Judgment-Based Lawyering: Working in Coalition

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Having spent considerable time over the last fifty years working with grassroots groups on social justice issues, I underscore in this article three attributes that for me are crucial to good lawyering. They are accessibility, responsiveness, and judgment. While professionally relevant across-the-board, these attributes are especially important when one counsels and represents individuals or groups who seek to act collectively in coalitions and who themselves are not paying for the legal services.

In this lawyering context, there are two important differences from the stereotypic client and lawyer relationship. First, assisting a coalition usually involves interacting with multiple individuals who have different backgrounds, affiliations, and points of view. Typically, the coalition does not operate hierarchically, and most decisions get made by consensus. In one way or another, all of the individuals are clients or in client-like positions. Second, meaningful external mechanisms, such as a fee, do not exist to help hold lawyers accountable to those being assisted. In my experience in California, it is also rare to have a written retainer agreement, which is not a professional rule requirement when legal services are provided for free. In short, when lawyers work with grassroots coalitions, formal accountability to the client group often is weak or non-existent.

As a result, lawyers working with coalitions specifically, and not infrequently with grassroots groups generally, have to assume a heightened responsibility for developing not only an appropriate role conception but...
also the self-discipline needed to keep their actions aligned or reconciled with the range of varying interests and goals within the client group. In my view, the key guideposts for internalizing such a sense of role and duty, and then shaping one's actions accordingly, lie in cultivating a self-reflective and critical understanding of the considerations involved in being accessible to clients, in being responsive to their concerns, and in using knowledge and experience with good judgment.

To provide substantive grounding for presenting my ideas, I describe at some length work done since 2007 by students and faculty in the Community Economic Development (CED) Clinic at the University of California Hastings College of the Law. Most of this work has been done in close collaboration with grassroots coalitions seeking to influence the plans for and community benefits from a major development project in San Francisco. The developer was California Pacific Medical Center (CPMC), which has multiple San Francisco hospital sites. CPMC's original plans included building a new hospital campus adjacent to the Tenderloin, a diverse low-income neighborhood in the center of San Francisco, and closing St. Luke's Hospital, a relatively recently acquired campus located in the low-income but gentrifying Mission District. St. Luke's had a well-known 150-year history of providing hospital and healthcare services to the poor.

The Hastings CED Clinic provides law students with experience in navigating the intersections and overlapping nature of law, politics, and public policy in an advocacy but non-litigation setting. The prospect of litigation is relevant as a potential threat, but if litigation ever were necessary, it would be referred to other attorneys. Similarly, the Clinic has no hesitancy in reaching out and drawing on the experience and expertise of outside attorneys and consultants in addressing substantive and institutional issues. Most importantly, Clinic students and faculty constantly learn from the clients themselves. Given the spread of issues that can come up, especially when interacting with a broad-based coalition, the Clinic always has new fields to learn and fresh insights to glean. One of the complicating responsibilities, yet an important advantage, of providing legal help through a law school clinic is that student learning is an equal priority with providing high-quality legal services. Scholarly as well as activist attention needs to be explicitly paid to lawyering issues often left unaddressed, particularly those concerning attorney roles and varying societal contexts.

The CED Clinic's involvement regarding CPMC's hospital construction plans began with raising the prospects of obtaining a Community Benefits Agreement (CBA) from CPMC as part of the development process. While there was not in the end a CBA, there was a Development Agreement

2. This article presents a first-person account of what happened. The narrative information presented is mostly based on my own notes and observations. I have file copies of documents for which I have not provided specific citations.

3. For an explanation of CBAs and their use, see Julian Gross, Community Benefits Agreements, in Building Healthy Communities: A Guide to Community Economic
(DA) negotiated by three members of the San Francisco Board of Supervisors, who substantially relied on an agenda of major issues set by the Clinic’s clients. Along with other provisions intended to benefit the public and to meet community needs, the DA addressed the respective sizes of CPMC’s proposed new hospital adjacent to the Tenderloin and a replacement hospital on the St. Luke’s campus, something which CPMC initially had no plans to build. The DA also set forth almost $74 million in negotiated cash benefits. These benefits included $40.64 million for affordable housing; $4 million for community-based workforce development programs; $8.6 million for a healthcare innovation fund, including support for community health clinics especially in the Tenderloin; $9 million for public works projects, including $4.45 million for Tenderloin streetscape and pedestrian safety improvements; and $11.5 million for transportation and rapid-transit fees.

The second stage of the CED Clinic’s involvement has concerned monitoring CPMC’s compliance with and San Francisco’s enforcement of the DA. While no problems have arisen pertaining to CPMC meeting deadlines for transferring cash payments, its performance in meeting non-cash DA terms has required continuing attention. The issues raised concern such matters as the expanded delivery of healthcare services to the Tenderloin poor, promoting employee use of public transportation and carpooling, and meeting employment targets for hiring and retaining healthcare workers from low-income neighborhoods in San Francisco. Monitoring the implementation of the DA’s terms is an ongoing process. In doing so, other issues outside the DA terms arise regarding not only CPMC’s provisions of healthcare services but also healthcare needs in San Francisco generally. These other issues have comprised an additional dimension in the assistance and representation provided by the CED Clinic.

Before providing additional information about the CED Clinic’s work with grassroots activists and using this material to spell out what I mean by accessibility, responsiveness, and judgment as lawyering attributes, I...
set forth in somewhat broad strokes a number of intertwined political and professional considerations to position my own perspectives on lawyering for social change.

II. The Political and Professional Context

In the United States, a neat separation does not exist between law and politics in the promulgation, enactment, and implementation of public policies. Rooted in our constitutional form of government and commitment to the rule of law, lawyers and judges in a professional capacity play inordinately central roles in the political process, whether the issues concern the structure of government or substantive public policy. For lawyers professionally, their participation in governance or policy matters is mostly as part of their representation of interest groups, including incorporated businesses and unions, and various associations, coalitions, or movements, of which some are highly organized, while others are more loosely coordinated.

In this section, I call attention to three key factors that complicate lawyering when representing groups with limited resources as compared to well-funded entities. The first has to do with the inherently conservative nature of legal counseling and representation and the long-term effects of who most benefits from lawyer involvement in public affairs. The second has to do with power imbalances in the lawyer-client relationship and how that affects the dynamics of providing legal assistance in group advocacy situations. The third has to do with the fluid nature of political circumstances and the difficulties in sustaining over time advantages and benefits for non-establishment client groups.

In 1831 following his travels in the United States, Alexis de Tocqueville commented on the special place of the bar and the bench in American politics. He famously observed: “If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.”

De Tocqueville considered lawyers “a conservative interest” within American political culture—a “counterpoise to the democrat element”; specifically, he expected the legal profession as “qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government.”

De Tocqueville, in light of the absence of an entrenched social aristocracy in the United States, the legal profession’s attraction to regularity, order, and stability was a present and necessary source of conservative constraints in the unfolding of American democratic politics.

De Tocqueville was correct in what has been the dominant historical role played by American lawyers and judges in response to changing social and economic circumstances. The reasons are twofold: one has to do with professional habits and commitments as emphasized by de Tocqueville; the other, not underscored by him, has to do with who has access to lawyers for what purposes.

9. Id. at 288-89.
As part of the education and socialization of lawyers, professional values and approaches are intended to channel and constrain individual behavior. Reflecting often long-standing traditions, their impact strongly tends to be cautionary and conservative. One example is the pivotal place of precedent in legal reasoning. Another fundamental professional commitment is the duty of loyalty to a client. Professional values are crucial in lawyering, but, in recognizing how those values play out, so too is identifying who are the clients and the kind of interests that are advanced and protected.

Both in the past and now, American lawyers in public policy matters overwhelmingly assist and represent wealthy individual and corporate interests. While the rich are not monolithic in their views, their financial ability to pay lawyers on a sustained basis means that ready pools of lawyers are available to represent their interests. In policy advocacy, lawyers most often are the handmaidens of the wealthy. The extent to which various interests converge or diverge and the extent to which a lawyer's personal views correspond with those of a client are peripheral considerations. While law and politics are not static and progressive developments arise, the on-balance impact of the professional work done by lawyers representing group interests has been and continues to favor those who historically have most benefited from the existing legal and political order.

Those attorneys working with non-establishment groups are a relatively small minority. Moreover, the dispositions, values, and methods of the legal profession, as de Tocqueville well-understood, mainly promote conservative decision-making. The underlying paradox for lawyers who seek to use legal advocacy for progressive social change, including when invoking constitutional ideals such as equality, is that so much of what comprises legal professionalism and what eventually results legally and politically reinforces the status quo. Nonetheless, there are choices in how lawyers work with client groups on progressive issues and causes that can make a difference in the degree to which lawyer involvement contributes to or distracts from the likelihood of success in facilitating the empowerment of traditionally marginalized groups and in obtaining desired policy outcomes.

This examination leads me to my second point, which pertains to the effects of power imbalances within the lawyer/client relationship on how professional responsibilities are carried out, specifically when formal accountability to clients is weak or non-existent. In these circumstances, my concerns are with what else needs to happen to further accountability or to mitigate the effects of such weakness or absence. When the opposite is the case, for example the payment of a hefty fee, the most likely professional relationship problem is not about accountability but about encouraging lawyers to exercise independent judgment and not avoid telling clients what they do not want to hear.

The academic literature analyzing what lawyers have done and prescribing what they should do when working with groups seeking progressive social change is voluminous and mostly the product of scholarship undertaken after the mid-1970s. These works include both social science
analyses of the impacts of using law in furtherance of social justice\textsuperscript{10} and texts and studies in legal professionalism that address ideas about the roles of lawyers and lawyering as a process.\textsuperscript{11} While some of these works heavily criticize the efficaciousness of progressive efforts, others concentrate on what can be learned from past shortcomings, mistakes, and successes.

The descriptions and critiques presented in this literature are especially rich in new terminology, which has had an impact within the academy and in practice. Certain terms that did not exist before are now fairly ubiquitous. One prominent example is “lawyering” as a word to describe generally what lawyers do professionally.\textsuperscript{12} Another is “client-centeredness” as a concept for underscoring that clients, not lawyers, are the ultimate decision-makers and for emphasizing the need to inquire explicitly and not make assumptions about the perspectives, values, understandings, and goals of clients.\textsuperscript{13} Related to client-centeredness are notions of “rebellious” or “collaborative” lawyering, which has an additional pivotal emphasis on working in partnership with clients, whether they be individuals or groups.\textsuperscript{14} The most frequent catch-all term for describing legal advocacy for groups seeking progressive social change has been “cause lawyering.”\textsuperscript{15}

Two breakthrough events in American legal and political history are the catalysts for much of the development of this literature. The first is the NAACP’s trailblazing campaign starting in the 1930s to end racial


\textsuperscript{12} One of the earliest uses of the term, if not the first, was in Bellow & Moulton.


\textsuperscript{14} Ascanio Piemelli, Appreciating Collaborative Lawyering, 6 Clinical L. Rev. 427 (2000); Gerald P. López, Rebellious Lawyering: One Chicano’s View of Progressive Law Practice (1992). López’s conception of legal practice has had a widespread impact on the academic literature regarding progressive lawyering in individual and group situations. See Symposium: Rebellious Lawyering at 25, 23 Clinical L. Rev. No. 1 (Fall 2016) and No. 2 (Spring 2017).

\textsuperscript{15} Cause Lawyering: Political Commitments and Professional Responsibilities (Austin Sarat & Stuart Scheingold eds., 1998); Cause Lawyers and Social Movements (Austin Sarat & Stuart Scheingold eds., 2006). For an analysis of lawyers from the other side of the ideological spectrum, see Ann Southworth, Lawyers of the Right: Professionalizing the Conservative Coalition (2008).
segregation, which began with actions and cases setting the stage for the litigation in Brown v. Board of Education. The campaign’s climax was the landmark Brown decision in 1954, but the legal struggle encompassed as well the frustrated course of implementation that followed. While the clients represented by the NAACP were highly courageous, it was the NAACP lawyers who made the crucial strategic and tactical decisions. The attorneys were the leading actors in what was institutionally a court-focused approach.

The NAACP campaign became the model for much social cause lawyering that occurred afterwards for a variety of constituent groups and across a wide range of issues. Such lawyer-centered and judicially dependent strategies for achieving social change have come under much critical scrutiny. When the focus is on lawyer and client relationships, the chief criticisms are that this type of approach is too top-down and not mindful enough about differences of opinion, concerns, and goals among the represented group. When such strategies are criticized as not sufficiently efficacious, or even counterproductive, in achieving concrete benefits for the intended constituencies, the main arguments stress that too much credence was given to judicial decision-making as an instrument for social change and not enough attention was given to other political and societal means for garnering long-term support and acceptance.

The second key catalytic event was the federal government’s funding of legal services for the poor in 1965 as part of President Lyndon Johnson’s War on Poverty. The pivotal development was the decision of Office of Economic Opportunity (OEO) administrators not only to expand the provision of individual legal representation but also to push for “law reform”—a multipronged approach utilizing legal assistance and representation of individuals and grassroots groups to promote and enforce policies beneficial to poor persons overall. In terms of lawyer-client relationships, the

17. See, e.g., Silverstein, supra note 10.
crucial consequence was the untethering of a substantial amount of legal services funding from direct control by individual and group clients.

Previously, the budgets of legal aid societies were small, and work on policy advocacy was relatively rare.\textsuperscript{21} Some foundation-funded demonstration programs served as a model for federal legal services funding, but these programs too involved limited numbers of attorneys.\textsuperscript{22} Prior efforts to reform the law and have a political impact largely were undertaken by lawyers employed by or associated with organizations, such as the NAACP and the ACLU, which had meaningful constituent-based organizational controls over attorney actions and activities. For the first generation of OEO Legal Services lawyers, considerably more individual attorney discretion existed than in other practice settings, especially in policy advocacy matters, to determine on what projects to work, whom to assist, and how to relate to client groups. Lawyers assisting and representing the poor were often on their own in figuring out how to exercise professional discretion responsibly in politically charged contexts.

The third background factor of particular relevance for this article is the continually changing nature of the political environment underlying and circumscribing social cause lawyering. The specific circumstances in the late 1960s and early 1970s were unique in our history for using legal advocacy to advance progressive causes. Among the key factors were recent cultural changes, not universally but widely shared, that challenged conventional traditions and norms; active protest movements over civil rights, poverty, and the Vietnam War; the coming of age of a generation of lawyers who had participated in protest movements; and most significantly the staffing and dispositions of the judiciary.

Blowback was not long in coming. It peaked in the 1980s when Ronald Reagan was president. One early major example was the enactment at his behest of the Omnibus Budget Reconciliation Act (OBRA) of 1981,\textsuperscript{23} which was a 600-page bill that among other matters cutback dramatically benefits for families receiving public assistance. OBRA's passage was the first time the federal budget process had been used in a sweeping manner to make programmatic legislative changes, and it was a key step in the federal government's retrenchment from supporting progressive New Deal social welfare legislation. With respect to the provision of legal assistance for the poor, the Reagan administration in seven of its eight annual appropriation proposals recommended the total defunding of the Legal Services Corporation, which since 1975 has been the successor agency to OEO Legal Services. Congress pared back federal funding and began to impose

\textsuperscript{21} Id. at 5–19; Note, \textit{Neighborhood Law Offices: The New Wave in Legal Services for the Poor}, 80 HARV. L. REV. 805, 806–09 (1967).

\textsuperscript{22} In the mid-1960s, the Ford Foundation was the leading philanthropic funder supporting demonstration legal services for the poor projects. JOHNSON, \textit{supra} note 20, at 22–35.

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significant limitations on the provision of legal services for the poor with such funds but rejected providing no funding. A conservative backlash is now again here, in potentially even more devastating ways, with Donald Trump as president.

Priorities get made, and strategies and tactics get tailored in light of such changing circumstances. Criticisms of the efficaciousness of past progressive cause lawyering, especially the use of litigation, are at times overblown. Lawyers involved in those efforts were not oblivious about the importance of other approaches and co-courses of action. The choices made not infrequently reflected what they regarded as potentially most advantageous given the limited resources available, the extent of organization and mobilization of affected constituencies, and the then existing political and legal opportunities and limitations.

Accentuated by the place money plays, our political and legal systems are not symmetrical in how claims are raised and benefits are dispensed. Outcomes not surprisingly by and large tilt conservatively in that well-heeled groups usually have their say and get meaningful concessions, not just specifically but also systemically. It is the unusual reform effort that disturbs underlying social and economic power relationships. Viewed structurally, positive changes for non-establishment groups are rarely other than incremental, which is not to say that they are unimportant.

Because seeking progressive change is always an uphill battle, it is risky to generalize from specific incidents of group representation. So much depends on particular conditions and players. Usually, however, three important functions are involved in social-cause lawyering for marginalized groups. The first concerns influencing and shaping policy making; the second involves the ongoing need to monitor or police implementation or enforcement of the policy or practice changes obtained; and the third pertains to the empowerment of those represented, which at its core involves how lawyers and lay activists working together in specific circumstances optimize their distinct skills and powers in complementary ways.


practice, these functions are not independent of one another: they overlap and when most effective reinforce each other.

In a 2017 article, Scott Cummings provides a thought-provoking and comprehensive review of the role of lawyers in progressive social change, primarily since 1970 but also with background information dating back to the early twentieth century. In developing his own ideas, he focuses on what he calls "movement" lawyering. He uses the term to emphasize two key features for effective social cause lawyering: "the representation of mobilized clients and the use of integrated advocacy."

Cummings defines movement lawyering as "the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define." The definition is a mouthful. I use it to highlight some similarities and differences that I have regarding the roles and responsibilities of lawyers in seeking progressive social change and to place in a contemporary scholarly context my discussion of the Hastings CED Clinic's work with grassroots coalitions and what I mean by accessibility, responsiveness, and judgment as professional attributes.

I agree with the importance of viewing the strategies available for affecting social change as multiple and as involving law-related and non-legal activities. Although the combination of strategies varies in different situations, they need to be highly coordinated when jointly deployed. Litigation is not always appropriate. When appropriate, it is seldom if ever sufficient in itself. Support needs to be built through media and grassroots activities. Furthermore, there is almost always a need for legislative and administrative work, either as a basis for obtaining policy changes or as necessary follow-up action to promote compliance with law and avoid the erosion of gains already obtained. Additionally, there are situations where the primary strategy requires transactional legal skills, such as the negotiating and drafting of a contract.

I also agree with Cummings that the clients set the goals and make the pivotal decisions. However, to not overly influence client group decision-making can be difficult, particularly when one shares the concerns and goals of the group. For both the lawyer and group members, reasoning and emotions are at play. In group discussions, there is a premium on lawyer self-awareness about one's own feelings and about the dynamics of the group. How lawyers tailor what they say or do is significant. Their

28. Id. at 1689.
29. Id. at 1690.
comments and actions need to be sensitive to their lawyering role as well as substantively understandable and helpful.

Where I disagree with Cummings is in his presumptions about the extent of mobilization and organization of marginalized constituencies and the likelihood of meaningful formal accountability in the absence of a strong external mechanism, such as a fee. The two matters are tied together. With a relatively well-organized and well-funded group, for instance a labor union or federation, attorney accountability is not likely to be much different from traditional lawyer-client relationships. The lawyers work for and are paid by the group. When constituencies are inchoate or in early or quiescent stages of organization or are still in informal and fluid states of organizational development and have no actual funding, conventional agency-like accountability is problematic. Differences exist in what attorneys have to do to help such groups realize their objectives and further their empowerment. In these less-developed organizational circumstances, even more than in other situations, lawyers need to be highly self-reflective and self-disciplined in how they interact with client groups and carry out their professional role responsibilities. From my perspective, much rests on their abilities to develop and utilize certain inner dispositions, habits, or mindsets that enhance how they acquire and apply knowledge and their character as a lawyer.

III. Working in Coalition

A. The Hastings CED Clinic

I begin this article’s narrative with brief background information about the Hastings clinical program and its location on an urban campus bounded by San Francisco’s Civic Center and Tenderloin neighborhood. The location is ideal for clinical legal education and learning from working on real cases and projects. It is very near local, state, and federal political offices and state and federal courts at both the trial and appellate levels. And it borders one of San Francisco’s poorest neighborhoods and all sorts of unmet needs for quality legal services.

The Tenderloin is a neighborhood with serious drug-dealing and related criminal problems, a host of concerns regarding social service and healthcare delivery for both housed residents and homeless individuals on the streets, a continuing need for additional quality affordable housing and jobs for neighborhood residents, and issues of economic and community development generally. The Tenderloin is home to families with children as well as single adults and couples from diverse backgrounds. The largest groups of residents are Southeast Asian and Latin American immigrants and refugees.

The typical Tenderloin building is four to six stories high with non-residential uses on the ground floor and residential units above. Most of the residential units are studios or one-to-two bedroom apartments or in Single Room Occupancy (SRO) hotels. The non-residential uses are mainly small commercial establishments, particularly family-owned, ethnic cuisine
restaurants and neighborhood-serving retail stores. Close to half of the residential buildings in the heart of the Tenderloin are now owned or long-term master leased by well-established and responsible nonprofit organizations. Unlike anywhere else in San Francisco, the likelihood in the Tenderloin of widespread gentrification and the dislocation of low-income tenants is very low. The reasons are both the high degree of nonprofit property control and favorable zoning laws that limit the height of buildings.\textsuperscript{31}

In addition to nonprofit housing organizations, the Tenderloin has a large number of nonprofit service organizations. Among both types of organizations are designated community organizers on staff. For those who reside or work in the Tenderloin, there is much room for improving its livability. But there also is a significant grassroots organizing infrastructure for seeking social change.

Toward the end of 1999, several Tenderloin community activists contacted me about having Hastings students, under clinical faculty supervision, assist in a proposed development project that was still in the talking stage. The community activists knew me because, prior to coming to Hastings in 1992 to start its in-house clinical program, I had worked with a number of Tenderloin grassroots organizations on community development and homelessness issues.\textsuperscript{32} After consulting with my clinical colleagues, our response was to start a Community Economic Development Clinic as an in-house clinic that would focus on projects affecting the Tenderloin and its low-income residents, mainly by working with various nonprofit social service, affordable housing, and community development organizations. The CED Clinic would undertake non-litigation matters covering operational and programmatic concerns of the different organizations and, in conjunction with those organizations, policy impact advocacy directed at improving the quality of life in the Tenderloin. I welcomed the opportunity to refocus my main teaching and lawyering responsibilities on directing the CED Clinic.

\textbf{B. Who Is the Client?}

In 2007, through the Clinic's ongoing work in the Tenderloin, I became aware of a proposed large hospital development on the Tenderloin's western boundary. The project sponsor was California Pacific Medical Center, the San Francisco affiliate of Sutter Health—a large nonprofit hospital conglomerate in Northern California. The original proposal before the San Francisco Planning Department not only covered the construction of a new hospital campus bordering the Tenderloin but also anticipated the closing of St. Luke's Hospital. In large part because of community opposition

\textsuperscript{31} See \textsc{Randy Shaw}, \textit{The Tenderloin: Sex, Crime, and Resistance in the Heart of San Francisco} 188–93, 227–39 (2015).

\textsuperscript{32} For thirteen years, I was the executive director of the San Francisco Lawyers' Committee for Urban Affairs, a civil rights and antipoverty legal services organization now known as the Lawyers' Committee for Civil Rights of the San Francisco Bay Area.
to CPMC’s plans regarding St. Luke’s, CPMC had put on hold its initial land-use applications. The near-Tenderloin campus, which was referred to as the Cathedral Hill campus in project documents, was intended to be a huge hospital facility replacing two other CPMC hospital campuses located in wealthy San Francisco areas. Unlike St. Luke’s, CPMC’s other campuses have a relatively sorry record in serving low-income individuals and families. The threatened closure of St. Luke’s became a hot button political issue in San Francisco.

Given the magnitude of CPMC’s development proposal, I thought that it was a project for which it made sense to seek a Community Benefits Agreement (CBA). A CBA is an agreement between a developer and community groups, where the developer agrees to provide a range of community or public benefits beyond what is legally required. The quid pro quo for the developer is a promise by the community groups to support or at least not oppose the project. The terms of a CBA are directly enforceable by the community groups. At the time, CBAs had not been much used as part of the politics involved in land-use permitting in San Francisco.

Instead, for large and potentially controversial projects, the more common method for obtaining enforceable but not necessarily statutorily required public or community benefits entailed the negotiation of a Development Agreement (DA) between the developer and a San Francisco governmental agency, with the bargaining taking place prior to final consideration of a land-use permitting request. With DAs, community groups may be able to influence the terms and conditions, but they rarely directly participate in the negotiations or the drafting.

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33. San Francisco is a unique local governmental body in California in that it is both a city and a county, which means that its public policies purview is broader than other cities. Most relevant for this article, it has not only city but also county public health responsibilities, which include both operating a public hospital and oversight functions regarding private hospitals. Structurally, there is a mayor and a board of supervisors rather than a city council.

34. California law requires hospitals to meet new highly stringent seismic standards. Cal. Health & Safety Code § 130050 et seq. To do so, virtually all California acute care hospitals have to be retrofitted or rebuilt within a statutorily fixed time period.

35. See infra pp. 572–73.

36. Among the matters that I worked on at the Lawyers’ Committee was a precursor to what later would be called a CBA. In the early 1980s, along with pro bono counsel, I represented the North of Market Planning Coalition (NOMPC), a now defunct organization, in negotiations with three hotel developers who sought to expand or build new tourist hotel facilities on the Tenderloin side of the Union Square district. The results were payments by the developers of non-statutorily required cash benefits for low-income housing and community services. An important follow-up action was NOMPC’s successful lobbying for the downzoning of the Tenderloin, which included lowered height limitations sufficient to discourage both the destruction of existing low-income housing buildings and the construction of high-rise buildings for higher income residential and commercial uses. See Shaw, supra note 31, at 181–93.
For both CBAs and DAs, the objective is to get significant concessions from the developer, whether a private party or a public entity. When the target is a private developer, the process is still highly political, as most of the community group’s leverage comes from the private party’s interest in getting a favorable governmental decision. For grassroots organizations, getting a meaningful CBA or affecting the shaping and writing of a DA involves effectively influencing public agency decision-making.

After gathering some preliminary information, I contacted a number of Tenderloin activists about the CPMC project. Knowing how busy they and their organizations were, I told them that the Clinic would monitor the planning process and that I would let them know when San Francisco’s review of the project became active and, thus, when it would be timely for them to decide what, if any, actions to take. For the next two years, two different paired teams of students spent part of their Clinic time gathering information about CPMC and the project, healthcare needs and services in the Tenderloin, applicable land-use requirements, and the nature and use of CBAs. The students prepared several memoranda and made several informational presentations to Tenderloin social service providers and activists regarding the project plans and the potential utility of seeking a CBA. In doing this preliminary work, the students puzzled over who was the client.

The work being done was in anticipation that the project in some form would go forward and would be of major concern for Tenderloin residents and activists. Such engagement reflected both the Clinic’s evolving role in the neighborhood as a resource on community development matters and a not uncommon reliance on lawyers to be principal monitors of projects and policies of likely strong interest to a particular constituency. The differences in this instance were that the Clinic was not being paid and was not acting pursuant to any formal retainer agreement. The bond was a shared commitment with local activists and residents to improving the quality of life in the Tenderloin. At this stage, to the extent there was a client, it was the Tenderloin itself.

C. Mobilization and Collaboration

In June 2009, as required by the California Environmental Quality Act (CEQA), the San Francisco Planning Department held a scoping hearing for an Environmental Impact Report (EIR) to be prepared for CPMC’s recently revised Long Range Development Plan (LRDP) to restructure and rebuild its multi-campus presence in San Francisco. The centerpiece was a new 555-bed hospital abutting the Tenderloin. The size of the hospital was slightly scaled-down from previous plans. As part of the same hospital campus site, CPMC additionally planned to construct a separate medical office building across the street from the hospital. Because the dividing street was Van Ness Avenue, a major San Francisco automobile and bus
thoroughfare, the plans further specified the construction of a tunnel to provide underground passage between the two buildings. In an apparent concession to past opposition, the revised LRDP also included a rebuilt but much smaller hospital of 80 beds on the St. Luke’s site. There were contingent but not firm plans for constructing a new medical office building adjacent to the rebuilt St. Luke’s Hospital. The total estimated LRDP development and construction costs were $2.2 billion. Following the scoping hearing, I informed Tenderloin community organizers that it was time to begin organizing if, indeed, sufficient neighborhood interest existed in responding to the revised proposal before the Planning Commission.

Shortly thereafter, the organizers convened several Tenderloin community meetings providing information about the project. Among the lead organizers were staff members at Community Housing Partnership (CHP) and Tenderloin Neighborhood Development Corporation (TNDC), two highly respected nonprofit affordable housing organization with multiple properties in the Tenderloin. They invited to these meetings not only Tenderloin activists and residents but also grassroots activists from the Mission and Bernal Heights neighborhoods adjacent to St. Luke’s Hospital, specifically from the Bernal Heights Neighborhood Center, and representatives from two healthcare worker unions—the California Nurses Association (CNA) and the National Union of Healthcare Workers (NUHW). The two unions between them had 1,600 members employed at CPMC campuses and were engaged in protracted collective bargaining with CPMC’s leadership. At the time, CPMC was the second largest non-public employer in San Francisco with more than 6,000 employees.

Most of the non-Tenderloin participants in these first meetings were associated with the Coalition for Health Planning-San Francisco and had been involved for several years in the effort to prevent the closing of St. Luke’s. The first reaction of the citywide healthcare activists was that the proposed 80-bed hospital on the St. Luke’s site would not be economically sound and would be abandoned within a relatively short period of time after being built. Rebuilding a hospital that CPMC’s leadership did not want was likely to be a small price to pay to get the land-use entitlements for the showcase hospital that they did want to build.

Also in attendance at these summer meetings was a long-time community activist from the Council of Community Housing Organizations (CCHO), a San Francisco-focused association of nonprofit affordable housing development organizations. This particular person had decades of experience in San Francisco land-use planning politics. Another early attendee with relevant political experience was from the Chinese Community Development Corporation (CCDC), which had several affordable housing projects in the Tenderloin, though the organization is primarily based in San Francisco's Chinatown neighborhood. I too attended these meetings, as did a student who was enrolled in the CED Clinic for the coming 2009–10 academic year.

As part of the initial organizing effort, the Tenderloin activists conducted a poll of 800 Tenderloin tenants about what they most hoped would happen as a result of the proposed nearby new hospital. The priority concerns of the polled tenants were access to healthcare services, jobs for low-income residents, support for additional affordable housing, and minimizing traffic impacts. By the time the other Clinic students began the school year in late August, there was within the Tenderloin community a functioning coalition with which to work and a set of issues around which to advocate that was grounded in and legitimated by a poll of residents. In addition, the Tenderloin organizers had forged an alliance with citywide healthcare advocates and had begun working with a network of affordable housing groups and two unions. Each of the two unions had continuing interests in furthering and protecting CPMC worker rights and benefits and advancing access to quality healthcare across-the-board.

During the school year, the student who voluntarily attended the summer meetings teamed with another student to serve as the Clinic’s main liaisons to the newly organized Tenderloin coalition and its citywide group allies. Working with employees of the constituent organizations and other volunteers, the students functioned as an additional staffing resource. The students participated in group meetings and worked on a variety of specific research and writing projects involving land use, environmental review, and healthcare delivery issues. A part of their work involved interacting with lay participants on developing and explaining specific demands based on both priority issues identified by Tenderloin residents and related concerns about CPMC raised by other associated groups. Most of this work was directed at the drafting of a comprehensive policy platform to be used politically, in the media and with policy decision-makers. The discussions were not just about substantive policy and law. Looking down the road, these discussions with community and labor organizers also were firsthand lessons for the students on the centrality of politics, particularly lobbying for and lining up votes at the Planning Commission and eventually the Board of Supervisors.

By the end of 2009, the Tenderloin coalition consisted of twenty-three organizations and had a name—the Good Neighbors Coalition (GNC). The organizations all endorsed the GNC’s positions, but not all were active
participants. Usually six to eight individuals from Tenderloin groups attended regular meetings, among them staff members from Tenderloin nonprofit affordable housing organizations and the chief organizer for the Central City SRO Collaborative—a Tenderloin tenants' organization. Other active participants were from San Francisco neighborhoods near the Tenderloin, specifically the Cathedral Hill Neighbors Association to the west and the South of Market Community Action Network to the east. Individuals associated with groups that were part of the Coalition for Health Planning-San Francisco, including labor organizers from CNA and NUHW, also regularly participated in these weekly or biweekly meetings. In discussions and planning, initial coalition affiliations rarely were a salient matter. Late in 2010, the chief staff person for Jobs with Justice SF, a coalition of mostly progressive local labor unions, became another core union-affiliated participant.

While changes would occur over time in who among the various participants were most active, the lead activists throughout have been highly sophisticated organizationally and politically. Internally, meetings were run informally, although with an agenda. Preliminary work was often done in committees, usually organized on an ad hoc basis. In addition, those attending meetings would enlist, if available and as needed, support from other staff in their respective constituent organizations. Almost all final decisions were arrived at by consensus after open discussions and without taking interminable amounts of time. Externally, the lead participants were very adept at using individual and organizational connections to get access to San Francisco politicians and administrators. They also were skillful in using the media and in structuring public events. At various governmental hearings and occasional demonstrations on the steps of City Hall, they continually relied on members of the different constituent groups, mainly Tenderloin and other low-income San Francisco residents and rank-and-file union workers, not only to attend but also to speak about what was at stake for them. San Francisco's political system is unusually open and responsive to progressive causes, but not without significant and visible grassroots support.

A major assignment for Clinic students and faculty in 2010, prior to the start of the fall term, was to work closely with representatives from the nonprofit affordable housing community on developing an affordable housing position as part of the GNC policy platform. San Francisco has strong public policies requiring developers of major projects to pay in lieu fees for affordable housing or to include affordable housing units within proposed residential developments. CPMC repeatedly claimed that

39. In describing this assignment, I have relied not only on my own notes and observations but also a memorandum dated July 12, 2013, entitled "Report on Final Approved Development Agreement for the CPMC Project," which was prepared for Council of Community Housing Organization Members by Calvin Welch, CCHO's Representative in the Coalition.
no housing obligation was triggered by its planned construction of new hospitals, as the sites did not involve displacing residents. CPMC did not dispute that it had an obligation to provide for the replacement of 25 residential units in buildings to be demolished as part of the development of the medical office building to be built on the Tenderloin side of Van Ness Avenue as part of the Cathedral Hill campus. To meet this specific obligation, CPMC agreed relatively early to make an in lieu fee payment. The eventual amount agreed to was $4,138,620. Regarding anything more, CPMC vigorously resisted even discussing any other project-related affordable housing responsibilities. The challenge was to conceptualize a basis for demanding much more from CPMC given the magnitude and impact of its proposed project. The backdrop was the crisis in the available supply of housing in San Francisco, especially for low-income individuals and families.

Two provisions in the San Francisco Planning Code were most relevant but had to be linked together in an interpretively novel fashion, which also invoked Housing Element policies and objectives in San Francisco’s General Plan. The first was the Jobs Housing Linkage Program, which provided formulas for determining in lieu affordable housing fee payments for different types of major non-residential projects. The Program’s purpose was to obtain from developers the funds to help meet affordable housing needs of future end-use employees once a project was built. Within the Program, how to treat development plans for hospital campuses was not facially clear. The second was land-use legislation establishing the Van Ness Special Use District, which encouraged the development of high-rise residential buildings in the very area where CPMC planned to build its Cathedral Hill campus. CPMC needed an amendment to the use requirements for this District to construct a hospital, which otherwise was not permissible. While this legislation clearly established the construction of new housing as the highest priority, it was silent regarding the percentage of affordable housing to be included. A specific committee working on the GNC’s affordable housing position came up with a formula derived from the amount of housing not being constructed in the Special Use District as a result of the planned CPMC hospital campus; the high priority commitment to developing affordable housing interwoven throughout the San Francisco Housing Element; and an in lieu fee amount based on provisions

40. Attorneys with the Chinese Community Development Corporation working with the Mayor’s Office of Housing negotiated this provision, which is noted in the final DA, as part of a parallel but separate agreement with CPMC. CPMC Development Agreement, supra note 5, Exh. G at 1-2.


42. S.F. PLANNING CODE § 413.

43. Id. § 243.
for determining the number of affordable housing units required by the Jobs Housing Linkage Program.

While the formula was far from statutorily straightforward, it made a credible case for getting a substantial affordable housing contribution from CPMC far in excess of anything initially anticipated by CPMC or City administrators. When the affordable housing group first met with the director of the Mayor’s Office of Housing regarding their approach, he expressed almost no interest, as he viewed the CPMC project as primarily a healthcare policy issue and not an affordable housing opportunity. A meeting in August 2010 with the director of the Planning Department drew a more positive but still noncommittal response.

To get the attention of CPMC and to further the attention of the Planning Department and other City administrators, the GNC with backing from its citywide allies proposed a resolution for the San Francisco Board of Supervisors supporting the housing requirements in existing area plans, such as the Van Ness Special Use District.44 A “whereas” provision explicitly referenced as a policy having affordable housing objectives in such area plans. The “resolved” section set forth as policy “discouraging new development projects [in specific area plans] that would seek an exception to housing requirements . . . unless that new development project shall substantially fulfill the underlying housing production goal.” In other words, without mentioning CPMC the resolution highlighted that if CPMC wanted approval for its hospital campus within the Van Ness Special Use District, the City was going to take seriously potentially applicable housing requirements, especially for affordable housing. On September 28, 2010, the resolution on a 7-3 vote was adopted by the Board of Supervisors.

Although the resolution was a statement of policy only, not binding law, it had its intended effect with City administrators. It was not until much later that the message got across to CPMC. Using the “blended” approach of applying the housing requirements of the Van Ness Special Use District and the in lieu affordable housing fee structure of the Jobs Housing Linkage Program, the GNC arrived at a figure of $140 million as an estimated CPMC affordable housing obligation in addition to all payments due to the loss of existing housing. Everyone within the group realized that this figure was high, but it was a justifiable place to start. It also was an attention-getter. After the resolution was passed, the affordable housing committee members met several times with Planning Department staff, who eventually accepted the group’s methodology if not its mathematics. The notion of a substantial CPMC contribution to affordable housing also came to be broadly accepted within the Mayor’s Office. Obtaining from CPMC a sizeable payment for affordable housing was now on the City’s agenda, not just the agenda of GNC and its allies.

For three years beginning with the 2010–11 academic year, all eight students in the CED Clinic worked on the CPMC project. Most of the student work during this period entailed researching and drafting background memoranda, factual reports, position papers, and formal filings with governmental agencies. Two examples are especially noteworthy. Each involved an entire Clinic cohort working together on a single assignment, and each had an important impact in advancing community objectives. The first pertained to the preparation of written comments on the Draft EIR for CPMC’s proposed Long Range Development Plan. The second, which I describe a bit later, concerned the production and distribution of a factual report comparing the profitability and charity care performance of San Francisco hospitals.

The overriding purposes of an EIR are “to provide public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.” An EIR is an informational document that has to be certified as having adequately discussed the environmental effects of a covered project before final decisions are made regarding major land-use entitlements and permit approvals. San Francisco procedures provide for review, public hearing, and action first at the Planning Commission and then, if there is an appeal, at the Board of Supervisors. After participating in and exhausting all San Francisco internal administrative procedures, an individual or a group objecting to the certification of an EIR as inadequate can file a judicial appeal. The EIR process is the single most important public opportunity for direct community participation in land-use decision-making.

Toward the end of July 2010, a little more than a year after the scoping hearing that triggered the GNC’s formation, the Planning Department released for public comment a Draft EIR for the entire long-range CPMC project. It was an enormous document involving thousands of pages, much of the analyses presenting highly technical information. Public comments were noticed as due by October 19. There would be a public hearing on the Draft EIR, after which the Planning Department would organize and prepare responses to the comments. The Draft EIR, the comments, and the responses comprise the Final EIR. While one need not be a lawyer to submit EIR comments, lawyers when available typically draft comment letters, in effect letter briefs, on behalf of concerned groups. The Good Neighbors Coalition looked to the Clinic to prepare a comment letter on the project expressing major grassroots concerns about the project and its environmental consequences. A new group of Clinic students starting in
the second half of August had less than two months to get up to speed about the project overall and about the EIR process.

The most important priority issues for the GNC concerned the social and economic effects of the project, which are EIR issues only to the extent they relate to the physical impacts of the project. In drafting the comments, the Clinic needed to be mindful of how to express credibly GNC concerns pushing the window but within the framework of EIR law. For example, healthcare delivery issues were not an easy fit. The EIR itself paid no attention to matters such as charity care and the accessibility of hospital services. The new proposed 555-bed CPMC hospital was less than a half-mile from another private hospital owned by a different nonprofit hospital chain, which had a far better record in providing charity care than CPMC. The argument made was that the EIR needed to analyze whether the new hospital posed a competitive threat to the existing hospital that could lead to the latter’s closure and, as a result, blighted conditions at the abandoned former hospital site. There was case precedent for such an environmental argument.\(^\text{48}\) The main purpose of the argument, however, was to underscore for decision-makers the importance of taking into account, when deciding whether to permit construction of the new hospital as proposed, the impact on the accessibility of in-patient care for poor individuals and families.

With a lot of hard work and hours spent, including many group sessions, the Clinic in mid-October submitted on behalf of the GNC, and after review by its members, a thirty-eight-page comment letter on a range of issues. The specific topics addressed were affordable housing, transportation and circulation, air quality and greenhouse emissions, local first-source hiring, healthcare delivery, and an analysis of project alternatives. As part of a coordinated effort, several other comment letters were submitted by organizations associated with the GNC but in their own names. The most substantial other comment letters were prepared by separate private law firms for, respectively, the California Nurses Association and several nonprofit affordable housing organizations. Those letters included and largely reflected the findings and opinions of environmental consultants, the most typical approach taken in serious EIR comment letters. Knowing what allied organizations were likely to say gave the Clinic room to prepare a comment letter that could focus heavily on the social and economic effects of the project without getting bogged down into too many technical details. The GNC’s comment letter immediately helped solidify its position as a major player in the review of the CPMC project by San Francisco public officials.

It would be another twenty-one months before the GNC comment letter, in a hearing before the San Francisco Board of Supervisors, would have its most important impact on the CPMC EIR process. In the interim, there

\(^\text{48. See Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184 (2004).}\)
were numerous private meetings and public hearings involving various San Francisco officials at the Planning Department and Planning Commission, at the Public Health Department and Health Commission, in the Mayor’s Office, and with the Board of Supervisors. In early 2011, two notable developments occurred that significantly affected the future course of events.

The first took place in February and early March and involved three meetings with CPMC that included both participants associated with the GNC and mayoral representatives. Although the hope was that productive negotiations would take place, CPMC had no interest at the time in making any concessions that would address community concerns. One clear indication was the absence at the table of anyone from CPMC’s decision-making leadership. Another was an ad hominem attack during the discussions by a CPMC publicist directed at CED Clinic students who had attended the meeting as observers. The sessions were not fruitful.

The second notable development originated immediately after the frustrating and futile negotiations with CPMC. It began with a meeting on March 15, 2011, attended by GNC members and allies and Mayor Ed Lee, newly in office as the interim successor to Gavin Newsom, who had been elected California’s Lieutenant Governor. The GNC had sent a copy of its platform to Mayor Lee the week before. At the meeting, he listened attentively. Two months later on May 17 was a second meeting with the Mayor to review and discuss a draft of the City’s proposed position regarding the CPMC project. On May 20, Mayor Lee announced publicly the City’s position and sent to CPMC “A Request . . . for Community Benefits” which, in exchange for San Francisco’s approving CPMC’s project proposal without any changes in the building plans, spelled out various terms for a proposed Development Agreement. Though not as extensive, the benefits and conditions proposed were in line with those found in the Coalition’s platform. One prominent provision in the Mayor’s proposal was a request for $73 million as an in lieu affordable housing payment in accordance with the requirements of the Van Ness Special Use District. This amount was a little more than half the amount put forward by the GNC eight months before but, nevertheless, a striking change in position by the City’s executive branch. At a press conference in early June, CPMC slammed Mayor Lee’s proposal as “fiscally impossible.”

Two weeks later, CPMC’s chief executive announced that CPMC did not believe that continuing negotiations with the GNC was the best way to proceed. In previous GNC discussions, some tactical disagreement had arisen about whether to seek a CBA or a DA to structure and enforce the terms and conditions of any eventually reached agreement. The GNC platform could serve as a community-benefits agenda for either type of agreement. Instead of choosing one or the other, the decision was to leave open both prospects and to determine down the line, depending upon evolving circumstances, which type of negotiated agreement to get behind. In light of CPMC’s lack of good faith in the negotiation sessions and negative
public comment afterwards, though not giving up on the idea totally, no one within the GNC was optimistic about the likelihood of a CBA eventually being reached. If there were to be any meaningful concessions from CPMC, the more likely vehicle would be through a DA.

In early July, CPMC made a counteroffer to the Mayor’s “Request” regarding various community benefits at levels significantly less than he had proposed and substantially less than the GNC proposals. A month later, Mayor Lee turned his attention elsewhere as he decided to seek election as Mayor, something he had foreseen when appointed Interim Mayor. Officials within his administration, however, continued backroom discussions with CPMC. The City’s lead representative was from the Mayor’s Office of Economic and Workforce Development. Individuals associated with the GNC and allied groups were not directly or indirectly involved in these discussions. Nothing became public about even the general nature of these discussions until the end of the year after the voters in early November elected Mayor Lee for a full term.

At the beginning of the 2011 fall term, it was not clear what might be the major CPMC project assignment for the CED Clinic students. The Final EIR on the hospital rebuild was still in preparation at the Planning Department, which meant no further official actions on the project for some time. GNC members and allies were meeting regularly and were involved in various efforts directed at informing public officials and the public about the project and GNC’s positions. A major undertaking during the late summer and early fall was the production and citywide distribution of 10,000 tabloid newspapers outlining those positions. Specially targeted were Board of Supervisor districts with upcoming election races in 2012.

With respect to new Clinic work, one area for factual research was the gathering and organizing of comparative information and data about the charitable activities and financial positions of San Francisco hospitals, which is not an easy task because of differences in organizational structure and mission. San Francisco, like other localities, has experienced a major reduction in the number of independent acute care hospitals from closures and consolidations. The City has two relatively large nonprofit fee-for-service hospital groups, each with multiple campuses. The largest is CPMC, which at the time of the research had four campuses.\footnote{They were St. Luke’s in the low-income but gentrifying Mission District; the Davies Campus in the Duboce Triangle, an already gentrified middle income neighborhood; the Pacific Campus in the wealthy Pacific Heights area; and the California Campus in the almost as tony Laurel Heights area.} The other is Dignity Health, which has two campuses—Saint Francis and St. Mary’s Hospitals. There is also a small nonprofit fee-for-service hospital serving the Chinatown neighborhood. Two other major fee-for-service hospitals are publicly supported—San Francisco General Hospital and the UCSF Medical Center, which now has two hospital campuses. There also is a federal Veterans’ Hospital. The only other San Francisco acute-care hospital is part of Kaiser Permanente, a
nonprofit membership-based healthcare provider serving a large number of Health Maintenance Organization (HMO) enrollees.

The students paired off in teams of two. Their initial research and drafting revealed that two students had unexpected and especially helpful skills. One was very comfortable in using computer software to produce highly polished reports with charts, tables, graphs, and photographs. The other, who prior to law school worked at an investment bank, was very skillful in identifying and analyzing online hospital financial and patient data collected by the State of California. After consulting with GNC participants, we decided to produce a report that would be professional in appearance and printed in color for use in advocacy efforts. The tone of the report would be objective, which meant just reporting the facts, not drawing the logical argumentative conclusions. The latter would be left to the reader. In working together on the drafting, one student in particular had a hard time not making explicit advocacy arguments as part of the text. The students got firsthand experience in the importance of tailoring language for different purposes and for different audiences, all in an effort to advance the objectives of a client group. Like the EIR comments, this assignment involved an enormous individual and group effort.

In early December 2011, the Clinic held a press conference at the Clinic’s office to announce publication of the report entitled Profits & Patients: The Financial Strength and Charitable Contributions of San Francisco Hospitals.\textsuperscript{50} The report’s lead student editor was the Clinic’s spokesperson and presided over the press conference, which was attended by a number of reporters including a reporter and photographer from the San Francisco Chronicle, the Bay Area’s main daily newspaper. The next day the Chronicle published a front-page story in the Bay Area section, which included a photograph of the student with a blown-up chart from the report behind him.\textsuperscript{51}

The report’s facts clearly showed that CPMC was exceptionally profitable even when including St. Luke’s Hospital, which operated at a loss, and that the CPMC campuses other than St. Luke’s had an abysmal charity care record. For fiscal years 2006–2010, CPMC’s average annual net income was $149 million. As a comparison, Dignity Health’s hospitals struggled during this period. Saint Francis had average annual losses of $3 million, while St. Mary’s average annual net income was $4.5 million. The picture was quite the opposite with respect to amounts attributed to charity care. Charity care covers a number of matters, but the largest component is a write-off of the shortfall in governmental reimbursements, based on supposed market rates, for services provided patients covered by Medi-Cal (Medicaid)—the federal and state health insurance program for poor and other low-income individuals and families. In fiscal year 2010, St. Luke’s ratio of charity care to net patient revenue was 3.77 percent, while the three CPMC campuses

\textsuperscript{50} Copy on file with author.

in wealthier San Francisco areas reported a joint charity care to net patient revenue ratio of 1.14%. For Saint Francis and St. Mary's the ratios that same year were, respectively, 4.43% and 2.95%. In 2004, the San Francisco Board of Supervisors in a nonbinding resolution had called upon CPMC to increase the delivery of charity care at its campuses, which at the time did not include St. Luke's, to 3% of net patient revenue. Despite unrivaled financial success during the years since 2004, the three CPMC campuses in wealthier San Francisco areas were far from doing their fair share in serving Medi-Cal and low-income patients generally. St. Luke's was the exception, and CPMC's initial position was to close the entire facility.

The GNC distributed copies of the report to the Mayor and members of his staff, members of the Planning and Health Commissions, and staff and members of the Board of Supervisors. It also was distributed to additional media representatives. The report became an important part of the campaign to rebuild St. Luke's Hospital at a size that would further its permanent sustainability and to increase overall CPMC's charity-care commitments and other community benefit contributions along the lines set forth in the GNC platform. CPMC's public response to the report was an attempt to discredit it by asserting that it was prepared by law students working with groups opposed to its development plans. CPMC never disputed any of the report's findings.

The publication of the report was timed to come out immediately before a Board of Supervisors Committee of the Whole Hearing on the CPMC project, which occurred on December 13, 2011. The hearing was convened by several supervisors, including the Board President, at the request of the GNC and its allies. It was not a common proceeding. GNC participants prepared briefing papers for the supervisors and met with a number of them ahead of time. The objectives were to educate the supervisors about the project and to get information about the status and general terms of the negotiations taking place between City administrators and CPMC.

The hearing began with presentations from City officials in the Mayor's Office of Economic and Workforce Development, the Planning Department, the Department of Public Health, and the Mayor's Office of Housing. Board of Supervisor members then questioned the City administrators. While not all specifics were presented, the topics covered a full range of project concerns, including charity care and Medi-Cal patient commitments, keeping a rebuilt St. Luke's Hospital open long-term, maintaining hospital-based Skilled Nursing Facilities, affordable housing needs, permanent entry level jobs for low-income San Francisco residents, and transportation, traffic, and streetscape issues mainly related to the large, showcase hospital proposed for the new Cathedral Hill campus. Opportunities for community group participation also came up with one Board member

specifically asking about having a CBA, not only a DA. Board members were well aware of CPMC’s hostility to grassroots coalition involvement.

After the back-and-forth between City administrators and Board members, community participants as part of a GNC group presentation were allotted time to raise both specific substantive and general institutional concerns about the project and the negotiations. The GNC speakers were primarily a mix of neighborhood group and hospital labor-union representatives. The first speaker, however, was a CED Clinic law student who underscored and responded to a Board member’s question about CPMC’s poor charity care record and notably high net revenue. The Clinic’s *Profits & Patients* report was a crucial piece in the effort to get Board members to view skeptically CPMC’s representations about the structuring and effects of the multicampus hospital’s Long Range Development Plan and its good faith in negotiating DA terms.

In March 2012, the Tenderloin organizers of the Good Neighbors Coalition and citywide activists initially associated with the Coalition for Health Planning-San Francisco and Jobs with Justice SF explicitly acknowledged that they, in effect, had been operating as a coalition of coalitions. Since the initial organizing in summer 2009, neighborhood groups and labor unions to an unusual degree had planned and acted together in challenging CPMC’s hospital rebuilding plans not to stop the project but to advocate for a much more equitable and publically beneficial project than otherwise was likely to be the case. Along with environmental matters, the primary substantive concerns involved healthcare, housing, and jobs issues. The organizers and activists chose San Franciscans for Healthcare, Housing, Jobs, and Justice (SFHJJ) or H2J2) as the new umbrella name and identity for their collective and joint advocacy efforts going forward. With now a citywide and not primarily a Tenderloin coalition as its client, the Hastings CED Clinic continued to provide legal assistance and representation.

Ironically that same month, Mayor Lee and CPMC announced that they had reached agreement on a DA. Although elected as a “can do” candidate the previous November, the mayor and his administration in early 2012 suffered two high-profile development losses not connected to the CPMC project. One consequence politically was that he was under considerable pressure to get a CPMC deal done.

The terms of this DA were significantly less costly and stringent for CPMC than those contained in Mayor Lee’s May 2011 “Request.” One example was that the $73 million initially requested by the Mayor for affordable housing was reduced to $58 million with half to be used for a “home ownership” program exclusively for CPMC employees (probably mostly for doctors and other professionals). This decrease meant that only $29 million would be available for affordable-housing purposes generally. Another example was a minimal local hire commitment for end-use jobs with CPMC. The goal was forty entry-level jobs annually for a five-year period. As a comparison, the City’s policy for construction jobs on targeted projects set a local-hire goal of fifty percent. A third example was
a provision that contained a complex formula allowing CPMC to close a rebuilt St. Luke’s Hospital in less than twenty years if it lost money. The Mayor’s representatives claimed that there was virtually no risk at all that this formula would result in allowing CPMC to shut St. Luke’s within twenty years—a troubling too-soon time period in its own right. A fourth example, one of particular concern to fiscal-minded supervisors allied with the Mayor, was the absence of any requirement that CPMC cap healthcare costs that affected group health insurance premiums paid by the City for its employees. The proposed DA also did not contemplate a change in the sizes of the two hospitals to be constructed. The plans still called for a 555-bed hospital near the Tenderloin and an 80-bed replacement hospital on the St. Luke’s site.

In early April, the Mayor sent the proposed DA to the Board of Supervisors. He did so before including it in the package of material to be considered by the Planning Commission as part of its environmental and permitting review of the CPMC project. A year and a half after comments had been submitted, the Planning Department at last had completed the Final EIR, which needed to be certified as adequate prior to consideration of the various land-use permitting applications and accompanying requests for necessary zoning legislative changes. Significantly, no member of the Board of Supervisors indicated support for the DA. Nonetheless, the Mayor’s Office pushed for full Planning Commission review of the CPMC project.

The CED Clinic on behalf of SFHHJJ and a private law office on behalf of the California Nurses Association (CNA) submitted written objections to certification of the Final EIR. The procedures established for the EIR process continued to provide the best opportunity for objecting to a major land-use project. At the Planning Commission hearing on April 26, SFHHJJ representatives and members of its constituent organizations expressed opposition to the Final EIR and the CPMC project. The objections focused on such issues as increased traffic, worsening air quality, insufficient affordable housing, and unsuitable sizes of the two hospitals—a too big Cathedral Hill hospital and a too small St. Luke’s replacement hospital. CPMC rallied support on its behalf, including from construction trade union leaders and members. The main arguments in support emphasized the creation of 1,500 construction jobs and 1,500 new permanent jobs. The contentious hearing lasted ten hours. On a 5-1 vote, the Planning Commission certified the Final EIR, approved the permitting applications and zoning changes, and recommended that the Board of Supervisors support the DA terms.

In mid-May, SFHHJJ and CNA appealed the Planning Commission’s decision on the Final EIR to the San Francisco Board of Supervisors, the effect of which was to stop the process regarding all administrative approvals and legislative changes until the full Board of Supervisors held

its own EIR hearing and decided whether to uphold the appeal or affirm the Planning Commission’s Final EIR certification.\textsuperscript{54} Originally scheduled for June 12, the full Board of Supervisors hearing on the CPMC Final EIR was continued until July 17.

In the interim, at the request of SFHHJJ, the Chair of the Board of Supervisors Land Use Committee convened four Committee hearings on various aspects of the proposed DA.\textsuperscript{55} The first two hearings on June 15 and 25 were fairly routine. In early July, the \textit{San Francisco Chronicle} reported that an anonymous whistleblower within CPMC had documents that indicated CPMC, under the formula included in the DA, could actually close St. Luke’s in less than four years after its opening, not twenty years as previously claimed by CPMC and the Mayor.\textsuperscript{56} The St. Luke’s issue dominated the third Land Use Committee hearing on July 9. At the hearing, CPMC representatives refused to share with Board of Supervisors members the data it used to determine when it would be able to close St. Luke’s under the DA formula. The Mayor’s representative at the hearing stated that his marching orders were to get a guarantee on St. Luke’s remaining open for a minimum of twenty years. It made no difference: CPMC still refused to budge.\textsuperscript{57} Issues also were raised at the hearing about the amount of charity care required under the DA, the provisions for permanent local jobs, and the potential effects on public and private healthcare costs if CPMC were not constrained from using its dominance in the San Francisco private fee-for-service hospital market to obtain increased fee reimbursements from insurance companies, thereby driving up health insurance premiums. At the last Committee hearing on July 16 attended by seven Board members, the main focus was on affordable housing and transportation issues not sufficiently addressed in either the DA or the Final EIR.

By the time the Final EIR appeal was heard on July 17, considerable skepticism arose within the eleven-member Board of Supervisors about the benefits for San Francisco of the overall project as then structured and spelled out in the DA negotiated by the Mayor’s Office. While the focus of the hearing was on the adequacy of the Final EIR, it was the merits and downsides of the underlying project that were of most concern. In preparing for the hearing, the CED Clinic and SFHHJJ leaders worked together in drafting backup material for sympathetic supervisors that highlighted

\textsuperscript{54} In preparing the appeal notice and supportive arguments, I enlisted the help of a graduating Hastings student who had taken the CED Clinic the year before. Prior to law school, she had worked for an environmental consulting firm. In preparing the Clinic’s original comments on the Draft EIR, she had been an enormous help in editing with me into a cohesive whole the various sections prepared by different student teams. We coordinated our written appeal with CNA’s appeal.

\textsuperscript{55} See CPMC Development Agreement, supra note 5, at 4.


significant legal flaws in the Final EIR and proposed specific lines of questioning. The main points covered transportation and traffic issues, the adverse impact on San Francisco’s housing policies, the need for a smaller Cathedral Hill hospital and a larger St. Luke’s hospital, and the rejection of environmentally superior alternatives. The full Board hearing began at almost 6:00 p.m. and ended just before midnight. Both CPMC and SFHHJJ supporters were present in sizeable numbers.

Legally, CPMC was represented throughout the land-use proceedings, including at the full Board of Supervisors hearing, by a law firm known for the high quality of its legal work and its political connections. At most proceedings, three or four attorneys from the firm were present, often including one of the firm’s named partners, a much respected Bay Area land-use lawyer. At public proceedings, the San Francisco City Attorney’s Office rarely played a visible role, leaving descriptions and explanations regarding the project and the City’s position to administrative personnel from the Mayor’s Office, the Planning Department, and the Public Health Department. While at most public hearings CED Clinic comments were integrated as part of coordinated testimony from SFHHJJ leaders and constituents, the EIR appeal was a formal administrative proceeding where attorneys when available usually assume a lead role.

In Final EIR administrative appeals, the hearing begins with presentations from and questioning of the appellant representatives. The plan was for the CNA attorney to be the primary lawyer speaking in support of the Final EIR appeal. I would provide backup support.\(^\text{38}\) Dating back to the preparation of Draft EIR comments, we had an open and cooperative relationship. As it turned out, when questions came up from members of the Board of Supervisors, the CNA lawyer motioned for me to respond. While she was an experienced environmental law attorney, I had greater familiarity with the project specifics and the political context and dynamics. She had been hired for her technical knowledge and apparently recognized that my having worked closely with SFHHJJ participants for almost three years would be a definite advantage in shaping what to say and represent. Following their questioning of me, the Board members heard comments from the public in support of the appeal.

The lead environmental officer on the project from the City Planning Department then presented the case for affirming the certification of the Final EIR. She was questioned by six supervisors, most critically by three supervisors with whom SFHHJJ representatives had met ahead of time. Only one supervisor in his questioning appeared supportive of the Final EIR.

Next to speak were representatives of the project sponsor. After a brief statement from CPMC’s chief executive, the general counsel associated

\(^{38}\) For almost two years in the early 1990s before assuming my professorship at Hastings, I had worked at an environmental law firm, so I had relevant prior legal experience responding to EIRs. Because it was mid-summer, no Clinic students were available to assist in the Board of Supervisors hearing.
with Sutter Health, its corporate parent, stepped in to indicate a willingness to continue the proceeding for two weeks during which, in his scenario, there would be further discussions with the Mayor’s Office. The idea of a two-week continuity was left hanging in the air. Instead, one of the supervisors questioned him about the early closing of a rebuilt St. Luke’s Hospital and pressed for full disclosure of relevant CPMC financial data. The hospital’s in-house attorney avoided definitively answering and sat down. Outside counsel for CPMC then provided a brief history of the project and offered arguments against various comments in opposition to certifying the Final EIR. His presentation was followed by public testimony in support of the CPMC project.

The public hearing was closed at 11:20 p.m., after which individual supervisors expressed their views regarding the adequacy of the Final EIR. Seven of the eleven supervisors clearly indicated that they would not support its certification. A number of them specifically referred to issues initially raised in the CED Clinic’s Draft EIR letter brief. The supervisors additionally indicated that they wanted to see further dialogue with community groups about the project and a reworked Development Agreement.

At the end of the hearing, there was a voting compromise: a motion for a two-week continuance passed without objection. Suggested by the general counsel for CPMC’s corporate parent as a short-term, face-saving measure, the two-week continuance wound up being almost a year. It would not be until June 25, 2013, that the Final EIR would come back before the Board of Supervisors for a final vote. In the interim, there would be a serious reworking of the Development Agreement—this time with the working agenda largely set by SFHHJJ. CPMC and Sutter Health had underestimated and continued to underappreciate SFHHJJ’s political wherewithal, most especially the local government experience and contacts of its affordable housing and labor union members.

In August and September 2012, SFHHJJ members devised a plan for restarting negotiation discussions with CPMC. The objectives were to maximize the Board of Supervisors support for SFHHJJ’s positions on affordable housing; transit, traffic, and neighborhood impacts; permanent workforce hiring and retention; healthcare access; and the proposed respective sizes of the Cathedral Hill and St. Luke’s hospitals. Another objective not explicitly linked was to call attention to the separate collective bargaining negotiations pending between CPMC and both the California Nurses Association and the National Union of Healthcare Workers, each being an important SFHHJJ participant.

Because of federal preemption under the National Labor Relations Act, City officials cannot interfere in a private party labor dispute by withholding or appearing to withhold a governmental benefit.59 There would be no discussion of management and union bargaining issues as part of negotiating a revised Development Agreement. All interested parties, however,

were well aware that the three separate but parallel negotiations would be happening at roughly the same time, with CPMC and Sutter Health management as a common, central player.

Tactically, the SFHHJJ’s approach to renegotiating the DA involved a restructuring of who would be present at the negotiations. Rather than pressing for direct CBA negotiations given CPMC’s continuing intransigence and hostility, SFHHJJ came up with three complementary ideas for restarting Development Agreement discussions.

The first was to have Board members, not the Mayor’s Office, take the lead in representing the City. SFHHJJ members contacted first the two supervisors who were most active in questioning the adequacy of the Final EIR—David Chiu, who was the Board president and seen as a centrist within San Francisco’s Board politics, and David Campos, who was part of its progressive wing. They both agreed and suggested that Supervisor Mark Farrell, who was seen as a moderate on the Board, join them as a negotiating team for the City. Not having had much support from the Board of Supervisors regarding the DA put forward by his office, the Mayor expressed no public opposition to Board members taking over the lead for the City in future negotiations. Top officials within the administration would continue to provide staff support as would lawyers within the City Attorney’s Office.

The second idea was to encourage the supervisors to request representatives from Sutter Health to participate directly in the negotiations. The leaders of CPMC, its subsidiary, appeared to be attached to building a large showcase hospital and not much else and had shown themselves to be largely tone-deaf politically. Sutter Health was increasingly centralizing major decision-making within its hospital system, so Sutter Health leaders, not local CPMC executives, would likely make final decisions.

The third idea was to bring in a prominent private citizen as a mediator. One of the union representatives within the SFHHJJ coalition had a specific person in mind, who had previously played a role in past collective bargaining disputes with CPMC. Widely known politically in San Francisco, the individual proposed was a lawyer and business owner, an experienced mediator, a former City commission member, and a CPMC Foundation donor and social friend of top CPMC executives. He also was a pro-union employer and a donor to various nonprofit Tenderloin organizations. The supervisors agreed with SFHHJJ’s proposal to have a mediator and to ask the SFHHJJ-identified candidate to fill that role as a public service and without financial compensation. CPMC and Sutter Health executives at first were reluctant to having him as the mediator but then reversed course and acceded. Advocating in the background, SFHHJJ was

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60. Farrell later became San Francisco’s Interim Mayor for the first half of 2018 after the sudden death of Mayor Ed Lee in late December 2017. "Moderate" in San Francisco is usually a term for a more business-friendly public official, who, on the national political spectrum, probably would be viewed as a moderate liberal.
able to reconfigure who would be the key participants in putting the DA negotiations back on track.

In late September 2012, SFHHJJ members met with the mediator to lay out the Coalition’s framework of issues. He agreed to consider the issues presented as the outline for the mediation. He emphasized that the key was getting Sutter Health to send the right people. In early October, the mediation group had its first meeting. Over the next five months, the group had a series of meetings, some productive and some frustrating. Sutter Health had its own executives, not just CPMC’s, participate in the discussions. In several in-person meetings at his business office, the mediator discreetly provided SFHHJJ members with updates about the negotiations and got their reactions to certain proposals. Throughout, SFHHJJ provided information, usually upon request, to the negotiating supervisors and their staff.

On March 5, 2013, the Mayor announced the major terms of a new proposed DA reached as a result of the mediated negotiations. Also that day, the National Union of Healthcare Workers signed a collective bargaining agreement with CPMC that provided a two percent retroactive wage increase, a ban on subcontracting, job security at the new Cathedral Hill campus, and full employer-paid health insurance. A week later, the Board of Supervisors unanimously approved a nonbinding resolution endorsing the Term Sheet to be used in the final drafting of a second proposed Development Agreement. Though SFHHJJ had a few additional concerns, none of its members publically objected to the Board’s action. On March 27, CNA reached a new contract for 800 nurses at CPMC hospitals, which gave them seniority rights and a six-percent wage increase over the twenty-four-month length of the contract. It had been a busy month.

D. The Development Agreement’s Terms

Substantively, the terms of the new Development Agreement provided most of the changes and community benefits sought by SFHHJJ, though some with conditions or in reduced compromise amounts. The most striking changes were the in-patient capacities of the proposed two new hospitals and the commitment to maintaining a hospital on the St. Luke’s campus. The showcase hospital planned for the Cathedral Hill campus was reduced in size from 555 beds to 274 beds, with shell space available to be developed for 30 additional beds depending upon future patient census data and state licensing authorization. This almost in-half reduction meant a significant lessening in long-term adverse environmental effects—

62. Id.
63. CPMC Development Agreement, supra note 5, at 4.
64. SFHHJJ Chronology, supra note 61.
65. CPMC Development Agreement, supra note 5, Exh. B-2 at 1.
for instance, traffic and transportation impacts. With respect to St. Luke’s Hospital, the plans included in the DA called for the construction of a 120-bed rather than 80-bed hospital.\(^{66}\) This increase in size by fifty percent furthered the likely economic viability of the new hospital.\(^{67}\) The new DA also contained no provisions allowing CPMC to close the St. Luke’s replacement hospital within a short time frame, and it further provided that the construction and opening of the new hospital on the St. Luke’s campus had to be synchronized with the construction and completion of the Cathedral Hill hospital.\(^{68}\)

Regarding purely financial obligations, CPMC as a hospital was not able to hide behind its nonprofit, tax-exempt status as a public charity. The $74 million in cash benefits set forth in the Development Agreement, and summarized at the beginning of this article, was an unprecedented amount for this type of project.\(^{69}\) In working out the details of the payments, an additional wrinkle arose for some of the funding allocations. Specifically, the DA contained provisions that enlisted the San Francisco Foundation, a well-respected local community foundation, in decision-making concerning the distribution of $8.6 million in innovative healthcare funding and of $4 million in workforce training money.\(^{70}\) A relatively late addition to the final benefits package was a specific commitment of $4.45 million for Tenderloin streetscape and pedestrian safety improvements—a matter of special concern to Tenderloin activists within SFHHJJ.\(^{71}\)

With respect to the magnitude of the monetary payments overall, the most remarkable development was $36.5 million for affordable low-income housing as a mitigation measure for removing land zoned for housing within the Van Ness Special Use District.\(^{72}\) This amount was in addition to the $4,138,620 triggered by ordinances covering the displacement of residents from existing buildings to be demolished to make way for the proposed Cathedral Hill Medical Office Building.\(^{73}\) Given the almost one-half reduction in the number of licensed hospital beds planned for the Cathedral Hill campus, $36.5 million proportionately was in line with the $73 million figure first put forward by Mayor Lee in May 2011 as

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66. Id., Exh. B-1 at 1.
67. In agreeing to these changes, CPMC may have had long-term business interests in mind. Neighborhoods proximate to the St. Luke’s campus were gentrifying. There also is a strong trend in medical care toward less hospitalization that might well have been a factor in support of CPMC’s decision to agree to a much reduced in size Cathedral Hill hospital. Even so, I am doubtful that CPMC would have made such changes in the absence of SFHHJJ’s advocacy and the negotiations carried out by S.F. Board of Supervisors members with the help of the selected mediator.
68. CPMC Development Agreement, supra note 5, Exh. C.
69. Id. at 3 & Exh. G at 1.
70. Id., Exh. F at 9–12 & Exh. E at 19.
73. Id., Exh. G at 1–2.
A response to SFHHJJ's initial $140 million calculation, and in anticipation of CPMC's then adamant view that it owed nothing. Seen in this light and the earlier lack of interest from City administrators in seeking any such funds at all, the unconditioned commitment by CPMC of $36.5 million for non-specified low-income affordable housing was an impressive turn of events.

There were several other noteworthy substantive provisions. One significant change affected CPMC's permanent hiring practices. Earlier, CPMC had indicated that it would give first-priority to hiring individuals from San Francisco low-income neighborhoods for forty positions annually for five years. The DA set the commitment as at least forty percent of all available entry level jobs for a ten-year period.74 Other provisions concerned commitments to providing healthcare and hospital services for low-income individuals and families. An especially important CPMC obligation pertained to meeting an annual unduplicated patient baseline for providing services to Medi-Cal and charity care beneficiaries.75 Another involved targeting hospital and specialty care services at CPMC campuses for 1,500 Tenderloin residents on Medi-Cal.76 In another subject area, augmenting the mitigation measures included in the Final EIR, the DA specifically obligated CPMC to subsidize public-transit monthly passes for employees to reduce traffic, pollution, and greenhouse gas production.77 These provisions were performance-based. They involved more than just writing a check, and they required ongoing, diligent monitoring.

Having obtained much of what it wanted substantively, SFHHJJ still had several procedural concerns. Starting in April and until a week before the Board of Supervisors on June 25 took definitive action on the CPMC project, SFHHJJ sought two changes regarding the DA's implementation. The first concerned obtaining a guarantee from the City that it would provide for a specific role for SFHHJJ in monitoring developments under the DA. The second concerned the public review process if any future amendments occurred to the DA, altering its terms.

With respect to the first, the San Francisco ordinance authorizing Development Agreements anticipated participation by community groups in carrying out DA provisions. Such participation could be provided through a "collateral agreement" between the community group and any one of the parties to the DA either at the time of the DA or at a later time.78 The stated purpose for having collateral agreements was to permit the use of community groups to "provide for and implement social, economic, or

74. Id., Exh. E at 16.
75. Id., Exh. F at 1-4.
76. Id., Exh. F at 8.
77. Id. at 3 & Exh. K at 5.
78. S.F. ADMIN. CODE §§ 56.2, 56.3(c), 56.11.
environmental benefits or programs” set forth in the DA.\(^79\) Giving a formal monitoring role to a community coalition was a novel but not unsupport-able interpretation if one liberally construed the meaning of “benefits or programs” and took into account the ordinance’s strong language regarding community group participation. SFHHJJ’s main concern was the potential for problematic implementation of nonmonetary provisions of the DA, such as those covering commitments regarding charity care and healthcare services, transportation and traffic mitigations, and permanent jobs for San Francisco residents. It was felt that a formal role for SFHHJJ in gathering and assembling information on certain key matters, not just as an outside advocate, would provide additional community leverage and better insure that both CPMC and the City would live up to the DA’s terms.

City administrators and the City Attorney’s Office were adamant in their opposition to having the City in any way entering into a collateral agreement with SFHHJJ regarding the CPMC Development Agreement. At the Planning Commission meeting on May 23, prior to a vote on a resolution recommending to the Board of Supervisors the adoption of the CPMC DA, a deputy city attorney made the legally preposterous argument that any collateral agreement would “guarantee successful litigation” against the City. The effect was that four members of the Planning Commission, who had previously spoken in favor of entering into a collateral agreement with SFHHJJ, backed down.

In the weeks that followed, SFHHJJ leaders pressed the need for a collateral agreement with the mediator. On June 14, he reported by telephone to SFHHJJ participants assembled together in a meeting that he had been unsuccessful in obtaining the support of City administrators and the City Attorney’s Office. They did not want to establish a precedent for having a collateral agreement covering the monitoring of a DA’s provisions. The mediator further explained that while a number of supervisors were willing to hold out for a commitment by the City to enter into a collateral agreement with SFHHJJ, CPMC and Sutter Health representatives would back out of the deal if there were such a commitment. They would regard any commitment to a collateral agreement with SFHHJJ as a change in the terms of the DA and would demand a re-opening of negotiations on key issues. SFHHJJ leaders made the decision not to make a collateral agreement a do-or-die matter. Too much was at stake, and the prospect of a collateral agreement was still open to be raised at a later date. Had SFHHJJ obtained the guarantee from the City that it wanted, the Development Agreement in its implementation would have functioned much more as though it were a Community Benefits Agreement.

Contrastingly, SFHHJJ did prevail on the second procedural issue regarding the public process for reviewing amendments to the DA. The draft before the Planning Commission limited the review by the Planning Commission and the Board of Supervisors of nonmaterial amendments

\(^{79}\) Id. § 56.3(c).
and established an exception to the standard notice and review procedures for amendments provided in the San Francisco Development Agreements ordinance. Shortly before a June 17 Board of Supervisors Land Use Committee hearing on the CPMC project, the mediator contacted the SFHHJJ to report that both the City and Sutter/CPMC agreed to a revision proposed by SFHHJJ that would restore in full the DA ordinance amendment procedures. Though not stated by the mediator or anyone else, this change may have been an attempt at a concession for SFHHJJ having backed away from insisting on a collateral agreement guarantee. The end result was important, as it avoided potential future disputes over what might be a minor or material amendment. It also insured that any DA amendment would be publically noticed and could come before the Planning Commission and the Board of Supervisors for approval.

The Land Use Committee meeting was the final step before full Board of Supervisors review of all the documents required to authorize the CPMC project. With public comments, the Committee meeting lasted several hours. SFHHJJ participants did not object to the enactment of any authorizing actions. On June 25, the Board of Supervisors certified the final EIR, initially approved the DA, and authorized several ministerial land-use decisions. Several of the supervisors publically acknowledged the key role played by SFHHJJ in the San Francisco’s review of the CPMC project. On July 9, the Board enacted the land-use ordinance amendments needed and an ordinance giving final approval for the Development Agreement and authorizing the City Planning Director to execute the DA on behalf of the City.

Four years before in early summer 2009, Tenderloin community organizers had brought together San Francisco neighborhood activists and health-care union organizers to work in coalition to reshape CPMC’s Long Range Development Plan, to improve low-income patient access to its healthcare services, and to obtain other project-related community benefits. It was a long and hard haul. Throughout, the effectiveness of such coalition work reflected the political and policy astuteness of those in the leadership core and their ability to garner visible and notable grassroots support.

In providing legal assistance from the start, the Hastings CED Clinic’s role was integral. It involved doing factual and legal research, participating regularly and continually in internal discussions and external meetings with public officials, and collaborating in the development and refinement of public positions, including as needed taking the lead in the preparation and presentation of backup material and arguments. The Clinic’s involvement has not been as intense in subsequent years, but it has been similarly supportive and complementary.

80. Id. § 56.15.
81. CPMC Development Agreement, supra note 5, at 42–43.
82. Id. at 4.
83. Id. at 5.
E. Implementation Monitoring—Dilemmas and Opportunities

The changes made in the Development Agreement were a climactic achievement. The City and CPMC set the final DA's effective date as August 10, 2013. The DA’s term of applicability is ten years. A follow-up task for SFHHJJ has been and continues to be monitoring the implementation of the DA’s community benefits provisions.

While no issues regarding CPMC’s payment of its financial obligations have arisen, the monitoring of its performance-based obligations has been dilemma-ridden. Participating in the annual compliance-review process has been frustrating yet also opportune. The chief dilemmas are rooted in the DA itself and who has direct responsibility for its implementation and enforcement. The opportunities lie in calling attention not only to CPMC’s performance under the DA but also to related healthcare service issues not covered by the DA.

As a first matter, the DA spells out a far-from-ideal process for annual reviews. A main underlying problem has to do with delays in receiving information and then obtaining a final decision from City decision-makers. Most reporting is on a calendar-year basis with CPMC’s report not due until the end of May of the following year. With time built-in for public comments, which have been almost exclusively from SFHHJJ, and a multistep review process that involves a joint hearing before the Planning and Health Commissions, it is not until near the end of the year, and sometimes even into the next year, that the City issues a final decision on compliance, at which time pressuring for specific remedial actions comes across as off-kilter. The principal reason is that CPMC shortly thereafter begins, or already has begun, preparing its report for the recently ended year. Anyone criticizing CPMC at that time in the review process, whether with the City or from the community, is in a paradoxical position. There is, practically speaking, a mootness and a ripeness problem. It is too late to feel comfortable taking decisive action regarding lack of full compliance based on information a year old not knowing where things now stand, and it is too early to know fully what happened during the about-to-end or just-ended year and therefore what corrective actions are still needed.

84. Letter from CPMC attorneys to S.F. Director of Planning, Confirmation of “Effective Date” and “Finally Granted” Date as Defined in the California Pacific Medical Center Development Agreement” (Nov. 19, 2013).
85. CPMC Development Agreement, supra note 5, at 14.
86. Id. at 32.
87. Copies with dates of CPMC’s Compliance Statements, the City’s Annual Reports, Certificates of Compliance, and the Third Party Monitor Letters re: Compliance with DA Obligations are available online at http://sf-planning.org/cpmc-annual-compliance-statements. All these written documents are part of the annual review process. The Third Party Monitor Letters so far have been prepared by the mediator who facilitated the negotiations leading up to the final DA and have been filed after issuance of the Certificates of Compliance.
Additional exasperating factors are that the standard for review is not “actual compliance” but “material compliance,” and that performance-based public benefits require only “good faith” efforts. In short, the DA’s performance review process is structurally awkward and formally toothless. At the very least, it would have been helpful had the DA provided for earlier and interim reporting of relevant data and information.

The second dilemma involves ritualistic compliance from CPMC and City officials, which is not to say that the process from their standpoints has not been time consuming and labor intensive. Rather, it means that they have viewed narrowly their roles in the review process. In particular, opportunities for detailed factual breakdowns of the data presented or for spelling out pro-active corrective measures and remedial steps have been disregarded. For CPMC, the paperwork provided mainly comes across as a checking-the-box process, notwithstanding all sorts of attachments. While not surprising, CPMC rarely acknowledges in its reports the shortcomings in its performance or what it intends to do to rectify any problems. The statements and actions from City officials, for the most part, have had a similar feel. Some pointed comments have been directed at CPMC’s performance by City officials but almost never in the City’s annual reports and final compliance decisions, which have been largely devoid of any suggestions for remedying deficiencies in CPMC’s implementation of DA terms. The City Planning and Health Directors are charged with making the final decisions. For the four review cycles so far concluded, CPMC has been found each time to have met its DA obligations.

The third dilemma relates to the previous two dilemmas. It concerns problematic DA enforcement procedures, which are unlikely to be invoked and, as directed at CPMC, are at best only a very weak threat. The legal remedy for a breach of the Development Agreement is specific performance, with provisions for liquidated damages if a CPMC breach involves a performance-based, not a financial, obligation. The DA includes a provision that explicitly prohibits any enforcement action by third-party beneficiaries, which consequently means that any legal action to enforce the DA’s terms only can be instituted by the City or CPMC. SFHJJ or anyone else has no standing to seek remedies. Furthermore, with respect to certain pivotal healthcare delivery obligations, there is an arbitration provision, which requires that any such dispute be brought before a mutually agreed private arbitrator. Arbitrations are not public proceedings, and the grounds for judicial review of an arbitration award are nar-
row and usually require corruption, fraud, or comparable misconduct. Additionally, the greater flexibility in an arbitration as compared to a court proceeding likely leaves even more room for downplaying performance deficiencies as meeting standards of “good faith” and “material compliance.” In the absence of CPMC flagrantly acting in bad faith, the chances of the City invoking or even threatening to use the DA’s enforcement provisions are next to nil.

A fourth dilemma is internal to SFHHJJ and dynamics of grassroots organizing, though to date it has not been an impediment. The dilemma involves two related components: the first is how to sustain over time sufficient grassroots engagement, especially when issues are less high profile; the second is how to manage inevitable changes in the group’s leadership core.

Challenging CPMC’s reconfiguring of its hospitals involved a series of actions that were highly visible publically, required San Francisco governmental approvals, implicated both neighborhood and labor interests, affected access to healthcare services, and centered attention on a common target whose record in serving the poor and bargaining with workers in a union-supportive city was questionable and provocative. During the period leading up to the final DA, the organizations that banded together in coalition maintained throughout a high degree of unity. This unity reflected a deeply understood sense among the participants that much could be gained by supporting each other. The mutually shared enhancements in advocacy effectiveness mainly came from sharing internal organizing responsibilities and reaching a pre-public consensus on issues and how to proceed, a heightened capacity for generating and applying policy expertise covering a fairly broad range of issues, and a greater capability in turning out mass support when needed from affected neighborhood residents and labor union membership. Over time, however, sustaining the same broad level of grassroots engagement, without a calamitous event, is a near impossible task.

A coalition without its own staff and financial resources depends, although not exclusively, on the time-pressured availability of staff and the limited financial means of its constituent organizations, which most often make decisions based on immediate priorities. There are also constraints on how hard to push issues so as not to lose credibility with public officials, the media, and a coalition’s own past, present, and potential supporters. Not all concerns call for a full-court press. Specifically with respect to CPMC, the monitoring of the DA has been a more pedestrian and less inclusive undertaking than the concerted effort to shape and affect its terms. In particular, there has been a drop-off in active participation from nonprofit affordable housing and other neighborhood organizations. The main reason is that from their standpoint the DA benefits of most interest involved cash benefits, most prominently the $36.5 million for affordable housing, over which there have not been implementation issues regarding CPMC’s compliance.
Since summer 2013, those most active in SFHHJJ mainly have been associated with the labor movement or have ongoing interests in San Francisco healthcare policies and CPMC’s performance as a healthcare service provider. Labor union continuing involvement is structurally tied to the representation of workers at CPMC campuses. For the participating labor organizations, such involvement also corresponds with long-standing concerns regarding healthcare policies and practices as they affect patients as well as workers. Both the California Nurses Association and the National Union of Healthcare Workers have a substantial history of engagement in San Francisco healthcare policy advocacy, and Jobs with Justice SF, the other major labor component to SFHHJJ, self-identifies as the progressive arm of the organized San Francisco labor movement on economic and social policy issues. In terms of non-labor union participation since the DA’s effective date, the most steady nonprofit staff involvement has come from a few community organizations, for instance, most recently San Francisco Senior and Disability Action and, since the beginning, the Council of Community Housing Organizations (CCHO).

Along with changes in the dynamics of organizational participation have been internal changes in organizational personnel regarding who functions as the staff representative in SFHHJJ’s core leadership, as well as changes in staff participation from the most active unions and from CCHO. Until summer 2018, the director of Jobs with Justice SF filled a key role as SFHHJJ’s coordinator. At that time, he resigned his labor-affiliated position to seek a seat on the San Francisco Board of Supervisors and reduced his involvement with SFHHJJ, which totally ended after he was elected in November. In his place, others have stepped up to schedule meetings, to set agendas, and to serve as SFHHJJ’s contact person.

In light of constituent organization staffing changes, a saving grace for SFHHJJ has been that among its most engaged participants have been volunteer activists, some unaffiliated and some associated with grassroots groups with a history of healthcare advocacy, such as the Grey Panthers and the Older Women’s League. Most of the volunteer activists are near or more than 70 years-old. For much of SFHHJJ’s history, three volunteers stand out—a retired public health administrator and activist with decades-long ties to San Francisco groups working with homeless and low-income individuals, a retired doctor who spent much of his career at St. Luke’s Hospital, and a CCHO founder and long-term, now retired, staff member. Since 2017, a retired geriatric physician has been highly active with SFHHJJ in the focus on subacute care beds and other post-acute care services in San Francisco.

There have been both continuity and fluidity within the SFHHJJ core leadership, which has varied between a half dozen and dozen people at any given time. Unquestionably, the experience and intelligence of the aging volunteers has been especially valuable. Looking to the future however, it is hard to envision that SFHHJJ survives without an influx of
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younger individuals from the staffs of participating organizations or as highly engaged volunteers.

An additional constant in SFHHJJ’s work has been the Hastings CED Clinic. In the nine years since community organizers created a coalition to challenge CPMC’s Long Range Development Plan, relatively few meetings and plans for actions have taken place without the participation of Clinic law students or lawyers. Like other organizational involvements, there have been shifts in personnel. While the institutional reason for Clinic participation rests on giving students hands-on lawyering experience, student direct involvement is not always feasible when providing long-term representation. Crucial moments occur when classes are not in session. Curricular staffing and enrollment also affect law school clinic offerings. At those times, clinic faculty have had to assume the primary role.

In summer 2013, I formally retired and became an emeritus professor. Fortunately my colleague Ascanio Piomelli decided to take on the directorship of the CED Clinic. I have continued to participate in SFHHJJ work as a pro bono Clinic lawyer. In terms of what has needed to be done, Piomelli has taken the lead in working with SFHHJJ on the monitoring of the Development Agreement and on miscellaneous assignments. Whenever opportunity, he has involved two-person or three-person teams of law students. I have served as legal backup and for the last few years as lead lawyer on the various issues that have arisen around post-acute care services in San Francisco.

For SFHHJJ, monitoring the DA has not been just about the implementation of its terms. It also has been an opportunity for seeking to affect CPMC’s healthcare service delivery practices in other ways and for calling attention to citywide healthcare service delivery problems generally. SFHHJJ’s credibility and visibility as a community-based advocate leading up to the DA have carried over into the post-DA period. While direct interchanges with CPMC’s administrative staff have been erratic, SFHHJJ has had a constructive continuing relationship with San Francisco Department of Public Health officials, including meetings with the director and other high level administrators, and has maintained strong ties with members

94. In our respective writings on community and social justice lawyering, Piomelli and I have tended to focus on somewhat different issues and analytic concerns. For Piomelli, see, e.g., Ascanio Piomelli, Rebellious Heroes, 23 CLINICAL L. REV. 283 (2016); Ascanio Piomelli, The Challenge of Democratic Lawyering, 77 FORDHAM L. REV. 1383 (2009); Ascanio Piomelli, The Democratic Roots of Collaborative Lawyering, 12 CLINICAL L. REV. 541 (2006); Ascanio Piomelli, Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering, 2004 UTAH L. REV. 395 (2004); Ascanio Piomelli, Appreciating Collaborative Lawyering, 6 CLINICAL L. REV. 427 (2000). For Aaronson, see, e.g., sources cited infra note 100. From my observations in our working with SFHHJJ, he and I have varied little in how we have approached lawyering roles and have carried out counseling and representational responsibilities.
of the San Francisco Board of Supervisors even as the Board’s composition changes. SFHHJJ also has served as a fulcrum for healthcare advocacy for others in San Francisco, particularly patient groups targeted for service cutbacks by CPMC. On the downside, SFHHJJ has not been able as part of the annual review process to persuade the City to agree to a collateral agreement, where SFHHJJ would have a contractual role in monitoring aspects of the DA’s implementation. Strong opposition has continued to come from the City Attorney’s office.

Focusing on explicit DA provisions, the problematic implementation issues of primary concern to SFHHJJ have involved both healthcare and non-healthcare matters. As to non-healthcare issues, CPMC was slow in establishing a public transit subsidy program for its employees and in meeting the local hire target goals for permanent entry level positions. The former did not begin until January 2017, rather than two years earlier as set forth in the DA. Suggesting lackluster promotion of the program, only eighteen percent of CPMC’s workforce so far has taken advantage of the subsidy.\footnote{95. Annual City Report on 2017 CPMC Compliance Statement 70 (Aug. 8, 2018), http://default.sfplanning.org/publications_reports/cpmc/2017_Annual_City_Report _Long_Range_Development_Plan.pdf.} Regarding its permanent workforce, CPMC did not meet the forty percent local hire target goal the first year but has exceeded it in subsequent years. An unexpected twist is that CPMC’s overall hiring for new entry level positions, as computed for the 2017 annual report, was lower than was assumed it would be during the DA negotiations. There were only fifty-eight new employees hired, of which thirty-three (fifty-seven percent) came from targeted low-income San Francisco neighborhoods.\footnote{96. Id. at 20.} Neither CPMC nor the City has provided an explanation for the reported downturn in hiring.

With respect to healthcare, the main DA implementation issues have concerned provisions directed at increasing access for Medi-Cal and other low-income individuals to CPMC hospital facilities. One example is a provision requiring that CPMC provide hospital-based services to 1,500 new Medi-Cal patients living in the Tenderloin. There have been practical complications due to both a lack of a qualified medical clinic in the Tenderloin to make Managed Medi-Cal coverage referrals and the distance from the Tenderloin to the existing CPMC campuses. The campus on the border of the Tenderloin, now named the Van Ness Campus (not Cathedral Hill Campus), is scheduled to open in March 2019. As of May 2018, only 176 Tenderloin beneficiaries had enrolled in the specific program.\footnote{97. Id. at 35.} Another example involves the baselines and targets set for providing services to unduplicated Medi-Cal and charity care patients from throughout San Francisco. Specific problems raised by SFHHJJ concern whether a countable service includes outpatient treatment, not just inpatient hospitaliza-
tion, and the sampling methodology used for determining the number of patients being served. Other areas of concern have been changes in staffing at the Diabetes Center on the St. Luke's (now Mission Bernal) Campus that have resulted in no bilingual professionals, or even a receptionist, being permanently assigned to serve a substantial Spanish monolingual patient population; the lack of advanced planning for Senior and Community Health Centers of Excellence at the new Mission Bernal Hospital; and major reductions in hospital-based Skilled Nursing Facilities on CPMC campuses.

During each annual compliance review period, SFHHJJ submits written comments in response to CPMC's Compliance Statement and critically reviews the City's subsequent Annual Report regarding CPMC's compliance. A joint Planning and Health Commissions hearing is held at least thirty days after the publication of the City's Report and prior to a final compliance decision by the directors of the Planning Department and Department of Public Health. At the hearing, SFHHJJ members in an organized presentation provide public testimony highlighting shortcomings and oversights in the two formal reports. In consultation with SFHHJJ activists, the CED Clinic director prepares and submits SFHHJJ's written comments and usually joins in providing oral testimony at the hearing. Because of insufficient attention to or resolution of problems identified by SFHHJJ, its comments and testimony each year have a familiar and recurring ring.

Although direct gains for SFHHJJ's constituents from its participation in the compliance review process have been limited, its perseverance has not been misdirected. The chief benefits and advantages have been institutional. Such participation legitimates on a regular basis SFHHJJ's position as a major advocate for grassroots concerns in interactions with CPMC. By not backing away after the DA negotiations, SFHHJJ has remained a thorn in CPMC's side. At the very least, CPMC has had to take into account that SFHHJJ's ongoing scrutiny could lead to unwanted public attention and consequent costs, politically and economically. SFHHJJ's persistence also has meant that City officials have continued to take its positions seriously. SFHHJJ has been able to nudge public officials to pressure CPMC, and to place and frame issues on the public healthcare agenda, in ways that otherwise might not have happened. Lastly, SFHHJJ's ongoing public visibility has meant that concerned individuals and groups not previously active in its advocacy know where to seek support or to join as a participating member.

On August 24, 2018, Sutter Health/CPMC heralded the opening of its new Mission Bernal Campus with a Blue Ribbon Cutting Ceremony. As reported to me, a former CPMC executive, who ran into a retired physician activist at the Blue Ribbon Ceremony, said, "I wanted to close this place down. You wanted to keep it open. You won." A hospital that CPMC at first had no interest in building, and then questionable interest in keeping open, was now lauded as a major step forward in healthcare service
delivery in San Francisco. SFHHJJ activists had mixed feelings. There still was a viable hospital on the St. Luke’s site. Yet, there was every reason to be skeptical about whether the services provided would be as accessible and as tailored to meet the needs of a low-income patient population as they were at the old St. Luke’s Hospital.

IV. Accessibility, Responsiveness, and Judgment

Functionally fulfilling a role similar to an in-house counsel, the Hastings CED Clinic was an active participant in almost all of the advocacy planning and actions described in this article. Sometimes the Clinic took the initiative in identifying a not-obvious assignment and carrying it out. Good examples were the Clinic’s keeping tabs on CPMC’s Long Range Development Plan during a quiescent period prior to 2009 and the preparation of the Profits & Patients report. Other times the Clinic took on a major assignment that lawyers, if available, ordinarily would handle, for instance, the extensive work undertaken as part of the Environmental Impact Report process and the principal drafting of SFHHJJ’s comments on the annual CPMC Compliance Statement. Much of the time, the Clinic’s and SFHHJJ’s interactions were interwoven into a single fabric of advocacy. A notable example of the distinctive contribution of lawyers, though still working closely with other SFHHJJ participants, was the formulation of the legal basis for seeking an affordable housing mitigation fee from CPMC. No matter what the task and circumstances, the Clinic’s effectiveness in working with SFHHJJ and the predecessor coalitions owed much to the political, policy, and organizational sophistication of their lead activists.

Equally important, however, was the Clinic’s approach to lawyering for progressive social change. As I noted earlier in this article, much rests on a lawyer’s sense of role and self-discipline in role performance. The key attributes that I emphasize are accessibility, responsiveness, and judgment. They are not skills per se but instead are inner dispositions, habits, or mindsets that bear on how one exercises various skills and seeks to achieve client goals. In my conception of good lawyering, they are pivotal underlying virtues. Their cultivation orients lawyers on what to do to complement and supplement actions of grassroots activists in ways that are supportive and not undermining in achieving short-term and long-term objectives.

Accessibility is not a usual term in the lawyering literature, but it is not an out-of-place idea. Indeed, in terms of client complaints about lawyers, one of the most common, and probably the most common, is that “my lawyer won’t get back to me or return my phone call.” Accessibility also fully resonates with conceptions of client centeredness, which in the shaping of understandings about best practice client relationships has become the single most dominant idea in contemporary clinical legal education. The touchstone for client centeredness is a profound respect for the

perspectives, viewpoints, and autonomy of others. The notion of accessibility adds a dimension that goes to a lawyer's genuine openness and actual availability to clients in ways that enhance meaningful professional relationships. Telling the group to "call me when you need me" will not do the job.

If one structural element in the Clinic's working relationship with SFHHJJ has mattered the most, it was the regular attendance by students and faculty members at coalition meetings and their capabilities in listening attentively to what others had to say. In grassroots coalitions, lawyers need to convey a strong sense of presence, but not in a dominating manner if they strive to be viewed as genuinely accessible. An especially important benefit of such presence is the furtherance of mutual trust.

Responsiveness and judgment lie at the core of what it means to act responsibly and effectively with or on behalf of others. They are complementary concepts whose development and application are contextually specific and largely dependent on learning from practical experience. As I have written extensively elsewhere about each, I provide here only brief summary descriptions. My own ideas heavily draw on concepts from normative political theory.

Responsiveness involves paying attention to big-picture issues and telling details. As a lawyer, responsiveness begins with a shared appreciation of purpose with those represented. The lawyer has to understand the priority values, interests, concerns, and goals of clients and commit to seeking their accomplishment. The strength of this bond of understanding greatly depends on the integrity of the lawyer—that is, his or her continuing willingness to act consistently with the encompassing reason for the representation. The overarching shared sense of purpose then needs to be formulated into concrete objectives that address particular problems. This narrowing of focus raises questions of substance and means. There are always choices to be made about what issues to address and what approaches or techniques to use to advance the interests of those assisted.


101. See, e.g., Hanna Fenichel Pitkin, The Concept of Representation 209 (1967). Drawing on ideas from traditional normative political theory, Pitkin in this seminal book presents a conceptual analysis of modern democratic representation. While she was not addressing lawyering, strong parallels exist from her writings to what it means to provide responsible legal representation and assistance. In describing the purpose of her analysis, Pitkin states, "Learning what 'representation' means and learning how to represent are intimately connected." Id. at 1. There are also here strong parallels to the need for critical self-reflection to best learn from one's lawyering experiences.
In a word, the lawyer has to be resourceful and flexible and always be mindful of what matters the most to the client.

Rigidity is the bane of responsive lawyering. The resourcefulness and flexibility associated with responsiveness continually call for critical assessment of situational factors and one’s own role. Determinations about the appropriateness of actions undertaken have to take into account direct and indirect effects and consequences that both further and push back against the client’s objectives. Being responsive requires anticipating and adjusting to what needs to be done, to having a sense of proportion, and to not being doctrinaire or just reactive. In what is a reiterative process, the responsive lawyer is ever alert to the need to adapt and to make adjustments in light of changing circumstances and new insights.

The Clinic’s involvement with CPMC started with my sensing an opportunity to obtain a Community Benefits Agreement (CBA). Several initial Good Neighbors Coalition and then SFHHJJ participants were skeptical about the feasibility of a CBA. They favored a Development Agreement (DA), an approach to binding private parties that had been successfully used in the past in San Francisco. The downsides of a DA are that community groups typically do not have a seat at the table and the benefits negotiated by governmental agencies are more likely to be weak and more symbolic than real. For CBAs to happen, the private party needs to be willing to negotiate in good faith with a grassroots coalition. With respect to CPMC, that never was the case. An idea that might have been feasible in other circumstance was not in the cards. SFHHJJ with the full backing of the Clinic, rightly focused on setting the stage for a DA that did make a difference and did provide real community benefits.

By judgment, I mean “practical judgment,” which is a process of reasoning directed at action or policy, not abstract theoretical issues. The crux of practical judgment is what the political theorist Hannah Arendt translating from the French *le bon sens* called “the good sense.”

Effective exercises of judgment ultimately depend on the ability to persuade others of the good sense of one’s position. The idea of “good” in good sense speaks to the importance of an individual’s moral as well as intellectual development. In lawyering, both are essential. Lawyers can problem-solve and manipulate information and situations shrewdly. Too often, however, such behavior can belie what it means to say someone has good practical judgment. Losing or burying a document in discovery might cleverly work, but no one is going to say that a lawyer who has so acted has good judgment.

Arendt characterized applying good sense to influence decision-making as a process of wooing. Her idea of wooing is highly respectful of the autonomy of others. It is about educating, not manipulating, people. While

103. Id. at 222.
the notion of wooing sounds awkward in a lawyering context, Arendt’s description actually fits quite well, especially when trying to help someone else make a decision—for example, a lawyer’s role in counseling. To do this well, an attorney has to know the client’s concerns and values, to have the trust of the client, and to convey information and advice in ways most likely to be heard and understood.

No one can teach good judgment. It is something that develops, if at all, with experience. Making mistakes and learning from them are a crucial part of the experience. It is possible, however, to help law students and lawyers to exercise better judgment than they otherwise might have. One constant factor is to examine critically one’s experiences—to be explicitly self-reflective. Another is patience because developing judgment involves a deep internalization of past knowledge and experience, which does not happen overnight. An especially important step is learning what is involved in exercising judgment.

In this regard, I have emphasized five key characteristics as central to the kind of judgment needed in lawyering. They are (1) the contextual tailoring of knowledge and experience, (2) a dialogic form of reasoning that accounts for multiple points of view, (3) an ability to be empathetic and detached at the same time, (4) the intertwining of intellectual and moral concerns, and (5) an instrumental and equitable interest in human affairs. These descriptive features are overlapping, rather than distinct and separate. All were at play in how the CED Clinic worked in coalition.

The background details provided in this article’s narrative section set a context for understanding why particular decisions were made and specific courses of action were pursued. There were judgment calls, and they were not made precipitously. The strategies and tactics involved the targeted tailoring of collective knowledge and experience and were the product of thoughtful group discussions that took into account the views and interests of constituent organizations, allies, public officials, and adversaries. Attorney expertise and initiative had a role but in a highly collaborative and integrative manner. The extent to which SFHHJ was able to influence major terms of the DA was unusual. It would not have happened without lay leaders exercising sound practical judgment. The key to effective lawyering was fully appreciating specific circumstances and knowing when, in what ways, and how much to contribute to the group decision-making process.

104. For how I have sought to accomplish this objective, see Mark Neal Aaronson, Judgment-Based Lawyering: Structuring Seminar Time in a Non-Litigation Clinic, in Susan Bryant, Elliott S. Milstein & Ann C. Shalleck, Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy 81–90 (2014).

105. For background sources and a full explication of my reasons for emphasizing these characteristics, see Aaronson, We Ask You to Consider, supra note 100, at 250–85.
The critical dynamic in developing good lawyering judgment is the ability to be both empathetic and detached.\textsuperscript{106} For everyone, it is always hard to put oneself in someone else's shoes. It requires imagination and compassion. It is never done perfectly. But it is absolutely necessary in helping others make decisions in light of what matters most to them. Detachment is also challenging, especially for a lawyer committed to the cause of a client group. One has to distance oneself not only from feelings for others, which are at the heart of empathy, but also from one's own feelings. The distancing is essential because it is important to account for the whole picture—both supportive and opposing information and aspects. Because empathy and detachment are in tension with one another, reconciling the two is difficult.

As a lawyer for SFHHJJ, I cared strongly about a lot of the issues. As part of my sense of role conception, I chose not to vote the few times there was an actual vote. I also refrained from explicitly joining in any consensus decision. Though what I was doing was probably more symbolic than tangible, not voting kept me alert to the value of providing professional counseling and not getting overly caught up in the emotions of a situation. It also lowered the prospect of my inadvertently jeopardizing the trust and confidence of those within the coalition who viewed matters differently.

Public policies have both intellectual and moral content. To get things done politically, groups need to act instrumentally. But fairness and equity also count, even during dark political times. Healthcare is the kind of issue where moral claims have political appeal. SFHHJJ well understood this connection. In the San Francisco political arena, CPMC found itself on the wrong side. Its bottom-line financial interests were too evident. Not wholly but importantly because of the moral appeal of its positions, SFHHJJ was able to outmaneuver CPMC. The San Francisco political order responded far more favorably than anyone would have expected at the beginning of the struggle, especially when SFHHJJ was able to utilize favorable land-use and environmental laws. In the end, however, grassroots pressure and public official outcries had limitations. With respect to healthcare policies, CPMC had and still has the law on its side and full autonomy to decide what healthcare services to provide.

V. Conclusion: Internal Dynamics and External Circumstances

For almost a decade, a coalition of neighborhood and citywide groups, nonprofit affordable housing organizations, labor unions, and individual activists, which came to be known as San Franciscans for Healthcare, Housing, Jobs, and Justice (SFHHJJ), generated sufficient political pressure to cause the largest fee-for-service private hospital chain in San Francisco to alter substantially its development plans and to be called, repeatedly and publically, into account for its failure to do its fair share in meeting

the healthcare needs of San Franciscans, especially low-income residents. While there were fluctuating levels of involvement depending upon the specific issue, SFHHJJ throughout maintained enough constituent group support and accompanying cohesiveness to be a credible, repeat player in San Francisco politics. A potential source of division—differences in union and neighborhood priorities—turned out to be a political strength. SFHHJJ’s core participants early on recognized that much could be gained by sticking together and working in mutual alliance. There was more political and policy expertise to draw on and a greater ability to turn out mass supporters when needed.

SFHHJJ is a successful example of diverse groups working in coalition for progressive social change. But the future is fraught with uncertainty. Particularly for an informally structured coalition like SFHHJJ, survival is fragile.

The ever-present internal challenges are to be continually responsive to issues affecting ordinary and especially low-income San Franciscans and to sustain, rekindle, broaden, and deepen neighborhood, labor, and citywide organizational involvement in its activities. The assistance and support of the CED Clinic have been productive and have provided a stabilizing presence. How and what the Clinic does going forward is a work in progress, with the exact roles and assignments for lawyers and law students still to be determined.

There are, as well, external challenges. SFHHJJ has to contend with always changing political and social circumstances. During the past decade, changes in the national economy and politics and, specifically, in healthcare policies and practices have been especially dramatic. The nation’s economy has gone from a deep recession to a substantial recovery but with striking inequalities. Politically, rarely have changes in presidencies had such a pervasive and, at the moment, disruptive impact on the entire society. For healthcare policies and practices, the prime example is the unsettling effects of the ups and downs of Obamacare and shifting expectations about federal involvement and financial support.

Local circumstances are overwhelmingly important. In San Francisco, factors such as a large immigrant population, homelessness, housing costs, and traffic congestion all have major effects on the delivery of healthcare services. In terms of local politics, so much depends on personal relationships, and constant changes in office have occurred. Since 2008, the City has had four different mayors, and, come January 2019, there will be a complete turnover in who sits on the Board of Supervisors. A recent surprising development has been the late summer 2018 resignation of the Public Health Director with whom SFHHJJ had a constructive relationship.107 Such changes set new opportunities and new obstacles for grassroots activists.

All of this is to say that social-cause lawyering is highly circumstantial. It is why I chose to provide a detailed narrative of the Hastings CED Clinic's work with SFHHJJ. It is also why I emphasize as lawyering virtues the importance of accessibility, responsiveness, and judgment. Good lawyering encompasses much more than the law. In progressive lawyering especially, the decisive factors are how one interacts with client groups and what in addition to the law one takes into account in a specific context.

Particularly at this time, when partisan divisions are extreme, a striking need exists to bring constituent groups together in coalition to transcend tribalism and negative aspects of identity politics, to fight for progressive social change, and to resist an onslaught of authoritarian challenges to our constitutional ideals and commitment to the rule of law. In such efforts, lawyers who are accessible, responsive, and capable of good judgment are the ones who will be most valuable.