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COMMUNITY DEVELOPMENT CORPORATIONS: A LEGAL ANALYSIS

John T. Baker*

INTRODUCTION

Poverty in the 1970's does not pose the same problem that existed ten years and twenty-two billions of dollars ago,¹ nor does it have the same significance as poverty had when racial segregation prevailed. Yet, poverty persists practically undiminished and prolongs our formally repudiated history of racial segregation.

In analyzing the problems that poverty presents it would be futile to complain of a lack of national commitment or to directly indict the methods that have been used to eliminate poverty. Clearly the delivery of financial, vocational and technical resources is essential in combatting poverty; just as obviously, the security, social status and professional positions that would be required to eliminate the distinction between historically advantaged and disadvantaged people are becoming more scarce for everyone and harder to deliver.

Appropriately enough, the major empirical basis for most anti-poverty activities has been economic need. However, the reliance on economic need combined with the possibility of success as the criterion of governmental action, appears to be an inadequate response to a poverty problem that has proved itself durable and perhaps in some degree perpetual. It is now necessary to disregard almost twenty years of concerted effort to view poverty as an emergency situation that calls for departures from the principles that are deferred to in other contexts. That is, emergency measures which current economic technologies call for to combat poverty are less important than the status which should be accorded poor people in keeping with the democratic traditions of the country.

This Article will examine one specific federal anti-poverty program, Subpart VII of the Community Services Act of 1974,² and suggest ways in which it can be used to bring past experience to bear on the problem of poverty in the present. That is, the analysis will

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1. See Washington Post, Dec. 8, 1977, at F1.

2. 42 U.S.C. §§ 2981-2985 (1976).

show how currently unexploited possibilities in the statute provide courses of action that are appropriate to a problem as impenetrable as poverty has been.

A preliminary understanding of Subpart VII, its stated purpose, history, and means of implementation is essential to the analysis. Congress' intent was to:

[E]ncourage the development of special programs by which the residents of urban and rural low-income areas may, through self-help and mobilization of the community at large, with appropriate Federal assistance, improve the quality of their economic and social participation in community life in such a way as to contribute to the elimination of poverty and the establishment of permanent economic and social benefits.³

This goal is to be implemented by Community Development Corporations (hereafter CDCs). A CDC is legally defined as:

[A] non-profit organization responsible to residents of the area it serves which is receiving financial assistance under . . . this subchapter, and any organization, more than 50 per centum of which is owned by such an organization, or otherwise controlled by such an organization, or designated by such an organization for the purpose of this subchapter.⁴

The origins of CDCs, however, predate Subpart VII. CDCs were not created by Subpart VII; rather, they originated as a result of efforts of leaders in low-income, predominantly black communities to create institutions through which residents of low-income com-

3. 42 U.S.C. § 2981 (1976).

4. 42 U.S.C. § 2981 (a) (Supp 1978). Considerable confusion attaches to the term Community Development Corporation, which has been employed by and used to refer to various enterprises operating as for-profit or non-profit corporations in urban and rural underdeveloped areas throughout the country. See, e.g., BLAUSTEN AND FAUX, *THE STAR-SPANGLED HUSTLE - WHITE POWER AND BLACK CAPITALISM* 179-86 (1972); HAMDEN-TURNER, *FROM POVERTY TO DIGNITY - A STRATEGY FOR POOR AMERICANS* 139 (1974); Note, *Community Development Corporations: Operations and Financing*, 83 HARV. L. REV. 1559, 1560 (1970); FORD FOUNDATION, *COMMUNITY DEVELOPMENT CORPORATIONS - A STRATEGY FOR DEPRESSED URBAN AND RURAL AREAS* 7 (Ford Foundation Policy Paper, 1973); Sturdivant, *Community Development Corporations: The Problem of Mixed Objectives*, 36 L. AND CONTEM. PROB. 35 (1971). As used in this article the term identifies the corporations selected to obtain federal funds under Title VII of the HEADSTART, ECONOMIC OPPORTUNITY AND COMMUNITY PARTNERSHIP ACT OF 1974, 42 U.S.C. § 2981 (1976).

munities could exercise control over important social, political and economic resources both within and beyond the boundaries of their communities.⁵ The federal government greatly accelerated the

5. See S. Perry, *A Note on the Genesis of the Community Development Corporation*, in *THE CASE FOR PARTICIPATORY DEMOCRACY*, 56 (Benello and Roussopoulos eds. 1971); M. Brower, *The Emergence of Community Development Corporations in Urban Neighborhoods*, 41 *AMER. J. OF ORTHOPSYCHIATRY* 646 (1971); TWENTIETH CENTURY FUND TASK FORCE ON COMMUNITY DEVELOPMENT CORPORATIONS, *CDCs: NEW HOPE FOR THE INNER CITY* 50-51 (Background paper by Geoffrey Faux, 1971) (hereinafter *Faux*); C. H. TURNER, *FROM POVERTY TO DIGNITY* 112-13 (1974). One of the most widely known CDCs was, in fact, created prior to the enactment of Subpart VII. Progress Enterprises is probably the oldest minority-owned CDC in the country. It was established in 1962 by a black minister, Rev. Leon Sullivan. Its original capital came from parishoners of Rev. Sullivan's church. Pursuant to Rev. Sullivan's 10-36 Plan, individuals contributed \$10 per month for thirty-six months with the understanding that the money would be used for community economic development. One of its first business ventures was Progress Plaza, a shopping center located in North Philadelphia. See *Faux*, *supra* note 5, at 65-68; Note, *Community Development Corporations: Operations and Financing*, 83 *HARV. L. REV.* 1558, 1562-67 (1970).

In addition to Progress Enterprises, other CDCs were established without assistance from the Federal Government. The Hough Development Corporation, like Progress Enterprises, was created by a black minister, Rev. Brown, in Cleveland, Ohio in 1968. In 1967 Brown called a meeting of most of the social and political leaders in the Hough section of Cleveland and "proposed the creation of a coalition of black residents and leaders to develop the community's own programs rather than depending solely on federal and city initiatives." The Hough Development Corporation was formed in the spring of 1968 to carry out the mission proposed by Rev. Brown. The initial members of the Board of Directors, mostly residents and people active in public programs in Hough contributed to the corporation's initial capital of \$2,000. See *Faux*, *supra* note 5, at 67-71; Note *Community Development Corporations: Operation and Financing*, 83 *HARV. L. REV.* 1558, 1571-73 (1970).

Action Industries, Inc., located in Venice, California (which is within the corporate limits of the City of Los Angeles) was formed in 1968 by a group of local community leaders. Initial funding for the corporation's community economic development programs came from the Commonwealth United Corporation, a diversified corporation whose stock has been publicly traded on the American Stock Exchange. Action Industries began its active phase by purchasing and operating several small businesses, mainly in the merchandising or service area. Initially, the directors of Action Industries were selected by Project Action, a community-based non-profit organization whose membership was open to all residents of Venice. See Note, *Community Development Corporations: Operation and Financing*, 83 *HARV. L. REV.* 1558, 1568-71 (1970). The FIGHT (Freedom, Independence, God, Honor, Today) organization was formed in Rochester, New York in 1964. FIGHT's directors were chosen at an annual convention by delegates from community organizations in Rochester. Initially, FIGHT confronted the Kodak Corporation over the issue of minority hiring. This resulted in some changes in that company's hiring practices as well as changes in other businesses in Rochester. The struggle with Kodak led to the formation of the Rochester Business Opportunities Corporation, a coalition of established Rochester businesses, which facilitated the formation of over sixty minority businesses within a three year period. One of FIGHT's major economic projects was an electronic subcon-

growth of existing CDCs and the creation of new CDCs by providing funds in exchange for some federal control over their activities. Nevertheless, Subpart VII incorporates some of the objectives of CDC founders by including social as well as economic goals⁶ and by providing that ownership of projects acquired with federal funds will vest in CDCs upon termination of the program.⁷

Since the areas in which CDCs are located differ substantially in size, population, and degree of deterioration, it is apparent that Subpart VII needs the flexibility to allow for different strategies to meet the potentially dissimilar problems of each area.⁸ Accordingly,

tracting plant, FIGHTON, which it established with the assistance of the Xerox Corporation. Most of FIGHT's funds, during its initial operation, came from church contributions and local fund-raising drives. See *Faux*, *supra* note 5, at 74-75.

6. 42 U.S.C. § 2982a (4) (1976), provides that CDCs may use federal funds for "social service programs which support and complement community economic development programs . . . including but not limited to child care, educational services, health services, credit counseling, energy conservation, and programs for the maintenance of housing facilities." *Id.*

7. See 42 U.S.C. § 2982c (1976). Currently, twenty-five urban CDCs receive Subpart VII funds. These CDCs and their locations are: Anacostia Economic Development Corporation, Washington, D.C.; Bedford-Stuyvesant Restoration Corporation, Brooklyn, New York; Black People's Unity Movement Economic Development Corporation, Camden, New Jersey; Chicanos Por La Causa, Phoenix, Arizona; Chinese Economic Development, Boston, Mass.; Community Development Corporation of Kansas City, Kansas City, Missouri; Denver Community Development Corporation, Denver, Colorado; East Boston Community Development Corporation, Boston, Mass.; The East Los Angeles Community Union, Los Angeles, Calif.; Eastside Community Investments, Inc., Indianapolis, Ind.; Economic Opportunity Commission of Nassau County, Hempsted, New York; Greater Roxbury Development Corp., Boston, Mass.; Harlem Commonwealth Council, New York, New York; Hough Area Development Corporation, Cleveland, Ohio; Hunt's Point Community Local Development Corporation, Bronx, New York; Mexican-American Unity Council, San Antonio, Texas; Pyramidwest, Chicago, Illinois; Operation Life Community Development Corporation, Las Vegas, Nevada; People Organized for Community Development, Pensacola, Florida; San Juan Community Development Corp., San Juan, Puerto Rico; Southside Community Enterprises, Minneapolis, Minnesota; Spanish Speaking Unity Council, Oakland, California; UDI Community Development Corp., Durham, North Carolina; Union Sarah Economic Development Corp., St. Louis, Missouri; United Methodist Community Center, Omaha, Nebraska. See Summary of CSA Funding Under Title VII of the Community Services Act of 1974 (Community Services Administration Internal Document). As corporations incorporated under state law, CDCs must have members or shareholders. But to qualify for funds under Subpart VII community residents must hold in excess of fifty percent of the places on their boards of directors. See Community Service Administration Regulations, Composition and Selection of CDC Boards of Directors, 45 C.F.R. § 1076.10-3 and § 1076.10-4 (1975).

8. Typical problems which CDCs have tried to solve with concrete programs include housing shortages, general deterioration of the environment, the exodus of skilled labor and upwardly mobile residents, and increasing rates of unemployment.

Subpart VII outlines three general CDC activities: initiating and sustaining community participation in CDC decision-making,⁹ inducing and sustaining comprehensive economic development,¹⁰ and underwriting the cost of social goods and services.¹¹ CDCs can therefore implement Subpart VII in a variety of ways. Creating an institution capable of representing local interests in relations with the larger public and capable of negotiating with governmental units for improved social services may satisfy the statute as fully as engaging in entrepreneurial activities or attempting to increase employment in ghetto areas.

While Subpart VII outlines a general approach to economic improvement it leaves unmade the wealth of choices that will shape the actual impact of CDCs upon the lives of residents of underdeveloped areas.¹² It says little about the practical issues of cor-

The projects proposed by and to CDCs are therefore usually designed to create jobs, improve living conditions, and maximize profits for distribution.

9. See 42 U.S.C. § 2982b (a) (1) (1976).

10. See 42 U.S.C. § 2982a (1976).

11. See 42 U.S.C. § 2982a (4) (1976).

12. The Community Services Administration had defined an underdeveloped area as follows:

To qualify as a Special Impact Area a community must possess a high incidence of poverty and physical deterioration. Indices of such conditions may include:

- (1) median family incomes substantially below those of the general community;
- (2) high levels of unemployment or under-employment;
- (3) high levels of dependency, as measured by numbers of families receiving public assistance, food stamps, Medicaid, etc., numbers of families headed by a single parent, or numbers of elderly couples or widowed individuals;
- (4) high percentages of substandard housing or old housing stock, or absence of new construction;
- (5) low and/or declining tax base, loss of commercial and industrial jobs, and absence of or socially destructive economic expansion; and
- (6) absence of or inadequate social and community services.

To further qualify, Special Impact Areas must be sufficiently large to provide a viable base for long-term economic development. On the other hand, the area must have a recognizable community of interest and be small enough to permit the attainment of the required appreciable impact given the amount of funds that can be reasonably anticipated to be available. Urban impact areas should generally be limited to defined neighborhoods; rural impact areas will generally cover whole counties or groups of adjacent counties or, in the case of Indian programs, an entire Indian reservation. GUIDELINES FOR COMMUNITY DEVELOPMENT CORPORATION PLANNING GRANTS

porate accountability and the allocation of power among the federal government, CDC officials and the residents of underdeveloped areas. The decision-making arrangement under the statute consists of corporations which are designed to act on behalf of and be responsible to the residents of the designated poverty area and a federal agency, the Community Services Administration (hereafter CSA), which retains funding control and veto power over the conduct of the corporation.¹³

Thus the scheme required by Subpart VII and the regulations promulgated by the CSA cause CDCs to simultaneously display some of the characteristics of a local government, a federal agency, a business enterprise and a social welfare agency. Despite the countervailing or competing interests, CDCs are apparently supposed to integrate all of these functions into their daily activities. Most institutions, however, whether charitable, profit-making or governmental, are internally structured so as to maximize a single unitary objective, although their actions remain subject to countervailing or competing interests.¹⁴ Thus, decision-making under Subpart VII departs significantly from the traditions of visibility and accountability that are material to other social institutions that hold and manage resources for identifiable constituencies.

The issue, therefore, is what kind of legal relationship between area residents and CDCs would express and reflect the statutory requirement of corporate responsibility to these residents. In exploring and resolving this issue the CDC will be viewed as both the setting in which decisions will be made and as a choice of alternative formats for decision-making. The intention is to define the significance of CDCs and the assumption is that, as legal entities,

UNDER TITLE VII-D SPECIAL IMPACT PROGRAMS, OF THE COMMUNITY SERVICES ACT OF 1974 3-4 (March, 1975) (hereinafter *Guidelines*). Although Title VII authorizes funds to both urban and rural CDCs, this Article will deal exclusively with urban CDCs.

13. See 42 U.S.C. § 2982b (a) (1976). There is no explicit language in Subpart VII authorizing or requiring the CSA to reverse particular CDC decisions. However, the CSA has promulgated regulations which provide: "Except as otherwise provided for by the terms of the grant no venture capital funds shall be used without the prior approval of OED." GUIDELINES FOR COMMUNITY DEVELOPMENT CORPORATION PLANNING GRANTS UNDER TITLE VII - D, SPECIAL IMPACT PROGRAMS, OF THE COMMUNITY SERVICES ACT OF 1974 3-4 (March, 1975). The OED is the Office of Economic Development, the division within the CSA which specifically supervises CDC activities.

14. See, e.g., A. HIRSHMAN, EXIT, VOICE AND LOYALTY (1970); Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J.L. STUDIES 251 (1977); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963).

CDCs have an importance apart from the possibility that they will produce the desired economic result. Specifically, the legal importance of CDCs derives from the fact that CDCs are located not only in ghetto areas, but also somewhere in the national life of a free enterprise democracy.

One of the primary concerns which will be dealt with in the analysis to follow is the difficulty and the danger of attempting to effect social change by doing good. The difficulty occurs because whatever good is obtainable usually is mingled with adverse consequences and because even the most admirable goals are seldom pursued without a level of ambivalence that is pervasive enough to distort the effort. Doing good is dangerous because of the risk that self-appointed samaritans will irresponsibly exercise the power to act in others' interests and instead will act according to their own presumptions. In America, such action departs from the nation's organizing principles and democratic traditions.

The dangers and difficulties of doing good can be summarized by saying that doing good is not enough. Good must be done decently so as not to degrade the doers or the beneficiaries. Though the demands of decency seem insurmountable in many contexts, in America these demands can be addressed and sometimes met through the social institution charged with that responsibility, the legal system.

An analysis of these issues, however, must be preceded by some factual background. Consequently, the first two sections of the Article will consist of a discussion of the history of CDCs, Subpart VII, and the current activities of CDCs. The Article will then examine the various aspects of CDCs which are alluded to by Subpart VII, namely their political, economic and administrative dimensions. The utility of this discussion will be tested in the fourth section by analyzing the only judicial opinion which has involved an interpretation of Subpart VII, *Corrugated Container Corp. v. CSA*.¹⁵ It is suggested that this opinion provides an unduly restrictive interpretation of the role of CDCs in the development process and that, in effect, it consigns CDCs to the task of serving as adjuncts to the Community Services Administration. The policy implications of this interpretation of CDCs will be explored and it will be shown that an interpretation of CDCs which takes their *corporate* character into account is far preferable to that adopted by the court in *Corrugated Container*. The interpretation of CDCs which is proposed by the

15. 429 F. Supp. 142 (W.D. Va. 1977).

author is preferable to that adopted in *Corrugated Container*; it is an interpretation which treats CDCs as institutions designed to resolve and mediate the conflicts that inevitably occur throughout the development process. In arriving at this conclusion, however, the Article will show that CDCs, as presently structured, fail to provide their constituents the same degree of legal protection provided by other social institutions which hold and manage resources for identifiable constituencies. It is suggested, however, that this defect can be remedied by a congressional amendment to Subpart VII that would simultaneously increase the autonomy of CDC decisionmakers and increase their accountability to residents of communities in which CDCs are located by providing these residents with legally recognized rights analogous to those possessed by shareholders of business corporations.

HISTORY OF CDCs

Social History

Understanding the origins of CDCs requires an appreciation of the fact that urban low-income communities lack not only material resources but the institutional means to obtain them. Although there are some influential institutions in low-income ethnic communities, e.g., the church and civic and fraternal associations,¹⁶ most economic institutions such as businesses, banks, credit unions and insurance companies, have not been owned or controlled by residents of these communities and until recently have not even functioned there.¹⁷

CDCs represent an attempt by residents of low-income communities to establish an institutional resource for the community which would be owned and controlled by community residents and would help to create economic and social structures directed to their needs. In short, the origins of CDCs can be located in an apparent belief—supported by substantial empirical evidence—of many of the urban poor and their leaders in the mid-sixties that the political,

16. See generally A. MEIER AND E. RUDWICK, FROM PLANTATION TO GHETTO (1970) (especially ch. VI); W. TABB, THE POLITICAL ECONOMY OF THE GHETTO (1970); S. WILHELM, WHO NEEDS THE NEGRO? (1970); WARREN, POLITICS AND THE GHETTO (1969); L. KENNEDY, THE NEGRO PEASANT TURNS CITYWARD (1969); J. H. FRANKLIN, FROM SLAVERY TO FREEDOM (1947); L. RUCHAMES, RACE, JOBS, AND POLITICS: THE STORY OF FEPC (1953); R. WEAVER, THE NEGRO GHETTO (1948); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1957); L. BENNETT, JR., BEFORE THE MAYFLOWER (1966); I. LIGHT, ETHNIC ENTERPRISE IN AMERICA (1972); K. B. CLARK, DARK GHETTO (1965).

17. See, e.g., W. TABB, THE POLITICAL ECONOMY OF THE BLACK GHETTO 22 (1970).

economic and social systems had not delivered to them a fair share of the system's benefits and rewards and that these benefits would never be forthcoming through the extant social institutions.¹⁸

Fortified by this perception, some of these leaders attempted to create new institutions. A minister in Philadelphia organized a job-training system and an investment trust which opened several enterprises.¹⁹ In Cleveland, Ohio, leaders of church and social service organizations formed a community corporation and attempted to develop housing projects and industrial organizations.²⁰ A militant organization in Rochester, New York, FIGHT, began by demanding jobs for black people at Kodak and Xerox plants, and attempted to engage in business development on its own with assistance from Xerox.²¹

The dual objective of most of these early efforts was to establish viable economic organizations in low-income communities, and to offer area residents an opportunity to participate in the decision-making process of these organizations. Leaders of some of the organizations envisioned a more ambitious role than simply producing and distributing goods and services. They believed that new institutions could be created in low-income communities which could simultaneously sponsor indigenous entrepreneurship and serve as a catalyst for inducing further economic, social and political development.²² For example, the CDC could bargain with banks on behalf of entrepreneurs to obtain capital for them, which in turn would provide jobs and in some instances desired goods and services to community residents; governmental agencies could be approached by CDC officials to obtain government contracts for local businesses, government grants for housing development, and grants for infrastructural improvement; and finally, attempts could be made to persuade large private businesses to locate plants or branch offices in these communities. It was also contemplated that profits from the businesses owned by the CDC would be invested in community ser-

18. See Innis, *Separatist Economics: A New Social Contract*, in *BLACK ECONOMIC DEVELOPMENT* 50 (Haddad and Pugh eds. 1969); A. BRAZIER, *BLACK SELF DETERMINATION* (1969); H. CRUSE, *REBELLION OR REVOLUTION* (1969); S. CARMICHAEL AND C. HAMILTON, *BLACK POWER* (1967).

19. See note 5 *supra*.

20. *Id.*

21. *Id.*

22. See note 18 *supra*; see also M. KOTTER, *NEIGHBORHOOD GOVERNMENT* (1969).

vices such as recreational facilities and day care centers.²³ It would be misleading, however, to give the impression that CDCs sprang into being in the 1960's because of an awakening of the urban poor to their status in American society. Several social forces helped to create an awareness of the need for this new institutional form. For a brief period in the sixties, society appeared to be willing to expend substantial sums of money to help eradicate racial discrimination and poverty. Civil rights legislation was passed,²⁴ an anti-poverty program was launched and private industry committed both money and manpower to solving the urban crisis.²⁵ None of these efforts was aimed at or succeeded in institutionalizing structures within low-income communities that would enable poor people to advocate and advance their interests collectively. That is, established institutions offered aid and assistance to individual minorities and poor people on the assumption that this aid and assistance would enable these individuals to acquire the resources necessary to succeed in the larger society.

While not eschewing the assistance to individuals, leaders in low-income communities realized that an entity was needed that could work on behalf of the entire community, articulate the needs of the community to those institutions that were attempting to overcome the underdeveloped status of the communities, or alternatively, oppose those institutions which were perceived as barriers to the community's growth and development.

Early examples of the CDC in Rochester, New York, and Cleveland, Ohio, suggest that the ambitious goals [of CDCs] may have arisen out of a sharply increasing recognition of the significance of outside influences in the affairs of the neighborhood. Many leaders had in the past recognized the destructive meaning of institutions that

23. See Note, *Community Development Corporations: Operations and Financing*, 83 HARV. L. REV. 1558 (1970).

24. See, e.g., Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.* (1976).

25. In 1966, 163 life insurance companies pledged to contribute \$1 billion for an "urban investment program to alleviate the problems of the core areas of our cities." See Conroy, *What the Insurance Companies Are Doing in the Ghetto*, 25 BUS. LAWYER 27, 28 (1969) (Special Issue entitled *Business in the Ghetto*). In 1968 the Urban Coalition in New York City established a lending and management assistance company, Coalition Venture Corporation, which lent over \$1 million to minority businesses in the area. See *Economic Strategies for the Ghetto*, 4 CITY ALMANAC 1, 6, 12 (April 1970). In 1968 the National Alliance of Businessmen was established as a joint enterprise by some of the nation's largest corporations and the federal government. In its first year of operation this organization located jobs for 125,000 persons. See E. BANFIELD, *THE UNHEAVENLY CITY* 111 (1970).

had no allegiance or commitment whatsoever to their neighborhoods and yet determined what happened there; but enough general recognition among residents awaited major conflicts with some of these outside influences. In one instance, it was a mayoralty campaign after a major civil disturbance; in the other, it was a dispute with a major local corporation. In both instances, after a successful conclusion of the conflict, neighborhood leaders moved aggressively into a larger, more ambitious campaign to bring about full local control through community control and economic resources. And that required a new institution, the CDC.²⁶

In summary, the social climate in the sixties was largely responsible for bringing into being a new institutional form in urban ghettos; an organization premised on the notion that resources which were essential to the development of the community should be controlled to some extent by the inhabitants of the community, whether those resources were generated by community residents or outside sources.

It is against this background that the federal legislation providing funds to CDCs must be viewed. The extent to which Subpart VII helped or hindered the development of CDCs can be ascertained by first examining the legislative history of the statute.

Legislative History

Several significant social welfare statutes which affected minorities and the poor were enacted in the mid-sixties. Subpart VII was one of these statutes. It originated in 1966 when Senators Kennedy and Javits introduced an amendment to Title I of the Economic Opportunity Act of 1964 which authorized Special Impact Programs for urban areas with high concentrations of low-income people.²⁷ The purpose of the amendment, according to one of its sponsors, was to create a federally funded program which concentrated on the problems of poverty areas rather than poor people.²⁸ Projects under this new program were to be designed "to arrest tendencies toward dependency, chronic unemployment, and rising community ten-

26. See S. Perry, *supra* note 5, at 60.

27. See *Report of Senate Committee on Labor and Public Welfare*, 11 S. REP. NO. 1666, 89th Cong., 2d Sess. (1966) (hereinafter *Report*).

28. See S. Perry, *Federal Support for CDCs: Some of the History and Issues of Community Control*, 3 REV. OF BLACK POL. ECON. 17, 23 (1973).

sions.”²⁹ They were to be implemented in poor neighborhoods, “employ the resources of the private sector—business, nonprofit groups, and the residents of poverty areas themselves—to supplement present government efforts themselves”³⁰ and were to be of “sufficient size and scope to have an appreciable impact.”³¹

Although Senators Kennedy and Javits did not experience significant difficulty in getting the amendment enacted, implementation of the objectives delineated therein proved difficult. The authority for administering this program was delegated by the Director of OEO to the Secretary of Labor.³² One year later, in 1967, Congress revised this amendment, and the Senate Committee responsible for drafting the original amendment as well as its revision, emphasized that community participation was an integral part of the program:

Experience of the first year's operation demonstrates that successful program operation, including active participation by business, requires and depends on the utmost cooperation of community residents. That cooperation, in the view of the committee, will best be achieved through effective and substantial participation of the residents in program decisions, responsibility and benefits. Community and community based corporations, which have demonstrated their potential utility as vehicles for such participation should be encouraged . . . to undertake sponsorship of programs under this part.³³

The Committee further commented that the Department of Labor had failed to carry out Congress' intentions with respect to community economic development.³⁴

29. See Report, *supra* note 27, at 12.

30. *Id.* at 13.

31. *Id.* at 12.

32. See Report of Senate Committee on Labor and Public Welfare, 32 S. REP. NO. 563, 90th Cong., 1st Sess. (1967).

33. *Id.* at 34.

34. Although the committee had intended that the funds provided for this program be concentrated primarily on economic and community development and manpower training, the Labor Department, to whom the program was delegated, used a substantial part of the funds for the concentrated employment program. Economic development activities, in particular were deemphasized. Since the concentrated employment program is given a separate authorization . . . the special impact funds this year should be used as the committee originally intended.

Id. at 32.

Thus, the 1967 Amendment provided that programs receiving federal funds must stimulate economic and business development. The programs were to provide, among other things, financial and other incentives to business to locate in or near the area served; create training programs which would support and complement economic, business and community development programs; and finally attempt to involve businesses, both inside and outside the ghetto areas, in the community development effort.³⁵

Once again, however, the Congressional purpose was frustrated. The opportunity for local ghetto residents to participate in the implementation of this new program was delayed because President Johnson directed that its administration be shared by the Departments of Labor, Commerce, Agriculture and the Economic Opportunity Administration.³⁶ The result was a diffusion of responsibility that eventually reflected the particular orientation of these governmental agencies rather than the needs of ghetto residents and poverty areas. The Department of Labor dispensed grants to indigenous businesses to provide jobs to unemployed residents of ghetto areas.³⁷ The Department of Agriculture projects in Kentucky and North Carolina reflected the general policy of reducing out-migration from rural areas by attracting industry.³⁸ Even the Commerce Department's approach of involving the business community in helping to solve the problems of poverty areas did not involve any participation by residents of those areas.³⁹ OEO did adopt an approach that attempted to foster community-based business and economic development activities by a locally owned and controlled community organization. But, OEO received the smallest share, \$1.6 million, of the \$20 million appropriation which it used as a grant to the CDC in Cleveland, Ohio.⁴⁰ According to Geoffry Faux, the first administrator of this new program:

35. Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, §151, Title I, Part D, 81 Stat. 672. Although Congress expressed its dissatisfaction with the absence of community participation in implementing the 1966 amendment, *see note 34 supra*, the 1967 amendment contained no mechanism for insuring that the money allocated for the program would be spent in a manner consistent with the priorities of area residents.

36. 33 Fed. Reg. 9850-51 (1968).

37. WESTINGHOUSE LEARNING CORPORATION, AN EVALUATION OF FISCAL YEAR 1968 SPECIAL IMPACT PROGRAMS iii-iv, Vol. I, Summary Report (1970).

38. *Id.* at iv-v.

39. *Id.* at vii.

40. The CDC was the Hough Area Development Corporation. *See* OEO Annual Report for fiscal years 1969-70, p. 70. According to one of the members of the

In the winter of 1968-69, Bureau of the Budget officials under the outgoing Johnson administration determined that the OEO project had met the intentions of Title I-D but that the projects in the Departments of Agriculture, Commerce, and Labor had not. The Bureau recommended that the entire program be run by OEO.⁴¹

The Director of OEO was instructed by President Nixon, who adopted the Bureau's recommendation, to take full responsibility for the Special Impact Program for the 1969 fiscal year.⁴² He continued to operate the program from 1969 to 1972 without any legislative change.

In 1972 Congress combined the Title I Special Impact Program with the Title III Rural Loan Program into a unified Community Economic Development section which became Title VII of the Economic Opportunity Act.⁴³ Several provisions were added to Title VII to expand the program's objectives, to give CDCs greater flexibility to carry out economic development activities, to insure their sound management and commercial success, and to attempt to insure the durability of CDC projects if federal funds were terminated.⁴⁴ Additionally, Congress identified Community Development Corporations as one of the organizational forms eligible to receive federal funds under Title VII.⁴⁵ Finally, in order to insure

OEO staff at that time, the major reason that OEO adopted the approach which it did was, "economic development had to be based upon what the residents themselves wanted to do and upon their definition of their problems." See Perry, *Federal Support for CDCs: Some of the History and Issues of Community Control*, 3 REV. OF BLACK POL. HISTORY 17, 22 (1973). The author stated that the OEO approach:

was based on taking a new look at what the low-income black communities were already trying to do for themselves, and what it seemed that these neighborhoods (especially the young men) most wanted - that is, self-determination, programs without strings, community control, and something besides services, something more real somehow, like business development or housing.

Id.

41. Faux, *Politics and Bureaucracy in Community-Controlled Economic Development*, 36 L. AND CONTEM. PROB. 277, 285 (1971).

42. *Id.*

43. See *Report of the Senate Committee on Labor and Public Welfare*, S. REP. NO. 92-331, 92d Cong., 1st Sess. (1971).

44. Economic Opportunity Amendments of 1972, Pub. L. No. 92-424, § 25, 86 Stat. 688. Title VII of the 1972 amendment is almost identical to an earlier version which appeared as S. 2007, 92d Cong., 1st Sess., § 7 (1971). S. 2007 was passed by Congress in 1971, but vetoed by President Nixon. See 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1634 (1971).

45. Pub. L. No. 92-424, § 715.

that community residents played a role in this development process, Congress made responsiveness to area residents a formal condition of receiving federal funds.⁴⁶

The mid-seventies heralded major legislative changes. On January 4, 1975, President Ford signed the Community Services Act of 1974 which superseded the Economic Opportunity Act of 1964, and replaced the Office of Economic Opportunity with the Community Services Administration.⁴⁷ Title VII of the Economic Opportunity Act became Subpart VII of the new statute and contained most of old Title VII as well as several additions.⁴⁸ The two most significant additions were: (1) CDCs became the organizational form for receiving funds under Title VII in urban areas;⁴⁹ and (2) Congress required each CDC to have "a governing body not less than 50 per centum of the members of which are area residents"⁵⁰ Although there have been some technical revisions of Subpart VII since 1975, no substantive changes have occurred.

CURRENT ACTIVITIES OF CDCs

Analysis of the way in which contemporary CDCs are operating under Subpart VII illustrates how these corporations have attempted to implement the purposes delineated by the architects of the statute. It also reveals that the multiple, ambitious purposes of Subpart VII have been reduced to a small number of concrete possibilities.

Although only a handful of CDCs exist, they control millions of dollars targeted for community development. Over \$173,000,000 in Subpart VII funds have been distributed to thirty-three CDCs from 1967 to 1977.⁵¹ Currently, twenty-five urban CDCs, located in inner-city (ghetto) areas,⁵² are recipients of Subpart VII funds.⁵³ The

46. *Id.* at § 712 (a).

47. 42 U.S.C. § 2981 (1976).

48. 42 U.S.C. § 2984 (1976) authorizes the Director of the CSA to make or guarantee loans to CDCs, families and local cooperatives for business, housing and community development; also, the Administrator of the Small Business Administration, and the Secretaries of HUD and Agriculture are directed to assist CDCs in carrying out their programs. *See* 42 U.S.C. § 2985 (a)-(c) (1976).

49. 42 U.S.C. § 2982 (1976).

50. 42 U.S.C. § 2982 (b) (1) (1976).

51. *See* summary of CSA Funding Under Title VII of the Community Services Act of 1974 Fiscal Year 1968-1977 (Produced by CSA, Washington, D.C.).

52. *See* note 7 *supra* for locations of urban CDCs.

53. Summary of CSA Funding, *supra* note 51. Most CDCs are funded for two-year periods. The grants are generally for a minimum of \$1 million, and include both administrative and investment funds. *See Guidelines*, *supra* note 12, at 6.

geographical areas in which they operate are primarily residential, with high population densities, substandard housing and low tax bases.⁵⁴ Each CDC has a full-time staff, and a board of directors composed primarily of residents of the area in which the CDC operates.⁵⁵ As of 1973, eighteen of the twenty-five CDCs owned or had investments in one hundred and forty-two businesses, ranging from substantial manufacturing plants to small retail stores.⁵⁶ Thirty-three CDCs, including those in rural areas, have provided jobs for approximately 7,000 persons.⁵⁷

54. See note 12 *supra*.

55. Approximately one-third of the funds received from the average federally funded urban CDC are used for full-time staff salaries and other administrative expenses. See ABT. ASSOCIATES, AN EVALUATION OF THE SPECIAL IMPACT PROGRAM: FINAL REPORT Vol. 2, 137 (1973). Most Executive Directors of urban CDCs have completed college (89%) and more than two-thirds (69%) have completed some graduate work. Fifty percent of the CDC Executive Directors specialized in business administration while in school. See R. KELLEY, THE EXECUTIVE DIRECTORS OF CDCs 4 (Center for Community Economic Development, Cambridge, Mass. 1974). The average size of the board of directors of urban CDCs is 20 members. See R. KELLEY, COMMUNITY PARTICIPATION IN DIRECTING ECONOMIC DEVELOPMENT 44 (1976) (hereinafter *Kelley*). The CSA has issued regulations governing the size of the CDC boards which state, in part:

CDCs are free to determine the size of their boards of directors. In doing so, CDCs must strike a balance between various, sometimes conflicting considerations. On the one hand, the board must be of a sufficient size as to provide adequate representation to both the target area residents and the business community . . . to permit the formation of working committees without requiring the same individuals to serve on more than one or two, and to insure that even a minimum quorum is still large enough to represent the community and legitimately reach basic policy and program decisions. On the other hand, the board must be small enough to permit business to be conducted in an efficient and expeditious way. It has been the experience of OED that the ideal size for a CDC board is between 15 and 30 members. Generally, anything larger tends to become unwieldy, while anything smaller overtaxes the capacity of individual members and limits the board's representativeness. Where a CDC chooses to have a board larger than 30 or smaller than 15 members, it shall explain its choices to OED.

CSA Composition and Selection of CDC Boards of Directors, 45 C.F.R. § 1076.10-3 (1975). Approximately eighty percent of all CDC boards are residents of the areas in which CDCs are located. See *Kelley*, *supra* note 55, at 48.

56. ABT. ASSOCIATES, AN EVALUATION OF THE SPECIAL IMPACT PROGRAM: FINAL REPORT 124, Vol. 4 (1973) (hereinafter ABT. ASSOCIATES, EVALUATION).

57. See THE NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT, THE CDC MODEL: A DEVELOPMENT VEHICLE IN POVERTY COMMUNITIES 2 (Washington D.C., 1977). This report is reprinted in the published *Hearings Before a Subcommittee of the House of Representatives' Committee on Government Operations*, 95th Cong., First Sess. 394-433 (1977) (hereinafter *Hearings*). The subcommittee held hearings on the operation of the Community Services Administration on March 1, 3, 23, 30 and 31, 1977. *Id.*

It would be quite inaccurate to group the existing CDCs together on the grounds that they all grew out of a single statute. Their sources are as diverse as those of conventional corporations and thus, each CDC reflects different priorities, perceptions, degrees of corporate responsibility to area residents and methods of implementing the statutory purposes. The operating CDCs fall, according to origin, into four major categories. The first category is comprised of CDCs which were the outgrowth of community mobilization to defend a real or perceived threat to the community. The second category consists of those CDCs which were created by community leaders for the specific purpose of engaging in economic development activities. The third group of CDCs grew out of previously existing government-sponsored programs, such as Community Action Agencies and Model Cities programs. The final category of CDCs was formed as a result of the cooperative efforts of persons living outside and inside of the ghetto.

CDCs in the first category reflect large initial investments of resident time, energy and money. For example, the East Boston CDC was incorporated by the East Boston Neighborhood Council (EBNC), a formerly inactive neighborhood organization formed in the 1930's as a civic improvement organization "which was reactivated after many years of inactivity to rally East Bostonians to mobilize against" the proposed expansion of Logan Airport which borders on East Boston.⁵⁸ For a number of years local media had publicized and expressed concern over the traffic, noise, and pollution that would be generated by an enlarged airport.⁵⁹ Not only was the EBNC, working with other local organizations, successful in resisting the construction of a planned new runway but it soon expanded its attempts to contain the airport into an effort to develop the community.⁶⁰ Membership in EBNC is open to everyone who lives or works in East Boston and is fourteen years of age or older.⁶¹ It was, at the time of the formation of the CDC, the one community organization which was both closely identified with the issues which affected the community, and without direct ties or obligations to

58. J. MACPHEE, LOCAL GOVERNMENT AND COMMUNITY AUTONOMY IN EAST BOSTON 4 (1973) (hereinafter *MacPhee*).

59. *Center for Community Economic Development Newsletter* 19 (March 15, 1972).

60. See THE CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT AND THE CAMBRIDGE INSTITUTE, PROFILES IN COMMUNITY BASED ECONOMIC DEVELOPMENT 19 (Cambridge, Mass. 1971) (hereinafter *Profiles*).

61. *MacPhee*, *supra* note 58, at 10.

city or state government.⁶² Therefore, EBNC was a logical choice for sponsoring the East Boston CDC (EBCDC), at least in the context of having legitimacy in the eyes of the residents of the community. The CDC was incorporated as a stock corporation in 1971 and all of its outstanding stock was issued to the EBNC. EBCDC has been involved in property acquisition and development through a subsidiary that was formed to acquire an apartment building and a nonprofit company that holds waterfront property.⁶³ Corporate assets have also been invested in several service and industrial enterprises.⁶⁴

Another urban CDC which arose out of a political issue community organization is the North Lawndale Economic Development Corporation. During the late sixties community residents became alarmed at the prospect that a major developer in Chicago had plans for the area which would, if effectuated, displace half of the area's population.⁶⁵ "The community responded by raising \$80,000 to hire its own consultant for economic planning. The consulting firm's recommendations were reviewed and accepted by some organizations representing the community."⁶⁶ Among other proposals, the consulting firm recommended that three existing community organizations, each of which represented different factions within the community, consolidate to form one strong, powerful and representative organization.

In November 1968, within two months of the private planner's recommendations, the Lawndale People's Planning and Action Conference (LPPAC) was formed as a community voice in planning for social and community development. LPPAC is a non-profit corporation with all residents of the community entitled to vote at membership meetings.⁶⁷

One month later the North Lawndale Economic Development Corporation (NLEDC), a for-profit corporation, was formed.⁶⁸ NLEDC is the economic development arm of Lawndale People's Planning and Action Conference, and concentrates its efforts almost exclusively in commercial and land development. It has purchased land for the con-

62. *Id.* at 11.

63. *See* ABT. ASSOCIATES, EVALUATION, *supra* note 56 at Vol. 3, p. 88.

64. *Id.*

65. *See Profiles*, *supra* note 60, at 37.

66. *Id.*

67. THE CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT, CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT NEWSLETTER 1-2 (Cambridge, Mass. September, 1972).

68. *Id.*

struction of an industrial park, residential housing and a shopping center.⁶⁹

The second category of CDCs tends to place primary emphasis on economic development; for example, the Harlem Commonwealth Council (HCC) in New York City.⁷⁰ The residents of the area served by HCC, central and most of East Harlem, are predominantly black and Puerto Rican.⁷¹ Organized as a non-profit corporation by twelve prominent Harlem leaders,⁷² HCC's board of directors has thirty members, twelve of whom are the original founders. Eight directors are elected by the United Block Association (a neighborhood coalition of Harlem residents) and ten are appointed to the board by community organizations operating within Harlem, including the NAACP, the Urban League and local church groups.⁷³ From its inception, the Harlem Commonwealth Council has been strongly committed to business and commercial development and has placed little, if any, emphasis on social development.⁷⁴ Although it has invested in some small retail and service ventures, its primary emphasis has been on larger businesses. It owns two manufacturing companies, has developed a land banking program, and plans to eventually buy enough land in Harlem to construct 400 housing units and 300,000 square feet of commercial office space.⁷⁵

The Hough Area Development Corporation, another CDC which fits into this economic oriented category, had its genesis in the collective decision of a group of community leaders in the Hough area of Cleveland to develop their own programs for the community.⁷⁶ Located in a decaying ghetto of approximately 60,000 people, almost

69. *Id.*

70. Another CDC which falls into this category is the Hunts Point Community Local Development Corporation (HPCLDC) which is located in the southwestern portion of the Bronx in New York City. Seventy-five percent of the residents of this area are Puerto Rican. Since its inception in June, 1971, HPCLDC has attempted to improve the general business climate within the area. See, L. Robbins, *Profile: Hunts Point Community Local Development Corporation* 6-9, CCED NEWSLETTER (August, 1974).

71. *Profiles, supra* note 60, at 20.

72. *Id.* at 21.

73. Interview with Ms. Sylvia Brown, Program Analyst, Office of Economic Development, Community Services Administration, December 6, 1976.

74. B. STEIN, HARLEM COMMONWEALTH COUNCIL - BUSINESS AS A STRATEGY FOR COMMUNITY DEVELOPMENT (1974); *Profile: Harlem Commonwealth Council* 4 CCED NEWSLETTER (May, 1974).

75. See ABT. ASSOCIATES, EVALUATION, *supra* note 56, at 134; Interview with Sylvia Brown, *supra* note 73.

76. See CCED NEWSLETTER, *supra* note 74, at 3-4.

all black, this CDC has a thirty-nine person board of directors composed of both community residents and representatives from community organizations.⁷⁷ Membership in the corporation is open to all area residents and the board is elected by the membership at its annual meeting.⁷⁸ HDC's principal venture is the Martin Luther King Shopping Plaza which provides housing for low-income families in elevated town houses constructed over a mall, with the ground floor constituting a shopping area containing seventeen businesses.⁷⁹ Additionally, HDC owns ventures in the manufacturing, service, and retail areas, including a McDonald's franchise.⁸⁰

The third category of CDCs includes those which grew out of previously existing government-sponsored programs, such as Community Action and Model Cities programs. Usually, their boards include representatives from the neighborhood organizations that serve low-income persons. Specifically, the Boards of Directors of the Union Sarah Economic Development Corporation in St. Louis, and the Denver Community Development Corporation include a large proportion of representatives from community organizations. The Union Sarah CDC was established by the Union Sarah Community Corporation which was already responsible for administering all federal anti-poverty programs in the area, and which retained fifty percent of the CDC's stock.⁸¹ Union Sarah's functions are particularly integrated: for example, it is the landlord of a medical center which offers services on a sliding fee scale and employs one hundred people. The corporate assets are concentrated in housing and property development, and minority contractors are employed for renovation.⁸²

The Denver Community Development Corporation serves a population of approximately 100,000 people, three-fifths of whom are Mexican American.⁸³ The motivating forces for the creation of this organization were the Neighborhood Action Councils, branches of local Community Action Agencies.⁸⁴ One of these Community Action Agencies, the West Side Action Council, established a local develop-

77. ABT. ASSOCIATES, AN EVALUATION OF THE SPECIAL IMPACT PROGRAM: INTERIM REPORT 14-21, Vol. 3, (1973).

78. *Id.*

79. *See* ABT. ASSOCIATES, EVALUATION *supra* note 56, at Vol. 3, p. 167.

80. *Id.*

81. *See Profiles, supra* note 60, at 45.

82. ABT. ASSOCIATES, INC., AN EVALUATION OF THE SPECIAL IMPACT PROGRAM: FINAL REPORT, Vol. I, pp. 345-56 (1973).

83. *See Profiles, supra* note 60, at 65.

84. *Id.*

ment corporation which subsequently formed, under the auspices of the Neighborhood Action Councils and the United Latin American Businessmen's Association, the non-profit Denver CDC.⁸⁵ It has a twenty-one member board of directors which consists in part of representatives from community organizations in the Denver area. These representatives then elect at-large members from the area in which the CDC is located.⁸⁶ It has acquired a 38% interest in a building which rents space to a supermarket, a refrigeration company and a check cashing booth. Fifty-percent of the supermarket is owned by the CDC. It also operates a wholly-owned supermarket in another location, and manages a wholly-owned office building.⁸⁷

The fourth and final category of CDCs includes those which grew from the initiatives of persons living outside the ghetto area. The prime example, Bedford-Stuyvesant Restoration Corporation, began when Senator Robert Kennedy brought together some of New York's most influential business figures. They subsequently agreed to set up a companion corporation, Bedford-Stuyvesant Development and Service Corporation, which was composed of prominent people and was designed to persuade outside investors to develop businesses in the area.⁸⁸ The Restoration Corporation is involved in assorted business enterprises, housing activities and property development. It is the largest and most diversified CDC in existence.⁸⁹

As is readily seen from the preceeding discussion of the origins of CDCs, the diversity of organizational structure, venture acquisitions, and related activities of urban CDCs make it difficult to comprehensively describe them in a few pages. The discussion should, however, be sufficient to refute any inference that they are conventional or one-dimensional organizations. As a prelude to determining if and how the opposing tendencies of CDCs can be integrated, the following section will isolate and discuss the implications of the principal disparate aspects of CDCs.

85. *Id.*

86. Interview with Craig Hathaway, Program Analyst, Office of Economic Development, Community Service Administration, December 6, 1976.

87. *Id.*

88. Following a reorganization of both Bedford-Stuyvesant Restoration Corporation and Bedford-Stuyvesant Development and Service Corporation, the latter had only one employee who was to serve as chief executive officer and general counsel. The remainder of the D & S staff was transferred to the Restoration staff. The boards of Restoration and D & S meet jointly and periodically. Craig Hathaway Interview, *Id.*

89. See THE NATIONAL ECONOMIC DEVELOPMENT LAW PROJECT, BEDFORD-STUYVESANT: RARE URBAN SUCCESS STORY, ECONOMIC DEVELOPMENT LAW PROJECT REPORT 1 (Earl Warren Legal Institute, Berkeley, Calif. July/August, 1976).

POSSIBLE INTERPRETATIONS OF SUBPART VII

Since decision-making under Subpart VII can proceed from a variety of purposes and follow assorted political and economic impulses, it is necessary to explore the various contexts in which CDCs can attain responsibility to area residents. The concept of responsibility does not supply an operational standard that can be used as a criterion for evaluating particular outcomes. Only decisions that are clearly corrupted by conflicts of interest can be called indifferent to area residents; even then the CSA's approval might legally suffice to redeem them, since it would provide an independent judgment that the proposed project serves statutory purposes and local needs.⁹⁰ Consequently, the concept of responsibility will be approached as an aspect of the long term relationship between CDCs and area residents.

Subpart VII and the regulations issued pursuant thereto suggest several routes to responsible decision-making which can be organized into alternative relationships between CDCs and area residents. The following three approaches are metaphors that organize several possible relationships so that they can be viewed as potential sources of responsible decisions.

Approaches: Three Patterns of Organizations

Exposing political, economic and legal approaches to the responsibility requirement of Subpart VII will be revealing. It will show how Subpart VII could operate if the analysis is abstract enough to cover the full range of options, yet concrete enough to convey the tangible differences between and opportunity for resident participation in CDC decision-making and conflict resolution under each approach. It is apparent that no single approach can address the enduring demands of development, for the development process requires diverse responses to changing realities and entails an enlarged capacity and diversification of the system to deal with increasingly complex conditions. Deciding whether the responsibility requirement partakes of democratic theory, Gallup polls, bureaucratic ballast, or the peculiar pattern of compromise articulated in American corporate law will, however, reflect assumptions about the character of the contemplated changes, and the extent to which they are subject to control.

90. For example, it would be very difficult for residents of the area to challenge a decision made by the CDC to purchase a housing complex from a member of the CDC's board of directors at a price substantially in excess of the apparent market value if the Community Services Administration approved the expenditure. See, e.g., *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964).

A. Political Approach

Subpart VII's commitment to participation, and emphasis on community control, suggests that CDCs were deliberately given a *political* dimension.⁹¹ The political CDC would be organized to reflect and would operate to give priority to the political purposes of the Act.

The political approach assumes that a CDC's allocation of resources, like other political decisions that redistribute wealth, can be appropriately controlled by small numbers of intensely interested people. Ghetto residents' participation in the political decision-making process would therefore be presumed to be analogous to the involvement of other constituencies in other political systems, and would be primarily prospective. First, residents would be directly or indirectly enfranchised to elect CDC directors.⁹² Second, residents could affiliate with local organizations or, in effect, form a federated system to amplify their impact as electors and increase their general political influence.

Absent extreme or systematic inequities, the political model would produce losers, but not legally injured minorities.⁹³ Since the

91. See 42 U.S.C. § 2982b (1976). The CSA, through its regulations has also attempted to clearly delineate the relationship of area residents to CDCs: "It is the clear intent of Title VII that CDCs be *self-help* organizations *controlled by and responsible to low income residents*." CSA Composition and Selection of CDC Boards of Directors, 45 C.F.R. § 1076, 10-2 (1975); *Faux*, *supra* note 5, at 29. ("The term 'community development corporation' is used to identify organizations created and controlled by people living in impoverished areas . . .") *Id.*; Perry, *Federal Support for CDCs. Some of the History and Issues of Community Control*, 3 REV. OF BLACK POL. ECON. 17 (1973) ("[C]ommunity economic development is the creation or strengthening of economic organizations . . . that are controlled or owned by the residents of the area in which they are located or in which they will exert primary influence.") *Id.* at 27; J. Rivera, *Community Control of Economic Development Planning: A Study of the Recipient Beneficiaries of Change as the Actors of Change* (unpublished Ph.D. dissertation, Brandeis University, 1972) ("During all the development stages, the CDC serves as the community-owned vehicle through which target group members can participate in actions designed to benefit them and their community.") *Id.* at 32; A. BLAUSTEIN AND G. FAUX, *THE STAR SPANGLED HUSTLE* (1972) ("The Common theme of all of them (CDCs) was control of the corporation by representatives of the depressed neighborhood or area. . . .") *Id.* at 180.

92. Under Subpart VII, and as CDCs currently operate, residents' freedom to elect the directors of their choice is curtailed by CSA specifications about who shall sit as directors and CDC eligibility requirements for voters. See note 55 *supra*.

93. The political system is such that in the absence of discrimination, fraud, or other forms of misconduct, the outcome reached by the electorate goes unchallenged. If a voter fails to achieve his aim, he has "lost" as part of an equitable political process. See, e.g., *Anderson v. United States*, 417 U.S. 211 (1974) (a voter has a right to have

legal system cannot ordinarily supply standards for judging political decisions, legal claims by defeated partisans against a political CDC would be untenable. As political officials, directors could largely ignore the opinions of unorganized or uninfluential ghetto residents. The directors of political CDCs would also be expected to serve their own interest in maintaining control over the organization and staying in office.

Beyond the extent to which state corporation statutes require specific disclosures,⁹⁴ the political model would not even obligate

his vote fairly counted); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 50 (1959) (absent discrimination, states have broad powers to determine the conditions under which suffrage may be exercised); *Hubbard v. Ammerman*, 465 F.2d 1169, 1182 (5th Cir. 1972) ("In the absence of a statute to the contrary, none but a candidate claiming to have been injured by illegalities therein occurring can contest the certified results of an election.").

94. Such disclosures take the form of requirements that annual reports, minutes, and membership lists be kept and made available to members. *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 513(b) (McKinney Supp. 1978-79): "[T]he treasurer shall make an annual report to the members . . . or board . . . concerning the assets held under this section (assets received for specific purposes) and the use made of such assets and of the income thereof." Section 519 provides:

(a) The board shall present at the annual meeting of members a report . . . showing in appropriate detail the following: (1) The assets and liabilities . . . (2) The principal changes in assets and liabilities . . . (3) The revenue and receipts of the corporation . . . (4) The expenses or disbursements of the corporation . . . (5) The number of members of the corporation . . . a statement of increases or decreases of such number . . . and a statement of . . . where the names and places of residence of the current members can be found.

(b) The annual report . . . shall be filed with the records of the corporation and . . . entered in the minutes

§ 621 provides:

(a) [E]very corporation shall keep, at the office of the corporation, correct and complete books and records of account and minutes . . . and . . . a list or record containing the names and addresses of all members . . . ; (b) Any person who shall have been a member of record for at least six months . . . or holding at least 5% of any class of capital certificates . . . upon at least five days written demand shall have the right to examine . . . , during usual business hours, its minutes . . . or record of members and to make extracts therefrom; (c) Upon . . . written request . . . the corporation shall give or mail to such member an annual balance sheet and profit and loss statement . . . for the the preceding fiscal year and . . . the most recent interim balance sheet

§ 718 provides: "(a) If a member or creditor of a corporation . . . or (other) state official makes a written demand on a corporation to inspect a current list of directors and officers . . . the corporation shall . . . make the list available for such inspection at its office during usual business hours." For similar, but less detailed provisions, *see also* ILLINOIS GENERAL NOT FOR PROFIT CORPORATION ACT, ILL. ANN. STAT., §§ 163a24 and

directors to keep the electorate informed. Absent a preexisting organized political system, Subpart VII might be construed to prompt more than the random involvement of a few ghetto residents and to require arrangements for eliciting broad public participation.⁹⁵ Otherwise, the provisions of the Act are far from conclusive since they generally call for only "maximum feasible" compliance with particular provisions of the Act.⁹⁶

Ghetto residents could not exercise effective control over a political CDC without having the power to remove a majority of its directors from office. A majority of the participating residents would presumably have the abstract power to influence at least general policies. And, although the occasional influence of at least some residents would be assured by the directors' needs to secure a certain amount of constituent support, publics other than ghetto residents might prove to be rival sources of power.⁹⁷

The political CDC would be most sensitive to the already organized and sophisticated occupants of ghetto areas. It is not clear, however, how or whether the political CDC could serve as either an incentive to organization and participation or function benevolently to benefit "unregistered" ghetto residents.⁹⁸ At least, assuming that Subpart VII can operate and can be enforced as a quasi-constitution, the political model is not clearly obnoxious to the Act. However, giving CDCs an economic superstructure might be a more obvious way of implementing the legislature's most pronounced purposes.

163a62 (Smith-Hurd 1970); OHIO NON-PROFIT CORPORATION LAW, OHIO REV. CODE ANN. § 1701.37 (Baldwin 1971); PENNSYLVANIA NONPROFIT CORPORATION LAW, PA. STAT. ANN. § 7508 (Purdon Supp. 1978-79).

95. A mechanism for allowing "constituent" participation might be created, analogous to those mechanisms established in organized political parties. Joseph Schlesinger noted that party membership is an extremely loose concept, *requiring* no participation beyond registering as a party member. In fact, affiliation with a party may be entirely verbal. However, registered party members *may* take part in party activities, run for office on a party ticket, attend conventions, vote in primaries and take part in organizational decisions. Schlesinger, *The Nucleus of Party Organization*, in *A COMPARATIVE STUDY OF PARTY ORGANIZATION* 56-57 (W.E. Wright ed. 1971). See also Kornberg, *Party Organization in the Electorate*, *id.* at 508; Hennessy, *On the Study of Party Organization*, *APPROACHES TO THE STUDY OF PARTY ORGANIZATION* 16-17 (W.J. Crotty ed. 1968); and M. DUVERGER, *POLITICAL PARTIES* 61 *et seq.* (1959).

96. See, e.g., 42 U.S.C. § 2982b (a) (12) (1976).

97. For example, the need to obtain refunding from the CSA may require management to pursue policies different from those desired by constituents.

98. That is, those residents who have not met formal requirements as specified by the CDC's certificates of incorporation or by-laws.

B. *The Economic Approach*

The prominent features of Subpart VII indicate that Congress' ambitions for community development were largely economic.⁹⁹ Though the amplified participation requirement suggests doubts that investment alone could remedy underdevelopment, the participation provision is compatible with the view that CDCs were intended to operate as business enterprises. Public participation would then build a kind of market research into CDC decision-making, and increase the efficiency of entrepreneurial activities. Further, by encouraging participation in the decision-making process, the CDC programs may be more effectively implemented than if the programs have to be "sold" after having been formally adopted.¹⁰⁰

An economic CDC can also accommodate both prospective and retroactive participation by ghetto residents. First, information elicited from ghetto residents during project selection may help to disclose market demand for particular goods and services. Second, both ghetto residents and non-residents can influence some corporate decisions as consumers. Of course, CDCs may abstain from profiting or sustain losses to subsidize specific goods, services, or individuals; and all of the costs or benefits generated by a particular venture cannot always be taken into account in assessing the worth of its contribution to the community.¹⁰¹ Nonetheless, the economics of investments and returns would dictate at least sporadic responsiveness to those residents with enough purchasing power to be

99. The Act authorizes programs designed to provide employment and ownership opportunities, 42 U.S.C. § 2982 (1976); financial assistance may be provided by CDC's aid to local businesses, 42 U.S.C. § 2982 (a) (1) (1976); create industrial parks, *id.* at (2); and train the unemployed, *id.* at (3). The Director is authorized to make or guarantee development loans to community economic development programs, 42 U.S.C. § 2984 (a) (1976), for which a development fund was established, *id.*, at (c) and is also authorized to establish a Model Community Economic Development Finance Corporation to provide long-term financing for CDCs. 42 U.S.C. § 2984a (1976).

100. See P. DRUCKER, *MANAGEMENT TASKS, RESPONSIBILITIES AND PRACTICES* (1974) (especially Ch. 10).

101. A particular project may be incapable of ever supporting itself but may at the same time be indispensable to the success of beneficiary and dependent programs. For instance, manpower training programs invest resources in developing skills that will inure to the benefit of other businesses. The qualifications they impart may be prerequisites to any employment. More importantly, however, bypassing training and simply finding jobs for the unemployed is unlikely to create durable economic development since unskilled workers are extremely vulnerable to mechanization and recessions. See, e.g., Cromwell and Merrill, *Minority Business Performance and the Community Development Corporations*, 3 REV. OF BLACK POL. ECON. 65, 70 (1973).

included in the relevant market. Insofar as the directors of economic CDCs consistently miscalculate or ignore demand, they might impair the CDC's capital structure, prompt termination or reduction of federal funds or discourage private enterprises and foundations from becoming involved in local development. Thus the accountability of the economic CDC would be primarily extra-legal because the model assumes that development, as a form of investment, is largely a matter of managerial discretion.¹⁰²

Some fiduciary standards, however, are undoubtedly applicable to directors of CDCs. For example, the goal of ghetto development and the purposes of CDCs might prompt the selection of directors who are personally and financially involved in other competing ghetto enterprises. In fact, Subpart VII specifically encourages the presence of local businessmen and representatives from local financial institutions on CDC boards of directors.¹⁰³

The economic model is nevertheless defective insofar as the histories of governments and free enterprise capitalism have persuaded Americans that expecting custodians of power to act responsibly is not enough. It is often necessary to activate the idea of responsibility by enforcing legal standards and obligations to particular individuals.¹⁰⁴ Further, the economic risks involved in achieving some social objectives discourage private sector solutions to many social problems that occur in ghetto areas.¹⁰⁵ The need to integrate managerial expertise with other sources of authoritative

102. Proceeding upon the assumption that the best method for producing improved conditions in ghetto areas is to pursue an intensely economic approach, those persons chosen to implement this strategy must have a considerable amount of discretion. Courts generally refuse to "second-guess" those who have made decisions which are explicitly economic and reflect no indication of bad faith or self-dealing. See, e.g., *Everett v. Phillips*, 288 N.Y. 227, 43 N.E.2d 18 (1942), where the court stated:

There are many matters disclosed by the record which cast doubt upon the prudence, the wisdom, and the concern for the public interest shown by these directors. We are constrained, however, to agree with the Appellate Division that there is little, if any, evidence to sustain a finding that they have violated their trust or have failed to protect the interests of the Empire Power Corporation according to the dictates of their judgment, be that judgment good or bad.

Id. at 230, 43 N.E.2d at 21.

103. See 42 U.S.C. § 2982b (a) (8) (1976).

104. See *Flast v. Cohen*, 392 U.S. 83 (1968); *Frothingham v. Mellon*, 262 U.S. 447 (1923). See also Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

105. See Marris, *Galbraith, Solow and the Truth about Corporations*, 11 THE PUBLIC INTEREST 37 (Spring 1968).

decisions is, however, a separate issue which has been addressed most explicitly in the area of administrative law.

C. *The Administrative Approach*

The Administrative approach to community development would classify ghetto residents as analogues of the "aggrieved person" who is eligible to participate in agency proceedings under the Administrative Procedure Act.¹⁰⁶ Participation would typically follow the notice and comment formula prescribed for rulemaking by federal agencies.¹⁰⁷ Consequently, opportunities to participate would be primarily prospective and procedural. Decision-making officials would be required to solicit public opinions, but could specify the form and scope for comments, could be selective in allowing oral presentations, and could rely solely upon their own expertise in reaching final decisions.¹⁰⁸

The Administrative approach would identify the CSA as the only authentic federal agency involved in CDC decisions. CDCs would operate as legally non-functional fronts for federal administrative action. Citizen participation in CSA decisions would be governed by the Administrative Procedure Act (APA), and anyone satisfying judicially prescribed standing requirements¹⁰⁹ or qualifying under the APA could appeal from final CSA decisions. Arbitrary, capricious or incomprehensible decisions would be the principal sources of appeals under federal law.¹¹⁰

Although conventional standing requirements would frequently deny ghetto residents access to federal courts,¹¹¹ CDCs would often

106. 5 U.S.C. § 702 (1976).

107. 5 U.S.C. § 553 (6) (c), (d) (1976).

108. See, e.g., *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965), where the court said: "It is apparent that in rulemaking hearings the purpose is to permit the agency to educate itself and not to allow interested parties to choose the issues or narrow the scope of the proceedings. The purpose of the notice is to allow interested parties to make useful comment and not to allow them to assert their 'rights' to insist that the rule take a particular form. The agency, in rulemaking, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." *Id.* at 205.

109. See, e.g., *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974).

110. See *Udall v. F.P.C.*, 387 U.S. 428 (1967); *Cinderella Career and Finishing Schools Inc. v. F.T.C.*, 425 F.2d 583 (D.C. Cir. 1970); *Pillsbury and Co. v. F.T.C.*, 354 F.2d 952 (5th Cir. 1966); *City of Lawrence v. C.A.B.*, 343 F.2d 583 (1st Cir. 1965); *Kerner v. Fleming*, 283 F.2d 916 (2d Cir. 1960).

111. While ghetto residents, among others, would probably be considered within the "zone of interest" protected by Title VII, *Data Processing Service v. Camp*,

be capable of challenging CSA decisions. The legal remedies available to individual ghetto residents would depend upon the provisions of state corporation acts, in conjunction with state judicial interpretations of Subpart VII.

A CSA-centered characterization of CDCs implies that Subpart VII gives formal recognition to the needs of ghetto residents, but reserves the tangible benefits for subsequent negotiation. Further, the CSA's patterns of veto and approval could easily preempt local initiatives. Yet the remote federal agency would neither be capable of closely supervising CDCs nor subject to local pressures. As a result, the arrangement would expose the development process to a variety of national influences and risk foreclosing routine responsibility to those most affected by administrative actions.

JUDICIAL INTERPRETATION

The fact that different concepts of CDCs do yield different policy decisions can be demonstrated by examining the opinion of the only court that has resolved a dispute involving a CDC. The court appears to have implied that CDCs are administrative agencies for all purposes. In *Corrugated Container Corp. v. Community Services Administration*,¹¹² the plaintiff, a Virginia corporation, engaged in the manufacture and distribution of corrugated paper products, sued the Community Services Administration (CSA) for permitting a Community Development Corporation to utilize federal funds to finance a for-profit business which was in direct competition with the plaintiff. The plaintiff asked the court to enjoin the defendant from disbursing additional funds to American Packaging Corporation, a wholly-owned subsidiary of the Southwest Virginia Community Development Fund (SVCDF).

The facts which led to this controversy are as follows: In 1975 the SVCDF (a Subpart VII-funded CDC located in Roanoke, Virginia) invested \$500,000 in a wholly-owned, for-profit, corrugated box manufacturing company, American Packaging Corporation. SVCDF did not receive the approval of the CSA prior to making its investment because the CSA had accorded "venture autonomy" to SVCDF and several other CDCs which empowered them to invest in business ventures without prior CSA approval. At the time SVCDF

397 U.S. 150 (1970), they would only erratically satisfy the prerequisites of a personal stake in a particular decision. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

112. 429 F. Supp. 142 (W.D. Va. 1977).

invested in American Packaging Corporation the corrugated box industry showed a downward trend. Additionally, there was evidence that currently operating corrugated box companies could adequately supply all end-users within both metropolitan Roanoke and a 100-mile radius of the city of Roanoke. Plaintiff corporation, a manufacturer of corrugated paper products alleged that it would suffer direct economic injury as a result of the newly-created corrugated box manufacturer since the industry was highly competitive and particularly since plaintiff and the CDC subsidiary were the only two corrugated box manufacturers located in the Roanoke Valley. Secondly, plaintiff alleged that Subpart VII specifically protects existing businesses in areas in which CDCs are located from unfair competition. Finally, plaintiff alleged that the CSA failed to exercise its statutorily defined obligation insofar as it illegally delegated to SVCDF full power to make investment decisions by entering into the venture autonomy agreement with SVCDF. The specific statutory language upon which the plaintiff relied states:

The Director [of the CSA] . . . shall not provide financial assistance for any community development program . . . unless he determines that . . . the applicant is fulfilling or will fulfill a need for services, supplies, or facilities which is otherwise not being met; The program will not . . . result in the substitution of federal or other funds in connection with work that would otherwise be performed.¹¹³

Plaintiff asked the court to enjoin the CSA from investing further funds in or providing assistance to the CDC-subsidiary, American Packaging Corporation.

After a careful review of the evidence presented by the parties and the language of Subpart VII the court found that the CSA had breached its statutory duty by entering into the venture autonomy agreement with SVCDF, and had inflicted irreparable harm upon the plaintiff for which there was no adequate remedy at law. It stated:

[t]here was an obvious Congressional intent . . . to protect Corrugated, and others similarly situated, from unfair competition from CSA-sponsored projects. The language of this statute creates a positive duty on the part of CSA to see that this Congressional intent is carried out. Although CSA was intended to have a great deal

113. 42 U.S.C. § 2982 (b) (a), (10) (1976).

of discretion in the distribution of their allotted funds, Congress did put certain very strict limitations on the manner in which those funds could be distributed.¹¹⁴

Sensitive to the facts that taxpayers' money was used to establish American Packaging Corporation and that this corporation was a going concern with paid employees, the court ordered the CSA to refrain from spending, or authorizing SVCDF to spend any Subpart VII funds "to support competition with enterprises such as Corrugated."¹¹⁵ Further, the court ordered the CSA to refrain from entering into any further venture antonomy agreements with SVCDF.

One of the interesting aspects of the case is the status the court accorded the CDC. In discussing its remedy the court stated: "SVCDF appears to have no interests separable from those of the CSA and APC which might be affected by any relief granted here, because SVCDF has acted *solely* as a medium for funneling CSA funds to APC."¹¹⁶ This view of SVCDF's role seems hard to reconcile with the provision of Subpart VII which states that ownership of projects undertaken by the CDC with federal funds shall vest in the CDC,¹¹⁷ unless the court views the CDC as simply an extension of the CSA. There is additional language in the opinion which suggests that the court does take this view of CDCs. In discussing the actions which the CSA and the CDC can take consonant with its decree the court stated: "SVCDF can continue to function as a *disbursing agency* consistent with those statutory limitations and the finding that the funding of APC conflicts with the Act."¹¹⁸

Consequently, the case raises the issue of what legal effect should be given to the complexity of Subpart VII. As previously shown the complexity consists of several dimensions which, on some levels, are mutually exclusive.¹¹⁹ However, another way of examining this issue is to discuss the possible precedential effect of *Corrugated*.

114. 429 F. Supp. 142, 152 (W.D. Va. 1977).

115. *Id.* at 154.

116. *Id.* (emphasis added). APC, referred to by the court, is the American Packaging Corporation, the wholly-owned subsidiary of Southwest Virginia Community Development Fund.

117. See 42 U.S.C. § 2982 (c) (2) (1976).

118. 429 F. Supp. 142, 154 (W.D. Va. 1977).

119. See text *supra*, at 54-61.

POSSIBLE PRECEDENTIAL EFFECTS OF *CORRUGATED CONTAINER*

The *Corrugated Container* case could provide the basis for a definition of CDCs as administrative agencies that could be accepted as literally true for all purposes. That is, CDCs could be construed as administrative agencies irrespective of the fact pattern of the dispute. But, this view of CDCs may deplete the relationship between area residents and CDCs of possibilities that other views preserve. The implications of the court's view of CDCs becomes visible when CDCs are viewed in the context of past experience, as expressed in related social institutions.

The array of institutions that have developed in America to hold and manage resources on behalf of various segments of the public, and for different purposes, provides a context for evaluating the consequences of giving the relationship between CDCs and area residents an entirely administrative character. That is, appreciating the kind of choices that CDCs comprise and reflect requires a comparison of CDCs to other related organizations that could have been selected to serve the purpose and achieve the objectives articulated in Subpart VII. The range of organizations that are at least theoretical alternatives to the CDC-CSA arrangement extends from administrative agencies and charitable trusts to large for-profit corporations.

All of these related organizations collectively reflect two inter-related social values or preferences which make the relationship between them a reflection of political predisposition. First, they display a relative resistance to government control over social and economic activities. Second, they express the notion that people should be able to influence decisions that affect their lives. The reluctance to vest comprehensive power in a central government appears to be part of a larger aversion to self contained decisions which can afford not to be responsive to popular demands or public needs; large concentrations of economic power as possessed by monopolists are similarly suspect. The preference for individual participation in decision-making reinforces the principle of responsive governance or management and also contributes to the resourcefulness of the system and its capacity for innovation. In practice, these preferences dictate that the nation's future will be largely or partially composed of individual decisions rather than a product of centralized planning. Indeed, little of this nation's experience is informative on the question of what standards of accountability are appropriate or applicable to the administration of a plan

that prefabricates part of the future of particular areas by permanently vesting resources in selected institutions.

The legal relationship between the constituents of particular types of organizations and those who administer, direct or manage them is ultimately reduced to the issue of standing to challenge certain decisions in courts of law, or eligibility to bring individual, representative and derivative actions, and rights to select management, receive information and participate in decision-making. Thus, the legal relationship is ordinarily discussed in terms of statutory obligations, property or ownership interests, fiduciary duties, and due process.¹²⁰ The contents of these terms, however, often overlap and are occasionally interchangeable.¹²¹ In concrete terms, each of the sources of standing serves to recognize some kind of "investment" of interested persons in the outcome of specific decision-making processes.¹²²

It seems likely that the federal and state governments would be more deeply involved in social welfare activities if not for tax

120. An unincorporated non-profit association consists of a group of persons who have come together for some non-profit purpose. The rights and obligations of the association are the cumulative rights and obligations of its members. Association property is deemed held by individual members. While the association's managers are fiduciaries vis-a-vis the association, there is usually no fiduciary relationship among members. See generally Oleck, *Non-Profit Unincorporated Associations*, 21 CLEV. ST. L. REV. 44 (1972). See also Henn and Pfeifer, *Non-profit Groups: Factors Influencing Choice of Form*, 11 WAKE FOREST L. REV. 181, 187-197 (1975).

The relationship between charitable trusts and their trustees, beneficiaries and settlors is controlled by trust indentures and trust law. The title to trust property is vested in the trustees for the benefit of unnamed beneficiaries; and the trustee managing such assets is subject to traditional fiduciary standards. See generally Freemont-Smith, *Duties and Powers of Charitable Fiduciaries: The Law of Trusts and the Correction of Abuses*, 13 UCLA L. REV. 1041 (1966). See also Henn and Pfeifer, *supra* at 197-206.

The non-profit corporation is a state-sanctioned entity distinct from its members. Management stands in a fiduciary relationship with the corporation and is answerable to the corporation, attorney general or individual members when their rights are violated. Corporate assets are held in the name of the corporation and their disposition is determined by state law, the articles of incorporation, and the will of the members. See Henn and Pfeifer, *supra*, at 206-214.

121. See e.g., *Pearlman v. Feldman*, 219 F.2d 173 (2d Cir. 1955).

122. It should be noted that the concept of investment has somewhat wider currency than the word usually enjoys as a description of ownership interests. For example, expectations alone can amount to property interests when properly founded. See, e.g., *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3rd Cir. 1947); *New York Trust Co., Trustee v. American Realty Co.*, 244 N.Y. 209, 155 N.E. 102 (1922). Consequently, what the concept of investment describes is not so much financial commitment as trust. See, e.g., *Meinhard v. Salmon*, 240 N.Y. 458, 164 N.E. 545 (1928).

exempt non-profit corporations and trusts. These organizations currently engage in the private management of resources for the public good, and thereby contribute to the general diffusion of decision-making power which could easily concentrate in governmental departments and agencies.¹²³ The purposes of such organizations have been limited and certified in advance so that as long as a "charitable" organization adheres to its purposes there is an assurance or presumption that it is responding to a genuine need and producing a social benefit.¹²⁴ In relation to activities that promote the general welfare, individual interests are virtually irrelevant.

Specifically, public and private reversionary interests in charitable trusts are quite narrow and often cannot be asserted without the assistance of the State Attorney General. Even the beneficiaries of a trust cannot contest matters pertaining to its general administration.¹²⁵ Similarly, in most jurisdictions the power to exercise continuing supervision over non-profit corporations resides in either the Secretary of State or the State Attorney General.¹²⁶ In contrast, shareholders of large publicly owned corporations can activate individual, corporate or collective interests in a variety of ways and can contest a wide range of decisions under the proper circumstances.¹²⁷

123. See generally G. McConnell, *The Public Values of the Private Association*, in VOLUNTARY ASSOCIATION 147-69 (Pennock and Chapman eds. 1969).

124. *Id.* See also N. OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS (1956).

125. While a beneficiary may sue to protect the purpose of the trust, and may bring suit for advice of the court as to interpretation of the trust instrument, "aid of the court may not be invoked to settle business problems or to advise the trustees how to use their discretionary powers." BOGERT, LAW OF TRUSTS § 153, p. 554 (1973).

126. See *The Status of State Regulations of Charitable Trusts, Foundations, and Solicitations* in RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, Vol. 5, p. 2704 (1977); Note, *Membership Rights in Nonprofit Corporations: A Need for Increased Legal Recognition and Protection*, 29 VAND. L. REV. 747, 768 (1976).

127. Shareholders have the right to determine who shall be the corporate policymakers; vote on matters which affect the fundamental nature of the corporation (mergers, acquisitions, sale of substantially all of the assets, dissolution); sue the corporation and sue on behalf of the corporation; seek appraisal rights; vote to amend the certificate of incorporation and by-laws. See, e.g., *Medical Committee for Human Rights v. Securities and Exchange Commission*, 432 F.2d 659 (D.C. Cir. 1970) (propriety of manufacturing napalm); *A.P. Smith Mfg. Co. v. Barlon*, 13 N.J. 145, 98 A.2d 581 (1953) (legality of giving corporate funds to a private university); *Sylvia Martin Foundation Inc. v. Swearing*, 260 F. Supp. 231 (S.D.N.Y. 1966) (legality of floating bond issue outside of the United States).

In contrast, the opportunity to affect the decisions of administrative agencies is provided by routine opportunities for participation in decision-making and judicial review.¹²⁸ Standing to seek judicial review of administrative action does not attach to a definite status but rather depends upon the circumstances of particular cases. Judicial review rarely reaches substantive issues and most often addresses the procedural dimensions of decision-making.¹²⁹ The attention to process reflects several significant features of administrative agencies. First, agencies often operate in areas where the criteria of action are uncertain and there is no measure of correctness. Courts often recognize these conditions under the rubric of expertise.¹³⁰ Second, the statutes that give life to agencies often give symbolic rewards to an identified constituency and reserve tangible benefits for subsequent negotiation. Hence, in the context of administrative agencies, the difference between due process and democratic process becomes indistinct, verifying DeTocqueville's observation that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹³¹

In the light of principles that are ordinarily important to the operation of organizations that make decisions on behalf of others, CDCs indeed appear to be somewhat anomalous. That is, their relationship to more conventional corporations, trusts and administrative agencies is more of a family resemblance than a logical connection.¹³²

128. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965); *Office of Communication of the United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966); see also, Albert, *Standing to Challenge Administrative Actions: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974); Gelhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

129. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Escalera v. New York Housing Auth.*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970).

130. "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Consolo v. F.M.C.*, 383 U.S. 607, 620 (1966). See also, *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942).

131. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Vintage Books ed. 1945).

132. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 65-67 (G. Anscombe trans. 1967).

First, members or shareholders of CDCs cannot sell their interests, insulate themselves from CDC activities, or easily remove themselves from a CDC's jurisdiction. The absence of a market and the rather monopolistic position of CDCs that results from the inability of many residents to "take their businesses elsewhere" makes it difficult to determine whether the needs that CDCs address accord with residents' self-defined interests.¹³³ Second, the scope of Subpart VII permits the management of CDCs to change the character of the enterprise without the assent of area residents.¹³⁴ Finally, even control over a CDC would not give them the power to choose its activities from among those authorized by the statute.¹³⁵ The CSA's powers limit the abilities of residents or management to implement the objectives that they prefer, and it (CSA) exists as an anonymous super board of directors which can ratify or veto corporate decisions. The CSA can give decisive weight to the interests of those outside underdeveloped areas or to minorities within the constituency of CDCs.

If the development program outlined in Subpart VII was implemented either entirely through corporations not subject to CSA vetos, or exclusively by the CSA, the rights of area residents would at least be clearer than they are at the present time. CDCs,

133. Even when there is more than one CDC in a particular city, each is located in a separate, clearly marked geographical area. For example, there are three CDCs located in New York City; however, one is located in Harlem, one in Bedford-Stuyvesant and one in the South Bronx. While there is no statutory or regulatory prohibition against more than one CDC in a particular geographical area, the fact is that each of the existing urban CDCs are located in separate areas throughout the country.

134. A CDC which has invested all or substantially all of its funds in business enterprises may, through a simple majority vote of its board of directors, decide to rechannel all or substantially all of its assets into housing or property acquisition. This, of course, does not necessarily imply that the action taken would be in contravention of state law. Presumably, the board of General Motors, by a simple majority vote, could discontinue the manufacture of automobiles and introduce a new pet food. However, the perceived adverse economic consequences of such action are significantly greater in the case of GM than in the case of CDCs.

135. Because of the CSA's power to veto investment decisions made by CDCs it is conceivable that even unanimous shareholder or membership approval may be inadequate to effectuate a change in corporate policy. If, however, CDCs were governed solely by state corporation statutes, shareholder approval of fundamental changes in the corporations' activities would suffice. *See, e.g.*, DEL. CODE ANN. tit. X § 271 (requires majority shareholder vote for sale of all or substantially all of a corporation's assets). Additionally, state corporation law is far more permissive with regard to eligibility to become a member of the board of directors. *Compare* DEL. CODE ANN. tit. IV, § 141 (no eligibility requirements for directors of for-profit corporations) with 42 U.S.C. § 2982b (a) (1) (1976) (requires all federally funded CDCs to have a board of directors, fifty percent of whom must be residents of the area in which the CDC is located).

however, represent a merger of the two formats. Thus, the legal position of residents is at best ambiguous and at worse non-existent. Consequently, before defining the relevance of past experience to contemporary CDCs, it is necessary to analyze the concrete advantages and disadvantages that adhere to interpreting *Corrugated Cardboard v. CSA*¹³⁶ as precedent for the position that CDCs should be viewed, for all purposes, as administrative agencies.

Advantages of Viewing CDCs As Administrative Agencies

Viewing *Corrugated Cardboard v. CSA* as a precedent that defines CDCs as mere administrative extensions of the CSA would give clarity, or at least familiarity, to the decision-making arrangement established by Subpart VII. Further, the resulting emphasis upon procedure would give sophisticated non-residents and residents of underdeveloped areas opportunities to challenge procedural irregularities and possibly substantive decisions.¹³⁷ These opportunities for involvement are significant insofar as they permit, and perhaps encourage, expressions of dissatisfaction before they disrupt the development process. Particularly with regard to non-residents, the thoroughly administrative view of CDCs might in the long run help to maintain a larger political constituency for social change than would otherwise be available. Finally, although administrative decision-making is certainly vulnerable to a variety of obstructions and delays when practiced in commercial areas, it is unclear that the residents of underdeveloped areas are capable of acting as the counterparts of those who are accused of co-opting or obstructing the actions of the principal federal agencies.¹³⁸ That is,

136. 429 F. Supp. 142 (W.D. Va. 1977).

137. Clearly, area residents would be in a position to seek judicial review of CSA actions if these actions arguably affected them personally or affected their immediate living or possibly working environment. The Administrative Procedure Act provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). Of course, the above provision of the A.P.A. would also be available to non-residents. Further, the courts have held that one has standing to challenge agency action including action which violates interests protected by statute as well as the common law. *See, e.g.,* *Alton R.R. v. United States*, 315 U.S. 15 (1942); *F.C.C. v. Sanders Bros. Radio Stn.*, 309 U.S. 470 (1940); *National Coal Ass'n v. F.P.C.*, 191 F.2d 462 (D.C. Cir. 1951).

138. *See* 2 A. KAHN, *THE ECONOMICS OF REGULATION* 11-14 (1971); Green & Nader, *Economic Regulation v. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973); Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016 (1971); Jaffe, *Federal Regulation Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. IND. & COM. L. REV. 565 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

logistically, the task of sustaining a degree of influence over administrative actions seems to require levels of money, mobility and monitoring that might be impossible for the urban poor.¹³⁹ Consequently, the application of technology and expertise to the problems of the low-income communities might be relatively unimpeded by countervailing conditions.

Disadvantages of Viewing CDCs As Administrative Agencies

Although a thoroughly administrative view of CDCs would help to achieve a degree of conceptual clarity and efficiency, the disadvantages of such a view may, in the long run, outweigh those advantages. Conceptually, combining CDCs and the CSA into a single administrative unit cancels out any corporate dimension that CDCs might have and thereby invites the problems inherent in centralized planning as opposed to more diffuse decision-making systems. The practical disadvantages that adhere to completely administrative characterization follow largely from the fact that some advantages are obtained only by superceding what were once community controlled corporations¹⁴⁰ with a bureaucratic structure that is probably less responsive to area residents. For example, the rigidity that can afflict an agency preoccupied with its own survival is especially costly when the agency is assigned objectives that entail uncertainties and call for innovation. Further, even if area residents are not in a position to disable the CSA, non-residents may be able to do so without difficulty.

The problems of an inaccessible decision-making procedure can only be compounded as the process becomes less visible to the public that it affects and as the problem to be solved, and the public to be served, become less visible to decision-makers. The remoteness of the CSA as a centralized planning agency would very likely impede the flow of information that is necessary for sound decisions. Under such circumstances, assumptions, ideology, and institutional self-interest are likely to play an inordinant role in planning. For example, material differences between various underdeveloped areas that are observable at the local level may not be recognizable by a remote agency.

The real world disadvantages that result from treating CDCs as administrative agencies for all purposes are severe and could

139. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685 (1975); Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969).

140. See note 5 *supra* and accompanying text.

substantially undermine the development process. The opinion in *Corrugated Container* does not seem to adequately account for the role of CDCs as social mediating institutions and components in a larger legal system. Sensitivity to the difficult accommodations that must be made between CDCs and the local community and the larger society necessitates an examination of factors not considered by the court in *Corrugated Container*.

ALTERNATIVE INTERPRETATIONS OF CDCs

An alternative approach to the foregoing interpretation of the role of CDCs under Subpart VII raises the issue of whether CDCs should be differently defined to accomodate and resolve conflicts among area residents. It also invites the question of whether the diffusion of decision-making authority that would result from a recognition of the non-administrative aspects of CDCs would be more responsive to the statute and the complexities of the decision-making process.

Treating decision-making under Subpart VII partially as a process of resolving conflicts among area residents would require formalizing the relationship between CDCs and area residents. Such treatment may also increase the susceptibility of CDCs to legal challenges, and might create managerial uncertainties. For example, seemingly objective and rational standards, such as profit maximization, cannot serve as the sole selection criterion or justification for one of several alternative courses of action if area residents are in a position to stymie effective implementation of a plan or challenge it in court.

Further, the confusion and complications that would result from formalizing the legal relationship between CDCs and area residents would certainly be costly and it is unclear that the opportunities for involvement would offer anything tangible or valuable to area residents. That is, the assumption that area residents want some control over decisions that affect their lives is speculative. But, this assumption is no more speculative than the assumption that the allocation of funds to substantive programs is of higher priority to those who live in underdeveloped areas than the expenditure of funds for holding meetings and requiring disclosures.

However, exploiting the relationship between CDCs and area residents would also yield some desirable results, as an interpretation of the statute and as a format for development. And, unless CDCs are more precisely defined, and the appropriate legal relation-

ship between CDCs and area residents articulated, many of the difficult policy questions relating to their capacity to function as agents of social change in underdeveloped areas will remain unanswered. For instance, the appropriate level of federal interference in CDC activities will remain unclear unless the rights of community residents are more sharply defined. Until restraints on the CSA's veto are developed and reviewed, CSA participation threatens preemption of CDC responsibility to area residents.

Moreover, CDCs' uncertain character, combined with government sponsorship and inevitable inabilities to deliver anticipated good results when expected, expose CDCs to criticism from all sides. Placing CDCs in a vulnerable political position would reduce their chance of attaining enough institutional legitimacy to operate effectively.¹⁴¹

Further, developing a clearer concept of the role of CDCs would assist in analyzing the concrete choices that continually confront CDC managers. Even mundane management and investment decisions cannot be separated from the larger issue of goal definition. Questions of constituency must also be faced by each CDC no matter what goal cluster it selects. For example, CDCs commonly face the choice between housing restoration, which benefits homeowners and occupants, and new construction, which increases the opportunities for home ownership. Decisions about rent levels and the amount and terms of mortgages to be made available also function to select certain area residents for favorable treatment from the greater number of people who are eligible for benefit. Even routine decisions, like selecting locations for a business venture, will tend to favor some residents and penalize others.

Of course, it is not clear that CDCs should be "clarified" or characterized in a way that makes them routinely responsive to selected constituencies. Some ghetto residents will always be better

141. See H. SIMON, *ADMINISTRATIVE BEHAVIOR* (2d ed. 1961), p. xxiv; see also J. MARCH AND H. SIMON, *ORGANIZATIONS* 140-41, 169 (1958); MAX WEBER, *ESSAYS IN SOCIOLOGY* 196-204, (G. Mills ed. 1946). Perhaps the paradigmatic example of organizations which appeared unable to resolve the need to establish legitimacy among ghetto residents and city officials were Community Action Agencies established pursuant to Title II of the Economic Opportunity Act of 1964. Community Action Agencies that became independent of local, state or federal governments were frequently debilitated or discontinued. Those that failed to assert independence were often discredited in their communities and were therefore ineffective. See S. LEVITAN, *THE GREAT SOCIETY'S POOR LAWS* 124 (1969); P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1970); Levitan, *The Community Action Program: A Strategy to Fight Poverty*, 385 *POL. SCIENCES ANNALS* 63, 68 (1969).

economic risks than others and some will undoubtedly remain more politically sophisticated and more effectively organized than others. Conceptual clarity should not be achieved at the cost of committing CDCs to isolated interests.

Legislators also face policy dilemmas that are difficult to address without a conceptual approach to, if not a coherent theory of, CDCs. For example, without more information than it presently has the CSA cannot possibly know whether a single CDC can accomplish the objectives articulated in Subpart VII in a given geographical area. Further, Congress must decide what financial investment to make in CDCs as opposed to other anti-poverty strategies. Calculating the optimal level of funds for each program would require information about the relative effectiveness of different programs.

Finally, as development proceeds more area residents will undoubtedly become interested in CDC activities. This will probably result in conflicts over CDC operations and priorities.¹⁴² Increased involvement will, however, probably consist only of the more organized while the least sophisticated residents, who may most need the benefits which a CDC could produce, will probably have the least influence in determining the outcome of CDC decisions.¹⁴³ Some method must therefore be developed that not only more precisely defines CDCs and their legal relationship to area residents but also protects minority interests. It is precisely at this point that the doctrines and theories of corporate law may prove useful.

RELEVANCE OF CORPORATE THEORY TO CDCs

CDCs are corporations and a corporation is a legal device that implicitly comprehends the possibilities of civilized conflict resolu-

142. According to Simon Kuznets, economic development depends upon minimal political stability and requires a means of expressing the conflicts of interest that inevitably arise in the course of economic change so that constraints upon further economic growth can be minimized. S. KUZNETS, *MODERN ECONOMIC GROWTH* 481 (1960); see also L.W. PYE, *ASPECTS OF POLITICAL DEVELOPMENT* (1966); G. ALMOND AND S. VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* (1963).

143. [T]he most active participants in community groups are not the poorest people in their communities; they tend to be upward mobile people, with middle-class (economic) expectations, who can invest in issues other than the daily struggle for sheer survival that plagues and drains the energies and perspectives of the very poor.

I. Laear, *Which Citizens To Participate In What?* in *CITIZEN PARTICIPATION—A CASE BOOK IN DEMOCRACY* 278, 285 (E. Cahn and B. Passett eds. 1970).

144. See, e.g., *Application of Vogel*, 25 App. Div. 2d 212, 268 N.Y.S.2d 237 (1966), *aff'd*, 19 N.Y.2d 589, 278 N.Y.S.2d 236, 224 N.E.2d 738 (1967).

tion.¹⁴⁴ Consequently, it is possible that residents of underdeveloped areas can improve their communities through the use of the corporate form if the corporation is not crippled by federal regulation or completely controlled by a powerful and articulate minority within the community. Therefore, the question is, how these locally operated corporations, which attempt to maximize multiple and at time inconsistent objectives, can be given the autonomy of corporations engaged in economic activities and the flexibility of charitable corporations, while being held accountable to federal and state governments and to area residents.

Suggested Amendment to Subpart VII

Perhaps the best means of accomplishing the aforementioned objective is a Congressional amendment to Subpart VII which would simultaneously increase the autonomy of CDCs and their accountability to area residents. The objective of such an amendment would be to clarify the legal position of CDC managers and the legal position of area residents in relation to the CDC.

The autonomy of CDCs could be increased by removing the CSA's veto power over CDC investment decisions and permitting them to exercise greater internal control. Removing the CSA's veto power would permit CDC officers and directors to make decisions more quickly and efficiently and, equally important, would increase their responsibility to area residents.¹⁴⁵ The fact that most of the operating and investment funds of CDCs come from the federal government for certain specified purposes means that Congress has responsibility for closely monitoring CDC activities. To fulfill this responsibility Congress could establish or authorize the CSA to establish a reporting system similar to that currently used by the Securities and Exchange Commission to monitor the activities of publicly held corporations.¹⁴⁶ That is, CDCs could be required to file

145. Although CDC directors are currently accountable to area residents who are shareholders or members of the CDC, there is at least the possibility that these directors can attempt to rationalize both the types of decisions made on the theory that these decisions are likely to be approved by the CSA, as well as the delay in implementing decisions on the theory that the delay was created by the CSA. Removing the CSA's veto power would also eliminate the availability of these justifications for particular decisions and sluggish implementation.

146. The Securities and Exchange Act of 1934 requires a registered company to file with the Securities and Exchange Commission (S.E.C.), "such annual reports . . . and such quarterly reports . . . as the Commission may prescribe." 15 U.S.C. § 13 (1970).

periodic reports, and perhaps pre-acquisition reports¹⁴⁷ with the CSA to provide some assurance that federal funds were not being used to compete with unsubsidized private enterprises or for purposes clearly beyond the scope of Subpart VII.¹⁴⁸

Nevertheless, increasing the autonomy of CDC management without expanding the role of area residents would create the very real possibility that CDCs would become the fiefdom of a small, well-organized group of area residents. Congress could, however, attempt to insure CDC accountability to a larger constituency by requiring that membership in CDCs be open to all adult persons who reside in the area designated by the CDC as the geographical area which it serves. This may, however, be only an apparent and not realistic solution. The majority of the federally funded CDCs are non-profit corporations and legal rights which attach to memberships in non-profit corporations in most of the jurisdictions in which CDCs are located are not as extensive as those possessed by shareholders in for-profit corporations. For example, the principal enforcement mechanism in most of these jurisdictions is an action by either the Attorney General or by any member or director of the corporation to dissolve the corporation.¹⁴⁹ Obviously, this is the last mechanism

147. By pre-acquisition reports is simply meant reports which would contain the same information which the CSA required from those CDCs that had entered into a venture autonomy agreement prior to *Corrugated*. The filing requirements for CDCs that had venture autonomy were spelled out by the court in *Corrugated*: "If a community development corporation has been awarded venture autonomy, then all that it is required to do before investing the grant funds in a venture is to file a feasibility study with CSA. This study must be filed at least twenty (20) days prior to the implementation of the venture." 429 F. Supp. 142, 145 (W.D. Va. 1977).

148. Since the scope of permissible activities in which CDCs can engage is so broad, it may be difficult for the CSA to rule that any proposed CDC activity or acquisition is clearly beyond the scope of Subpart VII; however, if negotiation between the CSA and the CDC proved unsuccessful the CDC could always resort to the courts by treating the CSA's adverse ruling as a final order. See *Medical Committee for Human Rights v. Securities and Exchange Comm'n.*, 432 F.2d 659 (D.C. Cir. 1970).

149. In nine of the twelve jurisdictions in which CDCs are located, the relevant statutes are based on the ABA-ALI MODEL NONPROFIT CORPORATION ACT. These jurisdictions are Colorado, District of Columbia, Illinois, Missouri, North Carolina, Ohio, Texas, Virginia, and Wisconsin. The principal enforcement mechanisms in the Model Act are actions to dissolve the corporation. These actions may be brought by either the Attorney General or by any member or director. The Attorney General may act if the charter was procured by fraud, if the corporation abuses its authority, if it answers official inquiries falsely, or if it fails to conform to various filing requirements. Members or directors can act when the board of trustees is deadlocked, when illegal or oppressive acts are being performed, when the corporation's assets are being wasted, or when the corporation is unable to carry out its purposes. The more useful remedy

which members of CDCs would utilize to discipline management, assuming the availability of less drastic alternatives. Congress should therefore incorporate into Subpart VII certain provisions of state business corporation statutes or, alternatively, incorporate provisions of a more recently enacted state not-for-profit corporation statute, such as New York's, which gives members of a non-profit corporation substantially the same rights as shareholders of a business corporation.¹⁵⁰ More specifically, the congressional amendment should specify that all adult residents of communities in which CDCs are located are members of the CDC. Further, it should provide that all members of CDCs have a legal right to sue derivatively on behalf of the CDC, vote by proxy, and receive annual, and perhaps quarterly, reports from the CDC.

The inclusiveness of local membership in CDCs under the proposed amendment is desirable because of the scope of Subpart VII, the intention of CDC founders that they be controlled by community residents and the low-income status of most residents affected by CDC activities. Unlike middle-income communities where many residents either participate directly or rely upon others to represent their interests in numerous organizations, most residents of urban underdeveloped communities are constantly engaged in the struggle for survival and therefore cannot afford the luxury of joining and participating in organizations which shape the social, political and economic life of their communities. Nevertheless, they probably have an interest in their communities which could be analogized to the interest of investors or stockholders in companies in which they own stock.¹⁵¹ The fact that the stockholder in a publicly-held corpora-

of a derivative suit is not mentioned in the Model Act, and there are no cases authorizing this remedy in these jurisdictions.

As far as internal controls are concerned, the Model Act provides for the removal of directors by any procedure provided in the articles of incorporation or the bylaws, or by a meeting called expressly for that purpose.

150. See N.Y. NOT-FOR-PROFIT CORP. LAW § 601 *et. seq.* (McKinney 1970).

151. Generally, the primary interest of an investor who holds stock in a large publicly-held corporation is not in exercising his legal rights as a shareholder to discipline or challenge managerial decisions. His primary interest is in his investment and to that end his main concern is the profitability of the corporation and whether he is receiving an acceptable return on his investment. See, e.g., LIVINGSTON, *THE AMERICAN STOCKHOLDER* 26 (1958). Similarly, it is probably true that the average resident of an urban underdeveloped community has little interest in disciplining or challenging decisions of CDC managers, assuming that he is even aware of the CDC's existence. His primary interest in CDC activities is probably more personalized. That is, he is probably more concerned with receiving a "dividend" in the form of enhanced job opportunities for himself and his family and improved services within the community and more particularly the neighborhood in which he lives.

tion has paid some consideration for his stock is not necessarily fatal to the analogy. First, as was shown earlier, many area residents participated in the formation and development of some urban CDCs and therefore, contributed some form of capital to the CDC.¹⁵² Secondly, in an obviously redistribution orientated federal program it is not impermissible for Congress to distribute cash to an organization and the power to control that organization to the intended beneficiaries. Further support for the analogy lies in the fact that the managers of a corporation control the financial future of their investors, at least that portion of the investor's capital which is in the company.¹⁵³ In exchange for the discretion to utilize this capital to produce some type of "product, and hopefully give the investor a return on his capital, corporate managers incur the risk of being dismissed, removed from office, sued, and the ultimate prospect that the shareholders will sell to others interested in taking over the firm and replacing management.

Therefore, it seems reasonable to argue that CDC area residents should enjoy the same degree of control over CDC directors as do shareholders in publicly held corporations. Managers of CDCs are given money by the government and instructed to create viable economic and social institutions in the community which will become a permanent part of the community's assets. Thus they should be held to the same level of accountability to local residents as are managers of for-profit corporations.¹⁵⁴

The suggestion that area residents be accorded the status of *de facto* shareholders in non-profit corporations raises several troubling

152. See text *supra*, at note 5.

153. Until and unless the investor decides to sell his securities, the capital which he has invested in the corporation is controlled by corporate managers and beyond the reach of the investor. If the corporate managers perform well, the financial future of the investor is enhanced by the growth of his securities and vice versa.

154. Another significant feature of the non-profit corporation is the nature of shareholder ownership. The shares of large profit-making corporations are generally valuable assets on which money can be realized by transferring them to another owner. Also the value of the shares rises and falls according to the diverse economic factors present in the securities markets. In non-profit organizations, however, the cost of a unit of ownership is generally fixed by the corporation rather than by the market, and often transfers of shares for money or other consideration is statutorily prohibited. The end result is that shares in profit-making corporations are generally held for investment purposes, while those in non-profit organizations are held because there is some external benefit to be derived from the membership itself—such as community development.

Phemister and Hildebrand, *The Use of Non-Profit Corporations and Cooperatives for Ghetto Economic Development*, 48 J. URBAN LAW 181, 200 (1970) (footnotes omitted).

issues. First, why not require CDCs to incorporate under state law as for-profit corporations? Perhaps the best answer is that the non-profit form provides more flexibility when the multiple goals of CDCs are taken into account.¹⁵⁵ Additionally, the loss of tax-exemption under federal law is a persuasive response.¹⁵⁶ Moreover, if most residents of urban underdeveloped communities are too preoccupied with survival to actively participate in community organizations how will an amendment to Subpart VII which accords *de facto* shareholder status to these residents insure greater managerial accountability? The short answer is that we simply do not know that it will.

A more equivocal response, however, is that if the CDC managers are required to supply fairly accurate information on a regular basis to community residents some of these residents will read and understand these corporate reports and on some occasions may be moved to take some form of action against CDC managers or against others on behalf of the CDC.¹⁵⁷ To enhance their chance of success these residents may seek the support of other residents with similar interests or concerns. Even short of taking action, however, the more sophisticated residents who read CDC reports could serve a type of brokerage function by conveying the information contained in the reports to other community residents in clear and intelligible form. This may cause the recipients to take some ac-

155. It is difficult, if not impossible, to define profit maximization or to ascertain when the directors are acting in the best interest of the "shareholders" when the corporation is attempting to maximize multiple goals rather than a single goal. The non-profit form permits CDC directors to simultaneously pursue economic and social objectives.

156. All federally-funded urban non-profit CDCs have received tax exemption under § 501 (c) (3) of the INTERNAL REVENUE CODE.

157. This does not necessarily suggest that the action will involve litigation, although on occasions it may. There are other forms of action which could be taken by CDC *de facto* shareholders. Based upon the information contained in the annual reports, these shareholders could evaluate the performance of management negatively and decide to vote against the management slate at the next election; they could decide to attend the next board meeting and lodge a formal complaint about some aspect of the management and direction of the CDC, and as suggested above, they may find some basis for instituting a lawsuit. For example, suppose the annual report showed that the corporation owned a business which was located in a building owned by one of the board members, and that the rent paid by the business was substantially more than that paid for comparable commercial space in that area. A *de facto* shareholder could conceivably institute a lawsuit on behalf of the CDC for breach of fiduciary obligation. The hypothetical posed above was taken from a report of a conflict of interest by an operating CDC. For other examples of such conflicts, see *Hearings*, *supra* note 57, at 512.

tion to protect their interests or the interests of the CDC.¹⁵⁸ Finally, the *de facto* shareholder status of area residents would facilitate a discrete form of resident participation in CDC decision-making. Assuming that some area residents would occasionally exercise their shareholder status and contest some corporate decisions, it is untenable to suppose that the directors of CDCs could completely ignore the possibility of legal opposition to their decisions. It is more likely that directors would begin to evaluate the likelihood that particular decisions would generate litigation, and to assess the probability that hypothetical plaintiffs would survive summary judgment motions and prevail on the merits of their complaints. The presence of "phantom plaintiffs" in the decision-making process would, in effect, transform some uninvolved area residents into participants and would secure a place in CDC deliberations for mute and minority interests.

Even if the *de facto* shareholder concept is analytically sound, the question of whether it should be encouraged depends upon the benefits that it would bring to underdeveloped areas, and its soundness as a method of implementing Subpart VII. The proposal has the virtue of equating participation by area residents in CDCs with participation by other investors in corporate decisions.¹⁵⁹ The consequence may be to allow interests and concerns in the ghetto to surface and be resolved through normal corporate channels rather than arbitrated by officials who may be preoccupied with institutional prejudices or self-interest.

American corporate experience demonstrates that opportunities for legal opposition can organize and activate interests that

158. The analogy with the investor who holds a few shares of stock in a publicly-held corporation is appropriate. Aside from financial reporting services, such as stock market quotations and other financial reporting in the daily newspapers, the average investor probably relies upon his stock broker for information about the company whose shares he owns. "The most important source of external information to the securities research process appears to be the financial statements of issuers Direct contact with security issuers ranks next, followed by information received from other research organizations" INSTITUTIONAL INVESTOR STUDY REPORT OF THE SECURITIES AND EXCHANGE COMMISSION, SUMMARY VOLUME, H.R. DOC. NO. 9-2-64, 92d Cong., 1st Sess. Part 8, 27-28 (March 10, 1971).

If financial and other information about CDC activities were available there are several persons in urban underdeveloped communities who might perform a type of "brokerage" function if that function is defined as interpreting and disseminating the information contained in the CDC's statement. Ministers, social workers, and staff directors of other social welfare organizations are among those who might perform this function.

159. See note 152 *supra*.

would not otherwise be taken into account.¹⁶⁰ The incentives to join in the pursuit of collective benefits are generally weaker than the impetus to oppose specific actions that are perceived as detrimental.¹⁶¹ It requires time, peer group interaction, and publicity to mobilize latent interests. Not all, if any, of those resources are likely to be available to a majority of ghetto residents. Allowing ghetto residents to participate in corporate decisions would give disorganized interests a chance to congeal, and would reduce somewhat the cost of public participation in institutional decisions.

CDCs cannot implement Subpart VII or adequately respond to ghetto conditions if they are patterned upon one model or committed to a single approach to issues. By bringing fresh influences into CDC decision-making, the *de facto* shareholder proposal can reduce the risk that CDC officials will be bound by belief in a particular construct. The resulting policy decisions might not always be sound, but they would not all suffer from the same set of assumptions.

The *de facto* shareholder proposal would also have the effect of generating relevant information about specific decisions and diminishing the need to rely on abstractions. For example, the size-density quandry could be addressed by establishing one CDC in each ghetto area and waiting to see if its operations would be severely encumbered by legal opposition. A debilitating number of lawsuits would suggest that the area includes more communities of interest than a single corporation can serve. The area could then be divided, or another CDC could be established. A second corporation could compete with the first, operate as a subsidiary, or take over a specific assignment, depending upon the substantive sources of the controversies.

Similarly, the appropriate level of federal intervention in CDC activities would be a function of the effectiveness of the *de facto* shareholder proposal in revealing and correcting defects in decision-making. A fully functional *de facto* shareholder system would largely cancel out causes of federal intervention related to the adequacy of participation or differing estimates of community concerns. Further, being subject to lawsuits by residents might deter government officials from arbitrary exercises of power, and prompt ad-

160. See, e.g., *Medical Committee for Human Rights v. Securities and Exchange Comm'n.*, 432 F.2d 659 (D.C. Cir. 1970); *Securities and Exchange Comm'n v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947).

161. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 60-61 (1971).

ministrators to articulate standards for their decisions.¹⁶² Giving ghetto residents the power to exercise control over CDCs would also enhance the local legitimacy of CDCs since the *de facto* shareholders would not have to accept as an article of faith that the corporation operates in their best interests.

In summary, accepting the view that the decision-making arrangement established by Subpart VII only makes sense if it is perceived as a format for conflict resolution leads to the conclusion that the application of corporate law principles by Congress, the courts, and the CSA is necessary if CDCs are to be effective in accomplishing their objectives. There is no way to establish unequivocally the need for the proposed congressional amendment, except insofar as it is important to attempt to bridge the gap between the poor and the non-poor. Translating Subpart VII into a program for social change which is decent, conscionable, and tolerable, regardless of whether changes occur, would be a beginning.

CONCLUSION

The purpose of the following concluding paragraphs is to expand upon the previous assertion that the approach to underdevelopment illustrated by Subpart VII is inadequate as a response to poverty, in the present, and particularly in the future.

Since it is legal analysis which has generated the conclusion embodied in the stated assertion, it is necessary to recognize the relevance of legal standards and customs to essentially economic activities. If programs such as Subpart VII do not conceptually belong in a legal or corporate context, then the conclusions legal analysis can reach are likely to be misguided.

Legal analysis has a peculiar capacity to address the present as more than an episode in time; it is a method of viewing current experience as an aspect of custom or tradition and in light of what is of shared importance. Consequently, legal analysis can disclose the effect of current activities upon social continuity; what is pursued or obtained can be measured against what is given up. Thus, the kind of recognition available through legal analysis is indispensable in assessing the social costs of anti-poverty activities.

The factual issues are, then, whether the difference between developed and underdeveloped areas is of a kind or degree that

162. See, e.g., Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973).

makes irrelevant the social experience expressed as legal precedents, and whether in any event it can be eliminated readily enough to moot the question. The answer to the latter question appears to be no, but the first question probably cannot be definitely answered by one person for another. However, although it is possible to conclude that the differences between underdeveloped and developed areas justify a dramatically different approach to poverty than has been applied to other problems, the assumptions underlying that conclusion are subject to several objections. Indeed, they might be termed unacceptable if it is agreed that it makes a significant difference whether the residents of underdeveloped areas are assigned, for development purposes, a different system of standards and values than that which applies in other areas. That is, it will be presumed that what is important is not only what happens to the poor under anti-poverty programs, but what the larger society does to itself in the process.

At this point it should be evident that the issue of whether legal analysis is an appropriate approach to economic development programs is very close, conceptually, to the issue of whether such programs would in practice profit from an infusion of legal standards and procedures. The two issues do actually collapse into one another at a certain level of analysis. The following paragraphs attempt to sustain such an analysis, and to provide a kind of reorientation toward poverty and the present, rooted in revised assumptions about the problem.¹⁶³

The assumptions that appear to discredit an extralegal approach to poverty culminate in a failure to recognize that it is ambivalence toward the asserted objectives and less certain results of anti-poverty activities that structure our efforts. It is precisely this ambivalence that is given legal effect when CDCs are viewed as substantive conflict-resolving institutions rather than simple vehicles for the delivery of resources to underdeveloped areas. There is, therefore, a need to add a jurisprudential dimension to development programs.

A summary of the assumptions that must be overcome before current development activities can proceed to address the present must be preceded by a reminder that the preceding section of the article proposed measures that would have two limited effects.

163. It should be noted that the prevailing and proposed approaches to poverty under consideration here are precisely those delineated as alternative interpretations of *Corrugated Container*. See text *supra* at 64-71.

First, the internal procedures of CDCs would be formalized; second, the standards imposed upon CDC decision-making would confer standing rights upon area residents, enabling them to challenge some CDC decisions or perhaps to bring suit on behalf of the corporations on some occasions. Nothing in the preceding material is intended to recommend any particular outcome for actions that might be initiated under the statute. Thus the social or political decency toward the poor which is one of the principal concerns of this article does not depend upon the substantive results of the proposed measures. Perhaps the following paragraphs summarizing the challenged assumptions will help to elucidate the sense in which decency is an issue in efforts to overcome underdevelopment.

Programs such as the one established by Subpart VII seem to presume that in a context of overwhelming and comprehensive need, the possibility of conflicts between individual interests and collective or community goals can be disregarded. However, the need for a decision-making format that accommodates divergent interests would seem more acute when comprehensive needs have generated a statutory design of the scope and ambition of Subpart VII. It is possible that the "collective good" is more evident in underdeveloped areas and can to some extent be defined by reference to objective standards, without the assistance of market mechanisms or a genuine political system. However, it would seem that the perceptions of the area residents who are the subject of development programs are important regardless of whether they comport with objective, rational conclusions. The opinions and sentiments of the non-poor are generally recognized even when they do not meet an accepted standard of logic. Any attempt to make decisions on behalf of others that ascribes to the others an inhuman rationality in identifying their own best interests is inhumane. Without channels for participation by the poor an acceptable degree of responsiveness to the needs which are in fact felt can probably not be achieved.

Subpart VII furnishes a concrete example of these difficulties. The control acquired by the government over CDC activities effectively replaced the original constituencies of CDCs with larger national constituencies. The degree of power held by non-residents over residents' lives may be defensible on the basis of the original bargain, but it is also embarrassing from a democratic standpoint. In that sense, the power can only be justified to the extent that its exercise is governed by standards.

The next assumption which needs to be overcome is somewhat subsidiary to the first and involves an apparent indifference to the distinctions that a development program makes between the poor and non-poor in the process of attacking poverty. However, it is submitted that poverty cannot be the operative standard in development efforts. It is precisely the difference between the poor and the non-poor, rather than poverty per se which is objectionable and that implies standards for development efforts. Assuming that poverty itself is the problem licenses a level of indifference to the poor that creates another difference and additional distance between historically advantaged and disadvantaged people. In this regard, it is again essential that the poor are viewed as participants in the development process. Residents of underdeveloped areas are as a rule incapable of escaping the condition of poverty and equally immobile with regard to the effects of anti-poverty strategies. Since their status as participants is axiomatic, it should be formalized and given substance.

The final assumption consists of misconceptions concerning development itself. The utility of the term "development" in discussions of domestic poverty is due in part to its capacity to disguise what is being discussed. The term can appear to refer to a substantive goal or to the process of overcoming underdevelopment. However, it is impossible to give "development" a very concrete substantive meaning without proceeding to plan the future, perhaps on the basis of personality or ideology.

Abandoning the goal of development and embracing the process has the effect of turning attention away from assumptions and toward some difficulties attached to development that are otherwise easy to overlook. It is precisely these difficulties that need to be taken into account in development programs. That is, the process of overcoming underdevelopment consists of social change. The concept of social change conjures up fears and uncertainties that the seemingly safer and more predictable "development" process appears to bypass. However, it is precisely such fears and uncertainties that are relevant to the question of who should control the development process. For instance, Subpart VII appears to be based upon the assumption that development is a kind of "cheerful engineering" that can be confined to designated areas. However, the basis for granting non-residents influence over the course of development is that the effects of activities undertaken upon the authority of Subpart VII cannot be confined to specific areas nor completely predicted. In this regard, it is especially significant that if develop-

ment had occurred with all deliberate speed, the historical position of racial minorities in America would be drastically different.

Viewing development as social change also makes it more difficult to suppose that an appropriate and effective technology can be designed, for social change is no easier to plan in advance and control than it is to allow in the first place.

If the preceding observations accurately depict the position that we are in with regard to poverty, then it is apparent that "development" is at once necessary and in a sense impossible, and that the very nature of development creates precisely the circumstances that have been described as the classic role of the courts in a democratic society. Thus underdevelopment in the context of the American system creates a paradigmatic need for the resource known as the common law approach to decision-making. The need is not entirely or even primarily a need of the poor; in large part, it consists of a national need to act in a manner that implicitly recognizes and honors the principles that define the relationship between the poor and non-poor as members and citizens of the same social system. That is, this article has delineated a difference between developing impoverished areas and integrating the poor into the larger social system. It has been argued that, on a legal level, anti-poverty efforts should be aligned to the later objective. It is conceded that the proposal may make little concrete difference to the poor. However, the difference that it would make, in a society that must somehow include poor and non-poor on equal terms, is that it would allow that society to retain, if not to implement, the decency of its anti-poverty impulses.

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