

THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK  
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## The Role Of Amenities In The Land Use Process

*By* THE SPECIAL COMMITTEE ON THE ROLE OF AMENITIES  
IN THE LAND USE PROCESS



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# The Role Of Amenities In The Land Use Process

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## *Introduction*

This report by The Association of the Bar of the City of New York responds to a request from Mayor Koch and the Board of Estimate to the Association's then President, Robert M. Kaufman. The Mayor stated that the Board of Estimate was considering the question of whether to adopt guidelines with respect to amenities to be obtained from developers building projects in New York City, as a condition for granting zoning changes, special permits and other discretionary approvals by the City. We were asked specifically to review tentative guidelines\* which members of the Board of Estimate had prepared to deal with this issue. The guidelines would be applicable to the Uniform Land Use Review Procedure ("ULURP"), the statutory procedure for obtaining such variances, permits and approvals.

The Mayor asked us to hold public hearings and to report. We advised the Mayor that we reserved the right to comment not only on the guidelines but also on the underlying issues. This was agreeable and the Mayor encouraged us to proceed in whatever manner we considered appropriate.

Mr. Kaufman appointed this Committee, consisting of persons in the Association with a broad range and diversity of experience on such questions. The committee is chaired by Sheldon H. Elsen, who served as Chief Counsel to the Moreland Commission which investigated the Urban Development

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\* The draft guidelines are appended to this report.

Corporation during the fiscal crisis. Mr. Elsen is a trial lawyer who also serves on the faculty of Columbia Law School and he has recently been elected a vice president of the Association of the Bar.

The other committee members are: Merrell E. Clark, Jr., a former president of the Association of the Bar and a current member of the New York City Board of Ethics; David C. Condliffe, who has served in City government as Executive Assistant to former Deputy Mayor Edward Hamilton and as a member of a Bronx community board; Kathleen Imholz, who has served on the Association's Committee on Municipal Affairs; Mark A. Levine, chair of the Association's Committee on Housing and Urban Development; Jerome Lipper, who has had broad experience in this area; and Hector Willems, who is serving on the Association's Committee on Municipal Affairs.

The committee preceded its public hearings with approximately three intensive months of preparatory sessions, in which views were solicited and ideas discussed with persons representing essentially all types of interests involved in the issues. We talked to: City government officials, including the Mayor, Deputy Mayors, Borough Presidents, the Corporation Counsel, the City Planning Commission chairperson and the staffs of all these officials; present and former heads of the Public Development Corporation and members of the City Council; developers and their lawyers, as well as others who had recently engaged in building within the city; many community board leaders and members; persons active in local civic organizations; others who had long studied the situation, including members of past commissions and persons active in city charter reforms; the chairman and staff of the Charter Revision Commission.

Four days of public hearings were held in January of this year. The hearings were covered in the media and elicited public response which we found helpful.

Throughout our investigation we have been impressed with the good will, ability, conscientious devotion to duty and open-

mindedness of the persons with whom we consulted and who gave generously of their time. They appeared to us to put the interests of the city ahead of political or private interests and to want to assist in making improvements in the ULURP process to deal with the issue of development amenities.

Since the hearings, we have spent an additional four months working on this report, internally debating the issues and reviewing aspects of our recommendations to determine that they can be implemented in a practical way. We now issue our recommendations.

Part I is a summary of our findings and conclusions. Part II states the principal issues and our conclusions about them. Part III discusses how to implement our recommendations, with a view to the creation of appropriate legal and other procedures. Part IV discusses the bearing which our recommendations should have on the revised City Charter and other legislation.

## I. *Summary and Conclusions*

### *Unrelated Amenities*

While at first blush it appears useful to require developers to meet community needs by providing amenities\* of various sorts in return for project approvals, in a city chronically short of funds for public purposes, the practice of requiring them to build amenities unrelated to needs created by their project has undesirable consequences for government and should be discontinued.

Requirements to provide amenities unrelated to project needs at bottom constitute taxes, which are not levied evenhandedly on the basis of neutral principles but are required from developers on a case by case basis. These ad hoc requirements cast government in an unjust and therefore untenable role.

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\* The word "amenities" in this report is not used in a technical planning sense but in its more common everyday meaning.



Such a practice also tends to undercut the decision making process. Government decision makers can be induced to approve projects in order to obtain amenities unrelated to the project's needs, rather than from an examination of projects solely on their merits. The use of such amenities thus tends to have a distorting effect on decision making.

They also distort the city's priorities and capital planning. While such amenities unrelated to project needs seem attractive to meet such needs as those for senior citizen housing, parks and libraries in some communities, these may or may not be the city's greatest priorities. Priorities should be worked out carefully on a city-wide basis, not ad hoc on a local community basis. Capital planning should also not be ad hoc.

Short term considerations should not overwhelm sound principles, particularly in New York City, which has spent years since the fiscal crisis in eliminating past practices that represented an accumulation of such gimmicks.

The requirement of building unrelated amenities also can make the city less attractive for developers. They thus can interfere with long term objectives of promoting rational development in the city.

While developers perhaps can adjust, the practice threatens to corrode the integrity of city government and its zoning and land use laws. That price is too high for any of the advantages claimed.

#### *Particular Government and Community Bodies*

The source of the problem is not found in any particular government body or community organization. Such amenities have been commonly obtained by central city officials, including the Board of Estimate, the City Planning Commission and the Mayor's Office, as well as by community boards and local community groups. The solution is to bar every body in the city's government from requiring such unrelated amenities.

Community boards in particular should be given the opportunity to redirect some of their energies to a meaningful role in the pre-certification environmental review process, where they can both contribute their knowledge of local conditions and at the same time obtain some guidance about project needs, before they begin their review under the ULURP process. Such participation, however, should not be permitted to create delays in completion of the environmental review (pre-certification) process nor to involve community boards in the technical aspects of environmental review. In the course of such review, the City Planning Commission should respond to community board inquiry about what amenities the City Planning Commission considers project related and therefore appropriate to discuss with developers.

Finally, it should be noted that the Board of Estimate can and should (at least prior to Charter reform) continue to play its important role as the final decision maker in the ULURP process. Nothing in this report is intended to limit that role.

### *Implementation of Reforms*

In order to control these practices, at all levels of government a record must be made of all agreements, including understandings, which have been entered into between developers and governmental bodies or community organizations, which involve any kind of amenities, as well as all gifts which developers have given or agreed to give. Developers should prepare disclosure statements and submit them, updated at each point, to every body which is to pass on their project, including community boards, the City Planning Commission and the Board of Estimate. The community board and the City Planning Commission each may add to the disclosure statement its own brief statement of additional facts known to it and pass

such statement on to the next reviewing body; and the Board of Estimate should promptly publish the minute of its decision, followed by an updated developer disclosure statement which shows all agreements. All of these statements should be made public.

The adequacy of disclosure should normally be self-enforced, since the participants in the process do business together over a long term, and amenities tend to be highly visible. Criminal sanctions should be reserved for only such egregious and rare cases as bribery or false disclosure statements, where appropriate, in which case existing criminal laws should serve.

The primary control over unrelated amenities should be through currently available government processes and civil remedies, including opinions by the Corporation Counsel. Aggrieved persons and others can invoke civil remedies and their rights to have administrative determinations reviewed in the courts, although we recommend against any laws which would give private citizens the right to delay construction by suing developers for inadequate disclosure. Control against abuses would be promoted by requirements that disclosures be made publicly available so that where they are important they can be reported in the media. We do not believe that it will prove necessary or desirable to create costly bureaucratic structures in order to keep a watch on the process and to enforce the reforms.

The United States Supreme Court in *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987), has recently held that a condition which a builder may be required to meet in order to obtain a governmental approval must bear a reasonable relationship to the governmental purpose underlying the approval requirement. There must be a "nexus."

Our recommended definition for a project-related amenity is as follows:

A project-related amenity is one which (1) addresses a need directly arising from the project, i.e., which has a nexus to the project, and which is identified during the environmental review process; or (2) is otherwise specified by law.

We believe this definition is consistent with the *Nollan* test. It goes beyond *Nollan* in that it applies even if the developer were willing to provide an unrelated amenity and it is one which would promote the policy which we believe should be followed.

We recommend that similar language should be incorporated into a revised City Charter as part of the provisions for the uniform land use review procedure.

While Charter amendment will take some time, the bulk of our recommendations can be implemented immediately by administrative rules and official policies, along the lines of the proposed guidelines which were submitted to us for our review, with the modifications which we suggest in Parts II and III of this report.

## II. *The Issues and Our Resolution of Them*

### 1. *Project Relatedness*

Our major issue has been whether amenities should be confined to those related to projects or whether developers can be asked to solve other community needs in short supply, as by building parks, special subway stations, senior citizen homes, libraries, etc., when they do not mitigate the environmental impact of the project and are not otherwise related to needs created by the project. The proposed guidelines would essentially confine amenities to those addressing needs directly created by the project.

After hearing from many witnesses on all sides of the issue, we have concluded that we agree with the guidelines' objective as a matter of public policy. A surprisingly widespread consensus has emerged to the same effect. Most witnesses, including

community representatives, eventually agreed that amenities should be limited in some manner.

#### *Arguments for Amenities Unrelated to Project Needs*

There are strong motivations to obtain amenities unrelated to project needs, since public funds are scarce in New York City and other great cities. Community board members and other community leaders<sup>6</sup> have told us about longstanding needs, often important needs, which had gone unmet until a developer came along who could be induced to meet them. Confinement of the amenities process arguably would leave many such needs without reasonable hope of solution. At the least, they would be harder to solve.

#### *Spreading the Amenities to the Outer Boroughs*

Some leaders, moreover, including Howard Golden, the Borough President of Brooklyn, would reform the process not by limiting amenities but by requiring developers to meet needs for amenities in the outer boroughs where there has been less construction of big projects. Most developers who have provided unrelated amenities have done so in connection with relatively large construction projects in Manhattan and to some extent in Queens.

It is hard to argue that pressing needs for, say, a park or library in Manhattan near a construction project should be met, while a similar need in Brooklyn or the Bronx should be ignored. Yet if a developer is asked to meet the city's needs wherever they arise the amenities process becomes rather purely a form of taxation.

#### *The Sviridoff Commission's Conclusions*

In 1983, after an extensive study, a distinguished committee under the city's former Commissioner of the Human Resources Administration, Mitchell Sviridoff, concluded that the use of

unrelated amenities constituted an ill advised method of raising revenues "to shore up other sectors of city life." Mr. Sviridoff took this position during his testimony at our public hearings. We are persuaded that his committee's conclusions on the issue were sound then and are still applicable.

*Amenities as Ad Hoc Taxes and Fees, Which Are Unjust*

Whether the unrelated amenity be called a tax or a fee, its most basic flaw is that it is not levied in an even handed and neutral way. Governments are supposed to tax and impose fees on all citizens according to neutral principles, without regard to how much a particular developer can be induced to spend on solving the city's unmet financial needs. Taxes should not be levied either ad hoc or ad hominem.

Ad hoc and uneven exactions offend our ideals of distributive justice. Streetwise New Yorkers of course are frequently cynical about government. Nevertheless the best and most effective government in this country has rested on a profound belief that the government is just, and that all citizens are treated as fairly as possible in accordance with neutral principles. No American government, be it at the city, state or national level, should lightly risk this faith of its citizens, be they the deprived or be they streetwise New Yorkers, or, indeed, be they real estate developers.

*Effect on Decision Making*

The ad hoc payment of money or services in return for favorable governmental action also adversely affects the decision making process. In egregious cases the decision maker is corrupted. In less egregious cases, satisfying the wish list for a borough president, community board or a Mayor enhances the recipient's political power. The prospect of receiving the amenity can divert attention from the merits. The decision maker may accept the project in order to get the unrelated amenities, when perhaps it should be voted down. Thus integrity is erod-

ed, of government in general and of the zoning laws and land use regulations in particular.

#### *Distortion of Public Priorities*

Unrelated amenities, moreover, can satisfy needs of the favored community which should not receive priority when viewed on a city-wide basis, while leaving unmet significantly more important needs elsewhere. Communities which lack construction projects are thereby short changed. Budgetary needs that are not satisfied by such amenities may go unmet. Thus unrelated amenities practices distort city priorities.

#### *Distortion of the Budgeting and Planning Process*

Similarly the budgeting process is distorted. Capital planning should not build on fortuitous deal-making. One reason amenities are appealing to local groups is that the city's recent development boom comes on the heels of the city's fiscal crisis and a period in which many capital projects have been necessarily deferred. The correct solution, however, is not ad hoc capital planning but longer range comprehensive planning. Similarly, budget decisions should not be made in an ad hoc manner. Capital projects may require continuing expense budget resources. If, for example, a developer is required to construct a library, the new library may require ongoing expense budget resources which may effectively prevent another more needy community from receiving a library. Such capital and expense budget decisions should be made in the context of city-wide, charter mandated budget procedures.

#### *Potential Burden on Development*

The extraction of unrelated amenities, finally, adds to the burdens of development in New York City. While many developers readily enough absorb the amenities costs in their budgets for large projects, some witnesses have told us that these

wish lists and protracted negotiations can affect a decision whether to concentrate their work in New York City or in other parts of the country. At the least, the requirement of building unrelated amenities affects the risk-reward decisions of developers, who already have to deal with New York City's convoluted approval process. We do not have substantial evidence that developers are yet being deterred from work in New York City, but this consideration also calls for bringing the amenities process under control.

#### *Availability of Alternatives*

There are other ways to raise funds for city needs than through unrelated amenities. For example, as former city Councilman Edward Sadowsky told us, a small increase in the city's real estate tax rates could raise the funds necessary to build the unrelated amenities. Others have suggested that the city should move to a policy of greater as-of-right development. Without endorsing any of these proposals, we suggest that they be studied. The city might also study Budget Director Paul Dickstein's testimony before us that an impact fee could be considered, although we decline to endorse it.

#### *Whether the Private Sector Should Be Coerced Into Public Service*

It has been argued that skilled developers do a better job in construction than city agencies. Without debating the point and without examining here laws like the Wicks law that entangle the city's construction work in red tape, even if we assume that the city can get better construction by the unrelated amenities procedure, the price is too high. The distortions in government are too important and the impact on the integrity of decision making too troublesome. Nor is it sufficient to say that the city has a need which developers can fill and therefore they should be required to do so.



### *Unrelated Amenities as Gimmicks to Solve Short Term Needs*

Short term solutions to the city's financial needs, which ignore the requirements imposed by sound fiscal practices, and which often paper over systemic problems, have found many expressions in city government over the years, and an accumulation of such practices, often referred to as gimmicks, helped bring on the city's fiscal crisis. We must continually be alert not to create new ones.

### *Conclusion*

We agree with the Mayor, other members of the Board of Estimate, the City Planning Commission and most witnesses who testified before us that amenities should be confined to project-related needs.

#### *2. The Role of Community Boards*

The guidelines devote considerable attention to community boards, apparently on the assumption that those boards, while acting only in an advisory capacity, have played a major role in creating understandings with developers about the provision of unrelated amenities. It has been contended that developers frequently agree to supply the amenities in order to facilitate community board approval for their project, although some such agreements would at least in part be motivated by a wish to create good will in the community where the project is to be located.

#### *The Guidelines' Proposed Restrictions on Community Boards*

The guidelines prohibit community boards from "accepting gifts, concluding agreements for developer-funded amenities or participating in negotiations regarding the granting of things of value to third parties."

This language received a hostile reception from community board members, some of whom construed it as an implied

reprimand for past misconduct. If one was intended, however, it appears to us to be unwarranted. No examples were offered to us of any gift-giving to community boards, and few examples were uncovered of boards participating in negotiations regarding things of value to be given by the developers to third parties.

Similarly, no examples were offered to us of an "agreement" between a board and a developer if by an "agreement" is meant a binding commitment enforceable by a board independently of Board of Estimate or City Planning Commission inclusion of the commitment as a condition of its approval of the project. Community boards have only the power to advise on project approvals.

The guidelines state that "the role" of the community board is to review a land use application and recommend whether it should be approved and whether any amenities should be required. There is no mention of negotiating with the developer over possible amenities, whether to mitigate environmental impacts or for unrelated amenities. When the guidelines were first issued, concern was expressed that they were intended to prohibit such negotiations. It is clear from our investigation, however, that no such prohibition was intended. We found no dissent from the proposition that "the role" of the board includes negotiating with the developer over amenities which the board might recommend, subject, however, to the important substantive limitation that such amenities must be related to the project, and that negotiations should be similarly limited.

The guidelines provide that community boards may not participate in negotiations for the granting of things of value to third parties, such as local community groups. This restriction seems to be aimed at such situations as the recent gift of \$250,000 from a developer to a local chamber of commerce in Rego Park. Keeping such negotiations out of public view, however, leaves them more susceptible to abuse; it would probably be best on balance if they were disclosed at community board

hearings and thereby exposed to public view. This would also afford more basis for control, either at that point or later.

A principal sanction in the guidelines for their violation by community boards is that the City Planning Commission, the Board of Estimate, and mayoral agencies "will not enforce such agreements where they have been made." But that is the law today, for the local boards' role is only advisory. Thus the sanction may be illusory.

The guidelines also leave the door open to third party coercion against developers to build unrelated amenities. This is presumably because civic groups and the like cannot be legally prevented from entering into such discussions and making such agreements. The restrictions on official pressures and the disclosure requirements which we recommend, however, should reduce substantially the over all pressure on developers to acquiesce in such arrangements.

We note that the guidelines' effort to control community boards more strictly than the Board of Estimate is not only undesirable but may also prove illusory, since any shifting of deal-making to the Board of Estimate is likely to bring the Borough Presidents into the process and they in turn are likely to involve their appointees on community boards to help review proposals.

#### *Community Board Concerns About the Guidelines*

Community boards have reacted negatively, even vehemently against the guidelines. They may, however, be reacting not so much to preserve their right to obtain unrelated amenities, a process whose defects many community boards have recognized, but because of the anomalies and impracticality we have mentioned.

Community boards may also have protested the proposed guidelines because they view them as a method of significantly reducing their role in favor of more centralized governmental decision making. Experts who have lived through the city's long

decentralization process have said to us that community boards have not been accorded the role originally envisioned for them. In the land use area, the City Charter requires the City Planning Commission to provide community boards with technical city planning assistance so they can perform their land use review function, but there is a good deal of evidence that the boards have not received adequate assistance. Community boards, perhaps concerned that Mayors and Boards of Estimate may be in some kind of competition with them for control of decision making, tend to view with suspicion such promulgations from central city government as the guidelines, which appear to restrict community board functions even further. Restriction of land use review functions could critically affect the viability of the boards.

We have been assured that neither the Mayor nor the Board of Estimate intended to use the guidelines to stifle community boards but intended rather to control the amenities process. Nevertheless, guidelines and other new regulation to control unrelated amenities should impact evenly on all agencies of city government which affect the amenities process, whether they be the community boards, the City Planning Commission, or the Board of Estimate.

#### *The Future Role of Community Boards on Amenities*

We are persuaded that community boards are valuable institutions, which can contribute significantly to the proper understanding of what impact projects will have on their communities, and which should play a role in helping to decide what developers should do to mitigate such impacts. The present City Charter mandates important functions for community boards and the chairman of the Charter Revision Commission, Richard Ravitch, has publicly expressed the view that community boards should play an important role under a future City Charter. Though the resolution of such issues in general is beyond our mandate, for our more limited purposes we agree

with Mr. Ravitch. Most community board leaders and members, while diverse, have been dedicated, able people who will serve their communities and the city. Their vitality should be preserved, in a constructive way.

This is not to say there are no problems with the boards. Some critics have accused community boards of opposing certain projects to keep them out of their neighborhood, a phenomenon known as NIMBY ("Not in My Backyard"). Some community boards may have overreached in dealings with developers. On balance, however, none of these considerations outweighs the advantages of preserving the community board functions which have been discussed.

### *Conclusion*

We conclude that control of the amenities process may be reconciled with meaningful community board land use review by giving the boards a role in the environmental review process, a role they do not now have, perhaps by the accidents of when various bills were passed. The subject is relatively complex and requires separate treatment.

### *3. Community Boards—Future Role in the Environmental Review Process*

If community boards are to limit their amenities discussions to those which address a need which is identified during the environmental review process, community boards should participate in that process from its earliest stages in order to give city officials the benefit of their local knowledge. Environmental review is a process which, by its nature, involves an assessment of local conditions. Hence we recommend that community boards be given this earlier and meaningful role for that purpose. Both federal and state law have similar provisions and we believe that substantial opinion in the city would support the change.

*The Need to Coordinate Environmental Review  
and Land Use Review Procedures*

Through an accident of legislative timing the city's land use review procedures and the city's environmental review procedures are not properly synchronized. A member of the Goodman Charter Commission indicated that the commission had intended that local participation in land use review would commence at the very outset of the process. Indeed the present City Charter so provides. Section 2800(d)(15) of the City Charter provides that each community board shall "Exercise the *initial* review of applications and proposals of public agencies and private entities for the use, development or improvement of land located in the community district . . . and the preparation and submission to the city planning commission of a written recommendation." (Emphasis added). Section 197c(b) of the City Charter requires the Department of City Planning to forward a copy of the ULURP application to community boards within five days of the date on which the application is "filed with the Department of City Planning."

The Goodman Charter, adopted in 1975, did not anticipate the passage of state legislation governing the environmental review process. (The New York State Environmental Quality Review Act ("SEQRA") N.Y. Env'tl. Conserv. Law §§8-010-8-0117 (Consol. 1982). Also see related state regulations at 6 NYCRR 617.1 *et seq.*) That process, as administered by the city, has not provided an opportunity for community boards to participate in environmental review of projects. (Executive Order No. 91, the City Environmental Quality Review procedure ("CEQR"), states the manner in which New York City has chosen to administer the state statute and regulations).

This inconsistency between the two legislative schemes is especially inappropriate because the environmental review process has become a means by which planning, infrastructure and budget decisions are being made on an ad hoc basis, over a

period that sometimes lasts from eighteen months to two years or longer, while the community board is left outside to puzzle at what is going on.

Many witnesses at our hearings expressed dismay at the way in which the city has elected to administer SEQRA; they noted that the city does not encourage community board involvement at the early stages of environmental review. Not only does state law permit such involvement, but regulations encourage it. (6 NYCRR 617.3(g)).

#### *The Federal Model*

Similarly, the federal government, in administering the National Environmental Policy Act of 1969 ("NEPA"), requires openness at the earliest stages in the environmental review process. (42 U.S.C. §§4321-4370 (1982)). Under NEPA and its related regulations (40 C.F.R. §1500.1-1503.28 (1982)) the federal government requires "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." (40 C.F.R. §1501.7). Once a decision to prepare an Environmental Impact Statement ("EIS") is made, a scoping process outlining the extent of the EIS is started. That process, which is to identify those significant issues to be analyzed in the EIS, includes information from local sources. (40 C.F.R. §1500.1-1503.28 (1982)).

The scoping process would be improved by inclusion of community board representatives at this early stage of the environmental process. While they may not possess the scientific and technical expertise of other city agencies, they will often possess important local information and perspective which could otherwise be overlooked by central city authorities. That local information and perspective should be obtained, without involving community boards in scientific or technical issues, or delaying or politicizing environmental review.

Under present city procedures, city scoping meetings are not

open to the public and are held between the developer, the developer's environmental consultants, the Department of City Planning and the Department of Environmental Protection (the city's designated "lead agencies") and the various other interested agencies which the lead agencies select. Neither community boards nor the public at large are now asked to send representatives to the city scoping sessions. We recommend that representatives from community boards be included in the scoping session or that some similar means be provided to obtain their knowledge of local conditions and to give them the thinking of the City Planning Commission on amenities issues.

The extent to which the NEPA model should be adopted by the city is a question we think best left to the city's administrative discretion; that model can serve best as a source of guidance, to the extent applicable to the city's conditions.

#### *No Time Delays*

One reason we would leave the details of community board involvement in environmental review to the administrators is that they must design the procedures which will not further prolong the process. The existing pre-certification process lasts too long. We have been advised that the city is presently reviewing its environmental review procedure in order to set sensible limits to the time spent. We support that initiative.

We believe that it is possible to design a process which ensures that the involvement of community boards will not delay the process. For example, scoping suggestions can be made by city agencies and the community boards simultaneously. Early involvement of community boards will generally reduce any mystery surrounding the plans of developers and central city authorities and reduce the likelihood of confrontations and consequent delay.



### *Politics and Environmental Review*

Concern has been expressed to our committee that involvement of community boards in environmental review will overly politicize what should be a purely scientific and technical process. The community board role, however, should be to supply knowledge of local conditions, not to be involved in scientific and technical questions. Their other functions should be reserved for the ULURP process.

### *Environmental Declarations*

While inclusion of community boards in the scoping of environmental impact statements will provide community boards with a meaningful opportunity to identify problems which should be addressed in the environmental review process, it will only do so with respect to those projects for which an EIS is prepared; community board participation in a non-EIS environmental review should also be encouraged. In the city's environmental review process, the review is initiated by a document called a Project Data Statement ("PDS"); outside of the city, the document is termed an Environmental Review Form. When no EIS is required, the city generally responds to the PDS filing by issuing a "negative declaration," meaning the project will not have an adverse significant environmental effect. At times, however, the city will issue a "conditional negative declaration" to the effect that the city will find that there is no adverse significant environmental effect (i.e., no EIS will be required) *if* the developer modifies his proposed project in a specified way.

During the review of the PDS, regardless of which declaration eventually issues, the co-lead agencies should afford community boards the opportunity to provide identification of possible project impacts.

In order to do so, moreover, the city should share a summary of the proposed project with the community board. This need

not entail a review of complex technical questions, but only of the local issues.

#### *Greater Guidance and Technical Assistance*

Too often legislative or structural solutions to public policy problems ignore important administrative reforms. Such should not be the case here.

Section 191(b)(5) of the Charter presently provides that the director of city planning shall provide community boards with staff assistance and other technical assistance to permit the boards to perform their planning duties. If community board involvement in environmental review is to be both meaningful and efficient, more guidance and assistance is necessary. It may become important to provide community boards with additional assistance in order to meet this charter mandate. A few developers have already recognized this need, and voluntarily provided boards with funds necessary to hire consultants because they are convinced that greater technical assistance will enable community boards to participate in a more meaningful, more technically accurate and, therefore, more constructive dialogue.

Developers also pay specified filing fees to the city to facilitate the processing of both environmental review and land use review applications. These funds are placed in the General Fund and not used to increase the staff resources of the reviewing agencies. It has been suggested to us that a similar fee be assessed for use by community boards to hire their own consultants. It has also been suggested that either the Borough Presidents or the borough boards be given the responsibility to administer such funds and allocate them to community boards in proportion to the number and nature of projects under review by a given board. Others suggest that the Department of City Planning's resources should simply be increased to permit technical assistance to the boards.

We do not take a position on the means of assistance other

than to state that the city has to assume responsibility for active guidance and assistance if local participation in environmental review is to be meaningful and if the pressure to negotiate unrelated amenities is to be eliminated.

### *Conclusion*

We conclude that existing land use and environmental review procedures should be revised to provide community boards with early and meaningful opportunity to identify needs created by the project, based on their knowledge of local conditions.

#### *4. Disposition of City Land*

In our work, we became aware of problems that had arisen where the city itself had decided to develop land it owned or to sell or lease such land to a third-party developer and where the formulation of the city's plans occurred without input from the community. The mandate of the present City Charter however is that the community boards shall have a continuing involvement in the needs of their districts, in planning for the districts and capital projects therein, and in the "initial review" of the proposals of public agencies for the use, development or improvement of land located in the districts. *See* Charter §2800 d.(1), (9), (13) and (15, *inter alia*).

We believe that these complicated problems are important and should be further studied, but they are beyond the scope of this report.

#### *5. The City Planning Commission and the Board of Estimate*

The proposed guidelines, while purporting to control all governmental bodies involved in negotiation of amenities, would impose looser controls on the City Planning Commission and the Board of Estimate than on community boards.

Our hearings have shown us, however, that many of the most significant deals for unrelated amenities have been made by the Board of Estimate, often very late at night. No argument has been made which has persuaded us that such deals in principle

or in practice are less subject to problems than those made by other bodies.

Thus arguments have been made to us that elected officials can properly be given responsibility to require unrelated amenities, though unelected community boards should be kept out. The reason given is that elected officials are accountable to the voters and can be controlled at the polls. We believe, however, that deals made by elected officials show all the infirmities that we have discussed above, such as distortion of decision making, ad hoc and unevenhanded taxes or fees, distortion of spending priorities and capital budgets, creating disincentives to development, and so on. Elected officials, moreover, who could point out to the voters their role in obtaining the unrelated amenities, if anything may be under greater pressure to make such deals. Restrictions should apply to them as well.

None of this discussion, however, is intended to be critical of such agreements at the Board of Estimate when they are project related.

The language of the guidelines also shows evidence of political compromise, such as requiring accountability from city agencies only "to the maximum extent feasible," a vague phrase that destroys accountability, and by qualifying the project related and environmental impact requirements to allow the City Planning Commission and the Board of Estimate also to obtain amenities if they are based on "land use planning considerations that address public health, safety or welfare needs." These vague tests could open the door again to the requirement of unrelated amenities. While the guidelines do seek to eliminate Board of Estimate and City Planning Commission deals with developers for unrelated amenities, their controls are too lax. Our recommendation is to adopt their objective but to improve the controls, in accordance with our recommendations in Part III. Nor is this solely a question of policy because the *Nollan* decision also applies to the Board of Estimate.

### *Conclusion*

We recommend that the Board of Estimate (or its successor) and the City Planning Commission become amenable to legal controls by inclusion of a project related requirement in any revised City Charter, and we so recommend to the City Charter Revision Commission. Detailed drafting recommendations are set forth in Part IV below.

In addition, until the Charter revision is adopted, we recommend a combination of improvements in the guidelines or policy statements, and opinions by the Corporation Counsel, together with self-discipline, to keep the amenities process under control within central city governmental bodies. The language for such guidelines or policy statements should be similar to that contained in our recommendation on this point for the revised City Charter.

### *III. Implementation of Reforms*

In our recommendations we shall focus on mechanisms to get the job done, without distinguishing between those adopted through legislation, charter reform or less formal rules contained in guidelines or policy statements, except where such distinctions are critical.

We will first examine the legal status and essential viability of the proposed guidelines which we have been asked to review. Then we will state our recommended definition of project relatedness. Such definition will entail not only drafting of language but also administrative procedures by which guidance can be given as to what is permissible.

Next we will recommend ways to provide disclosure of deal making with respect to amenities for projects. Such disclosure requirements must be enforced, but we will not advocate expensive and burdensome disclosure requirements on the federal model, such as that of the Securities and Exchange Commission. The city neither needs such a model nor can afford to divert scarce funds to it.

We will then deal with sanctions for violations and related requirements to make such sanctions work. The basic principle will be to seek the minimum sanction appropriate to get the job done.

In Part IV we will then recommend proposed changes for the City Charter.

### *Use of the Proposed Guidelines*

As we said in Part II, we approve the principal objectives of the proposed guidelines. We have doubts, however, that the guidelines would serve adequately to attain those objectives. Improvements are needed in several areas.

#### *1. Legal Basis of the Guidelines*

The guidelines, which were prepared by the city administration and by the Board of Estimate, do not rest on any specific statutory authority. No one would doubt, of course, the power of the Board of Estimate to publish a guideline describing how it intends to exercise its own authority in ULURP proceedings. It is not self-evident, however, that the Board of Estimate can issue guidelines for the operation of community boards whose existence, power and responsibility are independently bottomed in the City Charter, §2800. We note, moreover, that the City Charter does provide for the issuance of guidelines to community boards governing ULURP procedures, but it provides for their issuance by the City Planning Commission, not the Board of Estimate, and only after notice and a public hearing. (City Charter, §197-c(g)).

#### *2. The Definition of Project-Related Amenities*

The definition which is to be used to control the amenities process should meet several objectives:

1. It must be consistent with the constitutional test set forth in the *Nollan* decision, which requires "a nexus" between the condition of approval (in this case the amenity) and the govern-

mental or regulatory purpose behind the laws which require the approval.

2. It should be readily understood by persons working on land use problems, without requiring frequent recourse to lawyers or the courts for clarification of its meaning.

3. It would be best if the definition were given concrete meaning for each project during the environmental review devoted to that project, rather than simply left as an abstract test.

4. It should avoid an illusory precision. That is one problem with the word "directly," which in other contexts has been criticized as being misleadingly precise. Such a word needs to be supplemented and confined by other language.

5. The definition should be in appropriate form to be incorporated into the land use review section of the City Charter, as well as used administratively.

6. The definition of a project-related amenity should not be tied to geography. Some amenities could be on-site and still not project-related or they could be off-site and still project-related.

7. The definition should allow for amenities which are needed to deal with "secondary displacement," as well as with environmental impacts that hit physically close to the project.

After a review of these considerations, and taking into account the City Planning Commission's experience during recent months in dealing with such concepts as "directly related" and "nexus," both of which seem to have proven useful in the field, we approach the problem as follows.

The City Charter should be amended, and applicable administrative regulations or guidelines should be drafted, to bar agreements for unrelated amenities and to limit them to "project-related amenities." The notion of project-relatedness is useful in practice. At the same time, it should be defined more fully as follows:

A project-related amenity is one which (1) addresses a need directly arising from the project, i.e., which has a nexus to the project, and which is identified during the environmental review process; or (2) is otherwise specified by law.

This definition is intended to incorporate workable guidelines from the *Nollan* test, and to use the City Planning Commission's experience in working with various concepts, while creating a more specific operational dimension to the definition by calling for needs to be defined during the course of an environmental review process. The word "directly," qualified by the word "nexus," is not intended to limit amenities needed to deal with "secondary displacement," nor is it intended to tie amenities to geography.

Part (2) is necessary to permit amenities provided for in the Zoning Resolution, the Charter powers of city agencies such as the City Planning Commission or similar law. Examples are the creation of plazas and renovation of a subway station in exchange for a zoning bonus that permits increased bulk.

Our definition is, as noted above, in part grounded in the "environmental review process," a process not now defined or described in the Charter. We considered recommending that the Charter include a definition of the environmental review process, but decided against doing so for several reasons. First, to the extent such a definition would be grounded in state statute, we note that state legislation might change independently of Charter reform. Second, as a general matter noted elsewhere in this report, we do not think it is advisable to clutter the Charter with more detail than is absolutely necessary. Finally, and most importantly, we believe "environmental review process" has a generic definition in the law. Generally, and depending on the project, it would include federal, state and city environmental reviews. Such reviews are quite wide ranging. At present, for example, state regulations require consider-



ation of a project's impact on land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health.

We also wish to make clear that in our view the environmental review process is not complete until after final Board of Estimate review, so that needs recognized by the Board of Estimate which otherwise meet the project-related amenity test may be taken into account.

### 3. *Disclosure*

The guidelines would require a developer to submit to the City Planning Commission and the Board of Estimate an affidavit "disclosing all contributions or promises to provide things of value in connection with the site or project."

This requirement may have been included because of the "Rego Park" matter where the Board of Estimate became aware at the last minute of a \$250,000 commitment made by the developer to a community group in exchange for the group's support of the project. The Board of Estimate caused the developer to disavow the commitment.

We believe that this provision is inadequate. To consider what provision would be adequate we shall first discuss here what we think to be the purpose and proper function of disclosure and we shall make specific recommendations to carry them out.

Since some of our witnesses have contended that disclosure alone will cure the unrelated amenities problem, we add here that we do not agree with that evaluation. Too many disclosures which show unsound agreements will go unnoticed, either because they are not newsworthy, or because no one in city government notices the problems, or because politics dictate acquiescence even though the deal is not project related. If there is to be genuine reform, some enforcement mechanism in

addition to disclosure will also be required to make sure that no unrelated amenities are required of developers. This consideration should also influence the kind of disclosure to be required.

#### *A. The Purpose and Proper Functions of Disclosure*

Deals and understandings that are not known about cannot be proscribed or controlled. Adequate disclosure will be essential to enforce the new policy and this disclosure must be made to any official body charged with acting on projects. Since the Board of Estimate (or its successor) and the City Planning Commission must pass on all projects, disclosure must be made to them. We recommend, moreover, that developers make similar disclosure to community boards of their deals with community groups. Copies of disclosure statements should go to the Corporation Counsel, which may be called on to render legal opinions about compliance. All disclosure statements should promptly be made public, subject to the point which we make below that there should be no private rights of action based on these disclosure statements.

#### *B. Disclosure Statements*

We shall separate out the component issues of disclosure statements and then set forth our recommendations with respect to each.

#### *Matters to Be Disclosed*

We suggest that the Corporation Counsel or City Planning Commission prepare disclosure forms. The forms should call for disclosure of all amenities agreements or gifts, formal or informal, whether or not conditional on final approval of the project, and whether or not subject to any condition.

We have concluded that it would be too burdensome and ultimately undesirable to require disclosure of discussions about amenities that do not lead to agreements or understandings. While it would be helpful to decision makers to know, for example, that a community group opposing a project has made

an amenities demand which has been rejected, we have concluded it would be best to leave to the parties to decide, in their discretion, whether to report officially such aborted negotiations. The form should provide a place where such discretionary disclosure can be made.

*The Developer Should Prepare the Disclosure Statement*

Since developers are the only ones who would know of every agreement or gift or understanding, and since they normally would have staff and resources and presumably experience in dealing with disclosure problems, the developer would be the party most able to make adequate disclosure statements in the first instance. Community boards, which typically lack adequate staff and disclosure experience, would find a disclosure statement substantially more burdensome. Community groups cannot be compelled by guidelines and also lack staff and resources to prepare disclosure statements. Accordingly, the developer should prepare the initial statement. The developer should also update its disclosure statement each time the project goes before another decision making body.

*Disclosure Should Initially Be Made to the Community Board*

Developers should disclose to the community board in the first instance all of their agreements with neighborhood groups and city officials, including people in the City Planning Commission, the Public Development Corporation, the Borough President's Office, the Mayor's Office, and the like, as well as any gifts made. Just as the city bodies should have an opportunity to appraise the quality of the decision making coming up from below, while being advised of any extraneous factors that may be influencing decision making, so too should community boards be advised of developer agreements with other persons or groups which may have an impact on the quality of information which the community board is receiving from community groups, central city bodies, etc.

Whether such disclosure should be made directly to the community board or through the City Planning Commission is an administrative question on which we take no position.

*Supplemental Disclosure by the Community Board*

Since the community boards may know of matters which are not in the developers' disclosure statements, one principal check on the accuracy of those disclosure reports would be for community boards to issue supplements to the developers' disclosure statements, in which the community boards make such additions or changes in disclosure as they deem appropriate.

The community boards, moreover, may change the situation after receiving the developers' disclosure statements. Such changes should be disclosed by the developer for use by the City Planning Commission and the Board of Estimate, and community boards should be encouraged to make their own supplement.

The community boards will probably lack staff for extensive reports, but their supplemental statements can be in the form of a simple letter or similar document.

*Disclosure to the City Planning Commission  
and by the City Planning Commission*

The guidelines provide for disclosure by developers to the City Planning Commission, an essential requirement, but are silent as to any disclosure duties of that Commission. Since the City Planning Commission now renders a report to the Board of Estimate on projects, the City Planning Commission would do well to continue its practice of including in that report its own disclosure, which under the new scheme would serve as a supplement to the developer's disclosure and the community board's disclosure. Thus, if the City Planning Commission disapproves of certain negotiations or understandings, it should so state as a matter of record. In addition, the City Planning Commission may have learned of matters omitted from the

other two disclosure statements and these should be included in its report, together with a statement about what has been done to remedy the defective disclosure.

Some method should be afforded for the City Planning Commission to investigate disclosure inadequacies, either through the Corporation Counsel, the Department of Investigation or additions to the City Planning Commission staff.

#### *Disclosure of Board of Estimate Decisions*

In order to provide information on amenities decisions by the Board of Estimate, we recommend that the minute of the Board's decision be marked so it can be promptly transcribed, and that it be made publicly available within five days. Responsibility for doing so should be pin-pointed, as, for example, by delegating this duty to the Mayor's Office. We further recommend that the developer be obligated to provide promptly the minute and an update of its disclosure statement to the City Planning Commission, Corporation Counsel and any community boards which had passed on the project. We also recommend that at this point, like all other disclosure statements which are intended to be publicly available, this fully updated final disclosure statement should also be made public promptly.

#### *Disclosure Under A Changed City Charter*

If the Board of Estimate is abolished, as a result of Charter revision pursuant to the Supreme Court's decision or otherwise, we recommend that all of the foregoing statements that apply to the Board of Estimate should apply to the new ultimate decision maker.

#### *4. Enforcement*

There are two relevant sets of enforcement issues, one set relating to enforcement of the disclosure requirements and the other set relating to enforcement of restrictions on the extraction of unrelated amenities.

As to both sets, we will consider whether enforcement should use criminal sanctions, civil remedies, administrative or other remedies, and if so, what remedies.

#### *A. Criminal Sanctions*

The guidelines look to criminal penalties against developers who file false affidavits about their contributions or promises to provide amenities. There is no criminal sanction for agreements about unrelated amenities, only for false affidavits about them. Indeed, violation of the substantive provisions of guidelines could normally not be criminally sanctioned, since guidelines are not law, and the guidelines would have to be enacted into law to provide a basis for prosecuting such violations. False affidavits, however, are always crimes, as are false applications to state or local government. *See* Penal Law, §§210.35 and 210.40; and the Administrative Code, §1151-9.0 (now §10-154).

In one alternative formulation, the guidelines also provide that community boards must file an affidavit that they have received no gifts from or made any amenities deals with developers, and criminal penalties are provided against community boards which file false affidavits.

#### *Criminal Law Too Severe Except When Egregious Violations*

Criminal penalties in this area would normally be excessively severe for the offense. They could discourage developers from working in New York City, would probably prove unworkable before New York juries, and would add to the burdens of an already overloaded State court criminal justice system.

The exception would be for egregious situations as, e.g., where payments amount to bribery. These should be prosecuted under existing bribery laws. Similarly, the false statement provisions in the Penal Code should be used, where appropriate, against false statements.

### *Criminal Law Must Be Applied Evenhandedly*

The application of criminal laws against developers and possibly community board members, as the guidelines provide, would be unfair if all other actors in the process are left untouched. It may well make no sense to use criminal laws against members of city government, but just laws should apply evenhandedly to all violators.

### *The Effect of Prosecutive Discretion*

District Attorneys would also probably exercise prosecutive discretion not to enforce most such violations, because of the strain on their resources for cases in which juries may well not convict. Questions of criminal intent in this area could prove troublesome for juries. Contrast, for example, inadequate disclosure to mask motives of underlying greed or corruption, as in Federal insider trading violations, where jurors would probably convict. If the inadequate disclosure, however, was to conceal deals entered into to solve unmet community needs, jurors would be less likely to convict. Given the caseloads which most of New York City's District Attorneys have for street crimes and today's staggering burdens on our State courts, it would be a relatively rare criminal case that would be brought against actors in the amenities process. Thus the criminal remedy could prove illusory.

### *Conclusion*

In sum, we recommend against reliance on the criminal provisions referred to in the guidelines, including the alternative provision relating to community board members, and in general against the creation of new criminal laws to control the amenities process. Where an action violates the general criminal law, such as an action that amounts to a bribe, or a false application, however, the criminal law already on the books should be able to deal with it.

## *B. Civil and Administrative Enforcement*

### *Who Should Administer Disclosure*

The City has no agency like the SEC to administer and enforce disclosure provisions and we do not recommend one. While we recommend that disclosure be made to several bodies, and the adequacy of disclosure should be reviewed for each level, a single review may suffice, so long as it is performed before the project approval becomes final. We believe this should be done by a single reviewing body, supported by a legal staff with experience in interpreting disclosure requirements and in following up inadequacies. The appropriate body would seem to be the Corporation Counsel's office. Some budget allocation will be necessary, since the work will add to the present duties of that already very busy office.

### *Violations Should Be Rare*

In espousing remedies, we are mindful that non-disclosure violations should be relatively rare. There is no reason to believe that developers, community board members or city officials would violate the law. In addition, developers who, by the nature of things, would be the prime vehicle for disclosure, do business with the city on a repeat basis and must preserve their credibility. Finally, amenities are usually highly visible physical projects which are not readily concealable.

### *Violations Discovered Before Final Approval*

When, after approval by the City Planning Commission but prior to action by the Board of Estimate, it is discovered that there has been non-disclosure or incomplete disclosure by a developer with respect to a material matter, the Board of Estimate should defer action on the application, which should be returned to the City Planning Commission for reconsideration in light of the new information. This would be a normal



concomitant of the salutary principle that where facts relevant to its determination are withheld from a public body, it should have the opportunity to reconsider its determination in light of these facts.

#### *Violations Discovered After Final Approval*

Where the non-disclosure or partial disclosure of a material matter comes to light after final action by the Board of Estimate, the City Planning Commission should review its original findings in light of the disclosed facts, and may recommend to the Board of Estimate the voiding or modification of the Board's initial approval of the subject project. Indeed, where construction is already under way, one possible remedy may be that no certificate of occupancy should issue until the Board of Estimate and City Planning Commission have reviewed the situation and acted.

In the event that the developer has failed to make full disclosure, a recommendation by the City Planning Commission to the Board of Estimate to disapprove, or void approval of, a particular project, may be grounded solely upon such failure.

#### *Official Violations*

Official violations of the disclosure rules, at any level, should be referred to the Corporation Counsel and eventually made public. Where such a violation is not the fault of a developer, the latter should not be penalized.

#### *Requirement of Materiality*

The proposal in this section contemplates that, to trigger the mechanisms set forth, the failure to disclose be with respect to a "material" matter. The determination of what is "material" could be entrusted to any of several city agencies.

However, the Committee believes that the Corporation Counsel would be a particularly appropriate custodian of such authority.

#### *Roles of Self-Discipline and Sanctions*

The requirement of disclosure would impose a discipline on the process. Neither developers nor officials would normally wish to have to disclose in a document that they are violating the law. Nevertheless there would be violations. In some cases they could be remedied administratively by overturning the amenities agreement or understanding. Where building has already taken place in reliance on approvals and revocation of project approval is sought, the test would probably be the normal fraud test, enforceable in the courts.

Civil fines should also be considered for this type of violation.

#### *C. There Should Be No Private Rights of Action Based on Disclosure Statements*

Parties seeking to delay or derail a project should not be given a legal means to do so by having the right to sue developers for inadequate disclosure. Disclosure is for the decision makers, including community boards, and only incidentally for the public. Moreover, we have now had considerable experience in seeing how the disclosure requirements of the federal securities laws have been abused for tactical purposes, such as for lawsuits to delay a tender offer or to delay another type of transaction where delay can destroy the project. Such abuses should be particularly guarded against in the development area, where groups may, for example, oppose projects because they do not want them in their backyards, because they oppose development, or oppose them for any of the variety of emotion-laden causes which thrive in New York City. Laws should be enacted to bar private rights of action based on disclosure statements.

#### D. *Challenges to Administrative Determinations of Project Relatedness*

Developers who are aggrieved presumably can use Article 78 proceedings to review amenities deals that have been improperly imposed on them. Developers aggrieved because they have been asked to and in effect required to provide an unrelated amenity, however, are unlikely to challenge the action. They probably would have to prove duress, in a suit against bodies with whom they expect to continue to do business. If they refuse, moreover, the court cannot grant them an approval. The most that a court can do is return the decision to the body being asked to approve, with the amenities issue removed. Thus the fairness with which the new policy is carried out will depend heavily on administrative fairness and self-discipline within City government, reinforced by media attention.

Citizens aggrieved because City agencies or community boards have refused to request particular amenities would presumably have no legal right to seek a court order requiring those bodies to act, since such approvals are discretionary.

Citizens and civic organizations seeking to undo a project whose approval was cemented with an improper amenity agreement, in a situation which they may view as analogous, for example, to the recent Coliseum deal, appear to have standing to seek review in an Article 78 proceeding. *Douglaston Civic Association, Inc. v. Galvin*, 36 N.Y.2d 1, 364 N.Y.S.2d 833 (1974); *Municipal Art Society v. City of New York*, 522 N.Y.S.2d 800 (Sup. Ct. N.Y. Co. 1987).

#### *Conclusion*

Realistic but simple disclosure of all relevant agreements or gifts should be made to all bodies charged with acting on project approvals. Disclosure and project relatedness requirements will normally be self-enforcing, since the persons involved do business together over the long term. Where they are

not, the normal remedy should be civil or administrative, not criminal, except in egregious cases.

#### IV. *Charter And Other Legislative Reforms*

As we have said in Part III, one major change which we recommend should be reflected in the new City Charter, while others are more appropriate for the administrative code or agency regulations. Putting this change in the Charter would underline its importance, provide a firmer basis for enforcement, and make it more difficult to repeal or amend it.

The Charter Revision Commission that was established in response to the *Morris v. Board of Estimate* case previously expected to propose a new City Charter to the voters at the 1988 general election, but has delayed its timetable because of the granting of certiorari in that case by the United States Supreme Court. As of this writing, it is not known whether proposals for Charter reform in areas besides the Board of Estimate, including the amenities issue, will in fact be on the ballot later this year. Regardless, we think the changes discussed in this section should be considered at an early date.

We have been advised that the Charter Revision Commission would like to see the Charter streamlined, with some of the verbiage now contained in it relegated to the administrative code, or elsewhere, as appropriate. This is a sentiment with which we concur. Our suggestions are made with the understanding that they should conform to the tone and spirit of the City Charter that eventually emerges.

Since our most important recommendation involves the imposition of an across-the-board standard of project-relatedness for conditions imposed during or in connection with the ULURP process, our primary Charter recommendation, and the only one for which we propose specific language, is in that area.

We would add the following additional paragraph to ULURP (Section 197-c of the Charter now in effect), as follows:

- k. No recommendation, approval or modification of a proposal or application reviewed pursuant to this section shall be conditioned on the applicant's providing or agreeing to provide, to the city or otherwise, an amenity or other thing of value unless it (1) addresses a need directly arising from the project, i.e., which has a nexus to the project, and which is identified during the environmental review process; or (2) is otherwise specified by law.

We have recommended above that community boards should be involved in the environmental review process, but we do not believe that this requires new legislation. SEQRA and its regulations contained in 6 NYCRR 617.1 *et seq.* are flexible enough to permit the city, by its Charter and by its regulations, to adopt procedures that are harmonious with state law.

#### *Conclusion*

Our principal recommendation is that the process of requiring developers to build or provide amenities unrelated to needs created by their project should be stopped, in large part because of the bad effects which such practices have on government. We recommend that the problem be dealt with at all relevant levels of city government, including the community boards, the City Planning Commission, and the Board of Estimate.

The possible need for amenities should be uncovered during the environmental review process, into which community boards should have input to express their knowledge of local conditions, and the amenities which are permissible should only be those identified during such environmental review or otherwise specified by law. This reform should be implemented by

disclosure requirements, by amendment to the City Charter, and by a consistent enforcement policy within city government.

Special Committee on the Role of Amenities  
in the Land Use Process

Sheldon H. Elsen, *Chair*

Merrell E. Clark, Jr.

David C. Condliffe

Kathleen Imholz

Mark A. Levine

Jerome Lipper

Hector Willems

*June, 1988*

APPENDIX

GUIDELINES

I. *Disclosure.* For all projects which come before the Board of Estimate for a land use approval, the applicant and any affiliate will be required to submit to the City Planning Commission prior to its action, and subsequently to the Board of Estimate, an affidavit disclosing all contributions or promises to provide things of value in connection, with the site or project. False certification will be subject to criminal penalties. This disclosure requirement will be in addition to any disclosure required by other applicable laws or resolutions, such as the lobbying law which requires disclosure of paid lobbyists.

II. *Community Boards.* The role of the community board is to review land use applications and recommend to the City Planning Commission and the Board of Estimate whether the application should be approved and whether any amenities should be required. All proposed conditions must be appropriate for inclusion in the land use approval process by addressing a need directly created by the project.

Community boards are prohibited from accepting gifts, concluding agreements for developer-funded amenities or participating in negotiations regarding the granting of things of value to third parties. The City Planning Commission, the Board of Estimate and mayoral agencies will not enforce such agreements where they have been made.\*

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\* An alternate to the second paragraph of Section II has been proposed:

Community boards are prohibited from accepting gifts, concluding agreements for developer-funded amenities or participating in negotiations regarding the granting of things of value to third parties. Community Boards shall file an affidavit with the City Planning Commission and the Board of Estimate, attesting that they have not done any of the above. False certification will be subject to criminal penalties.

### III. City Planning Commission and the Board of Estimate

A. *Eligible Amenities.* All agreements or conditions placed upon a project by the City Planning Commission or the Board of Estimate as the final decision maker must be appropriate for inclusion in the land use approval process either (1) by allowing the City Planning Commission and the Board of Estimate to make the required findings to grant a specific land use approval, such as a subway bonus, or (2) by addressing a need directly created by the project, including mitigation of environmental impacts and land use planning considerations that address public health, safety or welfare needs. The examination of needs directly created by a project must be done on a case by case basis.

B. *Specificity.* All conditions or agreements must be specific and enforceable by the city.

C. *Accountability.* To the maximum extent feasible, there should be provision for fiscal controls, accountability and reporting through city agencies or other appropriate entities. Any operating groups must be selected according to existing city procedures, and the groups selected must be approved by the city.

D. *Budget Impact.* All proposed amenities must be analyzed to determine their expense and capital budget impact.

IV. *Enforcement.* Where an agreement violates these guidelines, the Board of Estimate will require that it be renounced.

#### THE MAYOR'S LETTER AND STATEMENT ABOUT THE PROPOSED GUIDELINES

Dear Community Board Chairperson:\*

Discretionary land use approvals are among the most important matters to come before community boards and the Board of Estimate. As part of the land use approval, applicants are sometimes required by the City Planning Commission or the Board of Estimate to provide amenities, either to mitigate environmental impacts identified in the Environmental Impact Statement or to address other impacts directly created by the project.

The enclosed guidelines have been developed after discussions with Board of Estimate members. The goal of the guidelines is to clarify the basis on which the Board of Estimate and the City Planning Commission will make decisions regarding amenities and to provide guidance to all participants in the land use review process concerning the appropriate procedure for the proposal of amenities in connection with land use applications. These draft guidelines and an accompanying draft statement are enclosed.

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\* Cover letter sent to community board chairpersons along with the draft guidelines and the statement that follows.

The draft guidelines will be the subject of extensive public review, including a public hearing to be held by the New York City Bar Association, review by an appropriate committee of the Bar Association and a subsequent public hearing at the Board of Estimate. This public review will ensure that Board of Estimate members have the benefit of a full array of public comments before a final set of guidelines are adopted.

As part of this public review, the draft guidelines are being sent to each of the city's community boards for comment. Community boards play an essential role in the land use review process by conducting a detailed examination of proposed projects, assessing the expected impacts and recommending to the City Planning Commission and to the Board of Estimate whether and on what conditions a land use application should be approved. We would appreciate receiving your comments on the draft guidelines by July 1. Please send comments to Theodore H. Meekins, Secretary to the Board of Estimate at 1356 Municipal Building, New York, New York 10007.

The draft guidelines are motivated by a concern to preserve the integrity of the land use review process. We know that all community boards share this concern and look forward to receiving your comments.

Sincerely,

Edward I. Koch  
MAYOR

#### STATEMENT

Discretionary land use approvals granted by the Board of Estimate often determine whether, and in what form, development projects will proceed. During the various stages of ULURP—at the community board, City Planning Commission or Board of Estimate—it is often proposed that the applicant be required, as a condition of the land use approval, to provide an amenity or benefit. Decisions on proposed amenities by the City Planning Commission and the Board of Estimate should be based upon full disclosure of all material facts and upon appropriate guidelines.

The Board of Estimate has developed the attached guidelines to clearly describe the basis on which decisions will be made to condition land use approvals on the provision of amenities. The attached guidelines are also intended to provide guidance to all participants in the land use process—applicants, community board members, local organizations and the public—regarding the appropriate procedure for the proposal and consideration of amenities related to land use approvals. We believe that all participants in land use decisions share a commitment to maintaining the integrity of the land use review process.



The Board of Estimate will only require an applicant to provide an amenity as a condition of a land use approval when the proposed amenity addresses a need directly created by the proposed project, including mitigation of environmental impacts identified in the Environmental Impact Statement and land use planning considerations, or where necessary to allow the Board to make the findings required by the Zoning Resolution. The determination that amenities are required to address the impacts directly created by a project must be made on a case by case basis. Proposed amenities which do not address a need directly created by the project are not a legitimate use of the Board's land use powers, no matter how worthy they may be.

Where land use approvals are conditioned upon the provision of amenities, the conditions must be specific, enforceable by the city and provide for adequate fiscal controls, accountability and reporting. Further, any operating groups must be selected according to existing city procedures and must be approved by the city.

In determining whether to condition a land use approval on the provision of amenities, the Board first considers the City Planning Commission's resolution approving the land use application and takes into consideration testimony received during ULURP, including any community board recommendations. The role of the community board in the land use review process is to examine the project in all its details and to assess its expected impacts. Based upon this examination, the community board recommends whether the land use approvals should be granted. The community board recommendation often includes proposed conditions designed to address the direct impacts of the project. Community boards and their members are precluded by the Charter from going beyond this advisory role and directly concluding agreements on amenities with applicants. In addition, the Board of Estimate is concerned that the land use review process not be compromised or impugned by the involvement of community board members in negotiating or brokering agreements between applicants and local organizations.

In an effort to engender local support for their project, some applicants enter into agreements with local organizations to provide funds for neighborhood improvements or public services. The Board is concerned that such agreements, entered into by applicants in an attempt to influence local organizations to support a project, may have the effect, in some cases, of distorting the land use review process. For this reason, applicants will be required to disclose to the City Planning Commission, and subsequently to the Board of Estimate, all agreements made in connection with the site or project under consideration in order to provide all information which may be relevant to evaluating testimony of local organizations and individuals during ULURP.

The Board wants to emphasize that such third party agreements are not required in order to secure discretionary land use approvals, which shall be based upon land use considerations. The Board will not enforce third party agreements where they have been entered into. Further, the exist-

tence of third party agreements will not affect the Board's decision concerning the amenities it will require in order to address the needs directly created by the project.\*

The goal of the Board of Estimate in issuing this policy is to ensure that the integrity of the land use review process is preserved and that discretionary land use approvals, including any amenities required, are based upon sound planning considerations.

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\* An additional sentence to the preceding paragraph has been proposed:

The intent of these guidelines is to communicate to all parties involved in the land use process that the Board of Estimate discourages such third party agreements.