not only increase the effectiveness of government administration, but also the efficient use of tax revenue.²⁹ In the words of Woodrow Wilson, the founder of the study of public administration in his pre-Presidential career as a Princeton political science professor: “The field of administration is a field of business. It is removed from the hurry and strife of politics”³⁰ The freedom from political interference permitted the public administration to make decisions based on technical expertise and with a long-term perspective regardless of the electoral timetable. In the view of Wilson and other Progressives, “[g]ood administration would involve the apolitical application of technical competence to politically defined ends.”³¹ The electorate and their political representatives should be limited to framing policy goals, while the public administration would have the authority and discretion to determine the most efficient means of achieving these goals. In Wilson’s formulation, “[t]he broad plans of governmental action are not administrative, the detailed execution of such plans is administrative,” and so should be left to professional technocrats armed with modern management techniques and expertise in engineering, accounting or other field relevant to the specific tasks.³² This framework clearly echoed recent developments in corporate organization where ownership had been separated from management, who enjoyed significant discretion in running the corporation, within the broad mandate from

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²⁷ Wilson, “The Study of Administration” at 201, quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 301.

²⁸ Frederick W. Taylor, *SHOP MANAGEMENT* (1905) and *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911); Jonathan D. Rosenbloom, “Is the Private Sector Really a Model of Efficiency and Independence? Re-evaluating the Use of Public Authorities During Recessionary Times,” 11 *NYSBA Government, Law and Policy Journal* 6, 7 (Fall 2009).

²⁹ Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 293; Caro, *supra* n. 23 at 60-61.

³⁰ Wilson, “The Study of Administration,” at 209, quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 292. See Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 25.

³¹ Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 38.

³² Wilson, “The Study of Administration” at 212, quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 293.

the shareholders to make a profit.³³ In adopting this framework, the Progressives assumed that no middle ground separates politics and administration, and so the decision to site a bridge, define welfare benefit eligibility or fund mass transit requires only administrative and technical expertise and does not implicate broader policy choices by the overall society.³⁴

Wilson and his fellow reformers overlooked the gray area between politics and administration because they trusted the “educated men of goodwill,” the new civil servants who would replace the incompetent political hacks and who possessed the skills and integrity to make public administration the equal of private business.³⁵ In an era of dynamic corporate leaders and organizations, the Progressive rhetoric extolling “nonpolitical” and “businesslike” civil servants derived from the stark contrast between corrupt, incompetent local governments and efficient, powerful corporations (even as these same corporations drew Progressive ire for being too successful).³⁶ Although the prominent Progressive theorist Herbert Croly, in *The Promise of American Life*, blamed the rise of “bossism” on the undue influence of powerful corporations in politics, he also celebrated the American businessman as a “very special type of man – the man who would bring to his task not merely energy, but unscrupulous devotion, originality, [and] daring,” for whom business was constant war to be conducted relentlessly.³⁷ This portrait of uncompromising drive and creativity reverberates in Croly’s praise of “Mr. Roosevelt’s endeavor to give to men of special ability, training and eminence a better opportunity to serve the public.”³⁸ In Croly’s view, Roosevelt’s efforts to give these talented men powers consistent with their capacities were fundamental to improving the

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³³ Rosenbloom, “Private Sector,” *supra* n. 28 at 7, citing Alfred D. Chandler, Jr., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 339 (1977). This echo of corporate organization remains a powerful analogy for defenders of government corporations’ autonomy – Austin Toobin, the executive director of the Port Authority of New York and New Jersey, often referred to the public, through their elected representatives, as the Port Authority’s shareholders. Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 178-9.

³⁴ Thus Austin Toobin, the executive director of the Port Authority of New York and New Jersey for thirty years, strenuously opposed the Port Authority’s involvement in rail transit and favored car highways due to the narrowly financial criteria he used for evaluation. Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21, at 224. Toobin’s narrow perspective ignored other criteria favoring mass transit based on a broader evaluation of the societal impact of cars versus trains on society on either side of the Hudson. *See* Doig, *EMPIRE*, *supra* n. 26 at 20-21.

³⁵ Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 25.

³⁶ *Id.* at 26.

³⁷ Herbert Croly, *THE PROMISE OF AMERICAN LIFE* 106-107 (1909).

³⁸ Croly, *PROMISE*, *supra* n. 37 at 170.

functioning of government: “[Roosevelt] has tried to supply them with an administrative machinery which would enable them to use their abilities to the best public advantage.”³⁹ Wilson echoed this call to not clip the wings of talented men when he asserted that civil servants should be granted “large powers and unhampered discretion.”⁴⁰ This trust in talented men recalls Wilson’s prior analysis of political, as opposed to administrative, reform: “political genius cannot develop its full strength unless special opportunities be opened to it in the institutions of government. ... statesmen must be cultivated. They can be gotten only by assured bounties of actual power.”⁴¹ Similarly, to attract these business entrepreneurs to redirect their tremendous energies from their self-interest to instead serve the public and the state would require granting the degree of autonomy and independence typical in the corporate world.⁴² Wilson argued that conferring this degree of power would increase its responsible use, whereas checks and balances on power only leads to irresponsible exercise of power due to the dispersal of accountability.⁴³

Behind these calls for special power for special men lay an elitist trust in the discretion of “university men” which pervaded the Progressive movement. Croly attacked Jeffersonian “equality” vociferously, asserting that it blinded the public to the reality that “[t]hose who have enjoyed the benefits of wealth and thorough education start with an advantage which can be overcome only by very exceptional men.”⁴⁴ Echoing Croly’s repudiation of equality in favor of a pragmatic recognition of class differences, Robert Moses, in his pre-Triborough career as a Progressive reformer, praised the British civil service system that he analyzed in his PhD thesis for its reservation of upper level administrative policy jobs to “university men”: “Can the state repair the defects of heredity or of early education? Can it endow the average individual with the intelligence, acuteness and cultivation which economic exigencies have denied him?”⁴⁵ Calling for the US to adopt this class-divided system, Moses admiringly quoted Wilson’s contrast

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³⁹ *Id.*

⁴⁰ Wilson, “The Study of Administration” at 213-14, quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 294.

⁴¹ Wilson, “The Modern Democratic State” (December 1884), quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 294.

⁴² Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 294.

⁴³ *Id.* at 294.

⁴⁴ Croly, PROMISE, *supra* n. 37 at 180.

⁴⁵ Moses, THE CIVIL SERVICE OF GREAT BRITAIN (Columbia University, 1913), quoted by Caro, POWER BROKER, *supra* n 23 at 54.

between the “statesmanship of the expert civil servant versus the mob rule of the masses.”⁴⁶ The admission policy of first school of public administration in America, the Training School for Public Service founded in 1911 by the prominent Progressive think tank the Bureau of Municipal Research, aimed to bring “university men” into public administration – and only the top “university men,” including Moses.⁴⁷ Wilson himself justified the “large powers and unhampered discretion” for these cultivated civil servants because “the people [and their elected representatives]... are selfish, ignorant, timid, stubborn, foolish,” and so should not be trusted with the details of administration, but instead limited to “superintending the greater forces of formative policy”⁴⁸ In Wilson’s view, these civil servants should respond with “ready docility to all serious well-sustained public criticism,” but should not stoop to respond to general public criticism beyond expressing “impudent exclusiveness and arbitrariness.”⁴⁹ This classism pervaded Progressivism and remains a latent influence in government corporations even today, as expressed in contemporary assertions of exclusivity and technocratic superiority by officials of government corporations – “trust us, we know better.”⁵⁰

Progressive Era Reforms: the Origins of Government Planning of Urban Development

At the same time as Progressive reformers sought to impose order on corrupt and ineffective bureaucracy by increasing the efficiency of government administration and separating it from political patronage, proponents of city planning (there was significant overlap between the two movements in members as well as principles) sought to impose order on urban squalor, improving traffic circulation and planning for growth in newly annexed suburban land in an organized and scientific manner instead of by back-room

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⁴⁶ Caro, POWER BROKER, *supra* n 23 54-55; paraphrase of Moses, CIVIL SERVICE 134, by Robert Fishman, “Revolt of the Urbs: Robert Moses and his critics,” in ROBERT MOSES AND THE MODERN CITY: THE TRANSFORMATION OF NEW YORK 127 (Hilary Ballon and Kenneth T. Jackson, eds., 2007).

⁴⁷ Caro, POWER BROKER, *supra* n. 23 at 63.

⁴⁸ Wilson, “The Study of Administration” at 207-8 and 215, quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 300.

⁴⁹ Wilson, “The Study of Administration” at 222 and 217, quoted by Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 298, 299.

⁵⁰ Walsh, THE PUBLIC’S BUSINESS, *supra* n. 21 at 25; Doig, “Wilsonian Dichotomy,” *supra* n. 26 at 297-98. A current example is the assertion that a tradeoff between transparency and efficiency exists for quasi-public entities, with the result that an ‘emergency’ requires an efficient response even though it may reduce outsiders’ understandings – made by the new head of the European Union’s quasi-public European Financial Stability Facility charged with shoring up EU member-states facing borrowing crises. “Klaus Regling, Chief bail-out officer,” *The Economist* 69 (July 3, 2010).

deals between real estate speculators and politicians.⁵¹ City planning advocates pushed to imitate European municipal statistical offices that collected and analyzed information relevant to city governance, and organized private organizations to research and propose reform proposals, such as the Bureau of Municipal Research, founded in New York City in 1907, where Robert Moses started.⁵² Other private groups, particularly the Municipal Art Societies (New York, 1893; Cincinnati, 1894; Baltimore, Chicago, and Cleveland in 1899), focused on the physical layout and appearance of their respective cities and also commissioned studies of proposed reforms, reports to use in subsequent lobbying efforts.⁵³ These efforts were not limited to façade treatments, but incorporated improvements to sewer and drinking water systems, and updated traffic circulation patterns with unified railroad stations, as critical elements of improving the physical city along with tree-shaded boulevards, public sculpture and monumental city centers.⁵⁴

The 1902 McMillan or Senate Park Commission plan for Washington, D.C, paved the way for governments or private groups to commission plans for cities throughout the country.⁵⁵ Growing out of the late nineteenth century parks movement, these city plans projected order over the existing city and its future growth, seeking to direct speculative growth in a rational manner and organizing infrastructure around needs by the research supporting the plan. The plans varied in subject matter, some covering only the city center (Cleveland, 1902), others focused on projected future growth into surrounding jurisdictions (Baltimore, 1904), but later plans increased the breadth to examine economic and housing needs (St. Louis, 1907; Chicago, 1909 - although the plans did not always propose solutions). Although some of these plans were commissioned by governments (Cleveland's 1902 commission appointed by the governor; New York City

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⁵¹ Mel Scott, *AMERICAN CITY PLANNING* 40-43 (1969). Indicative of the shared interests of Progressives and city planning proponents was the broad spectrum of attendees, including Croly, at the first National Planning Conference in Washington, D.C. in May 1909. Scott, *PLANNING* 95-6. Scott suggests that many Progressives would have seen the City Beautiful civic centers as tangible municipal reforms because the clustered government buildings represented a rejection of the efforts of real estate speculators to have civic buildings scattered to build up surrounding real estate values. Scott, *PLANNING* 62-3. Croly, however, attacked real estate speculators and their paid-off municipal politicians as perverting City Beautiful plans for boulevards and city centers through kickbacks and contract-rigging. Scott, *PLANNING* 79-80.

⁵² Scott, *PLANNING*, *supra* n. 51, at 42, 121-3 (influence of statistics, Taylorism and efficiency studies); Caro, *POWER BROKER*, *supra* n 23 at 60-61.

⁵³ Scott, *PLANNING*, *supra* n. 51 at 43-6.

⁵⁴ William H. Wilson, *THE CITY BEAUTIFUL MOVEMENT* 83 (1989); Scott, *PLANNING*, *supra* n. 51 at 45.

⁵⁵ Scott, *PLANNING*, *supra* n. 51 at 47-56.

Improvement Commission created by the aldermen in 1903), others were the products of private groups, either associations dedicated to parks or municipal arts (Philadelphia and Baltimore) or groups of local business leaders (Chicago’s Commercial and Merchants Clubs, 1909).⁵⁶ In Boston in 1909, civic-minded business leaders organized “Boston - 1915” to advocate for systematic planning for the future of the city and commissioned both a city plan and an analysis of the city’s financial, housing, labor, and public health conditions and resources. Boston - 1915’s efforts succeeded in convincing the legislature in 1911 to authorize the governor to appoint a temporary commission to determine the need for a comprehensive plan, although subsequent opposition by suburban municipalities rendered the commission stillborn.⁵⁷ These private initiatives dedicated their own resources to hire planning experts to write these plans, in recognition that the politicians either lacked interest or funding, and because it ensured the reformers control over the choice of experts and scale of the plan. Daniel Burnham pushed for the Commercial Club to privately finance the preparation of the 1909 Chicago Plan for these reasons and to pressure politicians (and the public) into acting: “[t]he public authorities do not do their duty and they must be made to.”⁵⁸ This model of planning done by outside experts on commission from a private interest group, with politicians (and the public) involved only at the final presentation of the plan, clearly presages the circumstances behind *Kelo v. New London*.

The popular success of these city plans soon led to public commissions charged with preparing and implementing comprehensive plans – a development to which the private groups happily acceded. Thus Chicago’s mayor endorsed the 1909 *Plan of Chicago* within two days of its public release and the city council soon authorized the mayor to appoint the Chicago Plan Commission, composed of most of the proponents of the *Plan* together with other private citizens and elected officials.⁵⁹ At the first National Conference on City Planning held that same year in Washington, D.C., Frederick Ford, the Secretary of the first official planning panel, the Commission on the City Plan for Hartford, Connecticut, asserted that city planning would no longer be the province of

⁵⁶ *Id.* at 57-65; 101-109; Carl Smith, *THE PLAN OF CHICAGO* 64-5 (2006).
⁵⁷ Scott, *PLANNING*, *supra* n. 51 at 110-14.
⁵⁸ Smith, *CHICAGO*, *supra* n. 56 at 52.
⁵⁹ *Id.* at 116-17.

private pressure groups, but instead “be undertaken more by official commissions with ample authority to employ experts.”⁶⁰ Ford was overly optimistic, as those cities that established commissions to prepare a city plan often did not provide resources to hire expert staff, with a private citizens’ group paying the salary of the city planner in one case.⁶¹ More importantly, the authority of these commissions often was merely advisory, and even planning proponents sought to separate the plan commission’s review of proposals from power of the city council. Thus the National Municipal League’s 1916 model city charter provided for a planning board with the authority limited to advising the city council – the council could not take any action that would affect the city plan until reviewed by the planning board, but the council was not bound to follow the board’s recommendations.⁶² This widespread model echoed Progressive ideals of insulating the planning board from political power and concerns, in order to ensure that the board’s recommendations were based on expert, technical advice and based on the long-term needs of the community instead of the electoral schedule. Some of the leading city planning proponents worried that any power beyond merely advisory would lead to a backlash against planning. Alfred Bettman, the force behind much of early city planning laws, asserted that the purpose of forcing a city council to wait for the planning board’s advice before proceeding was to “force [the] council ... into discussion with the planning commission” and to permit the public to be “aroused and mobilized and to express itself,” but not to give the planning board legally enforceable power over compliance with the plan.⁶³ Addressing a planning conference in Baltimore, Bettman asserted that giving the planning commission complete control would be a mistake, as “pressure groups” would focus on the commission, injecting political concerns into what should be a technical and rational decision. Instead the ultimate legal authority should rest with the city council, with a two-thirds majority required to reject the planning commission’s recommendations, so that the commission would be able to make expert recommendations free from external political pressure: “A [planning] commission should

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⁶⁰ Scott, PLANNING, *supra* n. 51 at 100.

⁶¹ *Id.* at 143, 166 (a St. Louis citizens’ group paid the first year’s salary for the “city planning engineer,” Harland Bartholomew).

⁶² *Id.* at 145-46.

⁶³ *Id.* at 231.

be a unit of influence rather than legal authority.”⁶⁴ The 1927 Standard City Planning Act issued by Secretary of Commerce Hoover adopted this organization, with Bettman’s influence manifested in the city council’s ability to reject the planning commission’s recommendations, with the requirement of a two-thirds majority. Moreover, this model act, used as the basis of local ordinances nationwide, provided that the planning commission, not the city council, adopt the city plan, reinforcing the planning commission as champion of planning, but also further removing the city plan and planning from the political realm.⁶⁵ This insulation from political power also led to the political isolation of planning commissions, with the result that very few received budgets to hire planning staff so that most of the comprehensive plans prepared in the 1920s continued to be done by outside expert consultants, while planning commissions themselves came under fire as unnecessary expenditures during the Depression.⁶⁶ Thus the emphasis on technical expertise and a long term perspective, combined with insulation from politics, created the expectation that city planning be completed out of public view by private consultants for the planning commission, with only the final version presented to the public for approval or rejection.

The First Government Corporations

It was in the midst of the culmination of Progressivism in government and informed by the contemporary concern for, and study of, how to improve the functioning and form of cities that the forerunner of American government corporations came to existence – the Port Authority of New York and New Jersey.⁶⁷ This entity literally grew out of a Progressive initiative – in 1911, Woodrow Wilson, then governor of New Jersey, and the governor of New York each convened commissions to analyze methods to improve the efficiency of New York Harbor, one port divided by the state line bisecting the Hudson River.⁶⁸ Despite this initial effort at cooperation, the rivalry between the states quickly returned in 1914, when the New Jersey commission shifted its focus to

⁶⁴ “Favors City Plan Power Limitation: Cincinnati Authority Says Effective Control Should Reside in Council,” *[The Baltimore] Sun*, Jan. 31, 1941, 8.

⁶⁵ Scott, PLANNING, *supra* n. 51 at 242-45.

⁶⁶ *Id.* at 227-28, 245, 278-83.

⁶⁷ Originally titled simply the Port Authority of New York (for the Harbor), “New Jersey” was added in 1972. Doig, EMPIRE, *supra* n. 26 at 1.

⁶⁸ *Id.* at 34-35.

consolidating the hodgepodge of local jurisdictions governing the New Jersey side under the control of a state-sponsored “central port authority,” with an eye to challenging New York’s previously unified side as an equal partner rather than multiple junior members.⁶⁹ Although the local governments along the New Jersey shore lobbied successfully to limit severely the authority of the resulting New Jersey Board of Commerce and Navigation (it had no condemnation or financing authority), the Board unified New Jersey’s position over the future development of the port and ultimately led to New Jersey filing a complaint with the Interstate Commerce Commission to overturn the unified freight charge for New York Harbor, seeking to lower the cost to ship to the New Jersey terminals and boost its competitiveness vis a vis the New York terminals.⁷⁰ Pressure from the business community and leadership by Progressive politicians interested in promoting rational and efficient development of the port by removing power from parochial and corrupt local politicians led to the formation in 1917 of the bi-state Port and Harbor Development Commission to plan for the port’s future.⁷¹ After four years of negotiations, New York, New Jersey, and Congress approved the creation of the Port Authority, a manifestation of Progressivism – an autonomous entity independent of direct political control with a businesslike ethic of a long-term perspective based on technical expertise. New York and New Jersey transferred some of their authority to the Port Authority under the Compact Clause of the U.S. Constitution, which limited the states’ ability to withdraw at will, and so ensured that the Port Authority would be free from political threats from the states to withdraw. The Port Authority could issue bonds backed by its revenues, earned from the piers, warehouses, and other infrastructure built, purchased, or operated by the Port Authority, thus enabling the Port Authority to resist political threats to cut off annual appropriations. The six-member board, three from each state, served overlapping six-year terms to smooth out any disruptions or radical reversals due to electoral changes, and received no salary for their service in order to reduce the value of these positions for political patronage – all designed to bolster the Port Authority’s autonomy. The board had the sole authority to determine the salaries and duties of its employees, removing

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⁶⁹ *Id.* at 37, quoting New Jersey Harbor Commission, 1914 REPORT 4-6, 32-38.

⁷⁰ *Id.* at 37-38.

⁷¹ *Id.* at 41-45.

another potential means of interference by state or local governments.⁷² As part of the negotiations leading to approval, the Port Authority did not receive the authority to condemn land, impose taxes, or regulate the building or operating of private infrastructure that might compete with the Port Authority’s plan without the approval of both state legislatures, which also retained control over any changes to any development plan of the Port Authority.⁷³ Despite these limitations, the Port Authority prominently featured the Progressive principles that effective government required the delegation of “large powers and unhampered discretion” to autonomous entities run according to modern corporate methods, with a long-term perspective and based on professional expertise.⁷⁴

Although the key impetus to create the Port Authority as an independent corporation was the need to overcome the competition between New York and New Jersey – echoing New Jersey’s prior consolidation of control of its port facilities from competing local governments – the model for the corporate structure came from the Port Authorities of London (1908) and Liverpool (1857), created to remove control over engines of economic growth from corrupt local government.⁷⁵ Simultaneously with the drafting of the Port Compact, and probably helpful in creating familiarity with the concept of a public corporation, President Wilson created five government corporations, run by appointed boards, to run aspects of the war effort after the U.S. joined World War I in 1917. These Congressionally-approved corporations received administrative autonomy, including freedom from governmental contracting requirements, within a defined zone of responsibility – general war financing, ship-building, housing, grain, and sugar price control.⁷⁶ The Port Authority quickly became a model for other ports nationwide, although the purpose for most of these port authorities was not to overcome multi-jurisdictional competition, but instead to provide focus for economic development efforts informed by technical, not political, concerns and needs.⁷⁷ The Port Authority’s influence extended far beyond the specialized needs of ports due to the fortuitous fact that

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⁷² *Id.* at 50-52.

⁷³ *Id.* at 57-58, 67, 73.

⁷⁴ Wilson, “The Study of Administration” at 207-8 and 215, quoted by Doig, *EMPIRE*, *supra* n. 26 at 54.

⁷⁵ Doig, *EMPIRE*, *supra* n. 26 at 49, 51, esp. n. 12.

⁷⁶ Mitchell, *EXPERIMENT*, *supra* n. 21 at 25.

⁷⁷ Six port authorities were created in the 1920s and many others in successive decades. Mitchell, *EXPERIMENT*, *supra* n. 21 at 28.

a future President, Franklin Delano Roosevelt, when governor of New York witnessed first hand the Port Authority's successful administration of major infrastructure projects, most notably the George Washington Bridge. As governor, FDR borrowed the Port Authority model to create the New York Power Authority to develop hydroelectric power along the Saint Lawrence Seaway, and then as President, to form the Tennessee Valley Authority, which he justified as "a corporation clothed with the power of government, but possessed of the initiative and flexibility of a private enterprise."⁷⁸ Like the Port Authority, the TVA's regional mission covered multiple governmental jurisdictions, which reinforced the importance of TVA's independence to its director, David Lilienthal, who built a grassroots power base among Tennessee Valley residents to fend off attempts to limit the TVA's autonomy. Lilienthal, with Robert Moses and Austin Toobin at the Port Authority, was a pioneer of the "entrepreneurial governance" that became synonymous with government corporations, and which recalls Progressivism's goal to bring the energy and efficacy of businessmen to public administration.⁷⁹

FDR was so enamored of the government corporation model that he launched a fleet of government corporations in a "chaos of experimentation" to address the Great Depression, with an initial wave of national public corporations aimed at the crisis that resembled President Wilson's wartime government corporations, as well as the Reconstruction Finance Corporation created in 1932 by President Hoover.⁸⁰ In 1934, his second year in office, FDR pushed to expand the use of government corporations to the state and local level by sending the states a model enabling act for state legislatures to authorize the creation of "municipal improvement authorities" and "nonprofit public benefit corporations" with the power to issue revenue bonds to fund infrastructure projects designed to gin the economy. The Public Works Administration and Reconstruction Finance Corporation would purchase bonds issued by these new local government corporations, effectively transferring federal aid to state and local governments through these new government corporations. FDR followed up with

⁷⁸ Franklin Delano Roosevelt, Message to Congress proposing the TVA, April 10, 1933, quoted by Walsh, THE PUBLIC'S BUSINESS, *supra* n. 21 at 27.

⁷⁹ Mitchell, EXPERIMENT, *supra* n. 21 at 30-31.

⁸⁰ *Id.* at 30, 32 quoting Richard Hofstadter; Walsh, THE PUBLIC'S BUSINESS, *supra* n. 21 at 28; James L. Butkiewicz, "Reconstruction Finance Corporation," Entry in on-line Economic History Encyclopedia, EHNet, available at <http://www.eh.net/encyclopedia/butkiewicz.finance.corp.reconstruction.php>, 2002 (last visited July 22, 2010).

personal letters to each governor further encouraging the authorization of state and local government corporations. By the end of the decade, 16 states had authorized government corporations, with 41 doing so by 1948, including 25 states that extended the authorization to local governments.⁸¹ For FDR, a political reformer influenced by the legacy of Progressivism, the government corporation model provided not only the opportunity to improve the economic and administrative performance of government administration, but it also enabled FDR to use federal aid as a means of encouraging local government reform by sidestepping the existing political structures and so avoid local political machines skimming from the new federal aid.⁸²

Government Corporations for Urban Redevelopment

FDR's initiatives firmly ensconced government corporations in urban development because his Administration's radical interventions in the housing market relied on these entities. City planning groups supported the use of government corporations for the Administration's public housing and slum clearance programs – indeed Ohio passed the first state act enabling metropolitan housing authorities in 1933, a year before FDR's Administration issued the model act to the states, because a sharp-eyed Ohio planning proponent had noticed that a provision in the 1933 National Industrial Recovery Act (NIRA) permitted grants and loans to local government housing corporations as well as private limited-dividend housing corporations (opening the door to non-public entities to undertake redevelopment efforts on behalf of the government).⁸³ The Ohio act derived from the report of a committee of the National Conference on Slum Clearance, which included Bettman and other prominent planning professionals, that urged the use of government corporations to ensure efficient and effective intervention

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⁸¹ Mitchell, EXPERIMENT, *supra* n. 21 at 32-33; Walsh, THE PUBLIC'S BUSINESS, *supra* n. 21 at 28-29.

⁸² Kathryn A. Foster, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 18, n. 47 (1999), citing Mark I. Gelfand, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965 24-26 (1975). FDR's push for local government corporation is somewhat ironic, given that his personal feud with Robert Moses might have revealed the problems with creating a new power structure apart from existing government institutions.

⁸³ Scott, PLANNING, *supra* n. 51 at 319. The thirty-percent set aside of the initial stage of grants and loans for private nonprofit or limited-dividend corporations, including unions, established a prominent role for non-public entities in public urban redevelopment projects in the early stages of federal urban intervention, and so a precedent for non-public non-profit local development corporations including the Charles Center Management Office, the first predecessor of the BDC. Gwendolyn Wright, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA 224 (1981).

instead of relying on existing municipal departments and personnel.⁸⁴ The Ohio law did include a check on the autonomy of these new housing corporations by requiring referral of all new streets, parks, and public spaces to the local planning commission in order to ensure coordination between these two types of entities that were both guided by the Progressive notion of technical expertise and insulation from politics. The National Association of Housing Officials, in the program issued by a 1934 national conference held in Baltimore, reiterated the planning community's support for local government corporations to play a prominent role in housing and slum clearance as part of federal initiatives, as well as a role for planning commissions to prevent contradictions in policy between the housing corporations and planning commissions.⁸⁵

The real estate lobby joined city planners in supporting the use of government corporations for urban development – and in so doing revealed the dark side of the autonomy and reliance on technical expertise of government corporations. In 1935, Herbert Nelson, the executive secretary of the National Association of Real Estate Boards (NAREB), announced a Neighborhood Improvement plan that would permit a district to create a government corporation, if approved by 75% of the district's property owners, to seek condemnation and taxing authority from the city council in order to improve the district.⁸⁶ NAREB lobbied state legislatures to enact authorizing legislation, issuing a model Neighborhood Improvement Act in 1938 prepared by a prominent planner, Harland Bartholomew, who envisioned the emergence of neighborhood planning associations whose improvement plans would be approved by the planning commission and city council and carried out in cooperation between the associations and city.⁸⁷ NAREB's Nelson, however, quickly expanded the scale of the undertaking, calling for the creation of "city rebuilding companies," government corporations with condemnation authority that would leverage federal aid to raise capital to destroy blight and rebuild throughout the city, not only in a single neighborhood. Although these corporations

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⁸⁴ Scott, *PLANNING*, *supra* n. 51 at 319.

⁸⁵ *Id.* at 325-27.

⁸⁶ Marc A. Weiss, "The Origins and Legacy of Urban Renewal," in *FEDERAL HOUSING POLICY AND PROGRAMS* 258 (J. Paul Mitchell, ed., 1985).

⁸⁷ Neighborhood Improvement Act, "For the Replanning of Cities by Neighborhood Areas," *LIII AMERICAN CITY* 56 (Feb 1938) and Harland Bartholomew, "Neighborhood Rehabilitation and the Taxpayer," *LIII AMERICAN CITY* 57 (Feb 1938) cited by Scott, *PLANNING*, *supra* n. 51 at 364 n. 156, 157.

would work under the city plan and within specified conditions, Nelson did not appear to require referral or approval by city planning commissions.⁸⁸

The emphasis on administrative efficiency and expertise in government corporations appealed to NAREB and Nelson because of the probability of finding sympathetic and likeminded professionals at the head of the “businesslike” government corporations, just as the real estate industry had established close ties with the Federal Housing Administration (so the Director of the FHA’s Land Planning Division during the preparation of the *Handbook on Urban Redevelopment for Cities in the United States* in 1941, three years later became the Director of the Urban Land Institute, which had been created in 1936 by Nelson as NAREB’s research arm and spun off as an “independent” entity in 1940).⁸⁹ More importantly, government corporations promised NAREB insulation from political pressures, especially from interference by the public, which introduced uncertainty and associated extra costs that businesses hate. Nelson succinctly stated this point in a 1949 letter to the president of NAREB: “I do not believe in democracy. I think it stinks. I believe in a republic operated by elected representatives who are permitted to do the job, as the board of directors should.”⁹⁰ Although diametrically opposed to Wilson’s focus on government role in promoting the public good, Nelson’s elitist viewpoint echoes Wilson’s contrast between the “statesmanship of the expert civil servant and the mob rule of the masses,” with both agreeing that governance by experts is best as long as the experts share one’s own worldview.⁹¹ This recognition by the private real estate investment community that government corporations represented an opportunity to ensure the real estate industry’s involvement without public scrutiny was an early harbinger of the criticisms leveled at government corporations like NLDC and the BDC.

The dominant role of state and local government corporations in urban redevelopment became firmly established in 1935, when the Sixth Circuit upheld a lower court’s ruling that the Public Works Administration (PWA) could not condemn land for slum clearance and housing under the National Industrial Recovery Act (NIRA) because

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⁸⁸ Herbert U. Nelson, “For Large-Scale City Rebuilding,” LIII AMERICAN CITY 5 (Aug. 1938); cited by Scott, PLANNING, *supra* n. 51 at 364.

⁸⁹ Weiss, “Origins,” *supra* n. 86 at 258-59; Scott, PLANNING, *supra* n. 51 at 369.

⁹⁰ Weiss, “Origins,” *supra* n. 86 at 258.

⁹¹ Wilson, as reported by Robert Moses as paraphrased by Fishman, “Revolt,” *supra* n. 46 at 127.

it did not constitute a public use under the Fifth Amendment. *United States v. Certain Lands in the City of Louisville*, 78 F.2d 684 (6th Cir. 1935). The court distinguished cases cited by the government as proceedings initiated “under state statutes passed to effectuate the purpose of a declared public policy of the state,” whereas this case involved the federal government acting under federal law. *Id.* at 687. Yet, declared the court: “[t]he state and federal governments are distinct sovereignties, each independent of each other and each restricted to its own sphere. Neither can invade or usurp the rightful powers or authority of the other. In the exercise of its police power a state may do those things which benefit the health, morals, and welfare of its people. The federal government has no such power within the states.” *Id.* Although the Administration initially appealed the decision to the Supreme Court, it withdrew its petition out of fear that the Court might use the case to find Title II of NIRA unconstitutional and so amplify its striking down of NIRA’s Title I in *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935), decided just months before the *Louisville* decision and cited by the appellees.⁹² 296 U.S. 567 (1935), *cert. granted*; 297 U.S. 726 (1936) dismissed. As a result of this decision, the PWA abandoned the policy of direct intervention it had adopted while waiting for states to adopt enabling laws for state and local government corporations.

The federal government changed paradigms, turning to the states to act under state laws authorizing eminent domain for slum clearance and housing based on state constitutional powers, with the federal government providing the financing for the projects to state and local government corporations.⁹³ The Sixth Circuit in *Louisville* had suggested this alternative, and two weeks after the Administration withdrew its appeal in that case, the Court of Appeals of New York, one of the few states that had responded quickly to FDR’s 1934 model act and enabled local government corporations for housing that same year, ruled that a local government housing corporation could condemn land for slum clearance and low-income housing as a “public use” under the state constitution

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⁹² Scott, PLANNING, *supra* n. 51 at 327; Lawrence M. Friedman, GOVERNMENT AND SLUM HOUSING 102 (1968); Alexander Garvin, THE AMERICAN CITY 207 (2nd ed. 2002).

⁹³ To avoid confusion, I am using “government corporations” in the broad sense that Walsh, THE PUBLIC’S BUSINESS, *supra* n. 21 uses it – to include agencies, authorities, and corporations that are semi-autonomous, technocratic, government owned entities that issue revenue bonds for capital. Thus many of the entities cited were called “authorities” or “agencies,” but shared this central identity. *But see* Jon C. Teaford, THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA 1940-1985 34 (1990) (describing state urban development corporations, similar to the housing government corporations, as “private”).

and did not violate the Fourteenth Amendment.⁹⁴ *In the Matter of New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (N.Y. 1936). This push to have state and local government corporations lead slum clearance and housing efforts with federal financing had been included in a bill that Robert F. Wagner, a leading housing proponent, introduced in the Senate just before the *Louisville* decision. When Wagner’s bill eventually became law as the 1937 Housing Act, it was the catalyst for the creation of state and local government corporations for slum clearance and housing – over one hundred local government housing corporations were formed by the end of that year, with 221 created by the end of 1938, under the enabling legislation passed by thirty-three states.⁹⁵ These state and local government housing corporations were overseen by a federal government corporation – the United States Housing Authority, a “body corporate” within the Interior Department.⁹⁶ By the end of the 1930s, most states had enacted enabling legislation, upheld by state courts, authorizing eminent domain for slum clearance and housing.⁹⁷

Yet policy makers, real estate interests, and city planners quickly judged the 1937 Housing Act to be only a partial response to the problem of slum clearance and urban redevelopment, given the focus on providing public housing. Thus the passage of the 1937 Act inspired further legislative efforts to expand the focus from slum clearance and housing to urban redevelopment, with particular focus on areas around the central business districts.⁹⁸ This concern with urban decay and the need to reinvent cities was shared by the public, which flocked to two exhibits on cities at the 1939 World Fair – GM’s “Futurama” depiction of car-based cities of the future and *The City*, a film created by the American Institute of Planners, which contrasted urban ills with new garden cities.⁹⁹ Responding to this perceived need, in 1941 the Federal Housing Administration

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⁹⁴ Friedman, GOVERNMENT, *supra* n. 92 at 102-3; Garvin, CITY, *supra* n. 92 at 207-8. The Supreme Court granted the Solicitor General’s petition to withdraw the *Louisville* appeal on March 5, 1936, and the New York Court of Appeals issued its *Muller* decision on March 17, 1936.

⁹⁵ Scott, PLANNING, *supra* n. 51 at 328-31; Friedman, GOVERNMENT, *supra* n. 92 at 103-4; Kenneth T. Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 224 (1985). *See also* “The Philadelphia Cure: Clearing Slums with Penicillin, not Surgery,” 96 ARCHITECTURAL FORUM 115 (April 1952).

⁹⁶ Friedman, GOVERNMENT, *supra* n. 92 at 106; Wright, BUILDING, *supra* n. 83 at 225-27.

⁹⁷ Weiss, “Origins,” *supra* n. 86 at 264; Friedman, GOVERNMENT, *supra* n. 92 at 106-7.

⁹⁸ Teaford, RENAISSANCE, *supra* n. 93 at 33-34 (1990); Weiss, “Origins,” *supra* n. 86 at 264-65.

⁹⁹ Scott, PLANNING, *supra* n. 51 at 361-64.

published *A Handbook on Urban Redevelopment for Cities in the United States* that identified those needs of cities that federal funding could potentially help address.¹⁰⁰ The following year ULI called for a new federal urban redevelopment program to fund local metropolitan land commissions authorized by state legislatures to draw up and implement master plans of metropolitan areas, including the power to condemn property and change zoning. These “land commissions” hewed to the Progressive ideal of autonomous entities, separate from existing bureaucracy, with large powers and businesslike operations, and ULI underscored the prominent role that private business would play by insisting that the “public” role lay in assembling and clearing the land, while private builders would do the construction and development.¹⁰¹

These lobbying efforts paid off in the decade after the 1937 Act, as state legislatures debated laws authorizing the creation of local government corporations for urban redevelopment with condemnation authority with different restrictions – some states limited eminent domain provisions to specific cities (e.g., Michigan’s law restricted to Detroit), and some states set minimum thresholds of ownership for the development corporations to meet before receiving authorization for eminent domain (51% or 60% of the redevelopment district).¹⁰² In 1944, when ten states had enacted redevelopment laws authorizing government corporations to use eminent domain and ten other states were considering similar legislation, ULI launched a lobbying campaign to ensure that these redevelopment laws would not authorize existing local government housing corporations as the redevelopment agencies, but instead enable new, separate redevelopment entities, in order to ensure that redevelopment was not limited to public housing, but could be used for commercial development surrounding central business districts.¹⁰³ ULI also pushed state legislatures not to limit the final use of redevelopment projects to public housing, but instead to grant redevelopment corporations flexibility, provided the final use complied with the comprehensive plan “and with the objective of securing the highest and best use of the area,” which would give private real estate interests a prominent role

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¹⁰⁰ *Id.* at 381-82; Weiss, “Origins,” *supra* n. 86 at 259.

¹⁰¹ Scott, PLANNING, *supra* n. 51 at 384-85; Weiss, “Origins,” *supra* n. 86 at 259.

¹⁰² Scott, PLANNING, *supra* n. 51 at 380-81 (Michigan’s statute only covered Detroit).

¹⁰³ Scott, PLANNING, *supra* n. 51 at 417-18; Weiss, “Origins,” *supra* n. 86 at 260-61; Robert M. Fogelson, DOWNTOWN: ITS RISE AND FALL, 1880-1950 364-65 (2001) (stating that twenty states had enacted such enabling acts by 1945).

in determining the location and use of redevelopment projects.¹⁰⁴ Spurred on by downtown business interests, cities quickly acted on state enabling laws and created redevelopment corporations, with most big cities having such entities by the late 1940s. These redevelopment entities, led by boards generally dominated by real estate and business interests chosen for their expertise as well as interest, typically took over the planning of redevelopment projects with the help of outside planning experts, with the city council voting only on the final plan, which would then be incorporated into the city's master plan.¹⁰⁵ This submission of the comprehensive master plan to the specific redevelopment plan, as well as the dominance of the autonomous, technocratic redevelopment corporation in preparing the redevelopment project, anticipated the process used by NLDC in New London.

The Influence of Private Business on the Use of Government Corporations for Urban Redevelopment

While state and local governments embraced government corporations for redevelopment, World War II largely diverted the energy of the federal government. Two Congressional bills governing urban redevelopment were introduced in 1943, one supported by Bettman and city planners that emphasized local government's control over the redevelopment by requiring governments to lease, not sell, the cleared land, and a rival ULI-supported bill that enabled governments to sell the cleared land to private entities that would determine the final use. These bills stalled in Congress until 1949, when the 1949 Housing Act established a national urban redevelopment program financed by federal aid but managed by local redevelopment entities. The 1949 Act included ULI's provision permitting local governments to sell the cleared land instead of maintaining control of the redevelopment by only leasing the land, as well as a provision that similarly reduced local government's potential control over redevelopment by only requiring local government approval of a project as conforming to a "general plan of the locality," instead of specifying compliance with the comprehensive plan of the

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¹⁰⁴ Urban Land Institute, TECHNICAL BULLETIN NO. 2 (1945), quoted by Weiss, "Origins," *supra* n. 86 at 261; Fogelson, DOWNTOWN, *supra* n. 103 at 365-66.

¹⁰⁵ Teaford, RENAISSANCE, *supra* n. 93 at 106; Fogelson, DOWNTOWN, *supra* n. 103 at 366.

municipality.¹⁰⁶ As the example of New London and NLDC reveals, this required “approval” does not mean that the local government prepared or would implement the project, especially if the redevelopment corporation has control over external funding sources. However, the 1949 Act did provide another means of leverage for local governments in conditioning the federal government’s payment of two-thirds of the cost of land assembly and clearance on a one-third contribution from local government. This gave local government a seat at the table, especially since the local government contribution was generally “in-kind” donations of land, street infrastructure, parks, playgrounds, or schools and other public buildings.¹⁰⁷ The process of determining the composition and assembling this one-third contribution necessarily involved local government in the details of the preparation of a redevelopment project under the 1949 Act, whereas New London’s contribution was only 1/30 (\$4 million of the total \$120 million project cost), and so had no impact on the preparation of the project’s plan, especially as the contribution was in cash and not in land or facilities to be built.

ULI’s successful lobbying efforts at the federal and the state and local levels to have the 1949 Housing Act, state enabling laws, and local laws creating redevelopment corporations include broader and more flexible authority granted to local redevelopment entities, ensured a prominent role for the private sector, which would control the building and operation of redevelopment projects, with the public role effectively limited to land assembly and clearance.¹⁰⁸ The National Institute of Municipal Law Officials pointed out the results: “Private capital will dictate the area in which its monies will be invested.” The influence of private real estate interests, especially downtown businesses, was magnified by the prominent role they played as members of the redevelopment corporations as well as leaders of private civic groups that financed planning reports offered to local governments as roadmaps for redevelopment.¹⁰⁹ At the same time, the

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¹⁰⁶ Scott, PLANNING, *supra* n. 51 at 466; Daniel Mandelker, “Commentary: *Kelo*’s Lessons for Urban Redevelopment: History Forgotten,” Slip Opinion, WASHINGTON UNIVERSITY LAW REVIEW (NOV. 24, 2008), available at <http://lawreview.wustl.edu/slip-opinions/kelos-lessons-for-urban-redevelopment-history-forgotten/>; Weiss, “Origins,” *supra* n. 86 at 259-60; Friedman, GOVERNMENT, *supra* n. 92 at 149.

¹⁰⁷ Friedman, GOVERNMENT, *supra* n. 92 at 148; Weiss, “Origins,” *supra* n. 86 at 259-62.

¹⁰⁸ Weiss, “Origins,” *supra* n. 86 at 262.

¹⁰⁹ Fogelson, DOWNTOWN, *supra* n. 103 at 364-66; *see also* Bernard J. Friedan and Lynne B. Sagalyn, DOWNTOWN, INC., HOW AMERICA REBUILDS CITIES 61-62 (1989) (asserting that this division of public and private roles was the key problem with urban renewal because it prevented cities from learning from “developers” as opposed to the “downtown elite” – but disregarding the role played by redevelopment

revival in the 1940s of municipal planning departments that had effectively gone dormant during the Depression transformed planning into a professional discipline that created distance between public planning decisions and the general public. Moreover, most of this increase in municipal planning focused on zoning the contemporary city, not long-term planning, which instead became dominated by business interests and redevelopment corporations funded by federal urban renewal programs.¹¹⁰ The increasing professionalism and concomitant technical skillset of urban planning with the emergence of graduate degrees in city planning that emphasized economics, social sciences, and techniques used in business management, further justified the use of government corporations for redevelopment planning.¹¹¹

The case of Pittsburgh is illustrative: in 1945 the Pennsylvania legislature passed an enabling act for local redevelopment corporations with eminent domain authority due to the lobbying efforts of Richard King Mellon, the banking and industrial tycoon.¹¹² Two years earlier, Mellon led a group of Pittsburgh business leaders in founding the private Allegheny Conference for Community Development to push for dramatic intervention in Pittsburgh's grimy Golden Triangle. The Allegheny Conference, funded by the Pittsburgh Civic-Business Council, provided detailed plans for the redevelopment for the local government redevelopment corporation to use, as well as negotiated the financing through an investment by Equitable Life Assurance Society, and then lobbied successfully for the 1947 state redevelopment law permitting insurance companies to invest in redevelopment projects.¹¹³ These redevelopment plans derived from those produced by Robert Moses when hired in 1939 by Mellon's predecessor as leader of

entities as quasi-public organizations with links to downtown real estate interests. This distinction is informed by their "teleological" approach that views the urban redevelopment successes as due to public-private partnerships – see Carl Abbott, "Five Strategies for Downtown: Policy Discourse and Planning since 1943," in *PLANNING THE TWENTIETH-CENTURY AMERICAN CITY* 407 (Mary Corbin Sies and Christopher Silver, eds., 1996)).

¹¹⁰ Thomas Hanchett, "Roots of the 'Renaissance': Federal Incentives to Urban Planning, 1941 to 1948," in *PLANNING THE TWENTIETH-CENTURY* 300-04 (Mary Corbin Sies and Christopher Silver, eds., 1996).

¹¹¹ Scott, *PLANNING*, *supra* n. 51 at 467-71.

¹¹² Weiss, "Origins," *supra* n. 86 at 262. See 35 PENN. STAT. §1701 (P.L. 991, §1, May 24, 1945).

¹¹³ Shelby Stewman and Joel A. Tarr, "Four Decades of Public-Private Partnerships in Pittsburgh," in *PUBLIC-PRIVATE PARTNERSHIP IN AMERICAN CITIES* 66-67 (R. Scott Fosler and Renee A. Berger, eds., 1982) (noting that the Allegheny Conference did not lobby as a group for the 1945 bill, instead having individual members lobby as representatives of their respective companies); John F. Bauman and Edward K. Muller, *BEFORE RENAISSANCE: PLANNING IN PITTSBURGH, 1889-1943* 1, 269, 275 (2006); Scott, *PLANNING*, *supra* n. 51 at 433; Weiss, "Origins," *supra* n. 86 at 262; Teaford, *RENAISSANCE*, *supra* n. 93 at 108-9.

Pittsburgh’s business community and of the private Pittsburgh Regional Planning Association (PRPA), Howard Heinz.¹¹⁴ This dominant influence on redevelopment projects by activist business leaders reflected a long tradition in Pittsburgh, with Heinz and Mellon founding the PRPA in 1936 to lead planning efforts following devastating floods combined with a municipal planning department overworked by the dramatic increase in planning required by the New Deal.¹¹⁵ The PRPA itself was a revival of the Citizens Committee on the City Plan, founded in 1918 by Mellon’s father and other Pittsburgh business leaders to push for Pittsburgh to adopt city planning, and its parent, the Municipal Planning Association, both of which disbanded due to the Great Depression in 1933.¹¹⁶ Unlike the 1920s-era Citizens Committee, however, the PRPA and Allegheny Conference aimed to catalyze public planning by providing plans for the city to adopt instead of just building support for municipal planning efforts.¹¹⁷ The successful redevelopment of Pittsburgh’s Golden Triangle enthralled the nation as proof that cities could be saved by this model, adopted by the 1949 Act, of new government redevelopment corporations acting in concert with private business interests.¹¹⁸

The dominant role of government corporations in urban redevelopment – the precursors for NLDC and the BDC – was sealed with the passage of the 1949 Housing Act and state enabling legislation for state and local government corporations for redevelopment as well as for housing. With the massive federal funding for urban renewal and highway construction (used for redevelopment purposes) through the 1970s, these government redevelopment corporations firmly fixed the model of redevelopment in the Progressive mold – autonomous, politically insulated (from accountability but not from political intrigue), technocratic and businesslike.

Government Corporations as A Paradigm for Government

The early successes of the Port Authority and TVA, combined with FDR’s extensive use of government corporations at the federal level and of state and local

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¹¹⁴ Bauman and Muller, BEFORE RENAISSANCE, *supra* n. 113 at 252-69, 275; Scott, PLANNING, *supra* n. 51 at 433.

¹¹⁵ Bauman and Muller, BEFORE RENAISSANCE, *supra* n. 113 at 229-32, 276.

¹¹⁶ *Id.* at 114, 198, 275.

¹¹⁷ *Id.* at 231, 261, 269; Teaford, RENAISSANCE, *supra* n. 93 at 46-47.

¹¹⁸ Weiss, “Origins,” *supra* n. 86 at 262; Teaford, RENAISSANCE, *supra* n. 93 at 46-47.

government corporations as conduits for new federal aid, heralded a huge expansion of these entities. Although the ability to raise capital by issuing bonds, and so expand governmental budgets without having to seek voter approval, was a key reason for their popularity, equally important was the Progressive ideal of businesslike, efficient, autonomous, and focused entities to do the “public’s business.” States quickly expanded the use of government corporations beyond the purposes pushed by the federal government, with Pennsylvania alone creating over 1,200 municipal government corporations by 1950.¹¹⁹ Ironically, a further impetus towards government corporations was the increasing size and complexity of government bureaucracy and the laws intended to ensure good government, since the autonomy of government corporations usually absolved them of compliance with contract bidding, civil service, auditing, and management laws and regulations.¹²⁰ Directors of government corporations energetically asserted this autonomy, particularly from legislative oversight, justified on the businesslike model of the government corporation and on the harm that political intervention and full disclosure would cause by leading investors to avoid purchasing government corporation bonds.¹²¹ More broadly, the directors defended their autonomy by analogy to the private corporation where the management had ample discretion in responding to shareholders.¹²² This analogy of the public as the shareholders of government corporations retained its luster to public administration theorists, and the public at large, even as scholars of private corporate governance attacked the assumption that shareholders “owned” a private corporation, with the result of almost unfettered discretion by management with limited accountability to shareholders. Although these corporate governance studies clearly suggested that government corporations would share this lack of management accountability to the public as “shareholders,” public administration theorists doubled down on their praise for this increased independence for

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¹¹⁹ Mitchell, EXPERIMENT, *supra* n. 21 at 33.

¹²⁰ Walsh, THE PUBLIC’S BUSINESS, *supra* n. 21 at 40-41.

¹²¹ *Id.* at 43 (quoting Robert Moses rejecting the assertion that Triborough Bridge and Tunnel Authority records should be public records).

¹²² Walsh, THE PUBLIC’S BUSINESS, *supra* n. 21, at 225-26 (discussing Austin Toobin’s views of the Port Authority’s autonomy).

directors of government corporations, falling back on Wilson’s Progressive mantra of ample discretion to management and insulation from the mob rule of the masses.¹²³

The use of government corporations over the next three decades continued to expand at all levels of government. A brief period of disfavor at the federal level under the Eisenhower Administration was followed by a return to prominence under Johnson’s Great Society program, while state and local governments proliferated in response to both local needs and federal funds.¹²⁴ By the late 1970s, over 7,000 regional, state, and local government corporations existed, and the model become paradigmatic so that management consultants advising governments routinely relied on “[a] common script – define a specialized problem, seek a purely organizational solution, [and] spin off a government corporation.”¹²⁵

The 1970s also witnessed a growing critique of government corporations for the lack of accountability and transparency that enabled directors to become lords of their personal fiefdoms, as exemplified by Robert Moses, who lost his power over an intricate web of New York City government corporations in 1968 after 44 years, or Austin Toobin, the head of the Port Authority from 1942 to 1971.¹²⁶ The 1974 publication of Robert Caro’s detailed biography of Moses included extensive analysis of how Moses set up and operated “his” government corporations to remain in power and unaccountable to politicians and voters, and its clamorous reception, including the Pulitzer prize, further ensconced in the public mind the corruptibility of government corporations.¹²⁷ The intricate web of state government corporations in New York led the Comptroller to describe them as “the Fourth Branch of Government” in 1972.¹²⁸ Starting the next year, the threatened insolvency of the Urban Development Corporation (UDC), created in 1968, led to concerns that New York State’s fiscal health might be affected, both by

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¹²³ *Id.* at 40, citing Adolf A. Berle and Gardiner C. Means, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1948).

¹²⁴ Mitchell, *EXPERIMENT*, *supra* n. 21 at 37-40.

¹²⁵ Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 6, 48 (quotation), 353-56 (estimate).

¹²⁶ Caro, *supra* n. 23 at 9 and *passim*; Mitchell, *EXPERIMENT*, *supra* n. 21 at 34-37; Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 211-26.

¹²⁷ Caro, *supra* n. 23. Despite exceeding 1200 pages, *The Power Broker* went through 27 printings by 2000 (Jon C. Teaford, “Caro versus Moses, Round Two: Robert Caro’s *The Power Broker*,” 49 *TECHNOLOGY AND CULTURE: THE INTERNATIONAL QUARTERLY OF THE SOCIETY FOR THE HISTORY OF TECHNOLOGY* (April 2008)).

¹²⁸ Office of the New York State Comptroller, *STATEWIDE PUBLIC AUTHORITIES: A FOURTH BRANCH OF GOVERNMENT* (1972), cited by Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 264.

having to bail out the UDC as well as the collateral concern over the debt-worthiness of the state's numerous other interlocking government corporations. Although catastrophe was averted after three years of significant state aid and reform legislation limiting the state's exposure, the debacle raised serious concerns about the functioning of government corporations – not just about the lack of transparency and accountability, but perhaps more damaging, about the Progressive image of a businesslike technocratic entity that outperformed the general purpose government.¹²⁹ The subsequent use of the UDC by Governor Cuomo to build prisons that voters had rejected in a bond referendum in 1981 further fanned criticisms of government corporations used as undemocratic backroom political tools.¹³⁰ These criticisms amplified opposition to the extraordinary powers granted the UDC to override local government zoning laws and permitting the state to intervene in New York City and other municipalities without recourse by the local jurisdiction's citizens – a harbinger of NLDC's lack of accountability to the citizens of New London.¹³¹

Despite these critiques, however, government corporations and private business influence in public policy received a new boost under the Carter Administration, which sought to replace the Great Society paradigm of top-down, “command-and-control” government programs with more flexible, market-driven “public-private partnerships.”¹³² To replace the urban renewal program (shut down in 1974), the Carter Administration created the Urban Development Action Grant (UDAG) program that awarded grants based on the level of partnership between public and private entities - the degree of private investment, the use of public loans instead of grants, and the size of the “equity kicker,” the ownership stake in the project, given the local redevelopment government corporation. UDAG transformed local redevelopment corporations from conduits of federal aid to active participants in the development process, negotiating with private

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¹²⁹ Walsh, THE PUBLIC'S BUSINESS, *supra* n. 21 at 129-40.

¹³⁰ Eric Schlosser, “The Prison-Industrial Complex,” THE ATLANTIC 51-77 (December 1998)

¹³¹ Eleanor Brilliant, URBAN DEVELOPMENT CORPORATION 51-52 (1975).

¹³² Katharine C. Lyall, “Public-Private Partnerships in the Carter Years,” in PUBLIC-PRIVATE PARTNERSHIPS: IMPROVING URBAN LIFE 36 (Perry Davis, ed.), PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 4 (1986); Lynne B. Sagalyn, “Public/Private Development: Lessons From History, Research, and Practice,” 73 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 9 (Winter 2007) (citing Carter's chairman of the Council of Economic Advisors, Charles Schulz, as the leading proponent of this paradigm shift).

developers to shape the ultimate deal, and in return becoming more and more akin to developers.¹³³ Whereas urban renewal prescribed that local government corporations assemble and clear land before negotiating with private developers who would then take over the project under the terms of the contract, UDAG encouraged local government corporations to include private developers before finalizing plans for land assembly and clearance, and to remain involved during the redevelopment phase, and after, through profit-sharing mechanisms.¹³⁴ In 1979, William Donald Schaefer celebrated this commingling: “Today, the public and private sectors are each acting more like the other use to act, and public/private ‘deals,’ publicly arrived at, have gained respectability.”¹³⁵ Given the intricate, drawn out, and often secretive nature of real estate development, how “publicly” the deals were arrived it is questionable – although Schaefer’s *modus operandi*, shared by many mayors seeking results, suggests a loose definition.¹³⁶ Indeed, the executives of local redevelopment government corporations became “public entrepreneurs,” wheeling and dealing with their private business partners with whom they potentially identified more than their general-purpose government bureaucrat peers.¹³⁷ These criticisms echoed those leveled at the government corporations with large bond issues, which critics asserted rendered the executives more responsive to bond investors than to the public.¹³⁸ Nonetheless, this “public entrepreneurship” found fertile ground in the market-focused Reagan era, sympathetic to the Progressive mantra of making government more businesslike. Politicians saw government corporations as ideal tools to

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¹³³ Sagalyn, “Public/Private,” *supra* n. 132 at 9-11.

¹³⁴ Bernard J. Frieden, “Center City Transformed: Planners as Developers,” 56 *JOURNAL OF THE AMERICAN PLANNING ASSOCIATION* 424 (Autumn 1990). Sagalyn, “Public/Private,” *supra* n. 132 at n. 2 suggested that individual cities skirted urban renewals precepts. I am somewhat skeptical of the degree of transformation perceived by Frieden and Sagalyn, and of the rigidity of their depiction of the phases of redevelopment under urban renewal. See Abbott, “Five Strategies,” *supra* n. 109 (describing their approach as “teleological”).

¹³⁵ William Donald Schaefer, “Public/Private Partnership: Views and Its Future,” in *CITY ECONOMIC DEVELOPMENT* 6 (National League of Cities, Jan. 15, 1979), quoted in Frieden and Sagalyn, *DOWNTOWN, INC.*, *supra* n. 109 at 216.

¹³⁶ C. Fraser Smith, WILLIAM DONALD SCHAEFER (1999) and his eight-day, twenty-two article series in the *Baltimore Sun* in April 1980 on Baltimore’s “Shadow Government,” which was a Pulitzer prize finalist that year (summarized in Smith, SCHAEFER 196-200). Baltimore’s Renaissance, associated with Schaefer, was celebrated and imitated as a model of how to revitalize struggling American cities. “Cities are Fun,” *TIME MAGAZINE* (August 24, 1981).

¹³⁷ Frieden, “Center City,” *supra* n. 134.

¹³⁸ Walsh, *THE PUBLIC’S BUSINESS*, *supra* n. 21 at 96 (e.g., “The management of the Port Authority has constantly invoked investors as its most important constituency.”).

promote public-private partnerships, especially for directing economic development policy, for which hundreds of new government corporations were created and existing government corporations repurposed.¹³⁹ UDAG itself, despite being targeted by budget-cutters antipathetic to the program’s social aims, survived until 1988 because of its popularity with local governments and business interests.¹⁴⁰

The continuing popularity of government corporations in the 1980s did not silence critics, especially after the 1983 default by the Washington Public Power Supply System on over \$2.2 billion in bonds and Diana Henriques’ 1986 expose, *The Machinery of Greed: Public Authority Abuse and What to Do About It*.¹⁴¹ In addition to this populist focus on the unaccountability of government corporations, echoed by Donald Axelrod’s 1992 *The Shadow Government: The Hidden World of Public Authorities – And How They Control Over \$1 Trillion of Your Money*, more sober academic research analyzed the successes and failures of government corporations, and proposed reforms including calls for greater transparency but also greater politicization of government corporation boards.¹⁴² In response, politicians enacted reforms that included consolidation of corporations with overlapping mandates; greater political control including removing much of the freedom from governmental reporting, contracting, and other regulatory requirements traditionally enjoyed by government corporations; and privatization.¹⁴³ New York State in particular has taken the lead in importing modern corporate governance principles from the private sector, with 2005 and 2009 legislation that included increased conflict-of-interest regulation and fiduciary duty requirements of directors and executives, tighter audit procedures, adoption of ethics code, whistleblower protections, greater transparency of property disposition, and the creation of a State Inspector General

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¹³⁹ Mitchell, EXPERIMENT, *supra* n. 21 at 40-44.

¹⁴⁰ Lynne B. Sagalyn, “Explaining the Improbable: Local Redevelopment in the Wake of Federal Cutbacks,” 56 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 431 (Autumn 1990).

¹⁴¹ Jerry Mitchell and Gerald J. Miller, “Public Authorities and Contemporary Debt Financing,” in PUBLIC AUTHORITIES AND PUBLIC POLICY: THE BUSINESS OF GOVERNMENT 71-81 (Jerry Mitchell, ed., 1992) (discussing the background of, and responses to, the Washington Public Power Supply System default); Robert Smith, “The Web of Actors in Authority Policy Implementation,” 18:4 POLICY STUDIES JOURNAL 986-98 (Summer 1990) (discussing the Federal government’s push in the 1970s and 1980s to increase contracting with the private sector and ensuing complications).

¹⁴² Walsh, THE PUBLIC’S BUSINESS (1978), *supra* n. 21; PUBLIC AUTHORITIES (Mitchell, ed., 1992), *supra* n. 21; and Mitchell, EXPERIMENT (1999), *supra* n. 21; and Doig, EMPIRE, *supra* n. 26 (2001); as well as lively debate in scholarly journals.

¹⁴³ Mitchell, EXPERIMENT, *supra* n. 21 at 44-47.

with defined jurisdiction over government corporations.¹⁴⁴ While these reforms focused on the budgetary autonomy and discipline of government corporations, greater transparency in this area will shed light on the operating practices of government corporations. The recent financial crisis has inspired at least one scholar to query if the Progressive ideal of “efficiency” in a businesslike government remains relevant, and to propose that government corporations look to the alternative business model of “sustainable development,” incorporating social, community, and environmental concerns into the corporate mission – effectively inverting “businesslike government” to ensure that public policy rises to at least equal the efficient bottom line as the aim of the government corporation.¹⁴⁵

And yet, in the midst of these attempts to fetter the autonomy of government corporations in New York, the Progressive countercurrent resurfaced in a revisionary analysis of Robert Moses’s career that celebrated him as “an unusually gifted public servant who mastered the Art of Getting Things Done.”¹⁴⁶ In the New York of the ever-promised Second Avenue subway and the languorous, meandering redevelopment of the World Trade Center site, these revisionists identified an appetite for “governmental actors that can tame the bureaucracy and overcome the opposition” that has prevented New York from “execut[ing] ambitious projects because of a multilayered process of citizen and governmental review.”¹⁴⁷ Most of these reviews, including environment, health, and traffic analyses, did not exist in Moses’s day, and some were designed to ensure that a future Moses could not run rampant over local opposition. This appreciation of Moses as Alexander cutting the Gordian knot of red tape echoes some of the praise for Bloomberg, the business executive turned mayor, and it underscores Moses’s Progressive beliefs, which led him to create the tangle of government corporations through which he

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¹⁴⁴ Lynn Wilson and Clayton Eichelberger, “New York State Public Authority Reform: Where We Have Come From and Where We Need to Go,” 11 NEW YORK STATE BAR ASSOCIATION, GOVERNMENT, LAW AND POLICY JOURNAL 19-20 (Fall 2009); Scott Fein, “The Public Authorities Reform Act of 2009,” 11 NEW YORK STATE BAR ASSOCIATION, GOVERNMENT, LAW AND POLICY JOURNAL 102-05 (Fall 2009). The 2009 Act went into effect on March 1, 2010 – Senator Bill Perkins, Press Release, “Public Authorities Reform Act of 2009 Takes Effect,” March 5, 2010, available at <http://www.nysenate.gov/press-release/public-authorities-reform-act-2009-takes-effect>.

¹⁴⁵ Rosenbloom, “Private Sector,” *supra* n. 28 at 9-10.

¹⁴⁶ Alexander Garvin quoted by Teaford, “Caro,” *supra* n. 127. Teaford, and many other urban, planning, and architectural historians praised this revision.

¹⁴⁷ Hilary Ballon and Kenneth T. Jackson, “Introduction,” in ROBERT MOSES AND THE MODERN CITY: THE TRANSFORMATION OF NEW YORK 65, 66 (Hilary Ballon and Kenneth T. Jackson, eds., 2007).

transformed the city: “Putting his trust in experts, he doubted the capacity of democratic methods to arrive at the common good.”¹⁴⁸ This realpolitik assessment echoes the justifications for the latitude traditionally granted government corporations going back to Wilson – it is better to trust the professional civil servant dedicated to the long-term common good than the fickle passions of the masses.

While praising Moses’s efficiency, the revisionists also question the charge that Moses was unaccountable to the electorate. As a prominent urban historian who praised the revision put it: “anyone knowledgeable about the complexities of government knows that [Moses] acted within the legal and structural constraints imposed by the representative system of American government. He did not force his projects down the throat of an unwilling city.”¹⁴⁹ Similar statements could be made of New London and NLDC, as Justices Stevens and Kennedy effectively did – the elected officials approved the plan and authorized the government corporation to implement it.

But surely this view glosses over the fact that the use of government corporations to “Get Things Done” privileges certain players with knowledge, power and connections over the ordinary citizen, just as the rigid focus on free speech in campaign finance overlooks the disparity between corporations and individual voters – everyone can speak, but certain voices are louder than most others.¹⁵⁰ Government corporations introduce an intermediary between the public and private spheres, blurring the boundaries of responsibility, especially in real estate development where secrecy is a vital part of negotiating strategy. Influential private interests can use privileged contacts with the government corporation to advance their interests, cloaked in the “independent” technical judgment of the government corporation, while politicians can assert plausible deniability of influence over their decisions based on their following the expert professional advice of the government corporations.

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¹⁴⁸ Ballon and Jackson, “Introduction,” *supra* n. 147 at 66.

¹⁴⁹ Teaford, “Caro,” *supra* n. 127.

¹⁵⁰ E.g. *Citizens United v. Federal Elections Commission*, 130 S.Ct. 876 (2010).

III. Baltimore: Is the Baltimore Development Corporation a Public or Private Entity?

The BDC has raised similar concerns about the appropriate balance between efficiency and accountability in government corporations overseeing urban redevelopment since its 1991 formation as the agent of Baltimore City (City) for economic development and urban redevelopment.¹⁵¹ Criticisms of the lack of transparency in the BDC’s operations, and the BDC’s asserted exemption, as a 501(c)(3) nonprofit corporation, from laws governing public entities, have dogged the BDC since its creation two decades ago, and led to a series of cases in which the Maryland Court of Appeals considered the role of the BDC in managing public-private partnerships for the City and attempted to distinguish between the “public” and “private” spheres in urban redevelopment projects. Two recent cases in particular highlight the ambiguous status granted the BDC by the Court of Appeals, both deriving from the proposed redevelopment of the Westside “Superblock” under an Urban Renewal Plan, the largest urban renewal project in Baltimore since the Inner Harbor¹⁵², proposed by the BDC and approved by the City Council, which delegated the implementation of the plan to the BDC.

When the BDC, upon review of proposals by various entities to redevelop parts of the Superblock, submitted a final recommendation to the Board of Estimates that the vast majority of the Superblock be developed by a single entity (Lexington Square Partners, LLC) with only minor roles for three other developers, one of the passed-over developers requested the records of the BDC’s deliberations proceeding this final recommendation. In response to the BDC’s refusal to release documents and minutes of meetings relevant to this final recommendation, based on the BDC’s assertion that as a “private, non-profit corporation” it was not subject to the Maryland Open Meetings Act (OMA) or Maryland Public Information Act (MPIA), the spurned developer sued the BDC to force the release of the requested records, claiming that the BDC was a “public body” subject to the OMA and an “instrumentality” of the City subject to the MPIA.¹⁵³

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¹⁵¹ Formed on October 7, 1991 of a merger of three non-profit corporations into the “City of Baltimore Development Corporation.” SDAT, F3365 / 1862. See *infra* n. 161 for specific references.

¹⁵² *120 W. Fayette St.*, 407 Md. at 259.

¹⁵³ Brief of Petitioner at 2, *Carmel*, 395 Md. 299 (2006) (2006 WL 1811834).

Superblock Litigation I: the Carmel case

In *City of Baltimore Development Corporation v. Carmel Realty Associates*, the Court of Appeals held that the BDC was subject to both the OMA and MPIA. 359 Md. 299 (2006). The court focused on the BDC’s authority to exercise eminent domain to implement the Superblock Urban Renewal Plan, authority that the BDC enjoyed solely as a part of the City’s exercise of its eminent domain powers. *Id.* at 317. Since eminent domain, even if legally permitted, threatened a constitutionally protected right to private property, the court emphasized that the process of exercising eminent domain “should be even more open to public scrutiny, especially when the property might ultimately be conveyed to other private parties.” *Id.* at 317-18, 333. The court quoted Justice O’Connor’s dissent in *Kelo* that called for “[a]n external, judicial check on how the public use requirement is interpreted,” notwithstanding the considerable deference the courts owe legislatures to determine “what governmental activities will advantage the public,” because of the difficulty of determining “the line between ‘public’ and ‘private’ property use.” *Id.* at 317 (quoting *Kelo*, 545 U.S. at 496-97, (O’Connor, J., dissenting)). This focus on the uniquely public power of eminent domain authority recognized that it is the key benefit that government redevelopment corporations provide their private partners, and that that potential for abuse of this public power by private interests requires a concomitant need for transparency in the exercise of eminent domain.

The court held that the BDC was a “public body” as defined by the OMA because the mayor controls the nomination, appointment, and removal of directors from the BDC’s board under the BDC’s 1997 bylaws. *Carmel*, 395 Md. at 326. The court rejected the BDC’s claim that the method of creation of the BDC – as a private corporation, and not by statute, charter provision, ordinance, executive order or other direct governmental act – was the sole determinant of qualification as a “public body” under Section 10-502(h)(1)(i) of the OMA. *Id.* at 323, citing MD. ANN. CODE, STATE GOV’T, §10-502(h)(1)(i). Instead, the court held that the plain meaning of Section 10-502(h)(2)(i) of the OMA expanded the definition of “public body” subject to the OMA to include entities appointed by a chief executive of a political subdivision. *Id.* at 324, citing MD. ANN. CODE, STATE GOV’T, §10-502(h)(2)(i). The BDC therefore qualified as a “public body” not only due to the mayoral control but also because of its numerous public traits,

including the broad range of responsibilities performed by the BDC for the City and the City's contribution of over 80% of the BDC's budget. *Id.* at 329-30.

These same public traits led the court to declare that the BDC was subject to the MPIA as an "instrumentality" of the City because the court found that "[t]he BDC was clearly established, and is maintained, as an agent or tool of Baltimore City in order to accomplish the City's ends or purposes." *Id.* at 334. Moreover, the City retained sufficient substantial control over the BDC to render the method of creation of the BDC (as a private corporation and not by a governmental act – although the court noted that three of the four founding directors were members of the mayor's staff (*Id.* at 308 n. 6, 323)) irrelevant in holding that the BDC was an instrumentality of the City, further confirmed by the City's use of the City Solicitor to defend the BDC. *Id.* at 335-36.

Central to the *Carmel* court's reasoning was the intent of the General Assembly in enacting both the OMA – to "assure the public right to observe the deliberative process and the making of decision by the public body at open meetings" (*Id.* at 321 (quoting *New Carrollton v. Rogers*, 287 Md. 56, 72-73 (1980))) - and the MPIA – to give citizens "wide-ranging access to public information concerning the operation of their government" (*Id.* at 333 (quoting *Caffrey v. Department of Liquor Control for Montgomery Co.*, 370 Md. 272, 305 (2002) (citations omitted)(quotations omitted)). To assure compliance with this legislative intent, the judiciary must construe these statutes "so as to frustrate all evasive devices." *Id.* at 321 (quoting *New Carrollton*, 287 Md. 56, 72-73 (1980))). "It is, therefore, the deliberative and decision-making process *in its entirety* which must be conducted in meetings open to the public, since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business." *Id.* (italics added). The court evinced frustration at the perceived pattern of attempts by the City and the BDC to evade the requirements of the OMA and MPIA, summing up its systematic and extensive analysis of the application of the OMA and MPIA to the BDC with a table of the public traits of the BDC that visually "demonstrat[ed] the extent to which the BDC has been able to cloak the business of the Citizens of the City of Baltimore behind the veil of a supposedly private corporation." *Id.* at 329-30. This concern to ensure that the ruling leave no wiggle room for the BDC and the City to avoid compliance with the OMA and MPIA reflected not only the specious

arguments of the City and BDC in these proceedings, but also the City’s persistent efforts to exempt its economic development arms from public scrutiny under the OMA and MPIA in a twenty-year cat-and-mouse game with legislators, media organizations, and transparency activists.

Historical Debates over BDC’s Identity as a Public or Private Entity

The creation of the BDC itself may have been partly due to concern with the closed-door operations of the BDC’s predecessor, the Charles Center-Inner Harbor Management Corporation (CC-IH) by members of the City Council. In June 1989, the Council, outraged at CC-IH’s refusal to release the report of its Architectural Review Board on CC-IH’s proposed waiver of Inner Harbor height restrictions for the IBM/T. Rowe Price building at 100 East Pratt Street, slashed the Mayor’s proposed contribution to CC-IH’s budget by 50%.¹⁵⁴ The Council, upset at being forced to choose between granting the height waiver or losing a city employer, sought to change CC-IH’s operating method to permit more discussion earlier in the process, and so put the missing 50% in escrow for CC-IH to request from the Council in six months if it could show improvement (the Council did release the remainder in a supplemental appropriation.¹⁵⁵ The Council’s action occurred just as CC-IH merged with the Market Center Development Corporation to become Center City-Inner Harbor Development, Inc. (CC-IH Development), merging responsibility for the economic development of the central business district and citywide industrial economic development.¹⁵⁶ Within months of the Council’s action, Al Copp, the head of CC-IH Development who pushed for the IBM/T.Rowe Price height waiver resigned, and his successor (and predecessor), Walter Sondheim, Jr., changed his decades long-advocated view that CC-IH, as a private entity,

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¹⁵⁴ Paul D. Samuel, “Copp’s budget sliced in half by City Council,” *Daily Record*, June 27, 1989, pp. 1, 4; Michael Fletcher, “BEDCO head to oversee Center City: Schmoke move a step toward merging agencies,” *Sun*, November 8, 1990; Dale Edward Thomson, *Political and Popular Control of Baltimore, Maryland’s Quasi-Public Economic Development Corporations from 1965 to 2000*, 196 (Oct. 26, 2000) (unpublished doctoral dissertation, University of Maryland, Baltimore County). On the controversy over the height waiver at 100 E. Pratt Street, Edward Gunts, “Going to the Wall: Though a striking architectural statement, 100 East Pratt spoils Inner Harbor views,” *Sun*, December 1, 1991, 1K.

¹⁵⁵ Samuel, “Copp’s budget,” *supra* n. 154 at 4.

¹⁵⁶ *Id.* at 1. CC-IH merged with Market Center Development Corporation on June 30, 1989 (SDAT, F3149 / 2520).

could close its meetings to the public when he permitted press to attend the meetings of CC-IH’s Architectural Review Board, the catalyst for the City Council’s action.¹⁵⁷

In 1991, a year later, in response to a lobbying effort by media organizations, the General Assembly strengthened the OMA with a broad introductory purpose statement, and with revisions to explicitly cover advisory panels appointed by chief executives of political subdivisions (the provision that the Court of Appeals ruled applied to the BDC in *Carmel*) and to create an Open Meetings Compliance Board to provide advisory opinions of the jurisdiction of the OMA.¹⁵⁸ This revision to the OMA may have survived the opposition of the Maryland Association of Counties and the Maryland Municipal League because of an exception added by the House permitting closed meetings to discuss negotiating strategies by the “public body” before opening bids or awarding a contract.¹⁵⁹ MD. CODE ANN., STATE GOV’T, §10-508(a)(14). Governor Schaefer signed the bill despite the law’s declared intent to cover gubernatorial advisory commissions, but tempered its effect by appointing representatives of quasi-public corporations now subject to the OMA to the newly created three-member Open Meetings Compliance Board – Sondheim, who also served as chair, and Courtney McKeldin, a public-relations manager for the City’s quasi-public Baltimore Area Convention and Visitors Association, Inc. (BACVA).¹⁶⁰ Three months after Schaefer signed the OMA revision, the City incorporated a new entity, the Baltimore City Development Corporation, into which it merged CC-IH and the Baltimore Economic Development Corporation two months later as the City of Baltimore Development Corporation.¹⁶¹ Although this merger was part of Mayor Schmoke’s revision of the City’s economic development policy, the timing

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¹⁵⁷ Edward Gunts and Ann LoLordo, “City architecture board agrees to open meetings to news media,” *Sun*, October 18, 1990, p. 1B; Editorial, “Open meetings victory,” *Sun*, October 18, 1990. Sondheim had resigned as head of CC-IH, ostensibly due to personal opposition to the merger and not over the open meetings issue, but returned as temporary head after his successor, Al Copp, resigned. Ted Shelsby, “Merger of city development agencies studied,” *Sun*, November 9, 1990; Stephanie Shapiro, “Downtown’s perfect partner; Keeping the charm in Charm City is Laurie Schwartz’s constant job,” *Sun*, May 30, 1993.

¹⁵⁸ 1990 Acts, c. 655, renumbering and amending Md. Code Ann. STATE GOVT, §§10-501 – 10-512. John W. Frece, “House passes bill to curb secret sessions,” *Sun*, April 6, 1991.

¹⁵⁹ John Frece, “House panel revises bill on open meetings,” *Sun*, April 4, 1991.

¹⁶⁰ Frece, “House passes bill,” *supra* n. 158; Frece, “House panel revises bill,” *supra* n. 159; John Frece, “Sondheim heads panel on meetings,” *Sun*, Aug. 7, 1991 (McKeldin, the daughter-in-law of former Baltimore mayor and Maryland governor Theodore McKeldin, also had headed Republicans for Schaefer when Schaefer ran for governor while Baltimore’s mayor).

¹⁶¹ SDAT F 3356 / 954 (August 30, 1991); F 3356 / 1862 (October 7, 1991).

suggests that a desire to avoid the just-enacted expanded reach of the OMA influenced the decision to create a new corporate entity instead of retaining the old entity.¹⁶²

Any hope by transparency activists that this expanded OMA definitively established its jurisdiction over quasi-public entities like the BDC and CC-IH was quashed by a 1996 decision by the Open Meetings Compliance Board (Compliance Board). Upholding BACVA’s claim to not be a “public body” subject to the OMA, the Compliance Board (including McKeldin, a BACVA employee) focused on the method of creation of BACVA, incorporated “just as any other private corporation” and not created by a “formal” government act. Open Meetings Compliance Board Opinion No. 96-14 at 198 (Dec. 19, 1996).¹⁶³ The Compliance Board emphasized that the BACVA board, thirteen years after incorporation, voluntarily granted the mayor the power to appoint and control the board, and that the BACVA directors – both those who ceded direct control to the mayor and those appointed by the mayor - had a fiduciary duty to the corporation, not to the City. *Id.* at 200. Therefore, the mayor’s appointment of the entire board of directors, the City’s contribution of most of BACVA’s funds, and the essential shared goals of BACVA and the City was irrelevant, according to the Compliance Board. *Id.* at 200. Moreover, the Compliance Board ruled that “board” as used by the revised OMA referred only to “governmental boards” and not to corporate entities with “boards” of directors like BACVA or the BDC, based on the General Assembly’s rejection of the original definition of “public body” as “any multimember governing body of any corporation,” replaced in the final 1991 bill by “any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State.” *Id.* at 199-200. Nonetheless, the Compliance Board recognized the legalistic contortions of its interpretation in concluding that BACVA “is in reality an instrumentality of City policy,” even though not legally subject to the OMA, and so “wise policy” called for BACVA to be more transparent to the public. *Id.* at 200.

This contradiction between the “reality” and the Compliance Board’s legalistic interpretation of the OMA’s reach to privately incorporated entities serving public purposes returned to the spotlight three months later, in March 1997, when budget cuts

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¹⁶² Fletcher, “BEDCO head,” *supra* n. 154; Shelsby, “Merger,” *supra* n. 157.

¹⁶³ McKeldin did not recuse herself, although it is unclear if at the time she was still a BACVA employee.

forced the Enoch Pratt Free Library to cut branches. The Library board refused to release minutes of its meetings, asserting its exemption from the OMA and MPIA as a private corporation, not a “public body,” along the lines of the Compliance Board’s 1996 ruling.¹⁶⁴ That same spring a bill introduced in the Maryland Senate to expand the OMA’s definition of “public body” to include “A private entity that, during the fiscal year in which a meeting is held: 1. will receive the proceeds of a state bond; or 2. receives funding in the state budget.”¹⁶⁵ Although this bill, presumably aimed at the Pratt but applicable to other quasi public entities like the BDC, ultimately did not pass the Assembly, the Library controversy led to a ruling of an administrative judge of the Baltimore City Circuit Court that the Enoch Pratt Library was a “public body” subject to the OMA.¹⁶⁶ *Friends of the Enoch Pratt Library Saint Paul St. Branch v. Board of Trs. of the Enoch Pratt Free Library*, Case No. 97238001 CC5338 (Circuit Court, Baltimore City, Sept. 18, 1997) (Kaplan, J.). The judge ruled that the City’s ownership of all of the Library’s buildings and contribution of over 90% of its budget made the Library a “public body,” an interpretation that contradicted the Compliance Board’s 1996 decision, and that forecast the expansion of the jurisdiction of the OMA to other quasi-public entities including the BDC.¹⁶⁷

Within weeks of this ruling, the BDC amended its bylaws to distance its board of directors from direct mayoral control, likely aimed at reinforcing the BDC’s claim to not be a “public body” subject to the OMA following the logic of the Compliance Board’s 1996 ruling on BACVA.¹⁶⁸ *Carmel*, 395 Md. 299, 325 n. 17. Under the previous bylaws, the BDC board had five members, at least three of whom were mayoral appointed city employees: the Mayor’s chief of staff, the City Director of Finance, and the Commissioner of the Department of Housing and Community Development (DHCD),

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¹⁶⁴ “Pratt proposing extensive changes; Closely guarded plan for ‘megabranches’ worries some patrons,” *Sun*, March 2, 1997, 1B; Jane Ball Shipley, “How we know Pratt left us a public, not a private, library,” *Sun*, March 27, 1997.

¹⁶⁵ Senate Bill 487 (1997) (failed), quoted in *Andy’s Ice Cream, Inc. v. City of Salisbury*, 125 Md.App.125, 153 (1999).

¹⁶⁶ Jamie Stiehm, “Judge rules Pratt can close St. Paul branch; Residents’ lawsuit had delayed closing,” *Sun*, September 17, 1997; Robert Guy Matthews, “Court ruling puts focus on meetings law; Library branch closing raises questions about city boards’ secrecy,” *Sun*, September 21, 1997.

¹⁶⁷ “Library branch must be closed,” *Sun*, September 18, 1997; Matthews, “Court ruling,” *supra* n. 166.

¹⁶⁸ November 4, 1997.

plus the president of the corporation and one additional board member).¹⁶⁹ This organization, nominally independent but effectively mayoral controlled, appears patterned on the composition of the similarly mayor-controlled Board of Estimates, made up of the mayor and two mayoral appointed city employees (the City Solicitor and Director of Public Works), together with the City Council President and Comptroller.¹⁷⁰ Under the amended bylaws, the BDC board expanded to include up to 15 members, of whom only two were mayoral appointed city employees (Director of Finance and DHCD Commissioner), and the board itself elected new members, although from candidates nominated by the mayor, who retained the authority to remove directors directly or through the Board of Estimates. *Carmel*, 395 Md. 299, 325 n. 17. The mayor also selected the chair of the BDC board.¹⁷¹ Although one impetus for the board reorganization was to incorporate more private-sector representatives and make it more business-like (as recommended by a mayoral advisory panel in late 1995, and adopted over the course of the following year by Mayor Schmoke and his new BDC president, M. Jay Brodie, a member of the 1995 advisory panel), the timing of the amended bylaws so soon after the *Enoch Pratt* decision suggested a prophylactic effort to ensure that the BDC appear more “private” and so avoid the jurisdiction of the OMA.¹⁷² By nominally separating the new board from direct mayoral control (an anonymous BDC insider had characterized the original five-member board as not intended to be a “working board,” but only “set up for legal purposes”¹⁷³), the bylaw amendment adopted the logic of the Compliance Board’s 1996 opinion that board members owed a fiduciary duty to the board, not the mayor. This bylaw amendment further codified the formal organization of

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¹⁶⁹ *Carmel Realty Assocs. v. City of Baltimore Dev. Corp.*, No. 24-C-04-008608 at 4 n. 1 (Circuit Court, Baltimore City, June 8, 2005) (Pierson, J), in Brief of Petitioner at App. 10, *Carmel*, 395 Md. 299.

¹⁷⁰ BALTIMORE CITY CHARTER, Art. VI, §1(a).

¹⁷¹ *Carmel Realty Assocs. v. City of Baltimore Dev. Corp.*, No. 682 at 12 (Md.App. Jan. 24, 2006), in Brief of Petitioner at App. 39, *Carmel*, 395 Md. 299. Although Westlaw provides a reporter reference (166 Md.App. 752), this is not available on either Westlaw or LEXIS, presumably because it was unpublished.

¹⁷² Mayor Schmoke initially expanded the board to 11 members (9 private individuals and two city employees). “A close look at BDC,” *Sun*, April 11, 1995; “A message to Schmoke,” *Sun*, April 19, 1995; “A chance to beef up economic efforts,” *Sun*, July 12, 1995; Kevin L. McQuaid, “Schmoke names business leaders to BDC board Key step in city’s efforts to revamp troubled agency - New panel faces uphill battle to keep firms in Baltimore,” *Sun*, November 02, 1995; “How Brodie would revive city,” *Sun*, January 28, 1996, p. 6; Jay Hancock, “Rebuilding BDC Brodie: Nine months into the job, the latest president of Baltimore Development Corp. hopes getting the small details right will lead to big results,” *Sun*, September 29, 1996.

¹⁷³ McQuaid, “Schmoke,” *supra* n. 172.

the BDC around the board initiated in 1996 by Brodie, reinforcing the shuffle in the BDC's hierarchy whereby the president, and employees, reported to the board instead of to the mayor directly as originally structured.¹⁷⁴ Indeed, the City later used a similar argument – that the BDC was not a “public body” because the BDC board itself, not the mayor, elected new board members - in its *Carmel* appellate brief. Brief of Petitioner at 12 n. 1, *Carmel*, 395 Md. 299.

The very next year, 1998, in what appears to have been a response to the confusion created by the dissonant rulings by the Compliance Board on BACVA and the Circuit Court on the Library, a newly-appointed Baltimore state senator, Joan Conway, introduced a bill to amend the OMA's definition of “public body” to include “any Maryland corporation that is governed by a governing body at least 50% of whose members are required by the corporation's articles of incorporation or bylaws to be appointees of a public officer or employee.”¹⁷⁵ This bill thus directly reacted to the Compliance Board's ruling that the mayor's effective control of the BACVA board was not determinative of its status as a “public body,” and would have extended the OMA to most quasi-public entities. Open Meetings Compliance Board Opinion No. 96-14 at 200 (Dec. 19, 1996). Indeed the Compliance Board itself wrote a letter urging passage of Senator Conway's bill in order to clarify the reach of the OMA. The Compliance Board's letter noted that the bill “is ... quite modest in the change it brings about,” because boards subject to the OMA retained the option of holding executives sessions for the 14 exemptions provided in the OMA.¹⁷⁶ Although the BDC probably would have relied on the new bylaws to claim exempt status since its board was self-elected, the mayor's control of the candidates on whom the board could vote likely would qualify as “appointees,” triggering OMA jurisdiction. This potential argument was not resolved because the bill, despite passing the Senate, failed to clear the House Judiciary

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¹⁷⁴ “How Brodie would revive city,” *supra* n. 172.

¹⁷⁵ Senate Bill 340 (1998) (failed), quoted in *Andy's Ice Cream*, 125 Md.App. at 153-54. The full bill is in Brief of Petitioner at App. 53-55, *Carmel*, 395 Md. 299.

¹⁷⁶ Letter of Open Meetings Compliance Board to Senator Blount, Chair of the Senate Economic and Environmental Affairs Committee, February 25, 1998, in Brief of Petitioner at App. 49, *Carmel*, 395 Md. 299.

Committee by one vote.¹⁷⁷ This result displayed the power of the BDC and other quasi-public entities in resisting transparency requirements, but also revealed the determination and strength of proponents of open government.

The Court of Special Appeals injected some clarity in a decision of the following year. *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md.App. 125 (1999), cert. denied 353 Md. 473 (1999). In considering the claim of the Salisbury Zoo Commission, as a private corporation, to be exempt from the OMA, the court noted that the Court of Appeals, a decade earlier, had highlighted the lack of Maryland legislative or common law definitions of quasi-public entities while underscoring that the hybrid nature of such entities required analysis of an entity's operation, not just its formal organization. *Id.* at 157 n. 10 (discussing *Potter v. Bethesda Fire Department, Inc.*, 309 Md. 347 (1990)). Since a "private corporate form alone does not insure that the entity functions as a private corporation," the Court of Special Appeals held that the "Zoo Commission's corporate cloak ... is illusory" because the Zoo Commission had sufficient public elements to render it subject to the OMA. *Id.* at 154-55. The court focused on the degree of control exercised by the Salisbury's mayor and council, in particular over the Zoo Commission's actions, budget, bylaws, appointment and termination of board members, and dissolution. *Id.* at 158. This focus on the governmental control instead of the corporate form of the Zoo Commission echoed the *Enoch Pratt* ruling, while implicitly critiquing the Compliance Board's 1996 BACVA opinion. The court did state that the Zoo Commission had more public attributes than BACVA, especially the directness of control by politicians over the Zoo Commission in contrast to the greater autonomy enjoyed by BACVA. *Id.* at 152-53. Nevertheless, the court challenged the Compliance Board's use of the changed language in the 1991 OMA revision to determine legislative intent, noting the difficulty of determining the precise reason for a change in language of the 1991 revision or for the failure of the 1997 and 1999 bills. *Id.* at 153-54. While accepting the Compliance Board's definition of the OMA as applying to "governmental or quasi-governmental 'board[s], commission[s], or committee[s]'," the court rejected the Compliance Board's assertion that that this definition excluded all "publicly funded

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¹⁷⁷ Gerard Shields, "2 bills aim to bring BDC into the open - City senators want agency's meetings accessible to public - Mayor opposes measures, Proposals' critics say business dealings require secrecy," *Sun*, February 21, 2000.

private corporations.” *Id.* at 154 (quoting Compliance Board Opinion 96-14 at 199, quoting MD. CODE ANN. STATE GOV’T §10-502(h)(2)). Instead, the court emphasized that quasi-public entities would be subject to the OMA, based on “a determination of the extent to which the controlled entity actually carries on public business,” because to exempt all private corporations would be “an invitation to great mischief” by permitting “the government to operate outside of the view of the public through private corporations.” *Id.* at 154. Yet despite the precedential and binding nature of this ruling, unlike those of the Compliance Board or the Circuit Court, it only partly clarified the limits of the OMA’s jurisdiction over quasi-public entities like the BDC since it was limited to the circumstances of Salisbury’s Zoo Commission.

Two attempts to demarcate the OMA’s jurisdiction more precisely were introduced in the Maryland Senate the next year, presumably partly in response to this analysis of the Court of Special Appeals. Senator Conway reintroduced her 1998 bill clarifying that any corporation with bylaws requiring at least half of the board to be public appointees be subject to the OMA.¹⁷⁸ Senator Della, peeved at the BDC’s intransigence in releasing information about negotiations over the waiver of height restrictions and tax-abatement subsidies for the Ritz-Carlton development in his Federal Hill district, introduced a bill to include the BDC specifically among the entities covered by the OMA and the MPIA.¹⁷⁹ Supporters of the bill included business owners threatened with displacement by the Westside Superblock project and neighbors of proposed projects elsewhere in the city, who sought increased transparency in the negotiations and planning process for these major economic development projects.¹⁸⁰

The BDC lobbied hard against both bills, warning that the proposed transparency requirements would hamper the efficacy of the BDC’s economic development efforts for the city, render them uncompetitive, and hurt the city’s economy. The chair of the BDC

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¹⁷⁸ Senate Bill 608 (2000) (failed), in Brief of Petitioner at App. 56-58, *Carmel*, 395 Md. 299. Shields, “2 bills,” *supra* n. 171; Timothy Wheeler, “Legislators urged to support move to open BDC meetings; City business owners express frustration,” *Sun*, March 3, 2000; *Carmel*, 395 Md. at 328.

¹⁷⁹ Senate Bill 241 (2000) (failed), in Brief of Petitioner at App. 65-67, *Carmel*, 395 Md. 299. Shields, “2 bills,” *supra*, n. 171; Wheeler, “Legislators,” *supra* n. 172; *Carmel*, 395 Md. at 328; Kevin McQuaid, “Neighbors to fight hotel if height exceeds 71 feet,” *Sun*, March 18, 1999. The height restrictions derive from the 1975 Land Disposition Agreement between the site’s previous owner, Bethlehem Steel, and the city. Kevin McQuaid, “Ritz-Carlton developer to ask for height variance,” *Sun*, March 26, 1999.

¹⁸⁰ Wheeler, “Legislators,” *supra* n. 178.

board, Roger Lipitz, asserted that subjecting the BDC to the OMA would be futile since “virtually the entire agenda that the BDC’s Board” considers would qualify for the OMA exemption for discussion of economic development or real estate purchases for public purposes, and that the appropriate venue for public knowledge of negotiations and planning was when the City Council and or Board of Estimates voted on the BDC’s proposals.¹⁸¹ BDC President Brodie echoed these points in his testimony before the Senate Economic and Environmental Affairs Committee, arguing that using the OMA exemption would deter private-sector leaders from serving on the BDC board, since a majority of the board would have to approve any executive sessions and because board meetings would be fractured by having to separate discussions between open and closed meetings. Brodie asserted that actions funded by private contributions to the BDC should be exempted from the OMA, and that public funded operations were supervised by the City Council and Board of Estimates.¹⁸²

Neither Lipitz nor Brodie expressed concern that the commingling of private and public funds might justify additional transparency and accountability requirements to ensure that private interests did not leverage small contributions to control the BDC’s publicly funded operations. Despite the initiative of Brodie and Lipitz to create a private economic development fund for the BDC starting in 1997, the City’s annual contribution to the BDC’s budget remained almost 90%, with the remainder split between other public sources and private contributions.¹⁸³ Nor did Brodie or Lipitz address the concern that postponing public access to the planning and negotiation process until a final plan was proposed to the City Council or Board of Estimates drastically reduced the opportunity to shape the final proposal with alternatives – the concern expressed by Council members with CC-IH’s forcing the height waiver for the IBM/T. Rowe Price building at 100 East Pratt Street in 1989, as well as by Enoch Pratt patrons seeking to participate in how the

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¹⁸¹ Letter of Roger Lipitz to Senator Blount, March 6, 2000, in Brief of Petitioner at App. 68-69, *Carmel*, 395 Md. 299.

¹⁸² Testimony of Jay Brodie to Senate Economic and Environmental Affairs Committee, March 9, 2000, in Brief of Petitioner at App. 62-63, *Carmel*, 395 Md. 299.

¹⁸³ Hancock, “Rebuilding,” *supra* n. 168. The City, in its *Carmel* brief, did not “quarrel” with the plaintiffs’ assertion that “the BDC receives approximately 87% of its budget from the City,” at the time of the *Carmel* litigation (2004-06). Brief of Petitioner at App. 68-69, *Carmel*, 395 Md. 299; *see also Carmel*, 395 Md. at 330 (“over 80%”). In 1997, the *Sun* reported that the City provided “all of the agency’s \$2.5 million operating budget.” Robert Guy Matthews, “Court ruling puts focus on meetings law; Library branch closing raises questions about city boards’ secrecy,” *Sun*, September 21, 1997.

Library structure its budget cuts. Most surprising was Brodie’s assertion that requiring a majority of board members to approve an executive session, or to structure the board agenda to separate topics to be discussed in open or closed sessions, would deter private sector leaders from participating. The speciousness of this argument echoed the contradiction between the strenuous opposition by the BDC and City to these bills as crippling economic development efforts on the one hand, and statements by Brodie and Mayor Schmoke that extending the OMA to the BDC would have little to no effect given the OMA exemption for economic development efforts on the other.¹⁸⁴

The full-court press by the BDC and the City succeeded in killing the BDC-specific bill in the Senate committee, but Senator Conway’s bill passed the same committee and the Senate (the unanimous vote against the BDC-bill included five sponsors of Conway’s bill, suggesting that the defeat of the BDC-specific bill had less to do with ideological opposition and more to do with procedural strategy).¹⁸⁵ Nevertheless, Conway’s bill died in the House of Delegates, just as its previous incarnation had in 1998.¹⁸⁶

Perhaps emboldened by this success, at the end of 2000, the newly elected Mayor O’Malley expanded his direct influence on the BDC board by appointing his newly appointed deputy mayor for economic and neighborhood development, Laurie Schwartz, to serve on the BDC board (presumably by having the BDC board elect her upon his nomination).¹⁸⁷ Schwartz had previously founded and directed another city quasi-public

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¹⁸⁴ Wheeler, “Legislators,” *supra* n. 178; Shields, “2 bills,” *supra*, n. 177; Matthews, “Court ruling,” *supra* n. 183.

¹⁸⁵ Brief of Petitioner at 18-19, *Carmel*, 395 Md. 299; “Senate passes bill to expand sunshine law,” *Sun*, March 21, 2000. The Senate Committee vote reporting the BDC-specific bill (S.B. 241) unfavorably included Senators Conway, Frosh, Pinsky, Dyson, and Sfikas, all sponsors of Conway’s bill (S.B. 608). S.B. 608, in Brief of Petitioner at App. 56, *Carmel*, 395 Md. 299, and Senate Economic and Environmental Affairs Committee Voting Report on S.B. 241, in Brief of Petitioner at App. 64, *Carmel*, 395 Md. 299.

¹⁸⁶ Brief of Petitioner at 18, *Carmel*, 395 Md. 299.

¹⁸⁷ Gerald Shields, “O’Malley names 5 deputy commissioners,” *Sun*, December 3, 1999, 1C; “The Nose: BDC – What the Mayor Says,” *City Paper*, posted May 21, 2001, available at <http://www2.citypaper.com/news/story.asp?id=3098>. Schwartz was on loan from the DP for her first six months as deputy mayor (with the DP paying her salary), until she permanently transferred to deputy mayor’s position. Gerald Shields, “Former partnership head to stay as deputy mayor; Laurie Schwartz says job helps her build on commitment to city,” *Sun*, July 8, 2000, 12B. Schwartz served as interim chair of the BDC from November 2001 through January 2002. Meredith Cohn, “City’s development agency seeks new board chairman – Lipitz resigned post in October after helping turn around BDC,” *Sun*, November 14, 2001; Andrea K. Walker, “Williams named chairman of BDC – He vows to press for development beyond the harbor,” *Sun*, January 15, 2002. After Schwartz left City Hall to take over the East Baltimore Development Inc. in December 2002, O’Malley’s chief of staff, Clarence T. Bishop, took over her portfolio

entity, the Downtown Partnership (DP), for which she had asserted exemption from the OMA as a private entity, even though 85% of the DP's budget came from a municipal special district tax.¹⁸⁸ In April 2001, O'Malley added his director of Minority Business Development to the BDC board, so that four of the sixteen board members were at-will employees of the mayor. O'Malley defended his increased direct control over the BDC board as providing accountability for the BDC - "the board is controlled by a publicly elected mayor" - even as he defended the BDC's claimed exemption from the OMA.¹⁸⁹ Indeed, he echoed the Compliance Board's 1996 analysis that BACVA was "in reality an instrumentality of City policy" in describing the BDC's status - "How 'quasi' has it ever been? My gut reaction is that they'd better [vote with me] or they'd better find another board to sit on."¹⁹⁰

The issue of mayoral control over a quasi-public corporation was central to the Compliance Board's analysis when it re-examined BACVA's status under the OMA in 2003 in light of the *Andy's Ice Cream* decision. Open Meetings Compliance Board Opinion No. 03-7 at 291 (June 6, 2003). The Compliance Board interpreted the *Andy's Ice Cream* ruling extremely narrowly, ignoring the Court of Special Appeals' emphasis on the purpose of the OMA and concern that governments not "use the private corporation form as a parasol to avoid the statutorily-imposed sunshine of the Open Meetings Act." *Andy's Ice Cream*, 125 Md. App. 155 (quoted in Compliance Board Opinion No. 03-7 at 289). The Compliance Board limited its analysis to whether the City of Baltimore had less "direct and ongoing" control over BACVA than the City of Salisbury had over the Zoo Commission, instead of considering if the degree of control that the City of Baltimore exercised was sufficient to trigger compliance with the OMA.

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of economic and neighborhood development. Eric Siegel, "Deputy mayor to head biotech park effort; Schwartz to leave post for interim appointment," *Sun*, November 21, 2002, p. 3B; John Fritze, "Dixon names top City Hall staff, selections suggest continuity with O'Malley agenda," *Sun*, December 7, 2006. Bishop subsequently joined the BDC board, becoming chair by November 2006. Jill Rosen, "BDC aims to protect secrecy - Open-meetings rule to have little effect, chairman suggests," *Sun*, November 15, 2006.

¹⁸⁸ The Downtown Partnership was originally incorporated as the Charles Street Management Corporation on December 12, 1983 (SDAT F2623 / 2952), with its name changed on February 23, 1990 to the Downtown Partnership of Baltimore, Inc. (SDAT F3219 / 688). Stephanie Shapiro, "Promoting the life of the city; Campaigner; For 15 years, Laurie Schwartz has worked tirelessly for the revitalization of Baltimore," *Sun*, March 30, 1997, 3K. Schwartz refused to reveal the salaries of two public safety officers hired by DP. William Zorzi, Jr., "Police major is hired to run special patrol," *Sun*, December 15, 1992.

¹⁸⁹ "The Nose: BDC," *supra* n. 187; Shields, "2 bills," *supra*, n. 177.

¹⁹⁰ COMPLIANCE BOARD OPINION NO. 96-14, at 200; "The Nose: BDC," *supra* n. 187.

Compliance Board Opinion No. 03-7 at 291, 292 n. 12. Within this framework, the Compliance Board viewed the mayor’s control of the appointment of the BACVA board and chair as less than the “explicit control” that Salisbury had over the Zoo Commission, which could be dissolved by Salisbury at will, whereas BACVA’s corporate articles provided for perpetual succession so that the BACVA board had control corporate governance. *Id.* at 291-92. The Compliance Board ruled that the City’s contribution of the vast majority of BACVA’s budget (89% of BACVA’s 1999 fiscal year proposed operations¹⁹¹) was irrelevant given that the mayor had “to rely on the good will of the board to achieve [Baltimore]’s objectives” because of the limited “direct and ongoing control ... built into the articles of incorporation and by-laws” of BACVA – merely the power to appoint the entire BACVA board, which included a member of the City Council. *Id.* at 291, 292 n. 12. BACVA’s exempt status was so clear to the Compliance Board that it did not repeat its prior statement that BACVA was “in reality an instrumentality of City policy” (Compliance Board Opinion No. 96-14 at 200), instead declaring that the mayor’s control of appointments to the board was insufficient to transform “BACVA into a City instrumentality.” Compliance Board Opinion No. 03-7 at 292.

The Compliance Board did not repeat its prior interpretation of the failed attempts to revise the OMA in the General Assembly, perhaps due to the cold water thrown on that practice by the Court of Special Appeals in *Andy’s Ice Cream*. However, the Compliance Board did cite BACVA’s argument supporting its claim to maintain its exemption that the General Assembly had decided not to revise the OMA in light of *Andy’s Ice Cream*. *Id.* at 286. The following year, 2004, the General Assembly did consider three bills to tighten the OMA – i) to remove the exemption for “executive function” meetings meant for administrative housekeeping in response to perceived abuse of this exemption; ii) to expand the definition of “public body” to include “a multimember board, commission, or committee” whose members were appointed by an “official subject to the policy direction of the Governor or chief executive of a political subdivision” (previously only if directly

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¹⁹¹ Antònia Casellas, “Moving from Decline to Revival in Post-Industrial Cities: An Examination of Why Baltimore’s Tourism Strategies Do Not Work,” paper prepared for the International Urban Fellows Program, Institute for Policy Studies, Johns Hopkins University, 36 (2002), available at <https://jscholarship.library.jhu.edu/handle/1774.2/32584>.

appointed by Governor or chief executive) to incorporate advisory panels appointed by a department head; and iii) to clarify the standing to sue for infringement of the OMA in light of a recent court decision limiting standing to individuals “affected adversely” by the alleged infringement.¹⁹² Although many, including Sondheim, recognized the potential for abuse of the “executive function” exemption which did not require publication of issues to be discussed, even the media industry failed to rally for the bill for fear it would harm legitimate uses and called instead for a study of how the exemption had been used.¹⁹³ The other two bills, which significantly expanded the reach of the OMA, especially in explicitly removing any standing requirement, both passed overwhelmingly and became law, signifying the General Assembly’s continued commitment to the principles of public transparency.¹⁹⁴

A similar concern about the perils of backroom dealings led two City Councilmen to propose bills requiring greater transparency and accountability by the BDC, echoing the Council’s frustration with the BDC’s predecessor fifteen years earlier. Incensed by the BDC’s sale of two properties to private developers for less than half of their appraised value, Councilman Curran conducted investigations revealing that one of the developers owed the City over \$150,000 in back rent, taxes and penalties, and that the BDC had lowered the price on one parcel to reflect the city-owned alley bisecting the parcel, only to transfer the alley to the developer for free after the sale.¹⁹⁵ Curran criticized the BDC’s justification that the appraisals were out of date (2-3 years between appraisal and sale)

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¹⁹² Tricia Bishop, “Open-meetings bill meets resistance; Media group, others say measure needs more study,” *Sun*, March 19, 2004; “State Senate OKs bills expanding Open Meetings Act,” *Sun*, February 18, 2004, 4B; Tricia Bishop, “Bill to clarify Open-Meetings Act gets big show of support at hearing; proposal would remedy ruling limiting lawsuits,” *Sun*, February 5, 2004.

¹⁹³ Bishop, “Open-meetings bill,” *supra* n. 192.

¹⁹⁴ Acts 2004, c. 440 (expanding definition of “public body” in MD. CODE ANN., STATE GOV’T §10-502(h)(2)); Melissa Harris, “Law helped open meetings; Statute changes, precedent end advisory panel’s closed sessions,” *Sun*, December 2, 2005, p. 1G. The bill clarifying standing requirement passed despite the Governor’s veto. David Nitkin and Andrew Green, “Lawmakers override veto on reform bill,” *Sun*, January 12, 2005, 1A.

¹⁹⁵ One parcel sold for \$609,000 after a \$1.29 million appraisal (47% reduction), while the other sold for \$750,000 after a \$1.96 million appraisal (38% reduction). Doug Donovan, “Deals for city-owned lots questioned; \$2 million below appraisal accepted by BDC for land; Councilman questions sale of city-owned lots at below appraised value,” *Sun*, July 3, 2005, 1A; John Fritze, “Council panel decries sale of lots below appraisals; BDC criticized for deal with indebted developer,” *Sun*, September 13, 2005; Stephen Janis, “Mobtown Beat: Hands Off Policy: City Councilman Questions the City’s Laissez-Faire Approach to the Baltimore Development Corp.,” *City Paper*, posted online October 12, 2005, available at <http://www2.citypaper.com/news/story.asp?id=11013>.

and introduced a bill requiring an appraisal of all City properties within the six months prior to disposition.¹⁹⁶ Curran’s bill would have merely codified existing City policy, which not only the BDC but also the Board of Estimates (including the Comptroller, whose office had proposed this policy) had ignored in these sales.¹⁹⁷ Nonetheless, after the BDC joined the Departments of Public Works and Housing and Community Development in opposing the bill, despite a favorable report from the City Solicitor, the bill languished in the Council for two years before failing in 2007.¹⁹⁸

The other Council bill, which became law, more clearly bound the BDC within the City’s bureaucratic web by subjecting the BDC to compliance with the Baltimore City Public Ethics Code (Article 8 of the Baltimore City Code).¹⁹⁹ This bill was most likely inspired by the BDC’s chief operating officer, Sharon Grinnell, who left to work for one of the developers whose bargain purchase of city land was investigated by Councilman Curran, a property that Grinnell had supervised as the BDC’s west-side coordinator.²⁰⁰ The BDC had previously agreed to abide by the Ethics Code, even as it claimed that the code “does not technically apply” to the BDC.²⁰¹

BDC v. Carmel: Conclusion to Debate over BDC’s Public/Private Status

It was against this backdrop of cat-and-mouse attempts to increase transparency in quasi-public entities and efforts by those entities to circumvent broader definitions of “public” entities that the owners of properties to be condemned for the Superblock redevelopment sued the BDC for using closed meetings to determine its final recommendation to the Board of Estimates on how to develop the Superblock. In June of 2005, the trial court ruled in favor of the BDC, following the Compliance Board’s interpretation of *Andy’s Ice Cream* in its 2003 decision that viewed the Salisbury Zoo

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¹⁹⁶ Baltimore City Bill 05-0254 (failed); Janis, “Mobtown Beat: Hands Off Policy,” *supra* n. 195.

¹⁹⁷ “The other hotel project,” *Sun*, August 7, 2005, 4C.

¹⁹⁸ Baltimore City, Bill 05-0254, Legislative History, available at <http://legistar.baltimorecitycouncil.com/detailreport/matter.aspx?key=2537&mode=print>.

¹⁹⁹ Baltimore City, Bill 05-0244 (signed by Mayor on December 14, 2005 as Ordinance 05-174), Legislative History, available at

<http://legistar.baltimorecitycouncil.com/detailreport/matter.aspx?key=2478&mode=print>.

²⁰⁰ Scott Calvert, “BDC official’s new job may be conflict of interest - Private contracting move concerns watchdog group,” *Sun*, November 12, 2004, p. 3B. Grinnell went to work for Ronald Lipscomb, one of the developers of the Zenith building on the parcel sold for \$750,000 after a \$1.96 million appraisal. Donovan, “Deals,” *supra* n. 195.

²⁰¹ Calvert, “BDC official’s new job,” *supra* n. 200.

Commission’s “public” characteristics to be the minimum requirements of a “public body” – in particular, the degree and type of control exercised by Salisbury over the Zoo Commission. *Carmel Realty Assocs. v. City of Baltimore Dev. Corp.*, No. 24-C-04-008608 at 12-15 (Circuit Court, Baltimore City, June 8, 2005) (Pierson, J).²⁰² In the court’s view, the BDC was not an instrumentality of the City because the City lacked control over the BDC’s creation, budget, actions, existence, bylaws or election of board members. *Id.* at 14-15. The court rejected as irrelevant evidence of the City’s control - including the BDC’s declaration that it was “chartered by the City,” that it “is the economic development agency for the city of Baltimore,” that the City’s website identifies the BDC’s president as a member of the mayor’s cabinet, and that the BDC’s president stated publicly that 87% of the BDC’s annual budget came from the City – because are “statements” and not “operative facts” evidencing the City’s control of the BDC. *Id.* at 4, 14.

The BDC’s response to this ruling, as represented by the Assistant City Solicitor that defended the purportedly “private” nature of the BDC, echoed the revisionists’ views of Robert Moses’s effect on New York City: “The BDC has been doing good work for the city of Baltimore for almost 50 years, and there’s a certain sense at the BDC and here at the city that if it ain’t broken, don’t fix it. This is a good development for the city because it allows a good arrangement to keep going as it’s been going for a long time.”²⁰³ An opponent agreed with the background premise of this statement – that the City was using the BDC – pointing out that “the BDC was represented by a city attorney. I don’t think a city attorney would represent me if I asked them.”²⁰⁴

In reversing the trial court’s ruling, the Court of Special Appeals explicitly rejected the Compliance Board’s interpretation of *Andy’s Ice Cream* as establishing the minimum “direct control” by a government to trigger compliance with the OMA: “The degree of control by the City over the Zoo Commission provides little or no guidance in deciding the question of control by the Mayor and Council over the BDC. Each case must stand or fall on an evaluation of the component parts of the final product.” *Carmel*

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²⁰² In Brief of Petitioner at App. 18-21, *Carmel*, 395 Md. 299.

²⁰³ Sumathi Reddy, “Judge says BDC can continue secret decision-making; Lawsuit by west-side businesses challenged closed-door discussions,” *Sun*, June 10, 2005, 1E.

²⁰⁴ Reddy, “Judge,” *supra* n. 203 (quoting the chief financial officer of the lead plaintiff).

Realty Assocs. v. City of Baltimore Dev. Corp., No. 682 at 10 (January 24, 2006).²⁰⁵ As it had in *Andy's Ice Cream*, the court emphasized the policy intent of the OMA, and MPIA, as expressing the General Assembly's commitment to public access to deliberations of public officials conducting public business. *Id.* at 11. In light of this clear public policy directive, public disclosure enjoys a presumption over the assertion of private corporate status where the degree of governmental control is "fairly debatable, as it is in this case." *Id.* at 13. The court rejected the BDC's argument that the board, not the mayor, elect board members as "technically correct, but visionary," given that all board members must have been nominated by the mayor, who also has the authority to remove members without cause – a view consonant with that expressed by Mayor O'Malley back in 2001. The court rejected the emphasis on the method of creation of the BDC, holding instead that "when a private corporation's own governing documents give a right of control to the government, then the Board's meetings are subject to the Open Meetings Act." *Id.* at 14. Fundamentally, the "BDC is acting as a quasi-public corporation carrying on public business to a degree that is inconsistent with its claim of being a private corporation." *Id.* at 14.

Despite the ruling's clear statement in favor of transparency, however, the Court of Special Appeals took care to soften its effect, emphasizing that "[t]here is no issue of fault-finding or criticism of BDC's management of the urban renewal projects on behalf of Baltimore City," which "benefitted from BDC's efforts" (albeit "at the cost of a huge investment of public funds funneled through BDC by the City"). *Id.* at 13. Moreover, the court hastened to minimize the effects of its ruling, asserting that "[c]ompliance with the Open Meetings Act will not unduly interfere with BDC's operating as a public body" because of the OMA's numerous exemptions permitting closed sessions. *Id.* at 13. Most importantly, the court decided to release the decision without reporting it, stripping it of precedential value so that it only affected the BDC and not the numerous other quasi-public entities in Maryland.²⁰⁶ Despite these limitations, the BDC appealed the decision, with BDC president Brodie justifying secret closed-door meetings as "a very effective mechanism to do economic development," while inadvertently underscoring the

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²⁰⁵ In Brief of Petitioner at App. 36, *Carmel*, 395 Md. 299.

²⁰⁶ John Fritze, "BDC must go public, appeals court says; Ruling opens books, meetings of agency," *Sun*, January 27, 2006; "It's still a duck," *Sun*, March 12, 2006, 22A.

exclusively public nature of the BDC: it is unlike “traditional city agencies,” even though “our single client is the city, and virtually our single [funding source] is the city.”²⁰⁷

A unanimous Court of Appeals disregarded the assertions of the BDC and City that secrecy was a necessary cost to achieve effective economic development and instead forcefully rejected the BDC’s claim not to be a “public body” or “instrumentality” of the City, as discussed above. The definitiveness and detailed analysis of the opinion, which established precedent as a published opinion, contrasted with the gentle rebuke of the unreported opinion of the Court of Special Appeals. This clear statement by the Court of Appeals that public policy favored disclosure was “unprecedented” among state supreme courts in applying “sunshine” laws requiring open meetings to quasi-public development corporations.²⁰⁸ Yet despite the clarity of the ruling, BDC president Brodie quickly contradicted his pre-decision claims that compliance with the OMA and MPIA “would be inhibiting,” instead asserting that the ruling would not cause the BDC to change its operations significantly because “ninety percent of what we do is probably exempt.”²⁰⁹

Superblock Litigation II: 120 West Fayette Street v. Baltimore

Inspired perhaps by Brodie’s apparent intransigence, as well as by the complaints of the businesses to be relocated by the Superblock redevelopment, a majority of the City Council sponsored a bill to require the BDC to comply with the City’s procurement procedures, “as if the [BDC] were an agency or unit of City government,” in February 2007, four months after the Court of Appeals issued its *Carmel* opinion.²¹⁰ This bill would have applied “to every request or solicitation for quotes, bids, or proposals and every contract for the purchase of goods or services or for the purchase, sale,

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²⁰⁷ John Fritze, “City files appeal in BDC case - Officials contend agency not subject to sunshine laws,” *Sun*, March 7, 2006; Stephanie Desmon, “Shining light on private use of city power,” *Sun*, March 12, 2006, 1F.

²⁰⁸ Patience A. Crowder, “‘Ain’t no sunshine’: Examining informality and state open meetings acts as the anti-public norm in inner-city redevelopment deal making,” 74 *Tenn. L. Rev.* 624, 648 (Summer 2007).

²⁰⁹ Desmon, “Shining light,” *supra* n. 197; Jill Rosen, “BDC aims to protect secrecy – Open-meetings rule to have little effect, chairman suggests,” *Sun*, November 15, 2006.

²¹⁰ Introduced on February 26, 2007 by 9 of the 15 Councilmembers. Baltimore City, Bill 07-0607 (failed), Legislative History, available at <http://legistar.baltimorecitycouncil.com/detailreport/matter.aspx?key=3294&mode=print>. The quotation is from proposed new subtitle 39-2 to Article 5 of the Baltimore City Code. Baltimore City Legislative File text, available at <http://legistar.baltimorecitycouncil.com/attachments/1493.pdf>.

development, or redevelopment of property that is made or proposed by the [BDC] or recommended to the City or others by the [BDC].”²¹¹ At a single stroke, this bill would have brought the BDC’s negotiations out of the shadows by publicly defining the procedures and limits of authority of the BDC in advising and contracting for the City, instead of the nebulous authority claimed by the BDC based on unspecified contracts with the City. As importantly, by enmeshing the BDC within the same legal framework that governed all City agencies (echoing the 2005 bill imposing Ethics Code compliance on the BDC and building on the *Carmel* ruling), the bill effectively signaled the end of the BDC’s assertion to act for, but not be part of, City government – to have the authority without the responsibility. As with previous attempts to corral the BDC into the government sphere, however, the BDC and its supporters beat back this effort, with unfavorable reports by the BDC, City Solicitor, and Department of Finance leading to the abandonment of the bill at the end of the Council term that December.²¹² The bill’s opponents likely cited the lawsuit filed against the BDC and City by opponents of the Superblock development the day after the bill was introduced, especially since the City moved for summary judgment a week before the various departments issued the unfavorable reports on the bill.²¹³

This lawsuit, *120 W. Fayette St., LLLP v. Mayor of Baltimore*, 413 Md. 309 (2010), became the second case in which the Court of Appeals confronted the issue of balancing the accountability of the BDC’s redevelopment efforts through increased public transparency against the efficiency of those efforts that the BDC and City claimed required non-disclosure grew out of the Superblock project and the *Carmel* litigation. The opponents of the Superblock sought to expand the “public” realm of the BDC’s redevelopment activities beyond compliance with the OMA and MPIA by challenging the City’s delegation of negotiating authority to the BDC and asserting that the City

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²¹¹ Baltimore City, Bill 07-0607 (failed). The quotation is from proposed new subtitle 39-1 to Article 5 of the Baltimore City Code. Baltimore City Legislative File text, available at <http://legistar.baltimorecitycouncil.com/attachments/1493.pdf>.

²¹² Baltimore City, Bill 07-0607 (failed), Legislative History, available at <http://legistar.baltimorecitycouncil.com/detailreport/matter.aspx?key=3294&mode=print>.

²¹³ The lawsuit was filed on February 27, 2007; the City filed for summary judgment on April 30, 2007 and the various reports on the bill were submitted on May 2 and 4, 2007; the bill failed at the end of the Council’s term on December 5, 2007, with the Circuit Court’s ruling issued on January 18, 2008. *Id.* and *120 W. Fayette St.*, 413 Md. at 322.

failed to conduct the negotiations over the Superblock redevelopment under City Charter provisions requiring the awarding of “public works” contracts to the lowest bidder. *120 W. Fayette St., LLLP v. Mayor of Baltimore*, 413 Md. 309, 322 (2010). The opponents claimed that the BDC’s management of the bidding process for the Superblock redevelopment - including awarding an exclusive negotiating privilege to a specific developer for over two years to prepare a Land Disposition Agreement (Agreement) that changed terms of the original request for proposal (parcels to be developed, sale price, and developer’s partners) - exceeded the “administrative and ministerial” powers legally permissible for the City to delegate to the BDC.²¹⁴ Focusing on the BDC’s status as a privately incorporated, non-statutorily constituted entity lacking the public definition provided to City agencies by the Charter provisions that created them, the opponents challenged the legality of BDC’s exercise of authority on behalf of the City, which “has no direct contract” with the BDC but instead allegedly assigned, without legislative approval, previously executed agreements with predecessors of the BDC to the BDC.²¹⁵ The BDC had usurped “discretionary” authority that only “Charter defined bodies” possessed, alleged the opponents, by selecting the developer and subsequently “massaging” the terms of the project without receiving formal authorization from the City.²¹⁶ The plaintiffs dismissed the Board of Estimates’ final approval of the Agreement as merely “perfunctory” and a “mere rubber stamp” because the Board “was not offered choices or alternatives ... [but] could either approve or reject the plan which it had not participated in developing” but which was “arranged, brokered and contrived by BDC.”²¹⁷ Moreover, claimed the opponents, changing the terms of the project after the bidding process was closed over two years of negotiations with the chosen developer before finalizing the Agreement for the Board of Estimates to approve violated the competitive bidding requirements of the City Charter for “public works.”²¹⁸ The opponents’ case thus centered on the contradiction between the BDC’s assertion of public

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²¹⁴ Amended Complaint at 6-13, *120 W. Fayette St.*, 2009 WL 4889014 (Md. Cir. Ct 2009).

²¹⁵ *Id.* at 4.

²¹⁶ *Id.* at 1, 4, 14, 15; Reply Brief of Appellant at 19, 20-21, *120 W. Fayette St.*, 407 Md. 253 (September 17, 2008).

²¹⁷ Amended Complaint at 13, 14, 15, *120 W. Fayette St.*, 2009 WL 4889014 (Md. Cir. Ct 2009); Reply Brief of Appellant at 19, 20, 23, *120 W. Fayette St.*, 407 Md. 253 (September 17, 2008).

²¹⁸ Amended Complaint at 14, *120 W. Fayette St.*, 2009 WL 4889014 (Md. Cir. Ct 2009).

authority and lack of a public regulatory framework delimiting the BDC's procedures, responsibilities and boundaries.

After the trial court dismissed the case for lack of standing and on the merits, the Court of Appeals intervened to grant *cert* directly before a review by the Court of Special Appeals. *120 W. Fayette St., LLLP v. City of Baltimore*, 405 Md. 290 (2008). The Court of Appeals reversed and remanded the case, holding that the opponents had standing both as taxpayers and as neighboring landowners, and that the trial court's consideration of evidence outside of the pleadings had converted the motion to dismiss into one for summary judgment without giving the opponents the opportunity to engage in discovery. *120 W. Fayette St.*, 413 Md. at 323 (citing *120 W. Fayette St., LLLP v. City of Baltimore*, 407 Md. 253, 262-65 (2009)). On remand, the trial court again dismissed the case on the merits, holding that the BDC's actions were only advisory because the Board of Estimates retained the "ultimate decision-making authority." *120 W. Fayette St.*, 413 Md. at 323-34. The trial court also ruled that the competitive bidding requirements did not apply to redevelopment projects because the City Charter authorized property disposition for redevelopment without competitive bidding and because the Superblock redevelopment was not a "public work" subject to a separate City Charter provision requiring competitive bidding. *120 W. Fayette St.*, 413 Md. at 324.

The Source of BDC's Authority

The Court of Appeals again interceded before the Court of Special Appeals took up the case, this time affirming the trial court's ruling for the BDC and the City. In stark contrast to its *Carmel* opinion that had criticized the attempts of the BDC and City to avoid public scrutiny, and so accountability, the Court now came down on the side of efficiency and effectiveness, and so limited transparency, in public redevelopment projects. The court held that the BDC, as a "public body" under the OMA and MPIA according to *Carmel*, constituted a "suitable board, commission, department, bureau or other agency of the Mayor and City Council" specified by Article II, §15(g) of the City Charter. *120 W. Fayette St.*, 413 Md. at 348-49. As an Article II, §15(g) body, the BDC could receive delegated authority by ordinance from the City to dispose of any land to a private entity for a redevelopment project under Article II, §15(c) of the Charter. *Id.* The

court accepted the City's claim that City Council Ordinance 99-423, which created the Urban Renewal Plan for the Superblock, was the source by which the City Council and Mayor delegated authority for the Superblock redevelopment to the BDC. *Id.* at 346-47; 349. Section 4 of Ordinance 99-423 provided that "the [BDC] acting pursuant to its contract with the Mayor and City Council by and through the Department of Housing and Community Development" (DHCD) will facilitate the interaction of "existing business owners who express an interest in returning to the redeveloped areas ... [with the] developers selected by the City." *Id.* at 347 n. 18 (quoting Ordinance 99-423, Section 4). The court noted that an alternative authorization for the BDC's role lay in Article 13, §2-7(n) of the Baltimore City Code, which permitted DHCD to contract for technical services, "subject to the prior approval of the [Board of Estimates]." *Id.* at 348.

In favoring efficiency over accountability, the court emphasized that "the magnitude and complexity of the role of modern municipal government permits delegation subject to flexible standards as long as the process is not arbitrary and the ultimate decision is rendered by the municipality." *Id.* at 350, 351. The BDC's actions were only "ministerial and administrative," and did not usurp "legislative and discretionary functions vested exclusively in the City or the DHCD," because the court found that "ordinance [99-423] charged the BDC with specific tasks and established protocols for the proposal evaluation process," thereby preventing arbitrary action by the BDC. *Id.* at 350. The Board of Estimates retained ultimate control because the Board "could have rejected the BDC's recommendation and requested that the BDC consider other proposals or re-solicit proposals for the project," and indeed did request the BDC to amend the Agreement to include a cap on City liability for environmental and demolition costs. *Id.* at 353-54. The court distinguished the Board of Estimate's permissible delegation of advisory authority to the BDC from the impermissible authority delegated by the Board to the trustees in *Hughes v. Schaefer*, 294 Md. 563 (1982), where the Board could only approve projects recommended by the trustees, "effectively giving the trustees veto power over the [Board]." *Id.* at 354 (discussing and citing *Hughes*, 294 Md. at 661-62). Yet the *120 West Fayette Street* court failed to note that the *Hughes* court had examined each of the contested agreements to determine if the Board had illegally delegated power to the trustees, and indeed based on that examination of the agreements

the *Hughes* court ruled that the Board had exceeded its authority only in those agreements with a clause restricting the Board to considering only projects previously approved by the trustees, effectively granting the trustees a “prior veto over the City’s power ... [which] the City may not do.” *Hughes*, 294 Md. at 656-62.

This focus on administrative effectiveness by the *120 West Fayette Street* court overlooked the messy reality of the BDC’s actions and structure of its relationship with the City, based on the complicated history of the BDC and its long-held assertion that it was not a public entity. Despite the trial court’s assertion that “Ordinance 99-423, Sections 4 and 5, authorizes the BDC to issue RFPs and details the process, procedure and time frame for the RFP,” *120 W. Fayette St.*, 2009 WL 4889014 (Md. Cir. Ct. Aug. 14, 2009), the ordinance did not do so, as the opponents observed.²¹⁹ Instead, the ordinance only addressed the BDC’s role in Sections 4-6, which merely assigned the BDC three discrete tasks ancillary to the overall Superblock redevelopment: (i) to help existing businesses participate in the redevelopment (Section 4); (ii) to promote preservation of historic architecture by encouraging adaptive reuse (Section 5); and (iii) to include certain interest groups (including local merchants, architecture, preservation, and planning associations) in the redevelopment (Section 6).²²⁰ Although Section 4 referred in passing to “as soon as developers are selected by the City,” it did not describe the procedures for bidding or selection of the developer, instead stating that these sections committed the BDC to perform these three tasks while “acting pursuant to its contract with the Mayor and City Council by and through the [DHCD].” *120 W. Fayette St.*, 413 Md. at 347 n. 18 (quoting Ordinance 99-423, §4).²²¹ The City Council included these three sections into the ordinance not to define the BDC’s overall role, but in an attempt to force the BDC to be more inclusive of the public and stakeholders affected by the redevelopment in these specific areas. Nevertheless, despite quoting Sections 4 and 5, the Court of Appeals accepted the argument of the BDC and City that Ordinance 99-423 delegated specific authority to the BDC within defined parameters. *Id.*

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²¹⁹ Reply Brief of Appellant at 11, 15-16, *120 W. Fayette St.*, 407 Md. 253 (September 17, 2008) (rejecting City’s argument that Ordinance 99-423 delegated power to conduct bid process, focusing on Section 5’s charge to promote “preservation/adaptive reuse of existing buildings”).

²²⁰ Brief of Appellees at Apx 8-30, *120 W. Fayette St.*, 407 Md. 253 (August 28, 2008).

²²¹ The Court of Appeals included the text of Sections 4 and 5, but not 6, although the City’s initial appellate brief included the entire ordinance in the appendix (and the Court of Appeals had included the text of all three sections in its *Carmel* ruling, 395 Md. at 311 n. 8).

More surprising, the court failed to discuss, or even refer to, “the contract” that theoretically defined the BDC’s actions and so limited the BDC to “ministerial and administrative” tasks, a stunning omission in light of the fact that the same court, four years earlier in *Carmel*, had explicitly raised this issue in discussing the BDC’s status as a “public body”:

It is not clear exactly what contract the BDC would be acting “pursuant to” as provided in Section 4 of Ordinance 99-423. The record contains two contracts. The first is dated September 1, 1965 and is between the Mayor and City Council of Baltimore, and one of the BDC’s predecessor companies, Charles Center-Inner Harbor Management, Inc [CC-IH]. The second contract is dated May 26, 2004 and is entitled “COMMUNITY DEVELOPMENT BLOCK GRANT-29 AGREEMENT BETWEEN THE CITY AND CITY OF BALTIMORE DEVELOPMENT CORPORATION.”

Carmel, 395 Md. at 311 n. 7 (capitals in the original). Either of these contracts would present problems as providing sufficient guidance for the BDC in supervising the Superblock development, since the 1965 contract addressed the responsibilities of CC-IH, which had a jurisdiction limited to the Charles Center and Inner Harbor developments that did not extend to the Superblock. The 2004 contract, assuming it addressed the Superblock, would also be problematic as a restraint against the BDC usurping discretionary authority as the BDC had already begun the bidding process a year earlier. The City, in its appellate brief, implicitly recognized the lack of a clearly defined procedure instituted by the City, whether the Mayor and City Council or the Board of Estimates, that bound the BDC – instead placing the BDC in the driver’s seat: “[t]he BDC’s typical practice in connection with redevelopment projects”²²² Yet the BDC’s cult of secrecy had prevented public access to any records until the final *Carmel* ruling in November 2006.²²³

This missing contract had been noted by the *120 W. Fayette St.* trial court on remand, which observed that despite the claims of the BDC and City to be bound by a contract, referred to in Ordinance 99-423, that specified the parameters of the BDC’s responsibilities and the bidding process, “neither party has presented a copy of a contract.” *120 W. Fayette St., LLLP v. Mayor of Baltimore*, 2009 WL 4889014, trial

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²²² Brief of Appellees at 8, *120 W. Fayette St.*, 413 Md. 309 (November 9, 2009).

²²³ Amended Complaint at 4, *120 W. Fayette St.*, 2009 WL 4889014 (Md. Cir. Ct 2009).

order at n. 25 (August 14, 2009). Nonetheless, the Court of Appeals overlooked this evidentiary gap, as the trial court had, and accepted the claims of the BDC and City that this unidentified contract established sufficiently defined standards and limits for the BDC’s actions for the Court of Appeals to hold definitively that “[t]he BDC did not usurp the City’s authority.” *120 W. Fayette St.*, 413 Md. at 352. Remarkably, both courts agreed that despite this missing contract, no genuine dispute of material fact existed to preclude summary judgment for the BDC and City, despite the amended complaint’s assertion that the BDC “has no direct contract with the City.”²²⁴

The Court of Appeals similarly avoided examining the alternative authorization process presented by the BDC and City, under Article 13, §2-7(n) of the Baltimore City Code which empowered DHCD to hire “any private, public, or quasi-public corporation, ... or other legal entity” to provide “technical or specialized services,” “subject to the *prior* approval of the [Board of Estimates].” *Id.* at 348 (emphasis added). Not only did the court ignore the absence of a contract as above, but it also glossed over the requirement that the Board, not the Mayor and City Council, approve the contract *before* execution, breezily asserting that “the [Board] delegated ‘ministerial and administrative’ functions to a nonprofit corporation known as the [BDC],” quoting its earlier statement in its first *120 W. Fayette St.* ruling, which provided no reference to support this claim. *120 W. Fayette St.*, 413 Md. at 318 (quoting *120 W. Fayette St.*, 407 Md. at 258-59). The amended complaint had raised this issue, asserting that the DHCD Commissioner’s consent to assign previous contracts, presumably with CC-IH and other entities, to the BDC was only “allegedly on behalf of the City.”²²⁵ This willingness to overlook the procedural requirements, in stark contrast to the *Hughes* court, underscored the degree to which the Court of Appeals focused on the need to ensure flexibility for government administration as a prerequisite for effective economic development (the recent refusal by courts nationwide to grant foreclosure to banks and investors that fail to produce the contracts evidencing their rights highlights the Court of Appeals’ opposite decision to ignore procedural requirements on broader policy principles).

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²²⁴ *Id.*

²²⁵ *Id.*

This emphasis is clear from the court’s assertion that the Board of Estimates had complete control over the redevelopment project and could have required the BDC to start over. While technically correct, this claim completely ignores the financial and political realities that foreclosed any but the most minimal amendments to the BDC’s recommended Agreement. The Board did not enjoy this freedom of action because voiding the Agreement negotiated over two years (December 2004-December 2006) and restarting the bidding process begun more than three years earlier (October 2003) would have chilled interest by potential developers in any city redevelopment project, reducing the quality and driving up the costs of redevelopment. Moreover, every member of the Board of Estimates was a politician, or an at-will employee of a politician, aware of the political repercussions of scrapping the largest urban renewal project since the Inner Harbor eight years after Ordinance 99-423 initiated the redevelopment.

The City Council had faced this same problem two decades earlier, when forced by CC-IH’s intransigence to approve the IBA/T. Rowe Price building with the height waiver previously negotiated by CC-IH. Although the Council technically had the power to force CC-IH to renegotiate the deal, the Council recognized the tremendous costs, financial and political, of doing so. Instead, the Council held their noses and approved the deal, but then cut CC-IH’s budget in an attempt to prevent future *fait accompli* by having CC-IH communicate with the Council before seeking final approval.²²⁶ If the Council had felt unable to substantially change CC-IH’s proposed agreement, which was for a single building, how could the Board have sent the Superblock redevelopment back to the drawing boards? The court’s citation of the Board’s amendment – the cap on City reimbursement for environmental and demolition costs – ignored the minor nature of this alteration in improving the City’s position. Although this cap provided clarity, it was 25% more than that estimated by the parties, and also effectively halved the sale price.²²⁷ Moreover, the developer could abandon the Agreement at will without penalty during the three years following the Board’s approval of the Agreement, which gave the developer the opportunity to conduct environmental due diligence to confirm the estimated

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²²⁶ See *supra* n. 154, *et seq.*

²²⁷ The BDC gave the \$8 million estimated remediation costs to the Board, which then sought the \$10 million cap, against the \$21 million total price. M. Jay Brodie, Memorandum to Board of Estimates at 3 (November 1, 2007), in Brief of Appellees at Apx 5, *120 W. Fayette St.*, 407 Md. 253 (Aug. 28, 2008); *120 W. Fayette St.*, 413 Md. at 342.

remediation costs before committing to the redevelopment.²²⁸ Indeed the court’s language reflected the Board’s tenuous real power – the Board “requested” this amendment. *120 W. Fayette St.*, 413 Md. at 354. The Board was effectively hamstrung by its role only at the end of the negotiation process, just as the New London City Council found that its similar procedural final approval authority was essentially hollow in influencing NLDC’s implementation of the Council’s redevelopment plan.²²⁹

Nevertheless, the Court of Appeals relied on the formal final approval by the Board in holding that the BDC had not usurped the City’s authority, ignoring the missing contract required under either delegation of authority (Charter Article II, §15(g) or Code Article 13, §2-7) – a contract that might have provided the procedural framework for the BDC’s actions that the City Charter and Code provided City agencies. Although this emphasis on the formal approval echoed Justice Kennedy’s focus on “elaborate procedural requirements” in *Kelo* to justify judicial deference to local government, the Court of Appeals’ willingness to trust the BDC and City, without evidence, that a contract with sufficiently defined terms to guide the BDC in its use of delegated authority existed, without any proof, comes close to Justice Kennedy’s scenario where the “procedures employed [are] so prone to abuse” that a higher standard of judicial scrutiny would be appropriate. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

Superblock Agreement as Sale of Land, Not Contract for “Public Works”

The court similarly disposed of the opponents’ related claim that the BDC violated city requirements for competitive bidding by changing the terms of the project, after the initial RFP competition and before the Board’s final approval, during extended negotiations with the developer to whom the BDC had granted the exclusive negotiating privilege. The court accepted the BDC’s and City’s framing of the redevelopment project, as provided for in the Agreement, to be only a “sale of land for redevelopment” by the City, rejecting the opponents’ argument that the Agreement was a broader transaction that qualified as a “public work” – a contract for an urban renewal project in

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²²⁸ The Board of Estimates approved the Agreement on January 10, 2007 with no liability to either party if the closing did not occur before December 31, 2010. *120 W. Fayette St.*, 413 Md. at 321-22.

²²⁹ See *supra* n. 6 and accompanying text (discussion of New London Council’s inability to control NLDC’s implementation of plan).

which the BDC and City effectively reduced the property's sale price in exchange for requiring the developer to develop the property in a specified manner. *120 W. Fayette St.*, 413 Md. at 330-35. This choice by the court determined its decision, since the court first ruled on the application of the competitive bidding requirements for City "procurement" contracts under Charter Article VI, §11 to urban renewal projects in general by holding that those projects which are sales of City property for redevelopment are not subject to competitive bidding, even as the court refused to exempt all urban renewal projects from competitive bidding requirements. *120 W. Fayette St.*, 413 Md. at 332-34. In reconciling this competitive bidding mandate with the authority granted DHCD under Article II, §15 of the Charter (and Article 18, §2-7(f)(1) of the Code) to dispose of City property for redevelopment without restrictions, the court held that it would be "illogical and unreasonable" to interpret the legislative intent in enacting these two provisions as imposing competitive bidding on DHCD's authority to sell property because competitive procurement bidding seeks the lowest bid, while property sales seek the highest. *Id.*

The court then turned to the particular circumstances of the Superblock project and rejected the opponents' claim that the Agreement qualified as a "public works contract" specifically subject to competitive bidding under Charter Article VI, §11(b) because the Agreement was only a contract to sell property, not to fund redevelopment. *Id.* at 334-45. Noting that the Charter failed to define "public work," the court adopted the definition suggested by the City in the Maryland Prevailing Wage Law: "a structure or work ... that (i) is constructed for public use or benefit; or (ii) is paid for wholly or partly by public money," a dichotomy echoed by the definitions in Black's Law Dictionary and other states' statutory and case law. *Id.* at 335-36 (quoting MD. CODE ANN., STATE FIN. & PROC., §17-201(j) (West 2009)). The court's decision that the Agreement constituted a sale of land determined its negative answer to the "public funds" branch because the court refused to consider land acquisition or business relocation as part of the City's costs, which the court instead held consisted only of the \$21 million sale price less the \$10 million reimbursement cap for environmental and demolition costs so the City would earn at least \$11 million – and therefore no public funds would be expended on the Superblock project. *120 W. Fayette St.*, 413 Md. at 339-45. Although the City retained some control over the development post-sale (affordable housing, new

streetscaping and other requirements), the court held that this did not transform the public incentives (the \$10 million for environmental remediation and demolition) into public “funding” because the developer, not the City, will own the property at the conclusion of development. *Id.* at 343-44. The developer’s ownership of the final redevelopment led the court also to find that the Superblock Agreement did not satisfy the “public use or benefit” branch since the public would have no right of access, or “use,” to the final redevelopment. *Id.* at 338-39. Since the developer controlled the property and right to income from its investment in redeveloping it, the court classified the economic development benefits to the public as “indirect and subsidiary” to the primary benefits accruing to the private developer, and so held that the Agreement’s primary purpose is not for the public “benefit.” *Id.* at 337-38. The court therefore ruled that the Agreement failed to satisfy the public funds or public use/benefit requirements to be a “public works contract” and that the BDC was not required to use competitive bidding for the Superblock project. *Id.* at 339.

In Defining “Public Work” the Court of Appeals Relied on Inapposite Prevailing Wage Cases Instead of Competitive Bidding Cases

The certainty of the court’s opinion, supported by numerous citations to cases, belied the ambiguity of defining a “public work,” particularly since this was a case of first impression in Maryland and so the court had to rely on cases from other states that were based on state specific statutes and case law. The increasing complexity of innovative financing and different legal structure of quasi-public entities further complicated the task of delineating the public and private spheres – leading the Rhode Island Supreme Court to state: “we recognize that there is a division of authority on this issue, depending on the nature and quality of the project to be built,” in one of the decisions cited by the *120 West Fayette Street* Court of Appeals.²³⁰ *Rhode Island Bldg. & Const. Trades Council v. Rhode Island Port Auth.*, 700 A.2d 613, 616 (R.I. 1997). Yet the Court of Appeals revealed no hesitation in papering over this ambiguity with copious citations to cases, even though only one of the fifteen cases cited defined “public works” as applied to competitive bidding mandates, while most of the cases cited considered the

²³⁰ 1 *Bruner & O’Connor Construction Law* §2:25 (updated 2010).

applicability of prevailing wage laws to “public works” – laws with a profoundly different purpose, to protect a particular class (construction workers) from competition instead of to protect the general public from government graft and corruption. Indeed, the court passed over its earlier decision in *Hughes* that specifically distinguished between cases addressing competitive bidding and cases involving mechanics’ liens, which are closer to prevailing wage laws in that the plaintiff is a third party seeking action against a public entity with which it has no direct contract but is only related through a contract through a counterparty with the public entity. *Hughes v. Schaefer*, 294 Md. 653, 665 (1982).

More surprising, that single competitive bidding case appeared to support the Superblock’s opponents’ argument that the Agreement was a public works contract as much as that of the BDC and City: the case held that a municipal water utility’s contract with developer that built sewer infrastructure for its subdivision in return for reimbursement and reduced rates from the utility *was* a “public works contract” requiring competitive bidding. *Bessemer Water Serv. v. Lake Cyrus Dev. Co.*, 959 So.2d 643 (Ala. 2006). The *Bessemer* court ruled that the financial structure of the transaction, as reimbursements and deferred bills instead of payments, did not alter the fact that the utility expended public funds (regardless of the final cost or benefit to the utility): a ruling explicitly rejected by the Court of Appeals in *120 West Fayette Street. Bessemer*, 959 So.2d at 650-51. The *Bessemer* ruling also underscores the difficulty of translating opinions across jurisdictions with variations on the common theme of “public works,” because the Alabama definition of “public works” requires the project to include “public property,” which the *Bessemer* court ruled was satisfied by the grant of sewer easements to the utility by the developer, despite the developer’s repurchase option. ALA. CODE, § 39-2-1 (1975); *Bessemer*, 959 So.2d at 650-51. The Maryland definition of “public work” in the Prevailing Wage Law does not have a similar requirement, thus reducing the relevance of this portion of the *Bessemer* ruling. Nevertheless, the Court of Appeals cited *Bessemer* on precisely this issue, without noting the statutory differences. *120 West Fayette Street*, 413 Md. at 336, 338 (the third citation to *Bessemer* addressed public financing, *Id.*, 413 Md. at 340).

Two other cited cases similarly differed significantly in defining “public works”: one confirmed the jurisdiction of a regional planning agency to require an environmental impact study to include, as a “public work,” privately financed and built improvements to a public highway required for a private commercial development. *Raley v. California Tahoe Reg’l Planning Agency*, 68 Cal.App.3d 965, 982-83 (Cal. Ct. App. 1977). Another cited case involved a Connecticut statute requiring performance bonds for public works projects, with the court ruling that the anti-flipping provision of the municipal economic development commission’s standard land sale contract that required a poured foundation before transfer of title did not render the contract one for the “construction ... of a public building or public work” subject to the performance bond statute, in a suit by the unpaid foundation contractor of the private developer that had purchased the land from the commission. *L. Suzio Concrete Co. v. New Haven Tobacco, Inc.*, 611 A.2d 921 (Conn. App. Ct. 1992). Although this performance bond case superficially resembled the City’s argument that the Agreement was a simple land sale, the contractor’s claim was very different as it sought to make the city, with whom it had no contract, liable for the nonperformance of the developer on a separate contract – a transparent attempt to assert a contract claim, despite the lack of privity, through the performance bond statute.

The remaining twelve (of fifteen) cited cases defined the limits of “public works” for prevailing wage laws, with six of these cases from New York State (*Erie County Indus. Dev. Agency v. Roberts*, 465 N.Y.S.2d 301 (N.Y. App. Div. 1983), *aff’d*. 63 N.Y.S.2d 810 (N.Y. 1984); *Vulcan Affordable Hous. Corp. v. Hartnett*, 545 N.Y.S.2d 952 (N.Y. App. Div. 1989); *60 Mkt. St. Assocs. v. Hartnett*, 551 N.Y.S.2d 346 (N.Y. App. Div. 1990); *Cattaraugus Cmty. Action, Inc. v. Hartnett*, 560 N.Y.S.2d 550 (N.Y. App. Div. 1990); *National R.R. Passenger Corp. v. Hartnett*, 572 N.Y.S.2d 386 (N.Y. App. Div. 1991); *Hart v. Holtzman*, 626 N.Y.S.2d 145 (N.Y. App. Div. 1995)), which has a tradition of narrowly interpreting “public works” to restrict the statutory protection to workers in the building trades: “the Labor Law provision applies only to workers involved in the construction, replacement, maintenance and repair of ‘public works’ in a legally restricted sense of that term.” *Erie County*, 465 N.Y.S.2d at 305 (internal quotation marks omitted) (citation omitted). In relying on these prevailing wage cases, the Court of Appeals glossed over the significant differences between the policy aims of

prevailing wage and competitive bidding statutes (protecting construction workers from public works projects lowering wages versus protecting taxpayers from government graft and waste), effectively removing the transparency and accountability concerns of competitive bidding laws from consideration. *120 W. Fayette St.*, 413 Md. at 341. The prevalence of prevailing wage cases shifted the focus away from the emphasis in competitive bidding challenges on the legitimacy of the contract between the public entity and the contractor for the public work. Instead the focus of the judicial inquiry shifted to the fairness of extending the prevailing wage responsibilities of a public entity, through its contract with a developer, to the separate contract between the developer and the contractor/builder, an inquiry similar to adjudicating claims seeking to pierce the corporate veil. Weighing the equities of conflating these two contracts, courts considering these prevailing wage law claims also faced competing public policy concerns: preventing public entities from avoiding prevailing wage statutes by using a nonpublic intermediary to hire the contractor/builder versus ensuring public authorities, quasi-public entities, and public-private partnerships the autonomy from many government regulations, including prevailing wage laws, intended by state legislatures. These courts therefore focused on the degree of control retained over the finished project by the public entity to smoke out “creative financing” schemes to camouflage public building projects as private projects. This focus derived directly from the purpose of the prevailing wage laws – to protect construction workers – and differed substantially from the aim of Baltimore’s competitive bidding law that sought to protect the city’s taxpayers from corruption and waste in public contracts for goods and services, for which control is irrelevant (e.g., the purpose of a waste-hauling or demolition contract is to dispose of the material, not retain title or control).

Nevertheless, the Court of Appeals overlooked this distinction in relying on these prevailing wage law decisions to decide *120 West Fayette Street*. Unsurprisingly, all twelve of the prevailing wage cases cited by the Court of Appeals rejected extending the “public” nature of the financing entity through the intermediary developer to the second contract, finding the link between the two contracts to be too tenuous to impose public hiring requirements on non-public entities (just as the *Suzio* court refused to extend performance bond requirements to the contract between the private developer and

contractor/builder). Yet ten of these twelve cases were governed by statutes that required a *public body* to be a party to the contract alleged to be covered by the prevailing wage laws, a requirement not in the Maryland statute (all New York State cases (*Erie Co.*, *Vulcan*, *60 Mkt. St. Assocs.*, *Cattaraugus*, *National R.R.*, and *Hart*) as well as *Carson-Tahoe Hosp. v. Building & Constr. Trade Council of N. Nev.*, 128 P.3d 1065 (Nev. 2006); *Town of Normal v. Hafner*, 918 N.E.2d 1268 (Ill. App. Ct. 2009); *Elliot v. Morgan*, 571 N.W.2d 866 (Wis. Ct. App. 1997); and *Portland Dev. Comm’n v. State*, 171 P.3d 1012 (Or. App. 2007)). This “public body” requirement clearly raised the threshold for a “public work” and led the courts in these cases to examine the role of the public entity in the second contract between the non-public developer and the contractor/builder – an element irrelevant to the Superblock circumstances where the only contract at issue was that between the City and the developer.²³¹

The Court of Appeals’ reliance on prevailing wage cases to define “public works” introduced a further discrepancy because these cases all focused on the financing of a construction project (attempting to link the financing and construction contracts) as opposed to a contract for redevelopment of a multiple block area like the Superblock. Five of these cases involved industrial or economic development bonds that financed new facilities for private entities that initiated, paid for, built and occupied the buildings (*Erie Co.*; *Rhode Island*; *Daniels v. City of Fort Smith*, 594 S.W.2d 238 (Ark. 1980); *Carson-Tahoe Hosp.*; and *Town of Normal*); three others were affordable housing projects built by nonprofit developers financed by public entities (*Vulcan*; *Cattaraugus*; and *Hart*); two concerned infrastructure projects financed partly by public entities but developed by quasi-public entities treated by the courts as non-public entities (*National R.R.*; *Elliot*); one was a public entity contracting with a developer to lease a building to be built by the developer on developer’s own land (*60 Mkt. St. Assocs.*); and one echoed the *Suzio* performance bond case with a public entity selling a property, with financing, to a private developer to redevelop (*Portland*). In all cases, the courts refused to treat financing of private construction projects as public contracts requiring prevailing wages, because the public entity financing the project was not the one contracting the construction, and

²³¹ The BDC’s role was not relevant for this part of the Court of Appeals’ analysis, since the Board of Estimates had approved the contract. Moreover, the Court of Appeals ascribed a public status to the BDC, based on its decision in *Carmel*, in rejecting the opponents’ claim that the BDC had acted *ultra vires*.

because of insufficient evidence that the intermediary developer was merely an alter ego of the public financing entity used to avoid prevailing wage requirements.

The two cases that superficially resemble the Superblock circumstances, *Elliot* and *Portland*, both reveal significant differences on a closer look. In *Portland*, the Portland Development Commission sold a property to a private developer to redevelop, but unlike the Superblock, this property was a single building, not a multi-block area, and the Development Commission did not issue a RFP establishing directives for the redevelopment of the site, but instead worked through a real estate broker to locate potential developers. *Portland*, 171 P.3d at 76. Moreover, the *Portland* court ruled that this was not a “public work” because the Development Commission had not “contracted for” the construction as provided in the Oregon statute’s definition of “public work” subject to the prevailing wage law, but instead had only sold the property with financing, so that the prevailing wage law did not extend to the private developer’s construction contract with the builder. *Id.* at 78-83 (discussing OR. REV. STAT. §279.348(3) (repealed 2005)). This “contracted for” language in the Oregon prevailing wage statute limited the definition of “public work” and reduced the relevance of the case and statute to the application of the Maryland prevailing wage law, which did not include that language, especially in regard to the Superblock redevelopment, which was “contracted for” by a public body. *Portland* would have been more apposite to the Superblock redevelopment, albeit still of limited relevance given the focus on a single property, had the Development Commission’s sale to the private developer been challenged as a “public works contract” requiring competitive bidding.

The redevelopment project in *Elliot* resembled the Superblock in its unified program for multiple properties – landscaping, sidewalks and lighting to create a riverwalk linking publicly and privately owned land. *Elliot*, 571 N.W.2d at 867. Nevertheless, the *Elliot* court refused to classify the project as a “public work” subject to Wisconsin’s prevailing wage law because the statute only applied to contracts to which a municipality is a party, whereas the challenged contracts were between non-public developers (a Business Improvement District and the Milwaukee Riverwalk District, Inc.) and construction firms. *Id.* at 868-69 (discussing WIS. STAT. §66.293(3) (1993-94)). The court rejected the claim that these developers were alter-egos of the municipality since

the supporting cases relied on “non-persuasive foreign case law” and “the Wisconsin statute differs from the statute at issue in the foreign cases.” *Id.* at 869. The Wisconsin legislature had chosen not to follow many other jurisdictions, including Maryland, by “broaden[ing] the definition of a public work to include any project which receives public funding,” and the court could “not read such an interpretation into the wording of our limited statute” because that “is a policy determination left to the legislature.” *Id.* The Court of Appeals in *120 West Fayette Street* felt no similar restraint in importing cases including *Elliot* that applied different statutory and case law without reservations. *Elliot*, like *Portland* and the other prevailing wage cases, provided a narrow definition of “public work” because of restrictive provisions of the local statute, which differed from Maryland’s statute, rendering these cases problematic support for the Court of Appeals’ rejection of the claim of the Superblock opponents. Had *Elliot* involved a challenge to a no-bid contract between the municipality and a private developer to build the riverwalk on city-owned property to be transferred to the developer, the case would have been more relevant to the Superblock’s circumstances – provided that the competitive bidding statutes of both jurisdictions were similar.

By ignoring these significant distinctions between the circumstances of the Superblock and these cases (different local statutory and case law, competitive bidding versus prevailing wage laws, and a single contract for redevelopment instead of two contracts for financing and construction), the Court of Appeals glossed over the ambiguities in defining a “public work” expressed in these cases and created the impression of a unified definition under which the Superblock contract clearly failed to qualify. Defining the limits of the public sphere in public-private partnerships, especially with regard to the extension of “good government” laws like competitive bidding that have policy justifications on both sides, has become more complex with the increased intricacy of such transactions whereby public goals are achieved through private actors with various types of public financial support.²³² The court referred in passing to this issue, but did so dismissively and without thought that a large redevelopment project necessarily is an intricate mixture of public and private, not a single unit either

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²³² See Julia Paschal Davis, “Public-private partnerships,” 44 PROCUREMENT LAWYER 9, 10 (Fall 2008).

completely private or totally public: “Complex financial schemes such as this one, coupled with government oversight of a development project, *arguably* create ambiguity as to whether a project is publicly or privately contracted. Nevertheless ...” *120 West Fayette Street*, 413 Md. at 343 (italics added). Furthermore, the court overlooked legal issues and cases that did not square with the court’s restricted viewpoint, issues and cases that had more in common with the Superblock’s circumstances and that supported an interpretation of “public works” that would include the Superblock.

The court particularly failed to recognize these alternatives within the context of competitive bidding statutes, which have a broader public purpose than prevailing wage laws (protecting all taxpayers, public contractors and their employees versus just construction workers), so that “to protect the public interest requires a liberal interpretation” of competitive bidding laws. *Achen-Gardner, Inc. v. Superior Court*, 809 P.2d 961, 965 n. 2 (Ariz. Ct. App. 1990), *vacated on other grounds*, 839 P.2d 1093 (Ariz. 1992). The Court of Appeals of New York State, a jurisdiction cited often and favorably by the *120 West Fayette Street* court, has developed an extensive case law fleshing out the boundaries of the state competitive bidding statute which also does not define “public works contracts” subject to the statute, and in so doing emphasized that these statutes achieve the legislative goal of preventing corruption and waste through transparency: “A wayward public official could use the secrecy and ambiguity inherent in any agreement not requiring public advertising and bidding to do great mischief.” *Diamond Asphalt Corp. v. Sander*, 700 N.E.2d 1203, 1208 (N.Y. 1998) (quotations and citations omitted). The *120 West Fayette Street* court failed to consider this broader public purpose when it limited its case citations to prevailing wage laws, leading it to miss legal issues relevant to the public nature of the Superblock contract.

Streetscape Improvements Should Have Satisfied Definition of “Public Work”

A key issue summarily dismissed by the court was the role of the public streetscape improvements that the Superblock contract called for the developer to build for the City, which would reimburse the developer’s expenses for streetscape costs, separate from the \$10 million cap on City reimbursement for the developer’s environmental remediation and demolition costs. *120 West Fayette Street*, 413 Md. at

342-44. The court only discussed these improvements as insufficient to satisfy the “paid for wholly or partly by public money” branch of the Maryland Prevailing Wage Law definition of “public work,” but failed to address the “constructed for public use or benefit” branch. MD. CODE ANN. STATE FIN. & PROC. §17-201j) (2009). Committed to its interpretation that the Board of Estimates played a significant role in the Agreement to reduce the BDC’s role to strictly advisory, the court focused on the Board’s capping of the reimbursement to \$10 million, emphasizing the potential for enormous costs for environmental remediation. Moreover, the court failed to note that the streetscape improvements would benefit, be used by, and be owned by the public, unlike the remediation and demolition that would occur on the developer’s property. The court emphasized public ownership as a determinant of a “public work,” but passed over the streetscape improvements and instead limited its discussion to the overall project (and the cited cases only involved projects on private property without improvements to the public realm).

Yet surely this portion of the overall Agreement constitutes a “public use or benefit” under the Maryland definition of “public work” used by the court. Other courts have held that improvements to public streets and streetscapes, even if built and paid for by private developers as part of a larger project, constitute “public works” subject to government regulation. *Raley*, 68 Cal.App.3d at 982-83 (privately financed lane and signal changes to public highway were “public works” subject to review by the public planning agency); *Bessemer*, 959 So.2d at 650 (sewer system was a “public work” subject to competitive bidding even if built and paid for by private developer); *Achen-Gardner*, 802 P.2d at 964-66 (off-site street improvements were “public works” subject to competitive bidding even if built by private developer, affirmed by Arizona Supreme Court in *Achen-Gardner, Inc. v. Superior Court*, 839 P.2d. 1093, 1095-97, 1100 (Ariz. 1992), vacating appellate ruling on other grounds).

In addition to providing a “public use or benefit,” these streetscape improvements appear to satisfy the “public money” prong of the Maryland definition of “public work,” since the Agreement bound the City to reimburse the developer for the expenses of construction of the streetscape. Competitive bidding cases from other jurisdictions have rigorously imposed competitive bidding law compliance on contracts for public

improvements performed by private parties but financed with public funds. The New York State Court of Appeals, in *Diamond*, ruled that the competitive bidding law required New York City to cease its practice of aggregating public street infrastructure work with associated private utility work into a single contract for competitive bidding, and instead to competitively bid the public contracts apart from the associated private utility work in order to avoid potential graft and waste by having public funds subsidize private work. *Diamond*, 700 N.E.2d at 1210-14 (holding that private utility work, even if affected by public street work, did not constitute “public works”). The *Diamond* court emphasized that the absence of any intimation of misdeeds in that case did not impact its ruling, since the competitive bidding statute’s purpose requires the court to protect a “fastidious bidding process.” Public officials must not be permitted “to ‘indirectly’ circumvent public bidding policies and prescriptions by ‘Lego-like’ rearrangements of the pieces of traditional contractual relationships and obligations,” in order to ensure that the public purse does not secretly enrich private contractors. *Id.* at 1211.

The Arizona appellate court in *Achen-Gardner* also emphasized the need to protect public money when it held that a private developer had to competitively bid the contract for off-site public street improvements since the municipality would reimburse the developer for these costs from future sales-tax revenues from the development. *Achen-Gardner*, 809 P.2d at 966-69. Echoing the *Diamond* court’s concern to prevent legalistic structuring of payments from thwarting the aims of competitive bidding statutes, the *Achen-Gardner* court focused on the effect of the financing scheme, rejecting formalistic arguments that the reimbursements were a special assessment: “the result of the reimbursement is that monies paid to the developer brings about a dollar-for-dollar reduction in the sales tax revenues.” *Id.* at 969. The Arizona Supreme Court affirmed this position:

“a municipality cannot alter the public nature of a project for the improvement of public property, to be paid in whole or in large part by public funds, by entering into a development agreement assigning a private party control over the bidding and letting of the construction contract.”

Achen-Gardner, Inc. v. Superior Court, 839 P.2d at 1099. Both *Diamond* and *Achen-Gardner* suggest that for the Superblock the streetscape portion at least of the Agreement should have been submitted for competitive bidding to protect the City from overpaying

and subsidizing the developer’s private works, as well as preventing any “sweetheart” deals arranged out of the public eye.

Yet the Court of Appeals in *120 West Fayette Street* disregarded competitive bidding case law and the public purpose of competitive bidding statutes, and so failed to consider the Superblock streetscape improvements as public amenities and so “public works.” Instead the court considered the streetscape improvements only within the context of the “public money” branch of the Maryland Prevailing Wage Law definition of “public works.” Even though the court recognized the Agreement required the City to reimburse the developer for *all* streetscape improvements, the court ruled that these improvements would be paid, as well as built, by the *developer*, not the City. *120 West Fayette Street*, 413 Md. at 343.²³³ The court reached this remarkable conclusion by accepting the City’s formalistic argument that the streetscape reimbursements, together with the \$10 million reimbursement of demolition and environmental remediation costs, were merely financial “incentives” given to the developer to purchase the Superblock, and *not* “costs borne by the City.” *Id.* For the court, the key issue was that the reimbursements would be deducted from the total price paid by the developer under the Agreement, so “the City is not funding that work.” *Id.* at 342. This view, however, ignores that this merely plumps up the nominal purchase price, since without the reimbursements the developer would insist on lowering the purchase price to reflect the developer’s estimate of the cost of required demolition, remediation and streetscape work. Moreover, the streetscaping costs differ from the demolition and remediation costs in being improvements for “public use or benefit” on public property or rights of way, as well as being reimbursed from “public money” by reducing the City’s income from the Agreement (like the demolition and remediation costs). Under this creative accounting, once the streetscape reimbursement was aggregated to the Agreement it no longer cost the City anything, whereas had the City awarded the reimbursement as a separate grant to the developer, then the City would have had to account for it as a cost.

This defies the fundamental principle of competitive bidding statutes - to forestall public officials from relabeling public funds and services by “Lego-like rearrangements

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²³³ The BDC explicitly stated this requirement to the Board of Estimates. M. Jay Brodie, Memorandum to Board of Estimates at 3 (November 1, 2007), in Brief of Appellees at Apx 5, *120 W. Fayette St.*, 407 Md. 253 (August 28, 2008).

of the pieces of traditional contract[s]” to avoid public scrutiny. *Diamond*, 700 N.E.2d at 1211. In New York State case law, oft-cited by the *120 West Fayette Street* opinion on prevailing wage laws but not on competitive bidding laws, this issue has long been firmly decided: “A contract which provides for a lesser income to a government unit than a competing contract *might* provide, is an “expenditure.”” *Diamond*, 700 N.E.2d at 1210 (quoting *Signacom Controls v. Mulroy*, 298 N.E.2d 670, 673 (N.Y. 1973)) (italics added). The Arizona Supreme Court rejected an argument similar to that of the City in *120 West Fayette Street*: in response to the claim that the reimbursement for street improvements did not cost the municipality because the reimbursement would come from future tax revenue created by the development for which the improvements were required, the Arizona court stated

“[w]hile it is possible that the tax revenue might never have existed without the development, once the development is undertaken the method of reimbursement cannot alter the fact that [the developer] will be compensated directly from tax money paid by the public with funds destined for and routed through the municipal treasury.”

Achen-Gardner, 839 P.2d at 1098. The Pennsylvania Supreme Court long ago rejected a similar shell game where a contractor asserted that its collection of fees for service rendered to the municipality shielded it from competitive bidding:

“[t]he need for bidding requirements is just as compelling in the instant case where the garbage collector is compensated directly by the recipients of his service as it is when the recipients pay for service through the conduits of the municipal treasury. In each case, regardless of who makes the final payment, it is the taxpaying citizen who provides the necessary funds and whose interest must be protected.”

Yohe v. City of Lower Burrell, 208 A.2d 847, 850 (Pa. 1965). The simplicity of this logic contrasts sharply with the convoluted reasoning of the City and BDC adopted by the *120 West Fayette Street* court.

The Maryland Court of Appeals appears to not have been aware of these rulings despite being long established in neighboring jurisdictions (particularly Pennsylvania and New York), presumably due to the court’s reliance on prevailing wage law cases, where the focus lay on balancing the rights of the private developer to choose contractors

against the policy goal of not depressing wages for construction workers – not the point of competitive bidding statutes that protect the general taxpayer. Thus the court transformed the income lost to the City through its reimbursement of streetscape expenses into thin air by interpreting these reimbursements as confined solely within the Agreement, despite the fact that the reimbursements would be applied well afterwards. *120 West Fayette Street*, 413 Md. at 343. As a result, the City ceded control over the cost of the streetscape project, potentially subjecting taxpayers to inflated costs that would subsidize the private developer, directly contradicting the purpose of competitive bidding statutes. The cases the court cited in support, all prevailing wage cases, are distinguishable from the Superblock circumstances because these cases involved no public improvements, only private construction projects on private property – key issues for determining how far governmental restrictions extend to private parties, but not as relevant for competitive bidding statutes seeking to ensure that public contracts do not overpay private counterparties. *Id.* at 343-44 (citing *Portland, Daniels, National R.R., Elliot and Hart*).

Had the court considered competitive bidding decisions, it might have resolved the issue of the streetscape improvements along the lines of *Achen-Gardner*, by ruling that the streetscape portion of the contract qualified as a “public work,” under both the “public use or benefit” and “public money” prongs, subject to competitive bidding. As with *Achen-Gardner*, this would not necessarily require the rebidding of the Agreement, but an amendment requiring the developer to competitively bid the streetscape portion as a condition of receiving public reimbursement. This solution would also address the problem of the open-ended commitment by the City to reimburse all streetscape costs without a cap, estimate or even objective criteria for defining what projects would be covered. The court’s refusal to consider any portion of the Agreement was subject to competitive bidding, and myopic reliance on prevailing wage cases and the inverted logic that reimbursements were not public funds, suggests that the court was concerned more to maintain the power of the City, and the BDC, to pursue in redevelopment efforts that the City clearly needed than to enforce a “fastidious bidding process” to ensure accountability and transparency in government actions. This is all the more remarkable in light of BDC president Brodie’s recent statement, based on consultation with the City’s

Law Department, that demolition contracts awarded by the BDC for properties that would be transferred to private developers for redevelopment constituted “public works contracts.”²³⁴

Land Acquisition Costs Should Have Been Included in the Overall Accounting of the Agreement, Which Thus Should Have Qualified As A “Public Work”

This sense of a “thumb on the scale” is reinforced by the court’s refusal to consider the cost of land acquisition as part of the Agreement, despite the inclusion of this land acquisition as part of the City’s performance under the Agreement, as specified in the BDC’s presentation of the final Agreement to the Board of Estimates for approval: “[t]he City agrees ... to acquire such portions of the Property as are not currently owned by the City by December 31, 2007.”²³⁵ *120 West Fayette Street*, 413 Md. at 340-41. Furthermore, the final Agreement provided that the City and developer would share the cost of acquiring 223 and 227 West Lexington Street as part of a settlement with the *Carmel Realty* plaintiffs, clearly linking the cost of land acquisition of these parcels to the price paid by the developer.²³⁶ At closing, the developer would receive title to these parcels and would pay the *Carmel* plaintiffs the \$2.7 million settlement, with \$2.45 million reimbursed by the City by reducing the overall price and counting the settlement payment toward the developer’s 10% down payment due at closing.²³⁷ The developer also would receive other Superblock parcels originally awarded to the *Carmel* plaintiffs (who subsequently renegotiated the settlement to include receiving \$1.5 million from the

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²³⁴ Annie Linskey, “BDC cancels pact for demolition that was not openly bid; Sun follow-up,” *Sun*, September 11, 2009, A1.

²³⁵ Brodie, Memorandum to Board, *supra* n. 233 at 5.

²³⁶ Pursuant to the Memorandum of Understanding between the *Carmel* plaintiffs, the City and the developer to settle the litigation approved by the Board of Estimates on November 7, 2007. Brodie, Memorandum to Board, *supra* n. 233 at 3 (“Purchase Price and Payment Terms”); First Amendment to Land Disposition Agreement (November 7, 2007), in Brief of Appellees at Apx. 8-14, *120 W. Fayette St.*, 407 Md. 253 (August 28, 2008), especially 2(b) “Purchase Price and Payment Terms;” Lorraine Mirabella, “City board clears superbloc deals; Board of Estimates appears to resolve final obstacles,” *Sun*, November 8, 2007.

²³⁷ The effect of this deal was that the Superblock developer received title to the *Carmel* properties for approximately \$1 million more than under the original Agreement (\$2.7 million instead of the \$1.68 million down payment), but with roughly \$750,000 applied to the developer’s balance owed the City. It is unclear from Brodie’s Memorandum to the Board (*supra* n. 233) explaining the terms of the final Agreement if the waiver of the down payment also reduced the balance, which would represent a hidden subsidy for the developer who nominally paid \$250,000 for these parcels, but would receive an additional \$1.68 million reduction in the overall price.

City to buy nearby property, with the understanding that the BDC would later award it back to the plaintiffs for redevelopment, as did occur), with the total price of the Agreement changed to reflect the addition of these parcels and the removal of others as part of a separate settlement with the Weinberg Foundation.²³⁸ By including the acquisition cost of these parcels in the Agreement, the City recognized the inextricable relationship between the acquisition by the City and the sale of the combined property to the developer. Nevertheless the court asserted that “the property is acquired ... through contracts separate from the development contract,” even though the amendment to the final Agreement laying out the integration of the *Carmel* settlement, with the BDC’s explanatory memorandum, was included in the City’s appellate brief to the Court of Appeals.²³⁹ *Id.* at 341. The court, however, neglected to use the final Agreement as the basis for its analysis, instead using the original Agreement that strengthened the court’s interpretation by not including the *Carmel* settlement, a striking sleight of hand.²⁴⁰

The court’s exclusion of the costs of the acquisition of the properties transferred to the developer under the Agreement from analysis of the Agreement and its total price/cost to the City, despite these links, appears inconsistent with the court’s reasoning that the reimbursements for the future streetscape improvements could not be separated from the Agreement. The effect of this seemingly self-contradictory reasoning was to bar the Agreement from qualifying as a “public work” under the “public money” prong of the Maryland definition, by classifying the public reimbursement for public streetscape improvements as “privately funded,” while excluding the costs of land acquisition

²³⁸ The addition to the settlement - the City’s purchasing the nearby property with the understanding that it would then be awarded back (presumably at a lower cost and with financial incentives for redevelopment) - clearly suggests a further payoff by the BDC/City to the *Carmel* plaintiffs. It is also unclear if the \$2 million to be paid by the City that the article discusses is separate from the *Carmel* settlement and amended Agreement that called for the Superblock developer to pay \$2.45 million on behalf of the City to the *Carmel* plaintiffs. Robbie Whelan, “In complex deal, Baltimore gets 2 more Superblock properties,” *Daily Record*, April 9, 2008; “BDC Awards Westside Properties to Carmel Realty Associates,” BDC press release, February 17, 2009 (available at <http://www.baltimoredevelopment.com/bdc-awards-westside-properties-carmel-realty-associates>); Lorraine Mirabella, “Mixed-uses to preserve old Kresge five-and-dime; City awards sites for retail-housing blend for Art Deco building,” *Sun*, February 18, 2009.

²³⁹ See *supra* n. 236.

²⁴⁰ Although the original complaint in *120 West Fayette Street* was filed in February 2007, ten months before the Board of Estimates approved the final Agreement, the suit was remanded in 2009 to permit discovery, and on appeal from the remand, the City included the BDC memorandum and Board of Estimates’ approved Amendment in its brief to the Court of Appeals. Brief of Appellees at Apx 3-14, *120 W. Fayette St.*, 407 Md. 253 (August 28, 2008).

ensured that the City “earned” money under the Agreement, which could therefore not be defined as “procurement” but instead as a “sales contract.” *Id.* at 334, 344-45.

The sole case cited by the court to support this ruling is inapposite since (i) the contract in that case did not include or refer to land acquisition, (ii) the provisions in the law analyzed in that case has since been changed, (iii) the legal principles involved differed as this was a prevailing wage case, and (iv) the peculiar facts of the case led to the particular ruling. *Id.* at 340-41 (discussing *Demory Brothers, Inc. v. Board of Public Works*, 273 Md. 320 (1974)). In *Demory*, a contractor challenged the state school construction committee’s application of the new state prevailing wage law to school construction contracts funded by the state which led to the rejection of the contractor’s low bid for a county public school financed by the state funds because the contractor’s bid did not comply with the state prevailing wage law. *Demory*, 273 Md. 320. Citing a provision (since-amended) of the state prevailing wage law defining “public bod[ies]” subject to the law to include “the State or any department, ... any other agency, political subdivision, corporation, person or entity of whatever nature when State public funds are the only funds used for the construction of a particular public work,” the *Demory* contractor claimed that the county’s providing the land for the school (as well as employing the building inspectors and processing the building permits) violated this provision. *Id.* at 322-23, 330 (quoting and discussing MD. CODE ANN., ARTICLE 100, §96(d)(1)). The contractor thus sought to regain the contract by a declaration that the county and state school construction committee did not qualify as “public bodies” subject to the prevailing wage law.

Demory was a case of first impression because this particular provision amending the prevailing wage law (itself only 2 years old) had been enacted just the year before the school contract was let, and since the General Assembly had enacted in that same session a law providing that the state assume the costs of all public school construction. *Demory*, 273 Md. at 321-24 (discussing 1969 Md. Laws, c. 558 (prevailing wage law); 1971 Md. Laws, c. 220 (prevailing wage law amendment); 1971 Md. Laws, c. 624 (public school construction); contract let on July 12, 1972). The 1971 amendment to the prevailing wage law extended the reach of the original 1969 law, which had only applied to state agencies and specifically exempted county and municipal construction contracts, to include any

project paid for exclusively by state funds, the provision cited by the *Demory* contractor. *Id.* at 322, n. 1. In rejecting the contractor’s claim that the costs of land acquisition (and building inspectors and permitting) be considered part of the construction contract, the Court of Appeals cited the clear legislative intent to apply the expanded scope of the prevailing wage law to the new state-funded school construction program (the General Assembly, in the session following an opinion by the Attorney General that the prevailing wage law applied to school construction, repeatedly defeated a bill to amend the prevailing wage law to explicitly exempt school construction), reinforced by the use of the same interpretation by the agencies charged with launching the state school construction program. *Id.* at 326-27. The court emphasized that the state school construction program regulations specifically prohibited state funds from paying for land (or building inspectors or permits) and that this particular contract conformed by not including any reference to these costs. *Id.* at 330. The *Demory* court therefore held that the contract did not include land acquisition (or other costs), and so the county and state school construction committee qualified as “public bodies” subject to the prevailing wage law since the state bore all construction costs.

The circumstances of *Demory* are distinguishable from those of the Superblock, most importantly because the Superblock Agreement included the costs of acquiring the *Carmel* plaintiff’s property and required the City to acquire all parcels of the site as part of the City’s performance under the Agreement, in stark contrast to *Demory* where land acquisition was not, and could not be, part of the school construction contract. *Demory*’s clean separation of land acquisition and construction, required by regulations, differed dramatically from the intermingled processes of land acquisition and negotiation of development terms of the Superblock, a complexity necessitated by the much larger size and scope of the Superblock project. This difference echoes that between the nature of the two laws: the prevailing wage law in *Demory* aims to protect workers in construction not land acquisition, whereas the Superblock’s competitive bidding ordinance has a much broader purpose of ensuring that taxpayers receive fair value when purchasing goods or services. Unlike the county in *Demory* that already owned the site of the school, the City did not own all of the Superblock at the time of the Agreement, so the cost of land acquisition is a key element in calculating the fair value of the redevelopment the City

procured with the Superblock Agreement. The two cases addressed different definitions used in the prevailing wage law: *Demory* addressed the definition of “public body,” a definition since changed to require only 50% state funds and that is separately defined and used in the prevailing wage law from the definition of “public works,” which is the focus of *120 West Fayette Street* – but only in order to understand the applicability of the Procurement Article of the Baltimore City Charter. MD. CODE ANN., STATE FIN. & PROC., §17-201(i) (“Public body”), §17-201(j) (“Public work”); BALTIMORE CITY CHARTER, ARTICLE IV, §11(b)(i). Finally, the effect of the two cases is diametrically opposed: the *Demory* court expanded the reach of the prevailing wage law based on contract law and clear legislative intent, whereas the *120 West Fayette Street* court cited *Demory* to support the opposite effect of restricting the scope of “public work” as defined in the prevailing wage law in order to interpret the City procurement requirements for which relevant legislative history does not exist.

The court’s restrictive interpretation owes much to the prevailing wage cases focused on limiting intrusion of public sector regulations into the private sector, in contrast to competitive bidding cases that emphasize accountability of government. Instead of relying on *Demory*, the court might have looked to *Department of General Services v. Harmans Assocs.*, 98 Md.App. 535 (1993), where the Court of Special Appeals rejected an argument similar to the City’s in *120 West Fayette Street* – that a transaction by the state to lease land on which a private developer would construct a new State Highway Authority headquarters that would subsequently be subleased back to the state was a transfer of real property and not the construction of a building subject to the state procurement law, which included competitive bidding. Judge Wilner insisted on “a fair consideration of the overall transaction, especially in light of the State’s own request for proposals,” which revealed that the real estate transfer was effectively illusory, “designed to avoid the creation of a State “debt,” while the purpose of the transaction was the construction of the building, and so the procurement law governed the transaction. *Harmans*, 98 Md.App. at 546-47. Although the circumstances of the Superblock differ substantially from those of *Harmans* (the state retained the ground lease and was the sole tenant of the completed building; the plaintiff was the contractor suing on a contract claim that the State sought to avoid the jurisdiction of the Board of Contract Appeals

which could not rule on the sale or lease of real property), sufficient similarity exists to suggest that the Court of Appeals in *120 West Fayette Street* should have adopted the broad approach of Judge Wilner in *Harmans* and considered the overall transaction involved in the Superblock development: that the City identified a large area to redevelop, planned the redevelopment, asserted eminent domain powers to acquire the numerous properties, and then requested proposals from developers for the site based on the redevelopment plans. The BDC described the Agreement to the Board of Estimates not as just a land sale, but focused on the specifics of the development to be constructed on the site by the developer in return for the City acquiring and assembling the properties on the site.²⁴¹ The transfer of land from the City to the developer was only a part of the overall project from which the City’s land acquisition, identified from the beginning of the project and completed after the signing of the Agreement, cannot be separated. The City effectively purchased the services of the developer to redevelop the area according to the City’s plans, a transaction little different from the City privatizing public services like garbage removal or the operation of parking meters or jails, where the City would dispose of its property interest but the overall financial balance of the transaction would remain a cost to the City. Competitive bidding laws were designed to protect taxpayers in precisely this type of transaction to ensure the public purse received fair value.

Instead of adopting “a fair consideration of the overall transaction,” however, the *120 West Fayette Street* court cited *Demory* to avoid addressing this commingling of land acquisition and development in the Agreement and the final balance of payments between the City and the developer. By excluding land acquisition costs and ignoring the amended Agreement that included the *Carmel* settlement’s purchase of 223 West Lexington Street, the court was able to characterize the Agreement as merely a contract for the sale of land for which the City earned income, and so would not qualify under the “public money” prong of the Maryland definition of “public works.” This in turn enabled the court to fall back on its prior holding that urban renewal projects in general were not subject to the Baltimore City Charter competitive bidding statute because as sales of property, requiring urban renewal projects to accept the low bidder would be “illogical

²⁴¹ See Amended Complaint at 9, *120 W. Fayette St.*, 2009 WL 4889014 (Md. Cir. Ct 2009); Reply Brief of Appellants at 12, *120 W. Fayette St.*, 407 Md. 253 (September 17, 2008).

and unreasonable.” *120 West Fayette Street*, 413 Md. at 333. Furthermore, the City competitive bidding statute only applied to contracts over \$25,000 in City expenses, so that as long as the interpretation of the Agreement portrayed the Superblock as earning income for the City, the competitive bidding statute would not apply to the Superblock Agreement.

Yet the court’s characterization of urban renewal projects as merely “property sales” for which the City earned money is disingenuous, since urban renewal from its inception assumed significant government subsidies in the form of land acquisition and assembly in order to attract private investment to redevelop the properties.²⁴² The City, with the predecessor of the BDC, sold the site acquired by the City through eminent domain to private developers to redevelop at a loss, a practice “anticipated by city, state, and federal statutes, and in part covered by federal funds from the Urban Renewal Act of 1954.”²⁴³ The costs born by the redevelopment agency in *Portland* are typical: the agency spent \$1.7 million to purchase the parcel, and sold it to the developers at a 30% loss, with the additional subsidy of a loan from the agency to the developers for all but \$50,000 of the \$1.2 million sale price. *Portland*, 171 P.3d at 1013. The figures available as part of the *120 West Fayette Street* litigation strongly suggest a similar loss on the part of the City when land acquisition is included in the overall calculations. In addition to ignoring the role the *Carmel* settlement played in the amended Agreement, the court also passed over the revised purchase price in that amended Agreement (which the court had in the Appendix to the City’s appellate brief), instead referring back to the original Agreement’s purchase price, which was higher and so supported the City’s position that no “public money” was expended on the transaction that instead earned the City income). *120 West Fayette Street*, 413 Md. at 340.

The amended Agreement reduced the purchase price from \$21.6 million to \$16.8 million, while retaining the reimbursements for demolition and environmental remediation capped at \$10 million (with a \$8 million estimate), resulting in the City receiving a total income of between \$6.8 million to \$8.8 million, less an unspecified

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²⁴² Fogelson, DOWNTOWN, *supra* n. 103 at 358-64.

²⁴³ Robbie Whelan, “Report: High property taxes and eminent domain misuse make Baltimore hostile to private investment,” *Daily Record*, June 24, 2008.

amount to reimburse streetscape improvements.²⁴⁴ This amended total includes a credit to the Superblock developer for paying the City’s “share” of the *Carmel* settlement, but does not reflect the additional \$1.5 million paid to the *Carmel* plaintiffs, nor the cost of acquiring the other parcels in the Superblock. Assuming the *Carmel* settlement of \$2.7 million for 223 West Lexington Street represented a fair value for the property, the City would have lost money if the parcels conveyed under the Agreement were more than three times the size and value of 223 West Lexington Street. Since 223 West Lexington appears to be at most one-eighth of the total parcel, the City almost certainly lost money under the Agreement, effectively paying the developer to redevelop the properties. This estimate appears to be supported by the City’s \$3.75 million settlement with another Superblock owner to purchase a parcel that appears somewhat bigger than 223 West Lexington Street.²⁴⁵ Brodie, the BDC president, estimated in 2000 that the overall value of properties to be condemned for the Superblock project was \$26.4 million, likely a low-ball figure since Brodie used it to highlight the increased value of the site post-development.²⁴⁶ Although Brodie’s estimate included parcels not part of the Agreement, it was also made in 2000 before real estate values started to rocket skyward. Even assuming that the Agreement only covered half of the properties in Brodie’s estimate, that values did not increase since 2000, and that the City purchased all properties at Brodie’s estimate, the cost of land acquisition for the Agreement would be \$13.2 million, twice the \$6.8 million that the City is guaranteed to receive under the Agreement (not including the reimbursement costs for streetscaping). The City itself relied on a similar estimate also in 2000 when it launched the Superblock, setting aside bond revenue to pay for the \$30 million minimum it expected land acquisition, demolition and relocating

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²⁴⁴ M. Jay Brodie, Memorandum to Board of Estimates at 3 (November 1, 2007) in Brief of Appellees at Apx 5, *120 W. Fayette St.*, 407 Md. 253 (Aug. 28, 2008); First Amendment to Land Disposition Agreement §3 (November 7, 2007) in Brief of Appellees at Apx. 7, *120 W. Fayette St.*, 407 Md. 253 (Aug. 28, 2008).

²⁴⁵ This property, owned by New York Fashions, measured 12,000 square feet, which would be roughly one-sixth of the block (comparable to that with 223 West Lexington Street), assuming that this measurement corresponded to the building plate and did not include multiple floors. The property will be conveyed to the Weinberg Foundation. Mirabella, “City board,” *supra* n. 235. The New York Fashions block measures roughly 200 by 360 feet and appears slightly larger than that of 223 West Lexington Street, based on the site plan by the BDC included in the City’s appellate brief. Brief of Appellees at Apx. 15, *120 W. Fayette St.*, 407 Md. 253 (August 28, 2008)(dated October 24, 2007).

²⁴⁶ “West-Side Story: What’s at Stake in the Rush to Redevelop Baltimore’s Original Downtown,” *City Paper*, June 7, 2000, available at <http://www2.citypaper.com/news/story.asp?id=3592>.

businesses to cost.²⁴⁷ The City’s estimate did not include sewer, water, street, and design improvement expenditures, nor consider the administrative costs of the BDC, Law Department and other city officials on the project - “overhead” costs that the Agreement did not cover, but which illustrate the City’s awareness from the beginning that the Superblock project was not merely several sales of property, but instead a carefully planned and orchestrated process to redevelop the site by acquiring and assembling the land and hiring private developers to construct a revitalized Superblock, with the City paying the developers by subsidizing the cost of land and granting them the ability to profit from the development.²⁴⁸ Thus the court should have recognized that the Agreement almost certainly satisfied the “public money” prong of the Maryland definition of “public work” and the Baltimore City competitive bidding law’s threshold of \$25,000 in City expenses. The court might have at least remanded for further discovery and trial on the cost of land acquisition and the degree to which various parcels were interwoven with the Agreement.

Instead the court inflated the City’s potential income by only using the total from the original Agreement and not factoring in the \$10 million in reimbursements promised by the City. To support its view that the City was not “funding” the construction, the court cited the schedule of payments the developer had to make to the City under the Agreement as proving that the City provided no financial support. *120 West Fayette Street*, 413 Md. at 340. Yet in discussing this payment schedule the court disregarded the City’s significant financial support by effectively giving the developer a long-term loan (a typical public benefit supporting private developers in redevelopment projects such as the project in *Portland*) by failing to note that the developer would probably not owe the City anything until after construction was completed, and then at most 40% of the purchase price, due to the \$10 million in reimbursements for demolition and environmental remediation which must occur before the commencement of construction. Under the amended Agreement, the City waived the 10% payment due at closing in exchange for the developer paying the City’s share of the *Carmel* settlement, which also reduced the total owed by the developer, which also received title to 223 West

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²⁴⁷ *Id.*

²⁴⁸ *Id.*

Lexington.²⁴⁹ The next payment, due at the completion of construction, of 40% of the total owed by the developer would be effectively waived by the City’s reimbursement for up to 60% of the total cost. The City’s reimbursement commitment also would carry over to the remaining 50% owed, to be paid in a series of payments starting after the end of construction, effectively waiving the first 10% of the total owed. The City also promised to reimburse the developer for an undefined amount of streetscape improvements that would be finished, and so deductible against the developer’s debt to the City, before the developer ever had to pay the City a dime. Thus the developer would only begin paying the City the final 40% of the total owed, less the streetscape reimbursements, well after construction was completed. This extended payment schedule permitted the developer to avoid financing the purchase price with construction financing that is more expensive than long-term post-construction financing. The court, however, ignored these very favorable terms that amounted to low-cost financing provided by the City to the developer in addition to the subsidized cost of the land itself, instead focusing on the developer’s required payment of interest on the final 50% of the total price. *120 West Fayette Street*, 413 Md. at 340. Yet the court neglected to note that the developer received an interest-free loan for the first 50%, that the interest would only be charged starting after the completion of construction (when that portion came due) when the developer would have access to cheaper long-term post-construction financing, and most importantly that the 6% interest rate charged by the City was significantly discounted from the prime rate of 8.25% in January 2007 when the Agreement was signed.²⁵⁰

The Court Erred in Declaring that Competitive Bidding Is Not In the “Public Interest”

In addition to ignoring the City’s subsidizing the Agreement by discounting the price of land, reimbursing demolition, remediation and streetscape expenses, and giving low-cost financing, the court asserted that the “public interest” would not be served by classifying the Agreement as a “public works contract” subject to competitive bidding. *120 West Fayette Street*, 413 Md. at 341. The court’s sole justification was that including

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²⁴⁹ Brodie, Memorandum to Board, *supra* n. 244; First Amendment to Agreement, *supra* n. 244.

²⁵⁰ The prime rate is that charged by banks for short-term business rates. FEDERAL RESERVE BULLETIN STATISTICAL SUPPLEMENT, December 2007, available at: http://www.federalreserve.gov/pubs/supplement/2007/12/table1_33.htm.

land acquisition costs in figuring the total financial return of the Agreement to the City would “def[y] common sense” because the contracts to acquire the site were separate from the contracts to develop the site – despite the court’s access to the amended Agreement that explicitly included the purchase of 223 West Lexington Street for the developer as part of the *Carmel* settlement, and despite the amended Agreement’s requirement that the City obtain title to the site from third parties in order to transfer to the developer. *Id.* Moreover, the court held that due to this supposed separation between land acquisition and development contracts, “the purpose of competitive bidding” would not be served by applying the costs of land acquisition to the Agreement. *Id.* Yet despite the court’s recognition that competitive bidding requirements sought to prevent graft and waste, the court’s focus on the potential intermingling of separate contracts suggests the profound influence of the court’s reliance on prevailing wage cases, which typically consider the equity of extending restrictions governing a public entity to a private entity’s (construction) contracts with third parties through a separate (usually financing) contract between the public and private entities.

Competitive bidding requirements, on the other hand, focus on individual contracts to ensure that the public entity receives fair value for the goods or services purchased from the private counterparty. The land acquisition costs are relevant to the Agreement for competitive bidding purposes because these costs reveal the size of the discount on the land values that the City gave the developer as payment for developing the site. If the Agreement were subject to competitive bidding, the amount of the City’s subsidy to the developer might be reduced as developers competed to produce the project, with the lowest bid equaling the least subsidy provided by the City. This is far from the “illogical and unreasonable result” of property sales awarded to the low bidder predicted by the Court of Appeals but only based on the exclusion of land acquisition costs. *120 West Fayette Street*, 413 Md. at 333. The court, in making this holding, glossed over the difference between basing the financial impact to the City on the sale price of the property as opposed to based on the sale price less the acquisition price, with the latter calculation aligning the property sale’s high bidder with the competitive bidding statute’s mandate to reduce the overall cost to the City. Thus including the costs for the land acquisition called for in the Agreement together with the nominal purchase price of the

Agreement would reveal the true cost of the Agreement to the City, and under competitive bidding would ensure the most effective use of the City’s funds in purchasing the services of developers to redevelop the Superblock. The court similarly erred in asserting that applying the competitive bidding statute to the Agreement would not help prevent collusion and graft, since including the land acquisition costs would reveal any sweetheart deals between politicians and developers that otherwise would be obscured by portraying the Agreement as merely a sale of property (too-cozy relationships with major City developers led to legal troubles for both Mayor Sheila Dixon and City Councilwoman Helen Holton this year).

Surprisingly, the court failed to discuss its earlier analysis of the City competitive bidding statute in *Hughes v. Schaefer*, 294 Md. 653, 664-66 (1982), instead relying on *Demory*, a prevailing wage law case, and the court’s unsupported assertions that the purpose of the competitive bidding statute would not be served by applying it to the Agreement. The court was certainly aware of this discussion in *Hughes*, as both the City and the Superblock opponents discussed *Hughes* in their appellate briefs, and since the court discussed *Hughes* elsewhere in the *120 West Fayette Street* opinion when ruling on whether the BDC exceeded its authority in handling the negotiations for the Agreement.²⁵¹ *120 West Fayette Street*, 413 Md. at 349-54. The court’s refusal to address *Hughes* is especially striking, as *Hughes* echoed the *120 West Fayette Street* in holding that applying the competitive bidding law “would constitute a futile act, in the name of a policy which would not be served, to require competitive bidding.” *Hughes*, 294 Md. at 666 (internal quotations and citations omitted). The *Hughes* court held that the specific project, despite being financed by public bond funds, did not qualify as a “public work” subject to competitive bidding “[b]ecause the proposed project relates to a specific location, owned or to be owned by the borrower, there is no competitor for a project at the site.” *Id.* Yet the *Hughes* court specifically limited its ruling to “where the particular property is held by the borrower, *other than as a transferee from the City.*” *Id.* (italics added). This caveat was key, since it emphasized the link between the purpose of the competitive bidding statute and the City’s transfer of property for redevelopment – if

²⁵¹ Reply Brief of Appellant at 17-18, *120 W. Fayette St.*, 407 Md. 253 (September 17, 2008); Brief of Appellees at 23-24, 38-39, *120 W. Fayette St.*, 413 Md. 309 (November 9, 2009).

the development will occur on property to be transferred by the City to the private developer then there will be competitors, as in fact occurred when the BDC issued the RFP for the Superblock. This points out the fallacy of the *120 West Fayette Street* court’s assertion that applying competitive bidding to the Agreement would be pointless, while also pointing out the importance of City ownership of property, even as a “seller,” in determining if a particular project qualified as a “public work” subject to competitive bidding. The *120 West Fayette Street* court’s silence on *Hughes* suggests a deliberate archiving of an inconveniently contradictory ruling by the same court in a decision used by the *120 West Fayette Street* court elsewhere in its opinion and cited in both parties’ briefs.

*Public Redevelopment Efforts Expend Public Funds for Public Purposes,
And Thus Are “Public Works”*

The Agreement itself illustrates the inextricable links in redevelopment projects between public entities transferring a site to private developers to redevelop and the public entities acquiring and assembling the properties to create that site, in specifying that the City’s performance include obtaining title to all of the property to be transferred to the developer.²⁵² The City must acquire the land itself instead of directly subsidizing the developers’ purchasing the properties because private developers lack the ability to force landowners to sell their property, so that a private developer assembling a redevelopment site would face holdouts that either would refuse to sell at any price, or those that would demand prices far above market value for the individual property because of the property’s value as part of the overall site. The City can avoid these holdouts by using its eminent domain authority, which permits the City to acquire all properties in a designated site regardless of the owners’ interest in selling, and at prices limited to the individual property without regard to the additional value due to being part of the site, provided that the City acts within its constitutionally prescribed authority. As a result, the subsidy provided by the City in redevelopment contracts with private developers is even larger than the total calculated by including the City’s land acquisition cost with the redevelopment contract price, because the City may acquire and assemble a

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²⁵² Brodie, Memorandum to Board, *supra* n. 244; First Amendment to Agreement, *supra* n. 244.

site at a substantial discount compared to what a private developer could achieve. The City therefore necessarily starts by identifying a redevelopment site for which it authorizes condemnation, and then offers the site to developers at prices even below what the City would have to pay to acquire the properties as compensation to attract the developers to redevelop the site. Thus the process of choosing the developers is dependent upon the City's ability to acquire and assemble the properties on the site, and so the costs of land acquisition and assembly are interwoven with the City's contracts with developers.

The court's curt dismissal of including these land acquisition costs in evaluating the Agreement's financial balance is therefore surprisingly myopic, especially the unsupported claim that applying competitive bidding to the Agreement would not be in the "public interest" nor prevent "collusion and government overspending." *120 West Fayette Street*, 413 Md. at 341. This is especially true in light of the court's *Carmel* decision just four years earlier that emphasized the importance of transparency by the BDC and Baltimore City in general as well as in the specific Superblock redevelopment project. The amended Agreement's inclusion of the *Carmel* settlement and requirement that the City acquire the land even more explicitly tied land acquisition costs to the redevelopment. The court's refusal strongly suggests a conscious desire to avoid the obvious consequence of recognizing the *Carmel* settlement's inclusion in the amended Agreement or any land acquisition costs – that these costs would easily exceed the income that the Agreement portrayed the City as receiving, that this would clearly illustrate that the City did spend "public money" to hire the developer to redevelop the site, that this would satisfy the "public money" prong of the Maryland definition of a "public work," and so the Agreement would have to be rebid under the Baltimore City competitive bidding requirements.

Moreover, glossing over the interdependence of the City's land acquisition and the Agreement enabled the court to avoid addressing how the City acquired and assembled land, by eminent domain, which the City may only exercise for a "public purpose" or "public use." BALTIMORE CITY CHARTER, ARTICLE II, (2)(a); U.S. CONSTITUTION, AMENDMENT V. If the City must have a "public purpose" or "public use"

to exercise condemnation authority to acquire and assemble a redevelopment site in order to transfer the site to a private developer as compensation for redeveloping the site, then how can that redevelopment not satisfy the “public use or benefit” prong of the Maryland definition of “public work”? MD. CODE ANN., STATE FIN. & PROC. § 17-201(j)(i). The court’s silence on this issue is all the more surprising in light of the court’s recent rebuffing of the City’s frequent exercise of “quick-take” condemnation in two 2006 cases, *Sapero v. Mayor of Baltimore*, 398 Md. 317 and *Mayor of Baltimore v. Valsamaki*, 397 Md. 222.²⁵³ Indeed in *Valsamaki*, the court held that the BDC and City had failed to justify the exercise of quick-take authority not only as an immediate need, but also as for a public purpose. *Valsamaki*, 397 Md. at 272-76 (Two of the seven judges only joined the opinion on immediacy, but not on public purpose. *Id.* at 277). In discussing what constitutes a “public purpose,” the court explicitly required that condemnation function within a previously determined project: “while economic development may be a public purpose, it must be carried out pursuant to a comprehensive plan. . . . simply providing that a property is to be condemned for “urban renewal purposes,” without more, is not enough.” *Id.* at 276.

Thus even though the *Valsmaki* court had just ruled that for the City to exercise eminent domain authority it had to show a “public purpose” by following a previously approved comprehensive plan, the same court in *120 West Fayette Street* declared that the very “public purpose” sufficient to authorize condemnation was not sufficient to define the same redevelopment project as “constructed for public use or benefit” and so qualify as a “public work” subject to competitive bidding. The only means by which the City was able to transfer the site to the developer was by using its public condemnation authority, without which no redevelopment of the Superblock would be possible. Thus considering the costs of land acquisition and assembly, and therefore also the process (condemnation), as an integral part of the City’s Agreement with the developer (as indeed the amended Agreement specified), should have led the court to rule that the Agreement satisfied both the “for public use or benefit” and “paid wholly or partly by public money”

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²⁵³ One study estimated the frequency with which the City has used eminent domain 1,676 times between 2004 and 2008. Robbie Whelan, “In Baltimore, condemnation drives urban renewal,” *Daily Record*, December 5, 2008.

prongs of the Maryland definition of a “public work,” and so require compliance with the Baltimore City competitive bidding statute.

Instead the court sophistically separated the assembly of the Superblock site from the redevelopment contract, by ignoring the amended Agreement and citing inapposite cases from foreign jurisdictions with significant differences in statutory and case law, in order to avoid subjecting the Agreement to competitive bidding, in an exercise that appears determined *a priori* to protect the City’s freedom to operate with limited accountability. This echoes the court’s holding that the BDC did not exceed its authority delegated by the Board of Estimates – despite the missing contract specifying the responsibilities and limits under which the BDC acted on behalf of the Board. On both claims, the court chose to ignore evidence of problematic procedures, and instead of remanding for trial to determine the contract under which the BDC operated and the links between land acquisition and the Agreement, the court held that the BDC and City had acted within their authority.

*Why Did the Court Change Course From Promoting Accountability
To Shielding the BDC From Accountability?*

This is all the more surprising given that this ruling seems so philosophically different from the court’s 2006 trifecta of decisions (*Sapero*, *Valsamaki* and *Carmel*) that brought the BDC and the City to heel from exceeding its powers by emphasizing the need for transparency and accountability in urban renewal projects. In all three cases the court had indicated a profound concern that the BDC and the City had overreached in avoiding revealing the decision-making processes governing urban renewal in Baltimore, and insisted that the BDC and City publicly justify the use of public authority (although the City’s use of eminent domain has not slackened since *Sapero* and *Valsamaki*²⁵⁴). Although the author of all three 2006 decisions, Judge Cathell, as well as two other judges sitting in 2006, had retired before the court heard *120 West Fayette Street*, this turnover of three of seven judges does not explain the sudden shift in philosophy, since the remaining four judges had joined all three 2006 decisions as well as *120 West Fayette Street*, albeit with some indications of concern (Judge Harrell refused to join the

²⁵⁴ *Id.*

Valsamaki analysis of public purpose, but did join the judgment and analysis of immediacy, while Chief Judge Bell and Judge Battaglia only joined the judgment, not the opinion, in *120 West Fayette Street*). *120 West Fayette Street*, 413 Md. at 359.

Perhaps the court found the *120 West Fayette Street* plaintiff, Peter Angelos, as unappealing as the City had been in the 2006 cases, since Angelos challenged the very urban renewal contracting process with the City that Angelos had successfully used to win a part of the Superblock redevelopment, among other projects. The City had drawn attention to this contradiction in its appellate brief, and the court may have been rightfully wary of permitting the judiciary to be used as part of Angelos’s negotiating strategy with the City.²⁵⁵ The Angelos strategy of seeking to box the court in by claiming that the BDC was a private entity illegally acting for the Board while also claiming that the Agreement was a “public work” - so that if the court had to either declare the BDC public, and so the Agreement would be a “public work” or declare the Agreement was private, and so the BDC acted illegally, with either conclusion leading to the Agreement being rebid – may have been too clever and led the court to view the suit as a delaying tactic.

Fundamentally, however, the court’s refusal to recognize the Agreement as a “public works contract” subject to competitive bidding, or to acknowledge the ambiguity in the authorization process for the BDC’s actions, appears to be based on a concern not to interrupt Baltimore’s redevelopment process too much. For the court, requiring public transparency per *Carmel*, and requiring justification of an immediate public purpose for quick-take condemnation per *Valsamaki* and *Sapero*, defined the limits of the City’s redevelopment process without upending the process, whereas requiring the rebidding of the Agreement, either because it was subject to competitive bidding or because the BDC had exceeded its authority, would dramatically reshape the existing redevelopment process. The court was also aware that the Superblock development had started over a decade earlier, and that it represented the “largest urban renewal plan since ... the city’s Inner Harbor,” so that forcing the project to start all over again, especially in a depressed real estate market, likely appeared a non-starter. *120 West Fayette Street*, 413 Md. at 317-18. Given the obvious need for redevelopment in Baltimore, the court appears to have decided to maintain the status quo instead of forcing the City and BDC to change

²⁵⁵ Brief of Appellees at 14-15 n. 11, *120 W. Fayette St.*, 413 Md. 309 (November 9, 2009).

the development process, as it had evolved over the past sixty years, to follow procedural safeguards to ensure government accountability.

The court likely was concerned as well that ruling against the BDC and City on this case, especially defining the Agreement as a “public works contract,” might open up new challenges to redevelopment projects by public and quasi-public entities other than the BDC and the City, including throughout Maryland. The court’s reliance on so many prevailing wage law cases also suggests that the court may have anticipated that redevelopment projects would not be limited to competitive bidding claims, but also to prevailing wage claims. Both scenarios would clearly slow down, and vastly increase the cost of, redevelopment projects in the City and throughout Maryland. The court therefore opted not to change the line between the public and private spheres where it had evolved over decades since urban renewal began in Baltimore. In so doing, the court fell back on the Progressive paean of making government more business-like, more efficient and effective, and based on technical expertise, as well as on the related tradition of government corporations granted autonomy from government oversight in order to avoid corruption, short term political aims, and promote long term professional operation. As laid out in the introduction, government corporations operating in the shadows between public and private spheres had been used for American urban redevelopment since the New Deal public housing programs that subsequently morphed into the urban renewal programs. Thus the court’s reticence to intervene radically in the City’s development process, including the BDC’s autonomy to act on behalf of the Board, reflected this traditional deference to the legislative intent to free redevelopment agencies from bureaucratic entanglements, especially in the area of economic development where governments sought to attract private business investment.²⁵⁶

But the court also faced a unique situation because the City’s development process, and the BDC and its predecessors that led the process, had evolved in fits and starts over six decades without clear statutory procedures or limits. Further obscuring the legal authority to act and procedures governing redevelopment in Baltimore was the long repeated refusal by the BDC and its predecessors to permit public access to their records

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²⁵⁶ See, e.g., *Hughes*, 294 Md. at 665 n. 12 (discussing legislative efforts to relax bureaucratic oversight of industrial development financing).

based on the claim to be private entities free from requirements binding public entities, a claim supported by the City, eager to avoid public scrutiny of redevelopment projects in order to get projects done. The strong influence of private business groups in Baltimore's development process dated back to the Progressive era and the origins of public planning in Baltimore, and so muddied the line between the private and public spheres in the City's redevelopment efforts. As a result, the court, facing the choice in *120 West Fayette Street* of forcing the City to define the procedures governing its redevelopment process at the risk of halting all redevelopment, or instead endorsing the current BDC redevelopment process based on Progressive ideals of government corporations bridging the gap between public and private, chose the latter. In so doing, the court rejected the movement for government accountability and transparency that also had its origins in the Progressive movement.

The *120 West Fayette Street* court echoed the Supreme Court in *Kelo* in relying on the formalistic following of procedural safeguards by the City and the BDC, while ignoring discrepancies suggesting that these procedures were largely empty gestures. Coming down on the side of Progressive efficient, technical, business-like government over transparency and accountability concerns, the *120 West Fayette Street* court, like the *Kelo* court, disregarded Justice O'Connor's warning that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Id.* at 505 (O'Connor, J., dissenting). Yet for the *120 West Fayette Street* court, the specter of dismantling the Rube Goldberg evolution of public redevelopment efforts in Baltimore scared the court into maintaining the status quo – "better the devil you know than the devil you don't." The court faced widespread agreement that BDC and its predecessors, despite their haphazard organization, had led successful redevelopment projects in the past - including the Charles Center, Inner Harbor, and Harbor East – and the clear and dramatic need for revitalization remaining throughout Baltimore. Faced with the dire predictions by the BDC and the City that subjecting the Superblock contract to competitive bidding would not only force a rebidding, but also endanger future development in Baltimore, the court blinked. The court thus retreated from its *Carmel* position, highly critical of the BDC, that the BDC was accountable to the public as a "public body" to the exceedingly narrow

and legalistic definition of “public” in *120 West Fayette Street* that the BDC could avoid public transparency and accountability of its redevelopment projects because (i) the BDC’s “public” status granted it public powers although the court failed to specify the source of these powers, and so avoided imposing any limitations on the BDC’s exercise of these powers, and (ii) redevelopment projects led by the BDC were not “public works” because private developers built the projects, even though the court ignored the crucial role of the BDC in assembling the site to be redeveloped.

IV: Reshaping the City's Redevelopment Process

Due to the Court of Appeals' watering down of its *Carmel* stance subjecting the BDC to public accountability, the BDC, and the City's redevelopment strategy in general, retains its nebulous identity located somewhere between the public and private spheres, a pseudo-public entity with enormous power through its control of public financing and the eminent domain process, but without virtually any responsibility to account for its actions to the public in whose name it acts. The BDC effectively is accountable only to its board, composed of mostly private business leaders and controlled by the mayor, and restrained only by the Board of Estimates, also dominated by mayoral appointees. The City Council has no direct oversight apart from the Council President's limited role as one of five members of the Board of Estimates. The council's power to cut the BDC's budget is blunt at best since the council can only respond to the BDC's past actions, which are largely impossible to block without significant financial consequences to the City, as the council's ineffective response to the BDC's predecessor in 1990 illustrates.²⁵⁷ The council lacks an advice and consent role over the mayor's selection of the BDC president, in sharp contrast to the council's right and responsibility to confirm the head of the Department of Housing and Community Development and other municipal officers.²⁵⁸ This lack of a defined oversight role for the council enables councilmembers to avoid responsibility for the BDC's actions while periodically protesting for political appearances with minimal practical effect.

The BDC's precise organizational role in municipal government remains unclear because the Court of Appeal refusal to require the City to provide the documents showing if the BDC receives its authority from the Board of Estimates directly or instead through the DHCD Commissioner. Establishing a clear chain of command, as well as the terms of the contract under which the BDC operates, would enable the public to hold the BDC accountable, as well as the politicians who currently can sidestep responsibility for the quotidian operations of the BDC as outside of their bailiwick. Thus if the BDC operates under a contract with DHCD, the mayor would be the politician responsible for oversight, but the Council would also have an important role as supervising executive agencies.

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²⁵⁷ See *supra* text accompanying n. 154 *et seq.*

²⁵⁸ BALTIMORE CITY CODE, Art. 13, Housing and Urban Renewal, §2-2(a), Commissioner (2010); BALTIMORE CITY CHARTER, Art. IV, Mayor, §6(a), Appointments of municipal officers (2010).

Alternatively, if the BDC's contract is with the Board of Estimates, the Comptroller and Council President would have a clearer responsibility to check the mayor's supervision of the BDC, and some soul-searching would be in order as to why the mayor has such control over an entity chosen to advise the Board of Estimates, nominally a check on the mayor's unfettered use of public power. Finally, if the BDC instead is an entity that directly reports to the mayor outside of a contract with the Board or DHCD, then it lacks authority to oversee urban redevelopment projects under the current legal framework. Indeed the legal requirements permitting private entities to contract for public business with the Board or DHCD are predicated on these entities being subject to some oversight by the legislative branch of the City, whether the council directly or through the Council President's seat on the Board. The council therefore would likely require a specific oversight role of the BDC in any legislation authorizing this third framework of an executive agency status for the BDC.

The current ambiguous status enhances the power of the BDC as an entity simultaneously inside and outside the City's government structure, a position similar to that of Robert Moses's Triborough Bridge Authority. In theory, mayoral control of the selection of the BDC's board members and president, as well as control of the Board of Estimates, should firmly ensconce the BDC under mayoral direction, so that the electorate could hold the BDC accountable through mayoral elections as Mayor O'Malley publicly asserted in supporting the BDC's current role.²⁵⁹ Yet the practical effect of the largely private board is to insulate the mayor from direct responsibility for the BDC's actions, especially because the board approves the BDC head's determination of what documents must be publicly released. The BDC board, dominated and led by leaders of the private business world where discretion and secrecy are the currency of trade, has reaffirmed the institutional reticence of the BDC and its predecessors to publicly release records of the BDC's operations. Even though *Carmel* compelled the BDC to comply with the MPIA and OMA, both the BDC president and chair of the board declared their opposition to transparency by aggressive claims to exemptions under these laws: "virtually the entire agenda of the BDC board" and "ninety percent of what we [the

²⁵⁹ See *supra* text accompanying n. 190 *et seq.*

BDC in general] do is probably exempt.”²⁶⁰ This embargo of information prevents public awareness potential intervention during the BDC’s planning, negotiating, and decision-making stages, with most public knowledge limited to the BDC’s press releases announcing completed negotiations and final decisions. This shields the mayor from facing politically challenging questions and calls to intervene until after the BDC has set its course on a particular project, at which point the mayor can justify not intervening as too costly to the City to scrap the project and start over. Moreover, the BDC can protect the mayor from accountability by proposing a politically unpalatable project supported private by the mayor, who can assert the project’s necessity as determined by the “independent” judgment of the business leaders on the BDC board – an option not available for a project proposed by the DHCD Commissioner or other executive agency leader.

Yet the mayor is as likely to be co-opted by the BDC board as to use the BDC board to push unpopular initiatives, since the mayor relies on the private business board members as conduits to financial support as well as for endorsements as a business-friendly leader in political campaigns, a potent endorsement in a city in desperate need of the jobs and tax revenue, as well as the cheerleading, of the business community. This in turn provides leverage to the private business leader board members of the BDC who can influence decisions that will have significant financial impact on the board members and their employers without leaving public fingerprints courtesy of the BDC’s guarded secrecy. Even though the mayor effectively appoints the board members, the mayor would be loathe to overrule a decision or initiative backed by the private business members that are the majority of the BDC board. Insidiously, board members can pressure the mayor out of public view since their leverage rests on the public impact of their resigning due to a lack of confidence in the mayor’s willingness to work with the business community. Mayor Schmoke, when he fired the president of the BDC’s predecessor in 1991, made sure to wait until after the mayoral primary, the *de facto* election in heavily Democratic Baltimore, in order to avoid a “potential political issue for the mayor’s opponents.” Schmoke’s careful handling of this issue was wise, given his

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²⁶⁰ Letter of Roger Lipitz to Senator Blount, March 6, 2000, in Brief of Petitioner at App. 68-69, *Carmel*, 395 Md. 299; Jill Rosen, “BDC aims to protect secrecy – Open-meetings rule to have little effect, chairman suggests,” *Sun*, November 15, 2006. See *supra* text accompanying n. 181 and 209.

modest primary victory and the public criticism of the firing by the *Sun*, which reported that “many business leaders ... feel less and less like partners” with the City because the Mayor and staff “simply don’t know much about economic development.”²⁶¹ Yet Schmoke had more leverage than mayors under the current BDC bylaws (enacted in 1997), since the BDC’s predecessor reported directly to the mayor without the interference of a board dominated by private business leaders.²⁶² Nevertheless, the business community’s criticism of Schmoke’s first BDC president, catalyzed by the resignation of Sondheim from the BDC board in 1994, led first to Schmoke’s firing that BDC president just before the 1995 mayoral primary and then to the wholesale restructuring of the BDC led by the current president, M. Jay Brodie, as an entity led by a “private sector board” starting in 1995.²⁶³

Brodie’s overhaul of the BDC’s organizational structure limited mayoral control by increasing the role of private business leaders and the authority of the board. The BDC president and staff no longer reported to the mayor directly, but instead operate under the leadership of the board.²⁶⁴ This change did not merely place an intermediary between the mayor and BDC, but more importantly shifted the allegiance, and legal duty, of the BDC president and staff to the BDC board instead of to the mayor. The domination of the board by private business leaders crucial for a mayor’s electoral success further limited the mayor’s ability to resist initiatives supported by the BDC. Moreover, recent mayors have focused on redevelopment projects as measures of their political success and so been reluctant to slow down or interfere with BDC efforts: Mayor Schmoke, in his final term, chose Brodie to restructure the BDC and to embark on the Westside redevelopment including the Superblock intended to be his political

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²⁶¹ Philip Moeller, “Schmoke image tarnished after Gillece resigns,” *Sun*, October 2, 1991; Michael Anft and Molly Rath, “The End: What Kurt Schmoke did right, and how he went wrong,” *City Paper*, December 1, 1999.

²⁶² See *supra* text accompanying n. 169 *et seq.* (previous board composed of three mayoral appointed city employees and two others).

²⁶³ John E. Woodruff, “‘Amateur hour’ at economic agency? Building Baltimore’s economy: Trouble at the top,” *Sun*, December 11, 1991, 1A; Kevin L. McQuaid and Jay Hancock, “Brodie likely to head city economic agency; ex-Baltimore official is urban planner with skill in large projects,” *Sun*, Dec. 8, 1995; “How Brodie would revive city,” *Sun*, January 28, 1996. Brodie was a member of the advisory panel that recommended increasing the role of private business leaders as well as the BDC president implementing these recommendations. See *supra* n. 172.

²⁶⁴ “How Brodie would revive city,” *Sun*, January 28, 1996.

legacy,²⁶⁵ and Mayor O'Malley successfully followed William Donald Schaefer's path to the Governor's Mansion by revitalizing Baltimore's downtown.²⁶⁶ Both Mayors Dixon and Rawlings-Blake succeeded to the office to finish their predecessors' terms and so were in particular need of endorsement from the business establishment that the BDC board provided for their first mayoral campaigns, especially since the economy was in a recession so that any apparent disruption to economic development plans would impair their political chances. Brodie's push to remake the BDC as less-public and more private entity led by a business-dominated board thus had two sides – on the one hand it encouraged greater involvement of the business establishment but it also did so in by increasing the business establishment's leverage in backroom dealings.

Moreover, Brodie's restructuring of the BDC cemented Brodie's status as the city's power broker in redevelopment. Brodie has remained as BDC president for more than fourteen years under four mayors, but this same continuity also suggests that Brodie has carved out a sinecure nominally subject to mayoral approval but effectively independent because of Brodie's careful cultivation of the City's business community. In a delicate dance, Brodie has made himself indispensable by providing what each mayor has needed politically while also making his retention a key symbol of an incoming mayoral administration's business-friendliness.²⁶⁷ His lengthy prior experience in Baltimore government during urban renewal (starting at DHCD's predecessor in 1962, he served as deputy commissioner from 1969-77, and as commissioner from 1977-84), as well as his network with federal agencies and national private real estate developers during his decade as head of the Pennsylvania Avenue Development Corporation in Washington, D.C. and then as head of planning for the international planning firm RTKL, provided him with experience, institutional knowledge, and politically savvy to fulfill an

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²⁶⁵ C. Fraser Smith, "Schmoke tries new approach: Legacy," *Sun*, December 16, 1997, 2B; Robert Guy Mathews, "Mayor's focus is back on downtown; Schmoke sees Inner Harbor as key to revitalization," *Sun*, January 23, 1998, 1B.

²⁶⁶ Tom Pelton, "Sparing development, if not feelings," *Sun*, December 9, 2000, 1A.

²⁶⁷ Thus Mayor O'Malley relied on Brodie to push ahead with the Superblock development, although with changes advocated by O'Malley, while O'Malley focused on crime reduction. Peter Kaplan, "City agency's mission: do more with less cash. (Baltimore Development Corp.)," *Baltimore Business Journal*, September 10, 1993. When O'Malley became governor, Dixon's retaining Brodie was reported as a sign of continuity with the business-friendly O'Malley administration. John Fritze, "Brodie to remain head of BDC, Dixon says," *Sun*, January 11, 2007, 3B.

incoming mayor's desire quickly and without political uproars.²⁶⁸ With each year Brodie remained as BDC head, he became that much more important as providing continuity to the lengthy redevelopment process (the Superblock has been ongoing for over a decade), so that an incoming mayor risked significantly setting back any redevelopment efforts that an incoming mayor would need for the next campaign by replacing Brodie. Thus Brodie survived Rawling-Blake's initial review of the BDC with the goal to reshape the BDC to encourage more transparency, although Brodie's close associate and former lieutenant, Andy Frank, who was also supported by the City's business establishment, did not.²⁶⁹ Brodie's influence is further reflected by Rawlings-Blake's reliance on leaders in the business establishment to conduct the review of the BDC, which provided her political cover but which also limited her ability to act outside of the review's recommendations (just as she did not fire Frank, but forced Frank to resign by isolating him from any decisions, presumably out of concern to limit the damage to her relationship with the business establishment).²⁷⁰ Brodie's continued sway was most recently illustrated by his convincing a majority of the city council's taxation committee to endorse a tax-increment financing district for Harbor Point, despite opposition to dedicating future city revenue to subsidize upscale development.²⁷¹ Brodie's testimony was accepted as that of an expert untainted by political concerns, on the Progressive model of the government corporation, and without concern that his engagement with the business establishment served not only to improve the City's economic development but also to increase his own power and job security.

Brodie's longevity, knowledge, and willingness to exercise the power he has built up have enabled him to use the undefined authority of the BDC to expand his power. The fact that the Court of Appeals accepted – twice! – the BDC's claims of authority to perform redevelopment projects for the City in the face of a cloudy and problematic chain

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²⁶⁸ Scott Calvert, "Keeping a commitment – He's lost the love of his life, but a shared passion for Baltimore still drives powerful development watchdog, 'Jay' Brodie," *Sun*, October 27, 2003, 5D.

²⁶⁹ Julie Scharper, "Deputy Mayor Frank resigns; Dixon holdover to work for Johns Hopkins president," *Sun*, March 10, 2010, A9.

²⁷⁰ Heather Harlan-Warnack, "Rawlings-Blake says Baltimore Development Corp. needs to end secrecy, no-bid deals," *Baltimore Business Journal*, January 25, 2010. Rawlings-Blake removed all of Frank's staff except for her closest aide who subsequently replaced him. Scharper, "Frank resigns," *supra* n. 269.

²⁷¹ Melody Simmons, "Council committee endorses tax breaks for Paterakis project," *Daily Record*, December 5, 2010.

of authority underscores the BDC’s ability under Brodie to establish power merely by asserting it.²⁷² Andy Frank, Brodie’s executive vice president before becoming deputy mayor, succinctly described the process: “[f]or those of us who have worked at BDC, [the rules] passed on from generation to generation.”²⁷³ Brodie, of course, had been involved with the BDC and its predecessors almost from the beginning (Charles Center Management Office started in 1959, three years before Brodie joined the DHCD’s predecessor, although Brodie had worked in Baltimore as an architect from 1960), and so has outlasted all but a select few urban redevelopment professionals in Baltimore (Martin Millspaugh and Robert Embry are likely the only others).²⁷⁴ Even the City Law Department claims to be unclear as to the limits of the BDC’s authority, according to the City Solicitor: “We all have varying levels of information on what BDC is allowed to do.”²⁷⁵ This cavalier attitude to the BDC’s authority by other City officials further enabled Brodie utilized the BDC’s murky authority to take steps he believed necessary, including awarding no-bid contracts to demolish buildings owned by the BDC without public notice, for which he obtained, without questions, the approval of the DHCD Commissioner.²⁷⁶ Brodie has used this accumulated power to rule the City’s redevelopment process with only the barest veneer of seeking approval of the politicians, recommending the Superblock project to Mayor O’Malley and the Board of Estimates as “[i]t’s my strategy ... and if it fails, you can blame me” (emphases added) in rejecting calls to rebid the project due to significant changes in the Request for Proposals.²⁷⁷ Brodie’s statement highlights his belief in the Progressive ideal of expert technical authority that craft and finalize policy for politicians to accept or reject with minimal amendment. Yet this Progressive model has permitted Brodie, like Robert Moses, to reshape the City with limited public accountability by exercising, through secrecy and the

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²⁷² See *supra* text accompanying n. 219 *et seq.*

²⁷³ Annie Linskey, “BDC bidding raises issues: \$2.3 million of contracts awarded without public notice,” *Sun*, October 5, 2009.

²⁷⁴ Calvert, “Keeping a commitment,” *supra* n. 267. The Charles Center Management Office opened on June 1, 1959. “Timetable: The Charles Center Plan,” in *BALTIMORE’S CHARLES CENTER: A CASE STUDY OF DOWNTOWN RENEWAL* 31 (Martin Millspaugh, ed., 1964).

²⁷⁵ Linskey, “BDC bidding,” *supra* n. 273.

²⁷⁶ *Id.*

²⁷⁷ Scott Calvert, “‘Superblock’ team plan recommended to mayor; Balto. Development Corp. likes four-party proposal: West Side,” *Sun*, November 25, 2004.

BDC’s ambiguous authority, power accumulated from political and business relationships.

Alternative A: Retain and Reform the Quasi-Public Corporate Structure of the BDC

Yet effective redevelopment does not require secrecy and unaccountability enabling an unelected official to amass this much power. Indeed, this concentration of power in a single person for decades risks damaging a city’s redevelopment prospects by fossilizing the city’s approach to redevelopment around a single viewpoint, as Robert Moses’ focus on highways impacted New York City.²⁷⁸ Brodie himself expressed a similar view in endorsing a two-term limit (eight years total) for Baltimore mayors:

I think there’s a burnout factor. Not strictly in the person of the mayor but the people around him. ... For government itself, it gets difficult to think new thoughts. ... The ability to change things is awfully important, and I think it gets harder to do after a certain point.²⁷⁹

If this is true for a mayor, who is confronted daily with alternative approaches by individuals with power and whose ability to deliberate secretly is circumscribed by public transparency mandates, the risk of such static group-think is exponentially more likely for the head of an entity like the BDC that operates largely outside of public view and unfettered by statutorily defined authority.

The protestations of Brodie, BDC chair Lipitz, and the City that compliance with the MPIA and OMA would limit the effectiveness of the BDC proved to have been theatrical gestures given the wide latitude of the exemptions in these laws that the BDC subsequently asserted covered much of the BDC’s activities.²⁸⁰ Before *Carmel*, Brodie had claimed that the only alternative to the BDC’s secrecy was a “public referendum about [redevelopment] proposals when they are still being reviewed,” ridiculing any possibility of expanding public transparency, and hence accountability.²⁸¹

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²⁷⁸ Owen Gutfreund, “Rebuilding New York in the Auto Age: Robert Moses and His Highways,” in ROBERT MOSES AND THE MODERN CITY: THE TRANSFORMATION OF NEW YORK 92-93 (Hilary Ballon and Kenneth T. Jackson, eds., 2007); Caro, POWER BROKER, *supra* n. 23 and *passim*.

²⁷⁹ Michael Anft and Molly Rath, “The End: What Kurt Schmoke did right, and how he went wrong,” *City Paper*, December 1, 1999.

²⁸⁰ Letter of Roger Lipitz to Senator Blount, March 6, 2000, in Brief of Petitioner at App. 68-69, *Carmel*, 395 Md. 299; Jill Rosen, “BDC aims to protect secrecy – Open-meetings rule to have little effect, chairman suggests,” *Sun*, November 15, 2006. See *supra* text accompanying n. 181, 209, and 260.

²⁸¹ “Hotel dilemma,” *Sun*, September 25, 2003.

Yet an alternative model that provides significantly more transparency and accountability exists, and that may have been the model for Mayor Schmoke’s creation of the BDC by merging CC-IH, the central business district development corporation, with BEDCO, the city’s industrial development corporation in October 1991: the New York City Economic Development Corporation (NYCEDC).²⁸² Schmoke’s move echoed Mayor Dinkins’s creation of NYCEDC in July 1991 as a budget-reducing consolidation measure by combining multiple economic development corporations with different jurisdictions (urban development efforts in real estate v. financial support).²⁸³ Like the BDC, NYCEDC is a private, non-profit corporation that retains its institutional framework of its predecessor, the New York City Public Development Corporation, founded decades earlier in 1966 (1965 for the BDC).²⁸⁴ NYCEDC receives the authority to engage in redevelopment efforts on behalf of New York City through contracts with a municipal agency, the Department of Small Business Services, just as the City alleges is the case with the BDC.²⁸⁵

In contrast to the BDC, however, NYCEDC has additional transparency and accountability requirements. NYCEDC’s two contracts with the city are subject to annual renewal,²⁸⁶ and subject to the municipal procurement standards.²⁸⁷ Although NYCEDC has a private board like the BDC, the intermediary role of the board is lessened by the mayor directly appointing seven of the twenty-seven board members, and only ten members chosen by the board chair from mayoral nominees. The ten remaining members are selected by other elected officials, although formally appointed by the mayor: five

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²⁸² CC-IH merged with BEDCO into the City of Baltimore Development Corporation on October 7, 1991. SDAT F3365 / 1862.

²⁸³ NYCEDC, created by a merger of the New York City Public Development Corporation, Financial Services Corporation and most of the office of Ports and Trade, was incorporated on July 1, 1991. New York State Department of State, Division of Corporations, Entity Information, “New York City Economic Development Corporation,” available at http://www.dos.state.ny.us/corps/bus_entity_search.html; Bruce Berg, NEW YORK CITY POLITICS: GOVERNING GOTHAM 270-1 (2007); Josh Barbanel, “Standard & Poor’s Cuts Rating of Issue for New York City,” *New York Times*, April 30, 1991, B3.

²⁸⁴ “Our History,” at <http://www.nycedc.com/AboutUs/OurHistory/Pages/OurHistory.aspx>.

²⁸⁵ Berg, NEW YORK 271, *supra* n. 283.

²⁸⁶ New York City Comptroller, “City recaptures \$120 million from EDC,” July 27, 2010, http://www.comptroller.nyc.gov/press/2010_releases/pr10-07-080.shtm.

²⁸⁷ See e.g. “Resolution of the New York City Workforce Investment Board Executive Committee,” June 22, 2006 (“the City’s contract with EDC was procured in accordance with the City’s Procurement Policy Board Rules”), <http://www.nyc.gov/html/sbs/wib/downloads/pdf/strive.pdf>.

chosen by the city council speaker and one by each of the five borough presidents.²⁸⁸ Six of the current twenty-four NYCEDC board members are municipal officials, four top officials for borough presidents, the head of the municipal law department’s economic development section, and the deputy mayor for economic development.²⁸⁹ This organization echoes that of the New York City Industrial Development Agency, a NYCEDC subsidiary, which board has four *ex officio* members, six members appointed by the mayor, and five selected by the borough presidents.²⁹⁰ This greater inclusion of politicians other than the mayor broadens the viewpoints represented on the board, and increases transparency and accountability by expanding the range of politicians responsible for NYCEDC’s actions – the mayor, borough presidents, city council president and her council colleagues. Perhaps most remarkably, NYCEDC not only publishes the agenda of board meetings, but also the minutes of those meetings, including discussions about pending real estate negotiations.²⁹¹ NYCEDC has not avoided criticism for lack of transparency and accountability, but its structure is nonetheless significantly more open than that of the BDC, and yet has not been attacked as ineffectual.²⁹²

Conclusion (Alternative A): Restructure the BDC to Resemble NYCEDC

NYCEDC thus represents a model for reform of the BDC that would stop short of a radical reshaping but that would still increase the accountability and transparency of the BDC’s operations. At the simplest level, the BDC could adopt NYCEDC’s transparency standards and engage in public disclosure in good faith instead of an instinctual and aggressive assertion of the need for secrecy. NYCEDC suggests that a more reasonable alternative exists.

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²⁸⁸ I could not find a more authoritative source than Wikipedia, “New York City Economic Development Corporation,” http://en.wikipedia.org/wiki/New_York_City_Economic_Development_Corporation. NYCEDC’s website lists the current board members and brief biographies, *infra* n. 289, but not the selection process.

²⁸⁹ <http://www.nycedc.com/AboutUs/WhoWeAre/BoardOfDirectors/Pages/BoardofDirectors.aspx>.

²⁹⁰ Berg, NEW YORK 35, *supra* n. 283.

²⁹¹ E.g., Minutes of NYCEDC board meeting, August 4, 2010, available at <http://www.nycedc.com/AboutUs/FinStatementsPubReports/NYCEDC/Documents/2010-08-04%20Board%20of%20Directors.pdf>.

²⁹² E.g., Tom Angotti, “The real power in city planning,” *Gotham Gazette*, October 2010, <http://www.gothamgazette.com/article/landuse/20101004/12/3377>.

Similarly following NYCEDC's model, the City could straighten out the precise relationship between the BDC and the City by reissuing the "mythical" contract under which the BDC purports to operate, and making this contract subject to annual renewal like that of NYCEDC. This would enable the politicians to confront the question of what functions the BDC should assume, and permit citizens, the business community, and media to participate in such a discussion. The idea that the BDC, in 2010, still operates under the terms of a contract issued several decades earlier, with no updates reflecting the innumerable federal and state economic development programs, as well as statutes and regulations, closed and introduced in the meantime, verges on the ludicrous. Even though the annual renewal of this contract would likely become a formality, the required reconsideration each year would provide the opportunity to revisit the relationship based on changing needs or circumstances, and it would also ensure that the tasks assigned and limits of the authority delegated to the BDC would be known publicly. The public availability of the contract would give BDC employees and opponents a better sense of the limits of the BDC's powers, unlike the current reliance on "generational memory" described by Andy Frank above. Moreover, if a particular action by the BDC triggered a significant response to inspire the city council to act, it would no longer be limited to the largely ineffectual cutting off of the BDC's budget as happened with the T.Rowe Price/IBM building (discussed above), but instead could amend the contract directly or require certain contractual amendments as conditions for the BDC's budget.

The BDC could also follow NYCEDC's broader involvement of politicians in selecting board members instead of the total mayoral control over the current board. Thus the mayor, in addition appointing the four *ex-officio* municipal officers, might nominate five other members to be appointed by the board, while the remaining six members would be selected by other elected officials, such as the city council president on behalf of the council and the comptroller (in place of New York's borough presidents). This change would bring the other politicians into greater involvement with the day-to-day oversight of the BDC, while the mayor's appointees would still hold the majority necessary to give the BDC direction. Furthermore, the inclusion of both the city council president and comptroller would involve all of the key members of the Board of Estimates, the third leg of Baltimore government, and one that no longer exists in New

Given Brodie’s personal identification with the Superblock as awarded, a change in the BDC president after the 2002 or 2006 elections, might have permitted more substantive negotiations that might have avoided the lengthy lawsuits seeking the rebidding of the original 2003 Request for Proposals. While the litigation may not have been avoidable, the BDC and City have settled with several of the significant opponents, including Carmel Realty, by involving them more significantly in the redevelopment.²⁹⁵ Turnover of the presidency, and board, should also lead these actors to view their time as limited and so push to get projects done by compromising instead of looking to create a long-term legacy. At the same time, tying the BDC presidency to municipal elections may galvanize public support for certain projects, if a central issue in a decisive election, that may permit faster resolution. Moreover, such a discussion about redevelopment plans in an electoral campaign might obtain greater buy-in by the electorate and awareness of the complex tradeoffs necessary in redevelopment projects. Although Brodie, Lipitz and others in the BDC and City government would argue that increased transparency would hobble the completion of redevelopment projects, the Superblock’s drawn-out evolution highlights the inability of the current secrecy-dependent process to achieve results – ground has still not broken over a decade after the project was proposed and seven years after the RFP was published.

Alternative B: Transforming the BDC from Quasi-Public Corporation to Public Agency

Considering NYCEDC as a model for the BDC, however, raises the question of why Baltimore has a BDC – a private corporation that runs its economic development efforts. New York City dwarfs Baltimore, with more than thirteen times the population than Baltimore (8.4 million v. 637,000), almost four times as much land area (303 square miles v. 81), and over twenty-four times as many wholesale and retail sales (\$229 billion v. \$9.3 billion).²⁹⁶ Does Baltimore’s much smaller scale and population really require the same organizational approach as New York City, or does the imposition of a quasi-public corporate entity on New York City’s model only create an additional layer of

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²⁹⁵ Edward Gunts, “Carmel named developer for West Side project,” *Sun*, November 29, 2010; *see supra* text accompanying n. 236-38.

²⁹⁶ U.S. Census Bureau, “Quick Facts: New York City,” available at <http://quickfacts.census.gov/qfd/states/36/3651000.html>; and “Quick Facts: Baltimore,” available at <http://quickfacts.census.gov/qfd/states/24/24510.html>.

bureaucracy preventing clear and effective economic development? The total control of the BDC's board by the mayor without any involvement of other politicians, further weakens support for the BDC, as it does not even serve the function of providing a forum in which politicians, as representatives of the voters, may negotiate the future of Baltimore's development. Instead, the BDC appears to be an executive agency responsible only to the mayor, without any meaningful legislative oversight, that really functions to internalize in the mayoral administration the desires of the business establishment leaders that sit on the board. Whatever debate occurs does so behind closed doors, due to the predilection for secrecy and the lack of other politicians' involvement in selecting the board members. The recent effort by the Greater Baltimore Council, representing the business community, to build support for an alternative site for a new arena represents a much more productive approach to development, since this proposal forces a public discussion of plans for the future in which all stakeholders can participate.²⁹⁷

Indeed, does the Progressive model of "business-like" government achieved through a quasi-public government corporation help or hinder Baltimore redevelopment efforts? The Port Authority, the first such government corporation, was created to permit a single approach to development of New York Harbor split between two states, and subsequent government corporations, like the Tennessee Valley Authority or New York State's Urban Development Corporation provided a single focus to a multi-jurisdiction problem, whether hydroelectric energy or affordable housing (although this initial single purpose often expanded significantly as the corporation took on more tasks). Government corporations also proved useful for long-range infrastructure programs with a public purpose and defined focus that required significant capital investments, such as airports, bridges, or water supply. The first housing and urban renewal government corporations, the precursors to NYCEDC and the BDC, were designed as conduits for massive federal aid that required autonomy from municipal officials otherwise tempted to reroute the federal aid to alternative local purposes. With the drying up of federal aid, these development corporations subsequently became a useful conduit of private money

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²⁹⁷ Edward Gunts, "Expansion would include a new Sheraton: High-rise hotel would be part of an enlarged convention center-arena complex," *Sun*, November 15, 2010.

through bond issues on the capital markets that did not impact the sponsoring government's debt load. These development corporations either focused on a single purpose citywide – industrial development – or on a specific geographic site in a multi-jurisdictional manner – port infrastructure or revitalizing a neighborhood by addressing housing, economic development, health, and crime. The latter type relied on the autonomy of the government corporation to retain its geographic focus and jurisdictional breadth instead of being swallowed by a larger, single jurisdiction municipal department.

But the BDC does not address any of these purposes. The BDC does not have a multi-jurisdictional focus like the Port Authority or Urban Development Corporation. The BDC's role directing the limited federal aid available today pales in comparison to its other activities. The BDC does not issue its own bonds, unlike NYCEDC, which does so through its Industrial Development Agency subsidiary,²⁹⁸ which requires a corporate structure separate from the municipal government to attract bond purchasers. Finally, the BDC does not focus on one type of development citywide or address a single geographic area holistically, but instead purportedly addresses all types of economic activity in all areas of the city.

The BDC appears to have taken the quasi-public corporation form due to historical accident and subsequently by institutional expansion, not because the quasi-public structure was necessary to achieve its responsibilities. Although the history of the BDC as a quasi-public entity extends back to 1959 with the creation of CC-MO, the current BDC with its mismatch between corporate form and public purpose was effectively created by two transformations: (i) when Mayor Schmoke created the BDC by merging the city's industrial development corporation, BEDCO, with its downtown development corporation, CC-IH Development Corporation, Inc., in October 1991; and (ii) when Mayor Schmoke turned to Brodie to mastermind a new BDC starting in 1995.²⁹⁹ By these two transformations, the BDC became a "shadow government" for redevelopment, aggregating a vast array of responsibilities behind the shield of a private corporation.

²⁹⁸ <http://www.nycedc.com/FinancingIncentives/NYCIDA/Pages/NYCIDA.aspx>.
²⁹⁹ See *supra* text accompanying n. 169 *et seq.*

Evolution of the BDC as a Quasi-Public Corporation Responsible for the City's
Redevelopment Process

The City had used private non-profit corporations under exclusive contract with the City to perform public tasks before the BDC's formation in 1991 – both BEDCO and CC-IH Development Corporation, Inc. were such entities – but those quasi-public corporations had been used for more focused tasks, usually involving the management of city real estate to promote economic development. One of the earliest was CC-IH, incorporated in 1965 to manage the redevelopment of the Inner Harbor following the 1964 Master Plan sponsored by the Greater Baltimore Committee (GBC) representing the business community.³⁰⁰ CC-IH was merely the incorporation of the Charles Center Management Office (CCMO), a two-person management team that managed the redevelopment of the Charles Center according to the Charles Center Plan prepared by the GBC and the Committee for Downtown and approved by the city council in 1959.³⁰¹ In both cases the GBC - following a long tradition of private business leaders proposing development initiatives for the City to adopt - proposed, funded and performed significant parts of the Charles Center and Inner Harbor plans.³⁰² Having invested significant funds and time on getting these projects to the construction phase, the GBC was concerned that the City's bureaucracy lacked the experience to supervise the construction, leasing, and subsequent management of these projects, and so suggested the management of the project be done by a non-public business entity – CCMO, later CC-IH, headed by the chairman of the Committee for Downtown.³⁰³ CCMO was created to ensure the GBC that the Charles Center project would be handled expeditiously by experienced staff who had worked on the preparation of the plan, and so CCMO charged

³⁰⁰ CC-IH was incorporated on September 3, 1965 (SDAT, # D57786, F 497/324). David Wallace, URBAN PLANNING/MY WAY 123 (2004); Martin L. Millspaugh, "The Inner Harbor Story," URBAN LAND 37 (April 2003).

³⁰¹ Wallace, URBAN PLANNING, *supra* n. 33, at 27; Millspaugh, "Inner Harbor," *supra* n. 300 at 37.

³⁰² An early example is the 1902 commission by Baltimore's Municipal Art Society to the Olmstead Brothers firm to prepare a plan for a network of public parks on the periphery of the City. Scott, PLANNING, *supra* n. 51, at 60-61. The Charles Center plan was created by the GBC's Planning Council, established in 1956 with an annual budget of \$37,500 on the model of a city planning commission. The Planning Council's first major project was the preparation of a master plan for the central business district, which was financed by the Committee for Downtown, a group of downtown retail merchants founded in 1954 led by J. Jefferson Miller, later the chair of CCMO and CC-IH. "Downtown Committee plans larger program for 1956," *Sun*, January 15, 1956; Martin Millspaugh, "The Planning Council: New look for old Baltimore," *Sun*, July 14, 1957.

³⁰³ Wallace, URBAN PLANNING, *supra* n. 300, at 23-24; Millspaugh, "Inner Harbor," *supra* n. 300 at 37.

the City \$1 a year for its services – a contract focused on providing CCMO legal authority to oversee the project.³⁰⁴ With the Inner Harbor’s vastly more complex scale, the GBC would not be able to continue to subsidize CCMO, so CCMO was incorporated as CC-IH, maintaining the same legal structure of a private entity performing services for the city under a contract with DHCD’s predecessor, the Baltimore Urban Renewal and Housing Agency (BURHA), but receiving its budget from the City.³⁰⁵ This contractual framework has been characterized as reflecting a different purpose for CC-IH, providing as-needed, temporary technical support, “unlike a city agency which has a *permanent* function.” (emphasis added).³⁰⁶ The transition from CCMO to CC-IH also changed the role of the GBC, which had dominated the Charles Center project, but which played a reduced role in the Inner Harbor, leaving CC-IH as the most important link to the business community through its chair, J. Jefferson Miller, the head of the Committee for Downtown and executive vic-president of the Hecht department store.³⁰⁷ Although CC-IH thus shared its corporate form with today’s BDC, its mandate was much narrower, limited to managing the leasing, marketing, and upkeep of Charles Center and the Inner Harbor once CC-IH had finished overseeing the construction of these projects in accordance with plans approved by the City.

BEDCO, the other leg of the BDC, also began in 1965 when the Baltimore Economic Development Commission (EDC), a panel of business leaders established in 1962 to advise the mayor on how to combat the deindustrialization of Baltimore, proposed a land bank to assemble industrial sites on behalf of the city, the Baltimore Industrial Development Corporation (BIDC).³⁰⁸ Despite much support, BIDC only

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³⁰⁴ Wallace, URBAN PLANNING, *supra* n. 300, at 23-24.

³⁰⁵ Dale Edward Thomson, *Political and Popular Control of Baltimore, Maryland’s Quasi-Public Economic Development Corporations from 1965 to 2000*, 102-03 (Oct. 26, 2000) (unpublished doctoral dissertation, University of Maryland, Baltimore County)(stating that CC-IH’s contract was with the Board of Estimates for CC-IH to advise BURHA/DHCD – but without any supporting references).

³⁰⁶ Roberto Brambilla and Gianni Longo, LEARNING FROM BALTIMORE 55 (1979) (this quotation is attributed to Martin Millspaugh in Katharine Lyall, “A Bicycle Built-for-Two: Public-Private Partnership in Baltimore,” in PUBLIC-PRIVATE PARTNERSHIP IN AMERICAN CITIES (R. Scott Fosler and Renee A. Berger, eds. 1982)).

³⁰⁷ Lyall, “Bicycle,” *supra* n. 306 at 46; Millspaugh, “Inner Harbor,” *supra* n. 300 at 38; Wallace, URBAN PLANNING, *supra* n. 300 at 6; J.S. Armstrong, “Top executive changes made by Hecht Co.,” *Sun*, May 17, 1955.

³⁰⁸ “D.W. Kornblatt named by J.A.C.,” *Sun*, February 7, 1962, 10; J. Anthony Lukas, “Five named to help city get business; Economic Commission Appointees are from 5 major groups,” *Sun*, February 19, 1962,

became a reality in 1972 under the newly elected Mayor Schaefer who had successfully supported a bonding issue to fund the land-bank operations.³⁰⁹ Like CC-IH, BIDC was set up as a private corporation to manage real estate related projects on behalf of the City.³¹⁰ Schaefer's initial proposal for the BIDC followed the example of the Philadelphia Industrial Development Corporation as a partnership between the City and the business community, each providing half of the annual budget and half of the board, with BIDC operating under a contract with the Board of Estimates, although the final version removed the business community's direct involvement and financial contribution.³¹¹ In 1975, Schaefer adopted the GBC's proposal to focus and catalyze the city's economic development efforts by merging BIDC with EDC to create BEDCO.³¹² Concerned that BEDCO and CC-IH coordinate on any overlapping issues, Schaefer made BEDCO, like CC-IH, report to, and receive its budget from, DHCD, in a change from BIDC which had reported directly to the mayor and received its budget from the mayor's office.³¹³ The aim of this change was to have the activities of BEDCO and CC-IH registered with, if not actually supervised by, a single Commissioner and municipal department, and also to unify all of the City's urban development initiatives under the same department, DHCD.³¹⁴ Although BEDCO's combination of management of industrial parks and city promotion foreshadows today's BDC, BEDCO's mandate was narrower, focused primarily on attracting industry, which required large parcels that

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30; "Land-bank plan readied; Industrial expansion bill due October introduction," *Sun*, September 3, 1965, 25.

³⁰⁹ Thomson, *Political Control*, *supra* n. 305 at 123-25 (with no supporting references). SDAT has no record for "Baltimore Industrial Development Corporation." G. Jefferson Price 3d, "Acquisition unit urged for city," *Sun*, March 29, 1972, C15 (discussing proposed BIDC under Schaeffer); Tracie Rozhon, "City plans to buy old stockyards," *Sun*, January 17, 1973, A7 (introducing BIDC in discussing its first project).

³¹⁰ Rozhon, "City plans," *supra* n. 309.

³¹¹ Price, "Acquisition unit," *supra* n. 309 (the proposed BIDC board would have seven members appointed by the mayor, seven by the business community, and six chosen by the other fourteen members). Thomson states that BIDC, as created, had a board of 21 members all chosen by the mayor, and that BIDC's contract was with the mayor and city council, not the Board of Estimates. Thomson, *Political Control*, *supra* n. 305, at 129-30 (with no supporting references). The City provided the entire budget for BEDCO, BIDC's successor, in 1976. Tracie Rozhon, "City promotion unit to urge tax incentives to lure business," *Sun*, November 22, 1976, D1.

³¹² Rozhon, "City promotion unit," *supra* n. 311; BEDCO was incorporated on December 31, 1975 (SDAT # 641134, F 2242 / 431 – without any mention of a predecessor corporation, suggesting that BIDC was never formally incorporated).

³¹³ Thomson, *Political Control*, *supra* n. 305 at 130 (with no supporting references).

³¹⁴ *Id.*

BEDCO would attempt to create by ensuring sufficient industrial zones and by assembling industrial parks.³¹⁵

Both BEDCO and CC-IH therefore adopted the structure of the private corporation under contract with the City because of the significant involvement of the GBC, and business community, in the creation and operation of these entities. BEDCO and CC-IH also had relatively narrow mandates that arguably were better served outside of the municipal bureaucracy, with their small size and direct reporting to the mayor permitting quick action.³¹⁶ When Mayor Schموke merged BEDCO and CC-IH to create the BDC, however, the benefits of the private corporation model – small size, narrow focus – were mostly lost while the negative aspects of this model – autonomy from political oversight, secrecy as a nominally private corporation – increased dramatically.

BDC I: Consolidation of the City's Economic Development Entities

The 1991 merger of BEDCO and CC-IH was the culmination of Mayor Schموke's strategy, announced soon after he became mayor in 1987, to consolidate the multiple economic development corporations that were the hallmark of Schموke's administration, including the Market Center Development Corporation (MCDC), created in 1979 to revitalize the area around Lexington Market, and the Charles Street Management Corporation, created in 1983 to revitalize the Charles Street corridor.³¹⁷ Some in the Baltimore redevelopment community assert that Schموke's aim was to "clean house" of Schموke's influence on the administration, while Schموke justified his push towards consolidation as reducing redundancy, promoting efficiency, and saving money.³¹⁸ Another influence on Schموke may have been an article critiquing Baltimore's "Renaissance" under Schموke as limited to the downtown area supervised by

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³¹⁵ Frank P.L. Somerville, "Cherry Hill shift voted; 35 industrial acres to be used for residences," *Sun*, March 27, 1963, 9.

³¹⁶ See *infra* text accompanying n. 338.

³¹⁷ Michael A. Fletcher, "Schموke wants possible merger of BEDCO, Center City explored," *Sun*, November 9, 1990. MCDC was incorporated on March 30, 1979 (SDAT # D1002526, F 2441 / 1444); Charles Street Management Corporation was incorporated on December 12, 1983 (SDAT # D1646835, F 2623 / 2952). R. B. Jones, "Mayor Schموke Brings the 'Shadow Government' Back to Town," *Sun*, July 24, 1992.

³¹⁸ Fletcher, "Schموke," *supra* n. 317; Kevin Thomas, "BEDCO president Gillece quits post; Resignation comes just after merger of two city groups," *Sun*, September 26, 1991; Thomson, *Political Control*, *supra* n. 305, at 167-68 (citing anonymous sources).

CC-IH and leaving the neighborhoods to decline, an academic version of the attack on Schaefer's redevelopment policy mounted by Schaefer's 1983 opponent.³¹⁹

Schmoke began by merging MCDC into CC-IH, renamed Center City-Inner Harbor Development Inc., in 1989.³²⁰ This merger dramatically expanded the jurisdiction of CC-IH to west and north of the Inner Harbor, and Schmoke further extended CC-IH's mandate to include the neighborhoods east of central business district.³²¹ This was a radical change of territory and of focus for CC-IH, which had heretofore been limited to implementing and managing two discrete projects – Charles Center and the Inner Harbor – but which now also took on the task of revitalizing a declining neighborhood with no clear redevelopment plan, few city-owned parcels, and declining government funds for urban redevelopment. Schmoke similarly expanded the responsibilities and authorities for another of Schaefer's development corporations in early 1990, when the Charles Street Management Corporation became the Downtown Partnership to reflect its changed focus from a single commercial strip to the entire central business district.³²² Concern that absorbing MCDC's responsibilities would diminish CC-IH's effectiveness led Walter Sondheim, the long-time chair of CC-IH, to resign. His successor, Al Copp, quickly outraged the city council with his refusal to share the Architectural Review Board's report on the proposed building height waiver for the IBM/T.Rowe Price building, and resigned a year later, replaced by Sondheim on an interim basis.³²³ Schmoke quickly moved to merge CC-IH (still processing its absorption of MCDC) with BEDCO and appointed BEDCO's president, David Gillece, to lead the newly created BDC.³²⁴ This move pleased the city councilman that had led the withholding of CC-IH's

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³¹⁹ Marc Levine, "The case for two Baltimores," *Sun*, August 10, 1986. Levine published a longer version as "Downtown Redevelopment as an Urban Growth Strategy: A Critical Appraisal of the Baltimore Renaissance," 9 *Journal of Urban Affairs* 103-23 (July 1987). The president of BEDCO defended Schaefer's economic development program in the same issue: Bernard Berkowitz, "Rejoinder," at 125-32, to which Levine countered with Levine, "Response to Berkowitz: Economic Development in Baltimore: Some Additional Perspectives," at 133-8. On the 1983 campaign, C. Fraser Smith, WILLIAM DONALD SCHAEFER 221-22 (1999).

³²⁰ MDCC and CC-IH merged on June 29, 1989 (SDAT # 57786, F 3149 / 2520).

³²¹ Fletcher, "Schmoke," *supra* n. 317.

³²² Stephanie Shapiro, "Downtown's Perfect Partner; Keeping the charm in Charm City is Laurie Schwartz's constant job," *Sun*, May 30, 1993, 1K.

³²³ On the IBM building controversy, *see supra* text accompanying n. 154; Ted Shelsby, "Merger of city development agencies studied," *Sun*, November 9, 1990.

³²⁴ Shelsby, "Merger," *supra* n. 323; Edward Gunts, "2 development agencies for the city to be merged," *Sun*, March 2, 1991.

budget over the IBM/T.Rowe Price building dispute, who believed that this consolidation would lead to increased transparency and a broader mandate beyond downtown for CC-IH and the City's redevelopment strategy in general.³²⁵ The *Sun* similarly applauded the merger as "indicat[ing] that [CC-IH]'s days as a largely independent entity are over," with the new BDC placed "more tightly under the Schmoke administration's planning umbrella."³²⁶

This prophecy of direct mayoral control proved true more quickly than the *Sun* anticipated: less than a year after Schmoke proposed merging CC-IH and BEDCO, and only days after finalizing the merger, Schmoke's hand-picked choice to lead the newly consolidated economic development entity, David Gillece, resigned, allegedly because of too much interference by the mayor's office.³²⁷ Gillece's sudden resignation concerned many in the development and business communities, given Gillece's experience and connections (prior to serving as BEDCO's president for three years, he had directed GBC's economic development program and been deputy director of Citizens Planning and Housing Association).³²⁸ As disconcerting to many was Schmoke's choice to replace Gillece: his special assistant for economic development, Honora Freeman, who lacked Gillece's economic development experience but who had close ties to Schmoke and had previously worked at a law firm closely associated with Schmoke.³²⁹ This unease increased existing concerns that the BEDCO-CC-IH merger would reduce focus on downtown and permit the Inner Harbor to decline, with CC-IH's resources effectively transferred to cover BEDCO's citywide mandate.³³⁰ Thus Schaefer, as governor,

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³²⁵ Fletcher, "Schmoke," *supra* n. 317.

³²⁶ "City planning reshuffle," *Sun*, November 27, 1990.

³²⁷ Kevin Thomas, "BEDCO president Gillece quits post; Resignation comes just after merger of two city groups," *Sun*, September 26, 1991 (attributing the resignation to interference by Schmoke's executive assistant Lynette Young and by Honora Freeman, Schmoke's assistant for economic development); Martin C. Evans, "City development director resigns," *Sun*, September 26, 1991 (attributing the resignation to Schmoke's insistence that the BDC retain the Shapiro and Olander law firm closely associated with Schmoke's advisors, including Honora Freeman, a former employee).

³²⁸ Thomas, "BEDCO president," *supra* n. 327; Kevin L. McQuaid, "Baltimore's new power base: Merger of Baltimore Economic Development Corp. and Center City-Inner Harbor Development Inc.," *Baltimore Business Journal*, January 7, 1991; Evans, "City development," *supra* n. 327 (Gillece moved from GBC to BEDCO in 1988).

³²⁹ "Who controls Schmoke's City Hall?" *Sun*, September 28, 1991; Philip Moeller, "Schmoke image tarnished after Gillece resigns," *Sun*, October 2, 1991; Edward Gunts, "All fired up to make city hot again," *Sun*, October 20, 1991; John Woodruff, "Development agency's chief a quintessential American success story; Building Baltimore's economy: Trouble at the top," *Sun*, December 11, 1994.

³³⁰ Philip Moeller, "Mayor Schmoke, Consider these ideas," *Sun*, November 21, 1990.

suggested a joint state-city task force focused on the Inner Harbor, while GBC’s former executive director, William Boucher III, discounted the possibility that “two entities [CC-IH and BEDCO] that are so different in purpose, methods and personnel [can] fit together and work well as one,” contrasting BEDCO’s “scattershot approach” with CC-IH’s “rifle-shot” focus.³³¹ Sondheim later declared the merger a “bad idea,” and the reason he stepped down from BDC’s board.³³²

Schmoke and Freeman, as well as Gillece, all rejected the fears that the combined BDC would mean a loss of attention to downtown, but the larger reality of dramatically declining federal urban aid – a \$24 million annual loss in his first term - always lay behind these protestations that the merger was done solely to improve the effectiveness and coordination of the City’s redevelopment efforts.³³³ Although Gillece in 1991 had estimated that the merger would lead to a 10% budget savings from the combined budgets of CC-IH and BEDCO, by 1993 the cut to BDC’s budget had doubled, while Gillece’s estimate of a 10% cut in staff had grown to 38%, with BDC’s 33 staff only slightly higher than CC-IH’s 29 pre-merger.³³⁴ At the same time, the BDC faced a larger mandate than its predecessors, including the loss of one-eighth of the city’s jobs between 1989 and 1994 due to the recession as well as the complex application for a federal

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³³¹ Doug Birch, “Schaefer urges joint planning of Inner Harbor,” *Sun*, December 20, 1990; John E. Woodruff, “‘Amateur hour’ at economic agency? Building Baltimore’s economy: Trouble at the top,” *Sun*, December 11, 1991, 1A.

³³² Eric Siegel, “Pondering the nature of city development - Vision: As Baltimore tries to coordinate management of its waterfront, a longtime planner shares his concerns,” *Sun*, June 13, 2002.

³³³ Michael Anft and Molly Rath, “The End: What Kurt Schmoke did right, and how he went wrong,” *City Paper*, December 1, 1999; Gunts, “2 development agencies,” *supra* n. 324; Gunts, “All fired up,” *supra* n. 329; Woodruff, “‘Amateur hour’,” *supra* n. 331; John E. Woodruff, “Schmoke defends development agency,” *Sun*, December 13, 1994; Honora Freeman, “Letters to the Editor: Development Chief Defends Agency Record,” *Sun*, December 19, 1994.

³³⁴ McQuaid, “Baltimore’s new power base,” *supra* n. 328 (Gillece’s 1991 estimate that merger would cause a staff cut of less than 10%); Shelsby, “Merger,” *supra* n. 323 (citing Gillece statements in 1991 that pre-merger CC-IH had “almost 30” staff and a \$1.7 million budget, while BEDCO had 24 staff and a \$1.3 million budget); Peter Kaplan, “City agency’s mission: do more with less cash (Baltimore Development Corp.),” *Baltimore Business Journal*, September 10, 1993 (1993 BDC staff totaled 33 and budget was \$2.4 million). There are some discrepancies over the estimate of staff and budgets of the pre-merger BEDCO and CC-IH: Kaplan reported that change since pre-merger was a 25% loss of staff (which would mean 44 pre-merger staff) and 17% budget cut (which would mean a combined \$2.8 million budget pre-merger), while Gunts (“2 development agencies,” *supra* n. 324) reported that each entity employed “about 24 employees,” and that BEDCO’s budget was \$1.6 million while CC-IH’s budget was \$1.7 million (echoing McQuaid’s report that BEDCO’s budget was \$1.5 million and CC-IH’s budget was \$1.7 million). I followed the most specific numbers reported in 1991 and in 1993.

Empowerment Zone grant.³³⁵ Schmoke's fiscal conservatism, which enable the City to retain its top A1 bond rating and earn inclusion in the ten best-managed U.S. cities according to *Business Month* and *Financial World*, also prevented the City from borrowing to replace some of the loss of federal aid and reducing the recession-caused budget cuts, and so further limited BDC's ability to respond effectively.³³⁶

By the end of his second term, four years after he had proposed merging BEDCO and CC-IH, Schmoke had successfully consolidated the City's economic development entities into a single entity that reported directly to him, with the president a trusted advisor and the five-member board appointed by him, including the president, his chief of staff, the City finance director and the DHCD commissioner, the latter three his employees.³³⁷ This absolute mayoral control certainly ensured the accountability of BDC by politicizing it as a direct extension of the mayor, just as the consolidation concentrated all complaints about economic development onto BDC, both a sharp contrast from the pre-merger situation in which each entity was largely autonomous and complaints about one entity's performance would not necessarily be linked to the performance of the others (although Schaefer's famously attention to detail and passion for the revitalization of his city vested accountability for these entities in Schaefer, but this reflected the individual, not the office).

Yet by consolidating these quasi-public corporations, Schmoke also reduced their effectiveness, losing the very elements that Gillece, as head of BEDCO, had highlighted as justifying the autonomous status of these corporations:

we are intended to have a fairly special purpose. I mean, we are a boutique, if you will, while the Department of Public Works is a department store. We are supposed to be small, flexible and be able to turn on a dime, and that is more

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³³⁵ Woodruff, "Amateur hour," *supra* n. 331 (citing the U.S. Bureau of Labor Statistics that Baltimore's jobs declined from 476,000 in 1989 to 416,000 in 1994); Gunts, "All fired up," *supra* n. 329.

³³⁶ Anft and Rath, "Schmoke," *supra* n. 333. An example of Schmoke's reluctance to use bonds to finance economic development is his lukewarm support to the Downtown Partnership's (DP) proposal to issue long term capital improvement bonds based on the DP's tax revenues (DP had previously convinced Schmoke and the city council to approve a BID district to fund DP) to pay for streetscape improvements, with Schmoke eventually ordered the Department of Public Works perform to undercut the purpose of DP's bond proposal. Robert Guy Matthews, "Tax district seeking to issue bonds; Downtown group says projects are funded adequately by city; Schmoke has concerns; After hearings, council would vote on proposal as early as October," *Sun*, June 19, 1996, 1B. Robert Guy Matthews, "Downtown business area gets touch-up; City begins makeover after group complains," *Sun*, October 8, 1996, 2B.

³³⁷ See *supra* text accompanying n. 169.

readily accomplished in a quasi-public arrangement rather than being a full agency of municipal government.³³⁸

Although budget cuts had reduced BDC staffing levels to almost the same as either CC-IH or BEDCO pre-merger, BDC's mission required BDC to adopt multiple "special purposes," including managing large industrial parks, revitalizing a peripheral residential neighborhood, redeveloping an aging commercial zone, or soliciting potential new businesses to move to, or open in, Baltimore. This fragmentation of focus undercut a key element of the Progressive idea of business-like government – to provide expert, technical advice on a limited subject – while the mayoral control blocked the central Progressive tenet of insulation from politicians, control associated with cronyism, a charge leveled against this first BDC incarnation.³³⁹

In December 1994, as Schmoke faced a potentially tough primary challenge focused on the loss of jobs, and economic development strategy in general, during his administration, the *Sun* ran a series of withering articles giving voice to criticisms of BDC as incompetent.³⁴⁰ These attacks asserted that the merger of CC-IH and BEDCO "was a total disaster," in Schaefer's words that others echoed, and that BDC president Freeman was unqualified and had been selected only because of her close relationship with Schmoke.³⁴¹ Although BDC president Freeman justified this close relationship to the mayor as crucial to a unified and effective economic development strategy, the *Sun* and others identified this "politicization" of BDC as the problem, with one "knowledgeable observer" asserting that "[BDC] tends to have one client and that is the mayor. There is another client, the job-producing corporate community. That connection has been lost."³⁴²

This call for a greater involvement of private business interests in BDC's operations

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³³⁸ "One on one; Gillece: a major player in city development," *Sun*, November 12, 1990.

³³⁹ "Who controls Schmoke's City Hall?" September 28, 1991; *Sun*, Moeller, "Schmoke image tarnished," *supra* n. 329; "Pushing Friends And Social Goals - BDC: Despite Independent Board, City's Development Agency Does Schmoke's Bidding," *Sun*, April 22, 1997.

³⁴⁰ Anft and Rath, "Schmoke," *supra* n. 333; "Schmoke's bombshell," *Sun*, September 21, 1993; JoAnna Daemrich, "'95 campaign has already begun: Can Mary Pat Clarke beat Mayor Schmoke," *Sun*, November 27, 1994; Woodruff, "'Amateur hour'," *supra* n. 331; John Woodruff, "Development agency's chief a quintessential American success story; Building Baltimore's economy: Trouble at the top," *Sun*, December 11, 1994.

³⁴¹ Woodruff, "'Amateur hour'," *supra* n. 331.

³⁴² *Id.*; "A chaotic development agency," *Sun*, December 13, 1994; "Rudderless City Development," *Sun*, December 13, 1994.

echoed a central campaign pledge for the victor of the Baltimore County executive race in November, Dutch Ruppertsberger, to make the county's economic development efforts more assertive by partnering with business, including possibly privatizing the county's economic development office.³⁴³

Both Freeman and Schmoke energetically defended BDC's efforts, pointing to the loss of federal funds and economic downturn as factors masking their efforts.³⁴⁴ In November, BDC had started a campaign to revitalize Howard Street beginning with artists' housing based on a study paid for by the private nonprofit Abell Foundation and performed by three prominent Baltimore developers, indicative of a BDC responsive to the private sector. This Howard Street revitalization was the germ of the Westside "Renaissance," which eventually was anchored by the Superblock plan.³⁴⁵ Moreover, ten days after the *Sun* published its scathing article and editorials, the *Sun* ecstatically reported a "Bonanza for Baltimore" - Baltimore had won one of six federal Empowerment Zones (EZ) nationwide, a designation that brought Baltimore \$100 million in federal grants, and that could leverage additional funds from multiple sources potentially totally \$800 million.³⁴⁶ Schmoke had declared the EZ program a primary target of his administration despite predictions that Baltimore had little chance, and Freeman had dedicated half of BDC's staff to preparing the complex application and had hired Michael Seipp, an official with extensive economic development experience in Baltimore and state government, to lead the EZ team.³⁴⁷

Yet this success was swiftly forgotten when USF&G announced in January that it was leaving its eponymic downtown building and consolidating into its Mount Washington office due to the recession, a move filled with symbolic potency because USF&G's downtown building had anchored the Inner Harbor development in the 1970s,

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³⁴³ "Doing business in Baltimore County," *Sun*, February 14, 1995; Patrick Gilbert, "Ruppertsberger chooses Hannon for economic development director," *Sun*, April 1, 1995.

³⁴⁴ Woodruff, "Schmoke defends development agency," *supra* n. 333; Freeman, "Letter to the Editor," *supra* n. 333.

³⁴⁵ Edward Gunts, "City sees Howard St. as Baltimore's SoHo; Buildings in 400 block to be bought as first phase of artists' community," *Sun*, November 8, 1994; Tom Pelton, "5 proposals offered for Howard St. area; 'Change is coming,' city agency says," *Sun*, September 21, 2000.

³⁴⁶ "Bonanza for Baltimore," *Sun*, December 21, 1994; Eric Siegel, "Study faults Schmoke on development efforts," *Sun*, July 8, 1995 (noting that Baltimore won one of six EZ grants nationwide).

³⁴⁷ JoAnna Daemmrich, "City chooses zone for 'empowerment'," *Sun*, February 23, 1994; C. Fraser Smith, "Mike Seipp: the \$100 million man," *Sun*, April 7, 1994.

projecting business confidence in Baltimore’s revival despite the 1968 riots.³⁴⁸ Although the USF&G CEO stated that BDC could not have changed the decision to move, which was motivated by the company’s ownership of the suburban campus and lease the downtown office, and even though some of the jobs would remain in Baltimore since the Mount Washington campus straddled the city-county line, political and business leaders in Baltimore united to condemn BDC and Schmoke for failing to know of the impending move or attempt to respond.³⁴⁹ Schmoke’s primary challenger, city council president Mary Pat Clarke, claimed the move illustrated BDC’s subservience to Schmoke and disregard for the business community, and the council held hearings on BDC calling for a larger role for business leaders.³⁵⁰ Even the news that BDC had helped bring another major employer downtown failed to quench the criticisms, especially when BDC’s acting head, Robert Hannon, who took over while Freeman was on sick leave, left to become head of Baltimore County’s economic development office.³⁵¹

BDC II: Realignment from Quasi-Public to Quasi-Private Entity

Schmoke did not launch a search for a new director, as he had when he chose Gillece to merge BEDCO and CC-IH, but instead arranged to have BGE’s economic development director assigned to BDC to replace Hannon for six months).³⁵² Instead Schmoke responded by following the example of Baltimore County Executive Ruppertsberger who, just weeks earlier, had appointed a task force to evaluate what economic development tasks could be privatized.³⁵³ In convening a panel of business leaders to review BDC’s operations and propose steps to improve its effectiveness, Schmoke chose six developers with regular dealings with the City, the heads of two city business organizations and the CEO of a firm that had just moved to Baltimore,

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³⁴⁸ David Conn, “USF&G to leave downtown,” *Sun*, January 20, 1995, A1.

³⁴⁹ David Conn, “Costs drove USF&G out of harbor,” *Sun*, January 21, 1995, A1; JoAnna Daemmrich, “Schmoke did not try to stop move from downtown,” *Sun*, January 21, 1995; Robert Guy Matthews, “US&F expansion plan triggers outcry,” *Sun*, April 18, 1995, A1.

³⁵⁰ The council hearings were chaired by future Mayor (and Governor) O’Malley. Eric Siegel, “Freeman leaving city development post,” *Sun*, April 21, 1995.

³⁵¹ Kevin L. McQuaid, “Sylvan close to deal to move downtown,” *Sun*, March 3, 1995; Gilbert, “Ruppertsberger chooses Hannon,” *supra* n. 343; Siegel, “Freeman leaving,” *supra* n. 350.

³⁵² Edward Gunts, “All fired up to make city hot again,” *Sun*, October 20, 1991; Siegel, “Freeman leaving,” *supra* n. 350.

³⁵³ “Doing business in Baltimore County,” *Sun*, February 14, 1995.

suggesting that Schmoke’s priority lay in getting redevelopment projects built, as opposed to expanding the number and size of businesses through recruitment and assistance.³⁵⁴ Schmoke also transferred Freeman from the presidency of BDC to become his deputy chief of staff, a move which only further catalyzed opponents of Schmoke and his BDC.³⁵⁵ Schmoke’s primary opponent, city council president, echoed by others, asserted that BDC’s “failure is not Honora Freeman’s; it’s the mayor’s and the direction he gives.”³⁵⁶ The city council passed a non-binding resolution calling for the existing BDC board, four of five members who were Schmoke administration officials, to be disbanded and replaced with a “new and more independent” board of business leaders.³⁵⁷

Although the panelists were close to the Schmoke administration, their report was sufficiently critical in a tight election that Schmoke refused to release it publicly, even after a copy leaked to the *Sun*.³⁵⁸ The panel faulted BDC for a lack of focus and recommended that its responsibilities be winnowed down to the physical redevelopment of the central business district and the marketing and recruitment of commercial and industrial firms, with all other economic development, promotion and property management efforts, including neighborhood business development, transferred to other city agencies, the Downtown Partnership or business groups.³⁵⁹ This proposal would effectively transform BDC from the City’s one-stop shop for economic development originally envisioned by Schmoke when he consolidated BEDCO and CC-IH back to those two constituent elements.³⁶⁰ The panel declared that BDC suffered from a

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³⁵⁴ Eric Siegel, “Development office review sought by mayor,” *Sun*, March 31, 1995. The panel’s developers: Anthony Hawkins and Robert Minutoli (Rouse Co.), Bill Struever (SBER), Elinor Bacon (Bacon and Co.), Betty Jean Murphy (Savannah Development Corporation) M.Jay Brodie (RTKL, Pennsylvania Avenue Development Corporation, and Baltimore DHCD); the other panelists were Douglas Becker (CEO of Sylvan Learning Systems that just moved into Harbor East), H. Russell Frisby (Venable partner and chair of the Baltimore City Chamber of Commerce, started in 1993 to make up for GBC’s perceived lack of interest in Baltimore City), and Michael Gaines, president of the Council for Economic and Business Opportunity. Eric Siegel, “Rouse executive to head to evaluate Baltimore’s development agency,” *Sun*, April 4, 1995; “A close look at BDC,” *Sun*, April 11, 1995; “A message to Schmoke,” *Sun*, April 19, 1995.

³⁵⁵ Siegel, “Freeman leaving,” *supra* n. 350.

³⁵⁶ *Id.*; Robert Guy Matthews, “Clarke hammers away at ‘Schmoke failure’ CAMPAIGN – 1995,” *Sun*, May 26, 1995.

³⁵⁷ “Three empty chairs,” *Sun*, April 21, 1995; JoAnna Daemmrch, “Council proposes disbanding BDC’s board of directors,” *Sun*, April 25, 1995.

³⁵⁸ Eric Siegel, “Study faults Schmoke on development efforts,” *Sun*, July 08, 1995; “A chance to beef up economic efforts,” *Sun*, July 12, 1995.

³⁵⁹ *Id.*; “Put Fizz Back in City Development,” *Sun*, July 11, 1995.

³⁶⁰ “A chance to beef up economic efforts,” *supra* n. 358.

perception that Schmoke did view economic development as a priority, and that BDC needed increased funding and a new leader with economic development experience and the confidence of the business community.³⁶¹ A key element missing from the existing BDC, according to the panel, was the “independence needed to succeed in a highly entrepreneurial environment.”³⁶² As the *Sun* noted with approval, the panel’s recommendations suggested BDC return to the development structure under Schaefer, the autonomous quasi-public entities of the “shadow government” that Schmoke had vowed to end in his first mayoral campaign.³⁶³ The *Sun* accused Schmoke of resurrecting this shadow government by his reliance on a private law firm just as Schaefer used his “trustees” to do public business through autonomous quasi-public entities to avoid public accountability.³⁶⁴ In the context of BDC, this charge is ironic, since the *Sun*, and many others, attacked BDC as too beholden to the mayor and called for greater autonomy for BDC, which would reduce its public accountability by restoring the autonomy it enjoyed under Schaefer.

Despite the animosity surrounding BDC, and his long-held antipathy to Schaefer’s quasi-public entities, Schmoke appears to have experienced a Damasacene conversion during the 1995 election, leading him to declare he would “change my style” to create a more “pro-business image.”³⁶⁵ Within a week after winning the primary that ensured his reelection, Schmoke publicly indicated that he planned to overhaul BDC and restore the quasi-public autonomy of its predecessors by selecting Roger Lipitz, a business executive who had just completed seven years as chair of the board of directors of the University of Maryland Medical System (UMMS), as chair of the BDC board tasked with reorganizing BDC to be more business-friendly.³⁶⁶ His close advisor, Larry

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³⁶¹ Siegel, “Study faults Schmoke,” *supra* n. 358.

³⁶² “Put Fizz Back,” *supra*, n. 359.

³⁶³ R. B. Jones, “Mayor Schmoke Brings the 'Shadow Government' Back to Town,” *Sun*, July 24, 1992.

³⁶⁴ “Schmoke’s Shadow Government,” *Sun*, July 5, 1995. On Schaefer’s Shadow Government, see *supra* n. 136.

³⁶⁵ JoAnna Daemmrich, “Lipitz to lead board of BDC Schmoke picks entrepreneur for development effort,” *Sun*, October 5, 1995.

³⁶⁶ Kevin L. McQuaid, “Schmoke, Lipitz discuss BDC post; Talks about agency's top job described as preliminary,” *Sun*, September 19, 1995; Daemmrich, “Lipitz to lead board of BDC,” *supra* n. 365; JoAnna Daemmrich, “New chief Lipitz pledges to revitalize city economic development agency,” October 6, 1995; “Baltimore's economic future,” *Sun*, October 7, 1995.

Gibson, recalled that Schmoke did so in fulfillment of a campaign promise to revive Schaefer's "trustee" system³⁶⁷ – a clear indication that Schmoke now valued the political benefits of a nominally independent body insulating him from criticism and the alluring promise that an autonomous quasi-public entity would get redevelopment projects started quickly. Schmoke had already chosen this approach when he responded to the crisis surrounding the departures of USF&G and Hannon by creating a panel charged with suggesting solutions, and so avoiding accountability for BDC, at least until the panel issued its report. Soon after appointing Lipitz as chair, Schmoke announced that the BDC board would be doubled in size to eleven members, with nine of the eleven private business leaders, a radical change from the prior BDC board of three municipal employees, a former municipal employee (Freeman), and one other member.³⁶⁸

The new BDC board echoed the emphasis of the review panel on Baltimore developers involved in projects with the City – six of the nine of the review panel members, and five of the nine private sector board members, two of whom were on the review panel.³⁶⁹ This prominence suggests that Schmoke's focus in revamping BDC lay in streamlining the redevelopment process in order to get projects built, especially with the Rouse Company's director of new business development replacing a less prominent Rouse representative together with Rouse's Baltimore director, who had also served on the review panel. The presence of these senior Rouse representatives underscores how Schmoke's new BDC focused on the Inner Harbor, especially as two other board members were developers along the eastern Inner Harbor.³⁷⁰ At the same time, Schmoke's choice of Lipitz, fresh from leading the board of UMMS, which dominated the city's west side, and Elinor Bacon, whose firm had conducted the study proposing the

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³⁶⁷ Interview with Professor Gibson by author, December 2009.

³⁶⁸ Kevin L. McQuaid, "Schmoke names business leaders to BDC board; Key step in city's efforts to revamp troubled agency - New panel faces uphill battle to keep firms in Baltimore," *Sun*, November 02, 1995. For original BDC board, see *supra* n. 169.

³⁶⁹ On the makeup of the review panel, see *supra* n. 354. The new BDC board's developers were: Hawkins (review panel member) and Bruce Alexander (Rouse Co.), Bacon (review panel member), Theo Rodgers (A&R Development Corporation), S.A. "Skip" Brown III (Belt's Corporation); the other private members were: Lipitz, Frank Bramble (First Mariner Bankcorp), Richard Berndt (Gallagher, Evelius, & Jones), and Arnold Williams (private accounting practice). The remaining public sector members with the City's Finance Director and DHCD Commissioner. McQuaid, "Schmoke names business leaders to BDC board," *supra* n. 368.

³⁷⁰ Theo Rodgers' A&R Development Corporation developed Lockwood Place among other Baltimore projects (<http://www.ar-companies.com/urban/index.php>), while Skip Brown was a Fells Point developer (Gerard Shields, "City to lease Fells Point pier to developer," *Sun*, February 4, 1999).

revitalization of Howard Street starting with artists' housing used by Freeman's BDC, indicated a commitment to the Market Center area that would eventually lead to the proposed "West Side Renaissance," Schmoke's anticipated "legacy" equivalent to Schaefer's Inner Harbor.³⁷¹ Two-and-a-half years later, Schmoke would announce the West Side Master Plan, "one of the most exciting moments" of his administration, prepared by a task force that included two of these BDC board members, as well as UMMS officials.³⁷²

These appointments highlighted the degree of Schmoke's turnaround from criticizing Schaefer's legacy as a "downtown mayor" in his first mayoral campaign to embracing the return of BDC's focus to downtown redevelopment – CC-IH's mission.³⁷³ Similarly, the selection of Richard Berndt, the architect of the referendum approving Harborplace in 1978 that cemented the Inner Harbor, underscored Schmoke's outreach to Schaefer supporters.³⁷⁴ Schmoke also reached out to the business establishment by appointing Frank Bramble, CEO of then First Mariner Bankcorp and incoming chair of GBC.³⁷⁵

The most prominent signal given by Schmoke that he was returning to Schaefer's model lay in his selection of Brodie as BDC president.³⁷⁶ Although nominally appointed by Lipitz and the board, Brodie was Schmoke's choice, as Brodie was a member of the review panel Schmoke appointed months before selecting Lipitz as chair.³⁷⁷ Schmoke

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³⁷¹ Edward Gunts, "City sees Howard St. as Baltimore's SoHo; Buildings in 400 block to be bought as first phase of artists' community," *Sun*, November 8, 1994. On Schmoke's legacy, see Michael Anft and Molly Rath, "The End: What Kurt Schmoke did right, and how he went wrong," *City Paper*, December 1, 1999.

³⁷² Schmoke announced the plan on May 25, 1998. The two BDC members were Theo Rodgers (A&R Development Corporation) and Frank Bramble (then First National Bank of Maryland). Molly Rath, "Mobtown Beat; Out on the Street: West-Side Plan Could Leave Homeless-Service Agency Homeless," *City Paper*, September 30, 1998.

³⁷³ Anft and Rath, "Schmoke," *supra* n. 371.

³⁷⁴ Gady A. Epstein and Tom Pelton, "A quiet mover and shaker adviser: Behind the scenes in Baltimore's power network is Richard Berndt, trusted by politicians and archbishops," *Sun*, May 6, 2001, 1A; Melody Simmons, "Harborplace planners on waterfront revitalization: 'We were rediscovered'," *Daily Record*, July 1, 2010.

³⁷⁵ McQuaid, "Schmoke names business leaders to BDC board," *supra* n. 368.

³⁷⁶ Kevin L. McQuaid and Jay Hancock, "Brodie likely to head city economic agency Ex-Baltimore official is urban planner with skill in large projects," *Sun*, December 8, 1995; Kevin L. McQuaid, "Brodie to direct city BDC agency RTKL official tapped by Schmoke to bolster Baltimore's economy," *Sun*, December 14, 1995.

³⁷⁷ Eric Siegel, "Rouse executive to head to evaluate Baltimore's development agency," *Sun*, April 4, 1995.

had also tried, unsuccessfully, to recruit Brodie to head CC-IH in 1990, before he decided to merge it with BEDCO.³⁷⁸ Brodie had declined at that time, remaining as head of the Pennsylvania Avenue Development Corporation (PADC) in D.C., but he had left that position in 1993 when the recession and accompanying real estate crash suspended PADC’s building program and took position as director of urban planning for RTKL Associates, an international design and engineering firm.³⁷⁹ When BDC came under fire in early 1995, Brodie reached out to Schmoke to see if the job might still be available, landing first a place on the review panel, and then the presidency six months later.³⁸⁰

Schmoke’s interest in Brodie stemmed from his leadership of PADC when it successfully jump-started the revitalization of D.C.’s ceremonial city, bringing in residents as well as offices and businesses.³⁸¹ As head of PADC, Brodie had shown the ability to “get things done,” a theme Brodie emphasized in taking the BDC presidency: “Baltimore has had a lot of studies. The key now is in doing some work.”³⁸² Brodie also brought extensive knowledge of Baltimore and its municipal administration, having worked at DHCD and its predecessor from 1961 to 1984, the last seven years as DHCD Commissioner and the prior eight as deputy commissioner, during the years when CC-IH supervised the development of the Inner Harbor under the supervision of DHCD.³⁸³ Having remained a resident of Baltimore during his hiatus working in D.C. after Schaefer “eased him out” as DHCD commissioner, Brodie had kept up with developments over the decade he was away.³⁸⁴ Brodie’s relationships with key figures from the Schaefer era such as Robert Embry, the head of the Abell Foundation, may also have attracted

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³⁷⁸ McQuaid and Hancock, “Brodie likely to head city economic agency,” *supra* n. 376.

³⁷⁹ Benjamin Forgey. “Pennsylvania Ave. Director Resigns,” *Washington Post*, July 7, 1993, C2. PADC had a twenty-five year term, starting in 1972, but Congress shut the corporation down a year early in a cost-cutting move (the Heritage Foundation included it among the 140 useless Federal programs, a dubious distinction during Gingrich’s reign). Maryann Haggerty, “Pennsylvania Ave. At the Finish Line; Development Agency Turned A City Eyesore Into Elegance,” *Washington Post*, March 30, 1996, A1; Timothy J. Mullaney, “Commercial real estate: Ex-HCD commissioner is joining RTKL Associates, Inc.,” *Sun*, July 7, 1993.

³⁸⁰ Scott Calvert, “Keeping A Commitment - He's Lost The Love Of His Life, But A Shared Passion For Baltimore Still Drives Powerful Development Watchdog 'Jay' Brodie,” *Sun*, October 27, 2003.

³⁸¹ Haggerty, “Pennsylvania Ave. At the Finish Line,” *supra* n. 379; Benjamin Forgey. “A Walk Down Memory Lane; Thanks to a Unique Agency, the Nation’s Main Street Has a Past -- and a Future,” *Washington Post*, March 30, 1996, B1.

³⁸² McQuaid, “Brodie to direct city BDC agency,” *supra* n. 376.

³⁸³ Calvert, “Keeping A Commitment,” *supra* n. 380.

³⁸⁴ “New energy for city development; Brodie appointment: Former housing chief has to remold Baltimore Development Corp.,” *Sun*, December 15, 1995.

Schmoke as a means of reaching out to constituencies that felt largely ignored during his first two terms.³⁸⁵

Schmoke's key move in changing directions on BDC was the appointment of the review panel, followed by the board, and only then tapping Brodie to lead the new BDC. Had Schmoke started by choosing Brodie, and then had Brodie rebuild BDC with an expanded board, the old criticisms that Schmoke controlled the BDC president would not have disappeared. Instead the review panel established a program for rebooting BDC seemingly independent of Schmoke, and the appointment of Lipitz, who nominally chose the board that then chose Brodie, further distanced the new BDC, board and president from Schmoke. Although these steps were not entirely Kabuki theater and did provide some external evaluation of how BDC could improve as well as permit an indirect rapprochement between Schmoke and the business community, this distancing created a model of autonomy that Brodie, with the support of Schmoke and subsequent mayors, together with Lipitz and the BDC board members, turned into a shadow government that exceeded anything of Schaefer's era. Most importantly for Schmoke, this transformation appeared to have been driven by independent experts from outside of his office. Given that Brodie reached out to Schmoke when BDC was melting down in spring 1995, it is entirely possible that Brodie suggested Schmoke adopt this strategy of a series of steps, especially in light of Brodie's strong belief in private boards:

Part of the new situation [at BDC] is not simply myself as president. It's the [creation] of a major private sector board, a first-rate board. That's very important. That means that we're going to have to understand the way we do business with a board. Boards set policies. Staffs do a lot of hard work but are there to implement policy and make policy recommendations to the board. I saw that as a very effective relationship at PADC, where the board played an important role, was able to open doors for us, help get things smoothed out, and get approvals quickly. . . . I think the creation of an effective board, with a first rate chairman at its head, with energy and dedication, is an important move.³⁸⁶

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³⁸⁵ Anft and Rath, "Schmoke," *supra* n. 371 (quoting Embry as saying: "Kurt was not inclusive in his decision-making. He didn't seem to like to sit down and talk to people about policy issues"); McQuaid and Hancock, "Brodie likely to head city economic agency," *supra* n. 376 (quoting Embry as saying: "it's exciting news for the city").

³⁸⁶ "How Brodie would revive city," *Sun*, January 28, 1996.

Brodie fulfilled his promise to move quickly, restructuring the internal organization, adding new staff and emphasizing outreach to the business community.³⁸⁷ He was helped in changing the perception of BDC by the upturn of economy and by Schmoke's newfound enthusiasm to reach out to the business community and public push for development projects.³⁸⁸ As evidence of his commitment, Schmoke increased BDC's budget by 12% to \$2.8 million, although this was still less than the review panel had recommended.³⁸⁹ One of Brodie's priorities was to increase the BDC budget by creating a fund raised from private businesses for economic development modeled on those in Cleveland and St. Louis, a model also pushed by Baltimore County Executive Ruppertsberger.³⁹⁰ Such a fund clearly required an independent, private board to convince potential contributors that the funds would not be accessible by public officials. Indeed Brodie justified his opposition to proposed legislation subjecting BDC to the MPIO and OMA because it would require BDC efforts involving "exclusively private money" to abide by public transparency laws and so would hamper BDC's private fundraising initiatives.³⁹¹

Despite Brodie's effectiveness in reviving the energy and effectiveness of BDC, he chose to not follow one of the key recommendations of the review panel: to narrow BDC's focus to only downtown development and citywide business recruitment and support. Instead BDC remains the City's economic development entity. Brodie ignored the review's explicit call to transfer neighborhood business development to DHCD, and BDC continues to run the Main Street program that delivers that service.³⁹² Brodie's refusal to narrow BDC's focus likely is due to his belief in his capacity to lead an

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³⁸⁷ Kevin L. McQuaid, "BDC is taking a team approach Baltimore agency regroups to become more responsive," *Sun*, March 15, 1996; David Harrison, "Brodie does rehab job," *Baltimore Business Journal*, January 31, 1997 (noting that Brodie's appointment coincided with rebound in real estate market as well as other longer term projects already in pipeline before he arrived).

³⁸⁸ Edward Gunts, "Building Another Renaissance; New construction: '96 sees Baltimore poised to rejoin the upper echelon of cities watched for new ideas in urban development," *Sun*, January 14, 1996.

³⁸⁹ Jay Hancock, "Rebuilding BDC Brodie: Nine months into the job, the latest president of Baltimore Development Corp. hopes getting the small details right will lead to big results," *Sun*, September 29, 1996.

³⁹⁰ *Id.*; Liz Atwood, "Private economic development agency on hold; Department's performance, lack of time, money delay county's plans until fall," *Sun*, April 29, 1996.

³⁹¹ Testimony of Jay Brodie to Senate Economic and Environmental Affairs Committee, March 9, 2000, in Brief of Petitioner at App. 62-63, *Carmel*, 395 Md. 299.

³⁹² Robbie Whelan, "Budget cuts would eliminate four of 10 Main Streets projects; Baltimore Development Corp. outlines reduced scope of activities for mayor," *Sun*, March 31, 2010; "City launches 'Miracle on Main Streets' holiday program," *Sun*, November 29, 2010.

organization with such a broad ambit, especially given his time as DHCD commissioner, responsible for 1,000 employees and numerous projects throughout the city.³⁹³ Brodie also likely believed that retaining responsibilities increased his likelihood of enlarging BDC's budget, which he managed to almost double to \$4.7 million in 2003, with 61 staff, almost twice the number of his initial staff.³⁹⁴

BDC's Weaknesses

Yet despite this expanded staff and budget, BDC was unable to keep up with one of the central missions of CC-IH: the upkeep of the Inner Harbor. Six years after Brodie took over BDC, in an indication of a perceived neglect, GBC began reviewing the disjointed oversight of the Inner Harbor, some of which was due to the expansion of development out from the original development area.³⁹⁵ BDC quickly launched its own initiative, inviting proposals for a new master plan extending the harbor in late 2001, while Mayor O'Malley responded by officially inviting GBC to conduct the study, even as BDC selected the firm to create a new master plan.³⁹⁶ This loss of focus on the Inner Harbor, and the subsequent separation of physical planning and management in responses to the Inner Harbor's decline concerned former CC-IH head Sondheim, who viewed it as a result of BDC's overly broad responsibilities.³⁹⁷ In contrast, Sondheim held up CC-IH's narrow mission, which he believed was the key to the original success of the Inner Harbor: "We weren't brighter. What we had was a limited job to do. All we had to do was worry about the Inner Harbor. [Whereas] I have a real concern about the fact that [Brodie's] plate is so full of things to do. [BDC]'s more likely to be an agency being reactive to a proposal that's been made, rather than proactive."³⁹⁸ Martin Millspaugh, his former CC-IH co-worker, echoed Sondheim: "We had a focus of responsibility. When we

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³⁹³ Calvert, "Keeping A Commitment," *supra* n. 380.

³⁹⁴ *Id.*

³⁹⁵ June Arney, "Group seeks to maintain harbor as city jewel - Study recommends ways to improve how it's run," *Sun*, October 30, 2003.

³⁹⁶ Rachel Mansour, "Baltimore seeks urban planner to provide comprehensive plan for Inner Harbor," *Daily Record*, December 14, 2001; Edward Gunts, "Solidifying future of Inner Harbor; Design: The Baltimore Development Corp. wants a team to come up with a single master plan," *Sun*, December 24, 2001; Eric Siegel, "Pondering the nature of city development - Vision: As Baltimore tries to coordinate management of its waterfront, a longtime planner shares his concerns," *Sun*, June 13, 2002; "Inner Harbor master planner announced by Baltimore Development Corp.," *Daily Record*, April 17, 2002.

³⁹⁷ Siegel, "Pondering the nature of city development," *supra* n. 396.

³⁹⁸ *Id.*

got up in the morning, we had no other thought in mind than to make sure the Inner Harbor worked. The GBC concluded that the focus of interest and responsibility really doesn't exist now. It makes it difficult for the city to control what happens there.”³⁹⁹ Sondheim proposed that problem be resolved by creating a new entity with responsibility only for the Inner Harbor that included both planning and maintenance in a holistic manner, while GBC’s report specifically referred to CC-IH as the model for the new entity.⁴⁰⁰ These criticisms of BDC’s neglect as derived from BDC’s overly broad mission, however, did not prevent BDC from maintaining control, under BDC’s vice president Frank over the coordinating group for another two years until the creation of a new quasi-public corporation, the Partnership for Baltimore’s Waterfront (PBW) took over responsibility.⁴⁰¹ Yet PBW was modeled more on the Downtown Partnership than on CC-IH, and so only had responsibility for maintenance, leaving the planning of the Inner Harbor in BDC’s hands.⁴⁰²

BDC’s neglect of the Inner Harbor is due not only to its overly broad mandate, but also to the focus on the Superblock which has absorbed enormous energy over the past decade. While the push to redevelop this area and create a new “Charles Center” or “Inner Harbor” drew the support of Mayors Schموke and O’Malley, eager for a legacy project, the process with its focus on large scale eminent domain land assembly and clearance bears the imprint of the era of urban renewal, the period in which Brodie was in DHCD’s leadership and the era in which PADC’s model, New York State’s Urban Development Corporation, was created.⁴⁰³ On assuming the BDC presidency Brodie made his intent to build projects and his belief that his BDC post represented a continuation of his DHCD efforts: “When I left [D]HCD, I left behind not a library full

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³⁹⁹ Arney, “Group seeks to maintain harbor,” *supra* n. 395.

⁴⁰⁰ Siegel, “Pondering the nature of city development,” *supra* n. 396; “Harbor needs attention,” *Sun*, October 31, 2003.

⁴⁰¹ John Fritze, “Dixon names top City Hall Staff; Selection suggest continuity with O’Malley agenda,” *Sun*, December 7, 2006; Jill Rosen, “Public-private partnership to take on Inner Harbor care,” *Sun*, October 13, 2005, A1.

⁴⁰² June Arney, “Improved atmosphere sought for waterfront; Guides start today to greet, aid visitors,” *Sun*, April 12, 2006, D1. The 2008 change in name to the Waterfront Partnership of Baltimore indicates the influence of DP, all the more evident from the involvement of Laurie Schwartz, the founder of DP, who initially advised PBW, but as of 2010 is its executive director. Edward Gunts, “Snowfall muffles museum’s 160th anniversary,” *Sun*, February 22, 2010.

⁴⁰³ Benjamin Forgey. “A Walk Down Memory Lane; Thanks to a Unique Agency, the Nation's Main Street Has a Past -- and a Future,” *Washington Post*, March 30, 1996, B1.

of plans but building that you could see and touch. We had tangible results, because I'm a results-oriented person. I plan to do the same at BDC."⁴⁰⁴ The original scale of demolition became controversial in the 1999 mayoral campaign, with a Republican candidate and developer, David Tufaro declaring: "I am unhappy that there has not been a higher priority placed on preserving the historic buildings in the area and retaining the existing small businesses. This strikes me as the kind of old-fashioned urban renewal projects that have really done damage to cities."⁴⁰⁵ O'Malley, the eventual victor, agreed with these goals of saving buildings and small businesses, and justified his vote against the West Side urban renewal plan when he was a councilperson as leverage to force BDC to adjust the approved plans. O'Malley also declared his support for creating a separate development corporation to focus solely on the West Side in place of an overworked BDC, an approach advocated by Millspaugh and others that echoed the calls of Sondheim and GBC for BDC to cede its control of the Inner Harbor to a smaller group with a narrower focus.⁴⁰⁶ As mayor, however, O'Malley indicated his support for Brodie's approach, albeit with increased sensitivity to preservation of the small businesses and historical buildings in the Superblock, and BDC retained control of the Superblock project.⁴⁰⁷ The limits of Brodie's ability to move beyond urban renewal's bulldozing methods were recently revealed when BDC issued no-bid contracts without public notice to demolish structures throughout the city to "prepare the grounds" for future development, but without guarantees that the proposed development would occur.⁴⁰⁸ After public outcry, most demolitions were put on hold, although Brodie viewed the error to have been only over BDC's legal authority to demolish, not the risk that the potential

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⁴⁰⁴ Kevin L. McQuaid, "Brodie to direct city BDC agency RTKL official tapped by Schmoke to bolster Baltimore's economy," December 14, 1995.

⁴⁰⁵ Tom Pelton, "Mayoral hopefuls differ on west side; Candidates divide support of downtown business leaders; Howard Street corridor," *Sun*, August 26, 1999, A1.

⁴⁰⁶ *Id.*; Martin Millspaugh, "Letters to the Editor: West side's story could recreate downtown's success," *Sun*, July 26, 1999.

⁴⁰⁷ Pelton, "Mayoral hopefuls differ on west side," *supra* n. 405.

⁴⁰⁸ Annie Linskey, "BDC cancels pact for demolition that was not openly bid; Sun follow-up," *Sun*, September 11, 2009, A1.

development might not occur, leaving the sites for more surface parking to pockmark Baltimore's urban fabric.⁴⁰⁹

Brodie's assemble-and-clear approach was recently explicitly repudiated by a panel of urban redevelopment experts convened by the Urban Land Institute to review BDC's Superblock project and the West Side renewal: "No bulldozers [are needed] in this area. This is not an area that needs urban renewal. It needs regeneration."⁴¹⁰ Reflecting current best planning practices, the ULI panel called for the city to sell its properties quickly instead of waiting to assemble large swathe of land, and to involve multiple developers instead of a single large developer on whose progress would depend the success of the entire revitalization effort. Most importantly, the mayor had to take charge personally, since the panel concluded that renewal had stalled for lack of leadership, an implicit criticism of BDC's approach and of prior mayors' outsourcing the management of the project to BDC and Brodie.⁴¹¹

Another problem with BDC's current structure, in addition to the lack of focus due to the "jack of all trades, master of none" approach, and to Brodie's reliance on old "command-and-control" methods of urban renewal unchallenged because BDC controlled all economic development, is the almost guaranteed conflict of interest of the board members. Thus Anthony Hawkins served on both the 1995 review panel and the new BDC board at the same time as he was negotiating with the City, through BDC and Brodie, over the City's contribution to renovations at Harborplace, which Hawkins managed in his job at the Rouse Company.⁴¹² Similarly, "Skip" Brown, another member of BDC's new board, received a no-bid lease from BDC to docking space adjacent to shops owned by Brown's company.⁴¹³ While both Hawkins and Brown were significant stakeholders in the development community, publicly interested volunteers in efforts to improve Baltimore, and the requests made by their firms likely above board, a clear

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⁴⁰⁹ Annie Linskey, "Dixon reverses policy on contracts; All future demolitions to be bid openly, Mayor says," *Sun*, September 9, 2009, A3; Annie Linskey, "BDC Bidding Raises Issues: \$2.3 Million Of Contracts Awarded Without Public Notice," *Sun*, October 5, 2009.

⁴¹⁰ Edward Gunts, "Urban Land Institute offers recommendations for city's west side," *Sun*, December 10, 2010.

⁴¹¹ *Id.*

⁴¹² David Harrison, "Rouse plugging away at Harborplace renovations," *Baltimore Business Journal*, August 25, 1997.

⁴¹³ Gerard Shields, "City to lease Fells Point pier to developer," *Sun*, February 04, 1999.

conflict of interest existed in both cases. These cases are clearly just the tip of the iceberg given BDC’s role in all economic development efforts throughout the city and the importance for BDC of having board members with knowledge and experience relevant to redevelopment. In light of these inevitable conflict-of-interests, the culture of secrecy and autonomy from political accountability justifies the perception that BDC is a “shadow government” doling out contracts to politically important individuals – as the *Sun* accused BDC doing when it negotiated subsidies for the hotel of a major Schmoke campaign contributor despite a rejection by BDC staff; or when BDC awarded no-bid demolition contracts to a frequent contributor to then-Mayor Dixon and other city elected officials.⁴¹⁴ Thus the cronyism that the *Sun* and others so bitterly complained typified the operation of Schmoke’s first BDC, was not prevented by the new private-board BDC, but in fact may have been exacerbated since Brodie’s tenure could be directly affected by the support or opposition of politically important individuals. This perceived culture of cronyism corrodes the reputation of a city and drives away potential economic development. The only way to limit these conflicts of interest is through transparency, accompanied by political (and legal) accountability. But this is anathema to BDC’s private board culture, as much as its structure.

Does BDC’s Quasi-Private Corporate Structure Help or Hinder Public Redevelopment?

In light of these criticisms of BDC – its neglect of key areas of responsibility; its outdated approach to redevelopment; and its tolerance of conflicts of interest – that are directly related to its structure, why does Baltimore continue to use a Progressive model of “business-like” government achieved through a quasi-public government corporation for its economic development efforts? BDC’s current structure as a private corporation run by a “private-sector” board that controls virtually all elements of the City’s economic development strategy (as well as MAGLEV Maryland!) happened accidentally, not as a result of any thoughtful public debate on the purpose, responsibilities and limits of an

⁴¹⁴ “Pushing Friends And Social Goals - BDC: Despite Independent Board, City's Development Agency Does Schmoke's Bidding,” *Sun*, April 22, 1997; Gary Gately, “Wyndham plan is city group's pick Development agency says Inner Harbor East hotel should proceed - Price exceeds 1st estimate - BDC also votes to delay Camden Yards Hyatt proposed by Angelos,” *Sun*, July 1, 1997; Linskey, “Dixon reverses policy on contracts,” *supra* n. 409 (no-bid contract to P&J Contracting owned by Pless Jones, “a frequent contributor to Dixon and other city elected officials”).

economic development entity in relationship with the rest of city government. Schmoke's initial consolidation of BEDCO and CC-IH into a single entity responsible for all economic development activities created an entity with a much broader reach and hierarchy than either BEDCO or CC-IH. His subsequent transformation of BDC from direct mayoral control, albeit with the appearance of a private corporation but one with a majority of the board at will employees of the mayor, into an autonomous entity in which municipal employees were a small minority put the consolidated power of the initial BDC into the shadows, with the board both shielding the mayor from political fallout while simultaneously limiting the mayor's freedom of action. Most importantly, all discussions, negotiations and reports of BDC were secret (*Carmel* only forced a sliver of light into the shadows, given the exemptions of the MPIA and OMA), preventing the public from understanding whether the board was truly independent and acted as a check on the mayor's power. Even if the board did act responsibly, it was not accountable to the public.

At the same time as Schmoke and Brodie transformed BDC into its current structure, Baltimore County considered a similar approach to privatize its economic development efforts.⁴¹⁵ The criticisms of the ineffectiveness of the City's economic development efforts under the initial BDC were also levied against Baltimore County's economic development office, and County Executive Ruppertsberger hired Hannon away from being active head of BDC to lead the county's office and implement its privatization.⁴¹⁶ Like Brodie, Ruppertsberger also cited the possibility of raising private funds as a primary motivation for privatizing the agency. Hannon himself said that the main benefit of privatizing the office would be to insulate it from political changes that led to a new county executive, without a trace of irony over the fact that his overhaul of the office was due only to Ruppertsberger's election and his power to choose a new economic development officer who could restructure the department. Yet after careful consideration of the benefits and detriments of privatization, and after Hannon had revitalized the economic development office, Ruppertsberger decided that privatization

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⁴¹⁵ "Doing business in Baltimore County," *Sun*, February 14, 1995.

⁴¹⁶ Patrick Gilbert, "Ruppertsberger chooses Hannon for economic development director," *Sun*, April 01, 1995; Liz Atwood, "Private economic development agency on hold; Department's performance, lack of time, money delay county's plans until fall," *Sun*, April 29, 1996.

would be counterproductive. Besides concerns that privatization would actually reduce the overall effectiveness of economic development efforts in the county by competing with existing private economic development entities for the same private funds, Ruppertsberger recognized that Hannon's leadership, as well as the improving economic circumstances, had transformed the office into a success and so would remain public.⁴¹⁷ Indeed the chair of the county Chamber of Commerce emphasized that the key ingredient in success was leadership: "Under Bob Hannon, the office is very aggressive, whether it's privatized or not. There has been teamwork with the administration."⁴¹⁸

This raises the question of whether Schmoke could have achieved the same results had he focused on the leadership of BDC and not its structure. Ruppertsberger negotiated with Schmoke to lure Hannon away, suggesting that Schmoke might have been able to keep Hannon and have him restructure BDC without transforming it further with a private board as Brodie did.⁴¹⁹ This is especially true since Hannon revived a completely public agency, retaining or creating over 7,000 jobs and attracting over \$250 million in investment in the county over 18 months - without the secrecy and privacy that Brodie and Lipitz continuously insisted was necessary for economic development.⁴²⁰ Although Hannon was certainly helped by the economic recovery, this applied equally to the county and city and enhanced Brodie's performance as well.⁴²¹ In fact some observers of Brodie's early performance emphasized the organizational shakeup as key to BDC's improved performance, not the private board structure: "They seem to be more organized and more directed than they ever have. They're much more focused."⁴²²

Focus and leadership thus appear to be the key ingredients to successful economic development, not necessarily the degree the structure of a public entity resembles that of

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⁴¹⁷ Liz Atwood, "Economic development agency won't be privatized; Ruppertsberger bases decision on cost, conflicts," *Sun*, July 08, 1997.

⁴¹⁸ Atwood, "Private economic development agency on hold," *supra* n. 416.

⁴¹⁹ Describing Ruppertsberger's negotiations with him, Schmoke commented: "If this is an example of how Dutch and I will work together, that [*sic*] the future of both the city and the county is pretty bright."

Gilbert, "Ruppertsberger chooses Hannon," *supra* n. 416.

⁴²⁰ Atwood, "Economic development agency won't be privatized" *supra* n. 417.

⁴²¹ David Harrison, "Brodie does rehab job," *Baltimore Business Journal*, January 31, 1997 ("Brodie can't take credit for external factors that have given a lift to the city's business climate: His stewardship of the Baltimore Development Corp. coincided with a rebound in the real estate market. And a number of large-scale projects, including the convention center expansion and the Baltimore Ravens football stadium, were under way before he came on board.").

⁴²² *Id.*

a private firm.⁴²³ Baltimore County’s decision to not privatize underscores the important role that truly private economic development entities play outside of any formal link with government, especially if it leads to more public discussion of alternatives for future development. Thus GBC has played a crucial role in Baltimore’s development by preparing plans and analyses, and by cheerleading initiatives GBC deems worthy, such as its recent effort to have the City consider an alternative site for a new arena.⁴²⁴ Moreover, privatizing a public economic development office may suffocate some of these private entities by competing for the same pot of private funds, contributing to a loss of diverse viewpoints.

The ULI panel suggests that rather than acting in a “business-like” manner by assembling land for a massive redevelopment, and so suffocating existing small businesses, the City involve private developers at the local level, a method that would also expand the number of potential participants in the redevelopment. Increased participation not only would provide a diverse development, it would also diversify the risk of failure so that an overall renewal program will not succeed or fail on the basis of a single developer or the status of the credit markets, since smaller loans for multiple projects are easier to come by than large financing packages for a single project. One of the largest criticisms of Brodie’s BDC is that it is *too* business-like, that it has the unfair advantage of public power and financing that prevent private entities from being able to compete. Moreover, the concentration of all economic development efforts under BDC promote larger projects like the West Side and Superblock in order to show success justifying BDC’s role, with the effort and funds expended on these blockbuster projects draining funds and staff from multiple other projects throughout the city that lack the charisma to get headlines but that cumulatively have a far larger effect on the city’s economic health.

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⁴²³ Carolyn Bourdeaux, “Reexamining the Claim of Public Authority Efficacy,” 39:1 *Administration and Society* 77-106 (2007) (finding that New York State counties that used public authorities to perform government tasks did not have significantly more efficient outcomes than counties that did not rely on public authorities).

⁴²⁴ Lorraine Mirabella, “Baltimore arena debate is back; City re-evaluates sites for sports and entertainment venue,” *Sun*, November 21, 2010; Edward Gunts, “Details of convention center and arena proposal released,” *Sun*, December 16, 2010.

Conclusion (Alternative B): Make the BDC Truly Public and Accountable As A
Municipal Agency

This analysis of BDC's history emphasizes as well how BDC's scale of responsibilities, assumed due to the merger of BEDCO and CC-IH, have limited the effectiveness of previous efforts which were more narrowly focused, but holistic in addressing multiple aspects of the revitalization of a single area or specialized category of economic development (e.g., industrial or port development). And yet, the ULI panel suggests that BDC's concentration of authority over all economic development and power as an unaccountable quasi-public entity has not even provided the direction and leadership – the effectiveness – that is the primary element of the Progressive ideal of the government corporation. Instead, the current BDC has become that which it was nominally created to avoid: a bureaucracy, full of managers, but with limited leadership at the top or focused mission at the bottom. Yet unlike a public bureaucracy, BDC is unaccountable to the electorate and able to hide its use of public funds and powers behind the smokescreen of its private status.

Therefore, instead of tinkering with the private structure of BDC as suggested above as the more modest reform proposal, the more radical, and likely more effective, reform would be to disband BDC completely. A new office, or department, of economic development would take over BDC's current responsibilities, headed by a deputy mayor or commissioner subject to confirmation by the city council. This would emphasize the importance of leadership from the mayor, rendering the performance of the office accountable through the mayor and through the city council. Establishing such an office would also permit a public discussion of the appropriate jurisdictional boundaries of tasks currently handled by BDC, including its control of neighborhood business revitalization and code enforcement officer – why are these tasks not united with the code enforcement section of the Housing Authority or the Community Development section of DHCD? A consolidation of these efforts would not necessarily have to mean increased responsibility for DHCD, as a good argument exists that Community Development might profitably be separated from the Housing Authority and joined with economic development. Another jurisdictional boundary that needs to be addressed is that between the Department of Planning and BDC: what is the purpose of the Department of Planning's preparation of a

new comprehensive plan or a new zoning code if BDC is in charge of preparing a master plan for the Inner Harbor, which is defined so broadly as to encompass most of the central business district? Might it not make more sense for the Department of Planning to retain control of master plans, while the economic development office concentrates on advocating for businesses and identifying potential revitalization projects?

Similar considerations led to the proposal to merge DHCD, the Department of Planning and BDC in Schموke's second term, a merger that probably was best left as a proposal.⁴²⁵ Nonetheless, this proposed merger does identify the shared jurisdiction of BDC's current economic development authority. By creating a new economic development office, the mayor and city council would enable a public discussion of how economic development should be done in Baltimore and the mission and jurisdictional boundaries of all entities involved. Moreover, as a municipal office or department, such an entity would be required to abide by the transparency mandates of MPIA and OMA, and less likely to be defined by the culture of secrecy of the private sector. This approach clearly worked for Baltimore County, and should be able to be adapted to the City's different circumstances.

At the same time, consideration should be given to reestablishing entities similar to CC-IH: small, narrowly-focused entities, but subject to transparency requirements and with a clear chain of command to the office of economic development. These entities could expand or contract depending upon the particular needs of an area: an entity coordinating the redevelopment efforts on the West Side would clearly need more resources before and during redevelopment and less afterwards. Unlike CC-IH, however, these entities would be responsible for implementing the direction established by the head of the economic development office, in consultation with the mayor and council, and for coordinating efforts with other municipal departments and private businesses. Although these entities could be established as nonprofit corporations, in which case they should be statutorily created by municipal ordinance, they would likely be more effective as teams within a relatively small office or department that would enable constant and direct communication between the deputy mayor and these specialized entities.

⁴²⁵ "Schموke's Government Overhaul," *Sun*, July 11, 1992.

The council needs to play a larger role beyond its current limited authority, although this should be limited to increasing the transparency and accountability of the City’s economic development efforts, and not through veto power over individual projects. One model may be the D.C. Council’s oversight role of the National Capital Revitalization Corporation (NCRC), which reports to the deputy mayor of planning and economic development. The former head of NCRC, Elinor Bacon, who is also a private developer in Baltimore and D.C. and who served on BDC’s review panel and the new board, has declared that it “works well to have all of the projects under the deputy mayor with council oversight.”⁴²⁶ NCRC’s corporate status does not take away from the effectiveness of combined reporting to a deputy mayor and council oversight.

Finally, private business should be encouraged to participate in entities like GBC or the Baltimore City Chamber of Congress, and to contribute, as individuals or through these entities, to public discussion of Baltimore’s economic present and future. Relying on such groups, instead of a position on the BDC board, will permit a freer conversation with multiple viewpoints and with more information released publicly. This will ensure that decisions are made on an informed basis, and permit the electorate, which includes the business community, to hold politicians accountable for these decisions. Baltimore deserves to be known for more than the home of “Shadow Government.”

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⁴²⁶ Sarah Krouse, “Elinor Bacon is in love with city life,” *Washington Business Journal*, August 17, 2009.