

# Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations<sup>1</sup>

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## I.

## INTRODUCTION

The opportunity to develop a Community Benefits Agreement (CBA) typically arises when a developer announces plans to construct a major project, such as a stadium or a theater complex. Local residents and business owners may often welcome these projects, but they may also have legitimate fears, such as: Will the project displace local residents and local businesses, either physically or through gentrification? Will it cause traffic problems and generate noise, pollution, or other nuisances? Will the economic development benefits espoused by the developer actually create jobs that pay a living wage and offer decent benefits for residents in the neighborhood or in a larger geographic community? Will the developer seek and/or welcome public participation in the project design and review of environmental and community impacts? In short, will the developer and the resulting built project be good neighbors?

The CBA movement was born in the late 1990s as a mechanism for community groups to organize and work collaboratively to communicate and negotiate directly with developers. CBAs allow community groups to address a multitude of community impacts and opportunities that the host municipality may not have legal authority and/or the political will to discuss otherwise. Usually framed as private agreements (with or without municipal involvement), CBAs may require a developer to mitigate potential impacts of the development. But often they go even farther, asking the developer to work with the community to improve housing, employment options, and recreational and cultural facilities. As a result, CBAs can empower communities to become active participants in the planning process. Because of their po-

tential to improve communities' quality of life, CBAs are becoming increasingly popular.

While CBAs are ardently supported by many stakeholders as a tool for obtaining amenities that might otherwise be unavailable, it should not be assumed that they are always ideal vehicles to promote social justice issues. Practical problems—from organizing coalitions of community groups to negotiating with legally and politically sophisticated developers—sometimes combine to make the process of negotiating a successful CBA an unwieldy exercise. Moreover, CBAs have yet to stand the test of judicial review. When they do reach the courts, they will undoubtedly raise numerous issues of contract validity and interpretation. Additionally, where municipalities may be a party to the CBA and/or may give administrative or legislative validity to a privately negotiated agreement, delegation and enforcement issues are likely to arise.

This article offers an analysis of legal and policy issues surrounding the development, implementation and enforcement of CBAs. Part II offers a general explanation of CBAs—what they are, what types of benefits they commonly include, and how they are negotiated and finalized. Part III briefly discusses the reasons behind the popularity of CBAs, and explains how they have been tied to smart growth and other social justice issues. Part IV reviews select CBAs from various cities, offering examples of successful models as well as discussing more controversial efforts. These case studies not only assist in understanding the dynamics of the CBA negotiating process, but also they illustrate some of the practical difficulties associated with the CBA model. These problems are discussed in greater depth in Part V. Part VI presents the legal issues surrounding CBAs, including questions of enforceability and validity. Finally, Part VII offers a checklist of items to be considered by developers, communities and municipalities before and during negotiations.

## II.

### WHAT ARE COMMUNITY BENEFITS AGREEMENTS?

A CBA is a contract negotiated between a prospective developer and community representatives. In essence, a CBA specifies the public benefits and amenities that a particular developer will provide to the impacted community in exchange for the community's support of its proposed project. Community support goes far to ensure that the development approval process will

occur expeditiously, and it may be especially useful to developers seeking government subsidies, zoning variances or permits.<sup>2</sup>

Negotiations for a CBA usually take place between the project developer and a coalition of community groups, which may include labor, environmental, civic, and religious organizations. Many CBA provisions are inspired by social justice concerns and desires of the coalition, including such things as: living-wage requirements, "first source" (i.e. local) hiring and job training programs, minority hiring minimums, guarantees that developments will include low-income and affordable housing, environmental remediation requirements, and funding for community services and programs.<sup>3</sup> Because CBAs are negotiated on a case-by-case basis, the benefits can be tailored to meet specific community needs.<sup>4</sup>

The flexibility of the CBA model is also apparent in the processes by which these agreements may be negotiated. Negotiations may be initiated by a developer or by a community coalition, and in some cases they may be encouraged by local officials.<sup>5</sup> Often, broad-based community input, gained through

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2. JULIAN GROSS, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9-10 (Good Jobs First 2005), available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>. For anyone interested in CBAs, Julian Gross' work is essential reading, providing a comprehensive analysis of CBAs in a highly readable style. In addition to making the development approval process easier, bargaining for community support may save the developer substantial sums of money in project financing costs as well as in potential legal fees resulting from proactive or defensive actions regarding the proposed development.

3. *Id.* at 10-11.

4. *Id.* This flexibility allows communities to address very specific needs, whether pre-existing or attributable to the proposed development. In Pittsburgh, for example, one of the primary benefits sought by the community in relation to the new Penguins hockey stadium is help in attracting a grocery store to the neighborhood. Residents have not had convenient access to a supermarket since the early 1980s. See Jeremy Boren, *Grocers may not desire Hill District site*, PITTSBURGH TRIBUNE-REV., Jan. 14, 2008, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_547352.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_547352.html). Another example in which a CBA was specialized to unique local needs involved an expansion of Los Angeles' LAX airport. The parties agreed that LAX would fund sound-proofing in nearby schools and residences. See GROSS, *supra* note 2, at 15-16.

5. Government involvement in CBAs has been widespread. In New York, the Columbia CBA was negotiated by a Local Development Corporation (LDC) created by the municipal authorities. Several seats on the LDC were filled by elected officials. See *infra*, pt. IV.B.2. City and county officials have also been heavily involved with negotiations concerning the construction of a new stadium for the Pittsburgh Penguins, as the stadium property is owned by the city-county Sports and Exhibition Authority and only leased to the Penguins. See Rich Lord, *Demolition begins at Penguins' arena site*, PITTSBURGH POST-GAZETTE, Apr. 11, 2007, available at <http://www.post-gazette.com/pg/07101/776848-61.stm>. In other states, CBAs may

public meetings, workshops and surveys, plays an important role in determining and prioritizing community goals. Community outreach may be initiated and facilitated by the emerging coalition, or the developer may attempt to coordinate a forum to ensure that an appropriate dialogue takes place.

After a CBA has been completed, it may, in some cases, be incorporated into a development agreement made between the developer and the municipality as part of the planning process.<sup>6</sup> Although this ensures a certain measure of transparency and also permits the government, as well as coalition members, to enforce the agreement, most states do not authorize local governments to enter into development agreements, so many CBAs will be enforceable only by the contracting community groups.<sup>7</sup> This reality raises a number of yet tested legal issues, including who will have standing to challenge and enforce privately negotiated CBAs, and whether these voluntary agreements, regardless of their terms, will be enforceable in a court of law.<sup>8</sup>

CBAs are considered by their supporters to be powerful tools for assuring that community impacts will not be overlooked

be incorporated into agreements reached between developers and local governments, and in these cases public officials also may become involved with the CBA negotiating process. See GROSS, *supra* note 2, at 9-10. It should be noted, however, that the involvement of public officials in this stage of negotiations does raise potential legal issues that should be carefully considered. See Salkin & Lavine, *supra* note 1, at n. 4.

6. A development agreement is a contract negotiated between a local government planning agency and a developer. In these agreements, the developer agrees to provide certain benefits to the public or to restrict the use of the land. In exchange, the local government promises to freeze the current zoning and land use laws for a certain period of time, thereby assuring that the development's construction will not be interrupted or stopped. See generally David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. R. 663 (2001). Development agreements have been authorized in about a dozen states, including: Arizona, ARIZ. REV. STAT. ANN. § 9-500.50 (2007); California, CAL. GOV'T CODE § 65864 (Deering 2008); Colorado, COLO. REV. STAT. §§ 24-68-101 – 106 (2007); Florida, FLA. STAT. ANN. § 163.3220 (2007); Hawaii, HAW. REV. STAT. § 46-123; Idaho, IDAHO CODE § 67-6511A; Louisiana, LA. REV. STAT. ANN. § 33:4780.22 (2008); Nevada, NEV. REV. STAT. § 278.0201 (2007); New Jersey, N.J. STAT. ANN. § 40:55D-45.2 (2007); Oregon, OR. REV. STAT. (ORS) § 94.504 (2005); South Carolina, S.C. CODE ANN. § 6-31-10; Virginia, VA. CODE ANN. § 15.2-2303.1 (2007); and Washington, WASH. REV. CODE ANN. § 36.70B.170 (2008). *Id.* at 671, note 32.

7. GROSS, *supra* note 2, at 10 (stating that the authors “strongly recommend that a CBA be incorporated into any development agreement for a project, so that the CBA becomes enforceable by the government entity that is subsidizing the development”).

8. See discussion *infra*, Part VI.

when large developments are planned for the neighborhood. Developers may also support the negotiating process as an effective method for obtaining community support, making the project approval process faster and smoother. Local governments may also look favorably upon CBAs since they can expect that when successful negotiations have occurred between the community and the applicant, it is less likely that the municipality will have to expend its resources defending land use and environmental permitting decisions. In addition, privately negotiated CBAs tend to remove and/or lessen the political pressures that might otherwise come to bear on elected and appointed representatives involved in the decision-making process.

### III.

#### ACCOUNTING FOR THE GROWING INTEREST IN COMMUNITY BENEFIT AGREEMENTS

CBAs have been negotiated in relation to dozens of development projects in cities across the country.<sup>9</sup> The growing interest in this practice is due in part to factors such as increased urban redevelopment and reinvestment in the face of shrinking federal aid provided to cities; the evolution of the smart growth movement; an awareness of the connectivity between land use and environmental justice; and increased public concern regarding developer accountability.

The types of development projects that most often give rise to CBAs—large-scale urban projects—are becoming more common. According to a recent study, eight out of the ten largest cities in the U.S. experienced population increases during the 1990s for the first time in decades and the growth rate is expected to accelerate over the next twenty years.<sup>10</sup> Space limitations and geographic boundaries have created expansion barriers and have resulted in the need and/or opportunity for redevelopment of already-populated areas. This creates a ripe environment for

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9. Harold Meyerson, *No Justice, No Growth; How Los Angeles is Making Big-Time Developers Create Decent Jobs*, THE AMERICAN PROSPECT (Nov. 2006).

10. GREG LEROY & ANNA PURINTON, Community Benefit Agreements: Making Sure Urban Redevelopment Benefits Everyone 19 (Neighborhood Funders Group 2005), available at [http://www.nfg.org/publications/community\\_benefits\\_agreements.pdf](http://www.nfg.org/publications/community_benefits_agreements.pdf). Urban scholars have coined the phrase "the back to city movement," and attribute it to an increased number of baby boomers looking to downsize and live closer to work, the post 1960s generation perception that an urban lifestyle is preferable, and an influx of Asian and Latin American immigrants relocating in urban neighborhoods. See Gross, *supra* note 2, at 4.

CBA, which function best when the community base is large and where the developer needs community support in order to obtain subsidies, approvals, or regulatory variances (as is often the case in dense urban neighborhoods). As urban areas become more popular locations for large developments, residents are becoming increasingly empowered to demand that such developments “give back” to the community with benefits that improve urban quality of life.<sup>11</sup> And, as has been suggested, “no one can credibly argue that a major development should *not* benefit the community. . . .”<sup>12</sup>

The “accountable development” movement has also contributed to the spread of CBAs. According to this view, communities provide substantial tax incentives and subsidies to developers to support new job creation, while developers pin community hopes upon attenuated “ripple effects” without giving communities any control over the job opportunities created.<sup>13</sup> Billions of dollars in taxpayer funds are funneled into economic development projects, but many projects produce “mixed results” and offer few assurances that developers’ promises of new jobs for community residents will be actually realized.<sup>14</sup> Additionally, impacts like gentrification, the creation of low-wage, dead-end jobs lacking health benefits, and the loss of affordable housing that frequently accompany large-scale urban developments have led to an awareness that economic development, without more, often fails to benefit the people who need it most.<sup>15</sup> By formalizing developers’ commitments to create jobs that benefit residents and to improve local housing and social conditions, CBAs add a dose of accountability to the often considerable tax benefits and subsidies that make large-scale developments possible. A representative from the Pratt Institute Center for Community and En-

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11. *Id.* at 19.

12. *Id.* at 18.

13. See GROSS, *supra* note 2, at 4.

14. See *id.*

15. *Id.* In April 2005, the New York City Council’s Select Committee on Community Development held a series of hearings due to concerns “that despite recent economic development activity and community development efforts, thousands of City residents living in distressed New York City neighborhoods, still continue to experience high levels of concentrated poverty, joblessness, poor health outcomes and low educational achievement.” Marcel Van Ooyen, Legislative Director, Briefing Paper of the Infrastructure Division, *NYC Oversight: Linking New York City Economic Development Policies and Programs to Community Development Strategies* (May 16, 2005).

vironmental Development explained his support of the use of CBAs:

[New York] City's community development efforts have often been separate from the larger economic development strategy which largely consisted of tax breaks, subsidies and large scale projects . . . . Today's community development needs to embrace new strategies to insure that the City's economic development investments create truly shared prosperity, not with lip service to job creation, but with sustained and significant efforts.<sup>16</sup>

The Smart Growth movement, with its emphasis on development guided by "equity, economy, and the environment," is also credited with the evolution of CBAs.<sup>17</sup> Smart Growth advocates have developed principles that focus beyond suburban sprawl and the environment, to include policy concerns related to the creation of livable cities with living-wage jobs.<sup>18</sup> After all, promoting the growth of healthy urban areas where residences, jobs, services, and entertainment are near enough to obviate the need for cars may be the most effective way of stopping sprawling, auto-dependent development. This also serves the current public policy goal of reducing greenhouse gas emissions to slow climate change.

In addition to advancing these Smart Growth goals by improving communities' quality of life, CBAs can be effective tools for promoting racial and social equity. Large-scale urban developments tend to have disproportionate impacts on low-income and minority communities, and CBAs provide a mechanism for these communities to ensure that they will benefit from developments rather than being overlooked or displaced through gentrification.

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16. *Id.*

17. See GROSS, *supra* note 2, at 4. The Smart Growth movement focuses on using comprehensive planning policies and tools to work toward sustainable development. Some smart growth goals include fostering community identity, preserving natural and cultural resources, ensuring social justice, expanding choices among transportation and housing options and encouraging healthy lifestyles. To achieve these goals, smart growth supports compact, mixed use and pedestrian/bicycle oriented planning with projects reusing existing infrastructure and locating in urban areas where transit and other services are available. See American Planning Association, Policy Guide on Smart Growth, <http://www.planning.org/policyguides/smartgrowth.htm>. For more information about smart growth initiatives, see Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 WIDENER L.J. 787 (2007).

18. GROSS, *supra* note 2, at 5.

CBA may also provide built-in benchmarks that allow the effectiveness of these Smart Growth policies to be measured.<sup>19</sup>

The resurgence in urban center growth coincides with a steady decline of federal aid to cities. Fears of further reductions in federal funding for Community Development Block Grants, as well as concerns about future federal support levels for public housing and Section 8 rent-subsidy vouchers, have generated interest in developing effective public-private partnerships to meet low-income housing needs and advance other Smart Growth policies. CBAs, with their ability to be more inclusive of diverse local interests than conventional public-private arrangements, are well suited in this regard.<sup>20</sup> Community involvement is especially necessary, because although city and county governments have planning departments, they are often relegated to “processing permits and other land use applications” and acting as facilitators in the private development process rather than being empowered to take on more of a leadership role in addressing other pressing Smart Growth needs.<sup>21</sup>

Perhaps most significantly, the rising popularity of CBAs can be attributed to their ability to empower low-income and minority communities and give them a voice in the development process. This process is frequently dominated by corporate interests and has failed in the past to include the people most likely to be affected by its results, often to the detriment of residents and local businesses.<sup>22</sup> For many of these communities, CBAs are also seen as a way to make up for past planning practices such as redlining and slum clearance that harmed poor and minority citizens. The CBA negotiating model has thus enabled local groups across the country to become more involved in their neighborhoods and to hold developers more accountable by persuading them that when they take advantage of a certain project site for commercial profit, they must reinvest a measure of those profits in the neighborhood and the people who live there. These ideal-

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19. *See id.* (noting that “[t]he community benefits movement gives Smart Growth advocates a set of concrete policy tools to advance these outcomes in ways that can be measured: e.g., how many thousands of affordable housing units have been built, how many tens of thousands of living wage jobs have been guaranteed, and how many millions of dollars have been redirected towards community services”).

20. *See* David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. L. 657, 660-62 (2007).

21. *See* GROSS, *supra* note 2, at 4.

22. *See* Marcello, *supra* note 20, at 661-62 (describing how the public has long been excluded from the planning process of public-private partnerships and why government officials may not adequately represent communities' interests).

istic principles, coupled with proven CBA successes, have captured the imagination of community groups all over the country.<sup>23</sup>

#### IV.

##### EXAMPLES OF CBAS

The following review of select existing CBAs exposes the benefits and challenges in negotiating, implementing and enforcing these agreements. It also reveals the similarities and differences inherent in community-based approaches that are as diverse as the neighborhoods where they arise.<sup>24</sup>

##### A. *California*

There are more current and developing CBAs in the State of California than in any other state. Possible reasons for this phenomenon may include the fact that development agreements are authorized by state statute,<sup>25</sup> and the existence of a high intensity of progressive activism and advocacy by community organizers in the state. What follows are highlights of some of the CBAs in California.

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23. CBAs have been championed by a number of national groups that link and organize community groups around the country. These organizations, such as the Partnership for Working Families, Good Jobs First and the Association of Community Organizations for Reform Now (ACORN), among others, have been instrumental in the drive to make CBAs common across the country. CBAs involve complex organizing, negotiation and drafting skills, and the resources that these organizations have offered to local groups have been important in making the CBA model viable. Gilda Haas, the executive director of Strategic Actions for a Just Economy (SAJE), a leading pro-CBA organization, explains, "community benefits agreements are tactical maneuvers in a strategic offense to take back our city. We want to take it back from historic redlining and absentee owners that have stripped our neighborhoods of their equity. To take it back from slumlords and speculators. To take it back from people who do not even see the beauty of our members, relationships, and children—who do not, in fact, see our communities at all." See Gilda Haas, *Community Benefits or Community Control? What We Really Want*, STRATEGIC ACTIONS FOR A JUST ECON., Feb. 21, 2007, available at [http://www.saje.net/site/c.hkLQJcMUKrH/b.2615505/k.13C4/Community\\_Benefits\\_or\\_Community\\_Control.htm](http://www.saje.net/site/c.hkLQJcMUKrH/b.2615505/k.13C4/Community_Benefits_or_Community_Control.htm).

24. See Patricia E. Salkin & Amy Lavine, *supra* note 1, for information on additional CBAs. The case studies discussed herein are also discussed in the aforementioned article. For news relating to the monitoring and implementation efforts related to existing CBAs and the progress of ongoing CBA campaigns, see the Community Benefits Agreements Blog at <http://communitybenefits.blogspot.com>.

25. CAL. GOV'T CODE § 65864 (West 1997).

### 1. Hollywood and Highland Center (Los Angeles, 1998)

The first CBA was negotiated in 1998 in relation to the development of the Hollywood and Highland Center, home to the theater that now hosts the annual Oscar ceremonies.<sup>26</sup> The development, which includes more than 4,000 theater seats, several parking lots and hotels, and 1.2 million square feet of retail space, was projected to cost \$388 million.<sup>27</sup> The project sparked concerns among Hollywood residents and business owners that traffic and congestion would be increased, that there might be environmental and aesthetic effects, and that crime rates might go up.<sup>28</sup> With the help of Los Angeles Councilwoman Jackie Goldberg and the Los Angeles Alliance for a New Economy (LAANE), the developer agreed to a deal with community groups. In exchange for the groups' support, the developer offered to finance traffic improvements, ensure that workers at the center would be paid a living wage, implement a first-source hiring plan, and enact a policy of union-neutrality.<sup>29</sup> The deal, though, was not one-sided; community support of the development helped the developer to obtain \$90 million in subsidies from the city.<sup>30</sup>

By most accounts the project has been a success. In addition to revitalizing Hollywood Boulevard, nearly 70% of the initial employees hired at the complex were recruited from the immediate area and about half of the permanent positions provide living wages.<sup>31</sup> In 2004, LAANE reached another CBA for a development just down the street from Hollywood and Highland. The benefits package for the Hollywood and Vine mixed-use, transit-oriented development included similar living wage, affordable

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26. Hass, *supra* note 23. The Hollywood and Highland agreement was not the first fully-fledged CBA. Rather than existing as a stand alone contract, the CBA was incorporated in the development agreement. For this reason, some people credit the Staples Center agreement as the first CBA.

27. Greg Goldin, *Mallywood*, L.A. WEEKLY, Dec. 18, 1998, at 30, available at <http://www.laweekly.com/news/news/mallywood/6982/?page=1>.

28. *Id.*; See also Jonathan Darr, Letter to the Editor, *Proposed Complex in Hollywood*, LOS ANGELES TIMES, Apr. 12, 1998, at M-4.

29. Goldin, *supra* note 27; LAURA WOLF-POWERS, BUILDING IN GOOD JOBS: LINKING ECONOMIC AND WORKFORCE DEVELOPMENT WITH REAL ESTATE-LED ECONOMIC DEVELOPMENT 18 (2006), available at [http://www.nycetc.org/pdf/Building\\_in\\_Good\\_Jobs\\_Report\\_12\\_06.pdf](http://www.nycetc.org/pdf/Building_in_Good_Jobs_Report_12_06.pdf).

30. WOLF-POWERS, *supra* note 29, at 18.

31. *Id.* See also SARAH GRADY WITH GREG LEROY, MAKING THE CONNECTION: TRANSIT-ORIENTED DEVELOPMENT AND JOBS 17-18 (Good Jobs First 2006), available at <http://www.goodjobsfirst.org/pdf/makingtheconnection.pdf>.

housing, and job training provisions.<sup>32</sup> As of early 2008, Hollywood and Vine's affordable housing was under construction and the developer had taken steps to implement other aspects of the CBA.<sup>33</sup>

## 2. Staples Center (Los Angeles, 2001)

The success of the Hollywood and Highland CBA was followed in 2001 by the completion of what is sometimes referred to as the first "full-fledged" CBA. This CBA was negotiated during the development of the Staples Center, a sports arena that is home to the Los Angeles Lakers.<sup>34</sup> Community residents suffered a blow when the developer failed to provide orally promised benefits after the completion of the project's first phase.<sup>35</sup> The community hoped that a CBA would ensure that the developer would follow through with promises made in relation to the project's second phase—the construction of L.A. Live, a sports and entertainment complex on a 27 acre parcel including two hotels, a theater, apartment buildings and a retail complex. Negotiations were held between the developer and the Figueroa Corridor Coalition for Economic Justice, which represented more than thirty community organizations, including environmental groups, church groups, health organizations, and immigrants' and tenants' rights supporters. Strategic Action for a Just Economy (SAJE) and LAANE were also involved in the negotiating process, providing organizational and political support to the coalition and community members.<sup>36</sup>

The spectre of broad community opposition to the project, which required significant land use variances and city subsidies, provided the community with the necessary leverage to negotiate

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32. *Community Praises Hollywood & Vine Developers for Community Benefits Package; Agreement Will Bring Living Wage Jobs, Affordable Housing and Job Training to Hollywood*, BUS. WIRE, available at [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2004\\_June\\_17/ai\\_n6083769](http://findarticles.com/p/articles/mi_m0EIN/is_2004_June_17/ai_n6083769)

33. Telephone interview with Roxana Tynan, Deputy Director, LAANE (Mar. 6, 2008).

34. GOOD JOBS FIRST, COMMUNITY BENEFITS AGREEMENTS VICTORIES, [http://www.goodjobsfirst.org/accountable\\_development/community\\_benefit\\_vic.cfm](http://www.goodjobsfirst.org/accountable_development/community_benefit_vic.cfm) (last visited Mar. 14, 2007) [hereinafter COMMUNITY BENEFITS AGREEMENTS VICTORIES].

35. Union groups had obtained promises of union-neutrality and living-wage benefits, but the developers refused to implement them after receiving the variances and subsidies from the city. The community had been further affected by the displacement of more than 250 residents, mostly low-income, and by the increase in traffic, noise and parking problems. *Id.*

36. *Id.*

one of the most comprehensive CBAs made to date. The completed agreement states that its purposes are to:

[P]rovide publicly accessible park space, open space, and recreational facilities; target employment opportunities to residents in the vicinity of the Figueroa Corridor; provide permanent affordable housing; provide basic services needed by the Figueroa Corridor community; and address issues of traffic, parking, and public safety.<sup>37</sup>

The CBA included reporting requirements and established a committee to monitor and enforce the agreement and to maintain a dialogue between the developer and the coalition.<sup>38</sup> The CBA was also incorporated into the development agreement between the developer and the city's redevelopment agency, making it enforceable by the city as well as by the contracting community groups.<sup>39</sup>

Several aspects of the Staples Center CBA were implemented shortly after its completion, including the establishment of a residential parking permit program and the distribution of seed money for the construction of affordable housing.<sup>40</sup> Since then, the developer has carried through with its obligations in a timely

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37. *Id.*; Staples Center Community Benefits Agreement, at section I, available at <http://www.saje.net/> (follow "publications" hyperlink; then follow "LA Sports and Entertainment District Agreement" hyperlink). More specifically, the developer agreed to the following provisions:

To provide at least \$1,000,000 for the creation or improvement of parks and recreational facilities;

To provide \$25,000 per year for a term of five years for the creation of a permit parking program;

To comply with the city's living wage ordinance and to make all reasonable efforts to reach the goal of ensuring that 70% of the jobs created by the project pay a living wage;

To give priority hiring to persons displaced by the project and to low income individuals residing within three miles of the project;

To coordinate job training programs with community groups;

To provide \$100,000 in seed money for the creation of the First Source Referral System;

To set aside 20% of the residential units constructed within the project as affordable-housing and to provide \$650,000 in interest-free loans to non-profit housing developers for the creation of additional affordable housing;

And to cooperate with the Coalition to establish an Advisory Committee to assist with the implementation and enforcement of the agreement. *Id.*

Additionally, the developer signed separate card check/neutrality agreements with five union organizations. See COMMUNITY BENEFITS AGREEMENTS VICTORIES, *supra* note 34.

38. Staples Center Community Benefits Agreement, *supra* note 37, at section 11.

39. COMMUNITY BENEFITS AGREEMENTS VICTORIES, *supra* note 34.

40. *Id.*

manner and with few problems.<sup>41</sup> One million dollars has been spent on parks, with priorities for the funding being determined through a series of community meetings and workshops.<sup>42</sup> About 300 units of inclusionary affordable housing have been financed, and a revolving loan fund for local businesses has revolved several times.<sup>43</sup> The coalition and city have also been able to assess the developer's compliance with the CBA's living wage requirements through annual reports detailing the proportion of living wage jobs created by the project.<sup>44</sup> SAJE has continued to be intimately involved with the project, and meetings between the coalition and the developer have been held quarterly to monitor the implementation of the CBA. Additionally, SAJE has developed a jobs program for local residents and businesses.

The Staples Center CBA has also shown that the flexibility of CBAs may extend beyond their initial negotiation. The CBA included provisions for assessment of the agreement's implementation at five and ten years after its completion; if it is found that the developer's performance of its obligations falls below 80% of the CBA's goals for two consecutive years, then the developer must meet with the coalition to formulate a mutually accepted plan to reach those goals.<sup>45</sup> The parties have also modified the CBA at their own instance to respond to the changing needs of both the developer and the community.<sup>46</sup>

### 3. LAX Expansion (Los Angeles, 2004)

Another Los Angeles CBA demonstrates the flexibility and adaptability of this method of negotiating. In December 2004, the Los Angeles City Council approved the agreement reached between Los Angeles World Airports (LAWA), the public administrator of LAX airport, and a coalition of 22 community

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41. See Laurie Kaye & Jerilyn Lopez Mendoza, *Environmental Defense, Everybody Wins: Lessons from Negotiating Community Benefits Agreements in Los Angeles* 2.11 (2008), available at <http://www.environmentaldefense.org/everybodywins>.

42. *Id.*

43. Telephone interview with Gilda Haas, Executive Director, SAJE (Feb. 1, 2008). See also Kaye & Mendoza, *supra* note 41.

44. Kaye & Mendoza, *supra* note 41.

45. *Id.*

46. Telephone interview with Gilda Haas, *supra* note 43. The CBA was renegotiated at one point because the developer was having difficulty complying with a provision prohibiting construction of market-rate housing units until affordable units were built. SAJE was willing to renegotiate the provision because it was interested in setting up a community land trust in order to combat gentrification.

groups concerning an \$11 billion airport expansion.<sup>47</sup> Among the coalition members were two local school districts and organizations representing community, religious, environmental, and labor interests.<sup>48</sup> In addition to provisions covering job training, first-source hiring, and living-wage requirements,<sup>49</sup> the CBA also devoted substantial resources toward mitigating the environmental impacts of the airport. As a result, the airport provided more than \$8.5 million annually for the soundproofing of local schools, city buildings, places of worship, and homes,<sup>50</sup> and it agreed to fund studies on air quality and community health.<sup>51</sup> Further, the CBA requires LAX to implement a number of environmental controls, including the electrification of passenger gates and cargo areas (to reduce the need for engine idling), emissions reductions and the conversion of airport vehicles to alternative fuels.<sup>52</sup> The CBA also clearly requires LAWA to incorporate CBA provisions into all airport contracts, lease agreements, and licensing or permitting agreements, thus ensuring the translation of the requirements to the airport's contractors and tenants.<sup>53</sup>

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47. Sheila Muto, *Residents Have Their Say on LAX Expansion Plans*, THE WALL ST. J., Dec. 15, 2004. Although the Federal Aviation Administration initially expressed concern that the CBA might conflict with a federal law requiring the use of airport revenue to be aviation-related, it has since abandoned its opposition to the program. Dan Laidman, *FAA Changes Course on Airport-Related Jobs*, COPLEYS NEWS SERVICE, Dec. 13, 2006.

48. For a complete list of the CBA signatories, see *The LAX Coalition and the CBA*, 1 STAKEHOLDER CONNECTION 2 (LAX/Los Angeles World Airports, L.A., Cal.), available at [http://www.laxmasterplan.org/stakeholder/pdf/Newsletter\\_Vol1\\_Issues2\\_only.pdf](http://www.laxmasterplan.org/stakeholder/pdf/Newsletter_Vol1_Issues2_only.pdf).

49. COMMUNITY BENEFITS AGREEMENT: LAX MASTER PLAN PROGRAM § 5-6, 4, available at [http://www.laane.org/docs/policy/cbas/LAX\\_CBA.pdf](http://www.laane.org/docs/policy/cbas/LAX_CBA.pdf). The CBA also establishes a program to encourage the involvement of women and minority owned businesses. *Id.* at § 13.

50. *Id.* at § 3. The "Aircraft Noise Mitigation Program" also requires LAX to limit nighttime departures. The noise mitigation concessions were seen as an especially important aspect of the CBA to local schools, many of which had boarded up their windows in attempts to avoid the noise. *Id.* As one community activist explained, "[g]enerations [of students] have come and gone through school here with rattling windows, teachers they couldn't hear, and no natural light in their classroom experience. . . ." Daniel B. Wood, *In Los Angeles A Unique Plan to Dull the Roar of Jets*, THE CHRISTIAN SCIENCE MONITOR, Dec. 21, 2004, at 2.

51. COMMUNITY BENEFITS AGREEMENT: LAX MASTER PLAN PROGRAM, *supra* note 49, at § 7-8.

52. *Id.* at § 10.

53. *Id.* at § 5(A). For example, LAWA has required area hotels to reduce the number of airport shuttle trips made daily in order to comply with the CBA's air quality provisions. Thomas Winfrey, *LAX Requires Hotels to Consolidate Courtesy Shuttle Trips to Improve Air Quality, Reduce Traffic Congestion*, MARKET WIRE, Dec. 4, 2006.

Implementation of the LAX CBA has been affected by political trends and a lawsuit brought to prevent the airport from expanding.<sup>54</sup> While the lawsuit did not succeed in preventing the expansion, the settlement agreement contained several modifications to the expansion plan, resulting in delays to the CBA's implementation.<sup>55</sup> Internal changes in the coalition and complications with Federal Aviation Administration requirements have also slowed implementation.<sup>56</sup> Despite these hold-ups, the CBA is proceeding. In early 2008, LAWA announced plans to spend more than \$2 million on an air pollution study as part of its obligations under the CBA. It will be the most comprehensive airport pollution study to have been undertaken in the United States, and it will provide data to show which communities are bearing the brunt of the airport's environmental impacts.<sup>57</sup>

#### 4. Ballpark Village (San Diego, 2005)

In September 2005, a broad coalition of 27 housing, labor, community, environmental, and religious groups negotiated San Diego's first CBA with developer JMI/Lennar in relation to Ballpark Village, a seven-acre project with 3.2 million square feet of offices, residences and retail space. The CBA negotiations were held in private and were not made public until just before the city council was to vote on the project's master plan.<sup>58</sup> By this time, the developer had been working on a deal with the local redevelopment agency for nearly two years, and the last minute change in plans provoked some criticism that it had "circumvented the process."<sup>59</sup> Moreover, the new agreement called for significant changes to be made to the project's affordable housing component. Although it called for more units, none of them were to be inclusionary units located on-site, as the agreement with the redevelopment agency required. Despite this negative publicity surrounding the CBA, a revised version that

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54. Kaye and Mendoza, *supra* note 41, at 3.26.

55. *Id.*

56. *Id.*

57. See Tami Abdollah, *Plan Aims to Gauge LAX's Effect on Area's Air Quality*, LOS ANGELES TIMES, Feb. 26, 2008; LAWA, News Release, Airport Commission Awards Contracts to Study Air Pollutant Emissions at LAX, Feb. 25, 2008, available at <http://www.lawa.org/news/newsDisplay.cfm?newsID=999>.

58. Martin Stolz, *S.D. Council OKs Huge Ballpark Village Project; Compromise Ends Weeks of Rancor*, SAN DIEGO UNION-TRIBUNE, Oct. 20, 2005, at B-12:6, B-4:1.

59. Martin Stolz, *New Ballpark Village Deal Rejected; CCDC Rips Developers of Downtown Project*, SAN DIEGO UNION-TRIBUNE, Oct. 5, 2005, at B-1:1,7, B-4:6.

incorporated some aspects of the original affordable housing plan was eventually approved,<sup>60</sup> and the CBA, as a whole, has been viewed positively.<sup>61</sup> The agreement set out a range of community benefits, including:

- requirements that the developer meet LEED green building standards for the development and use environmentally-friendly construction practices;
- a requirement to include “bird-friendly” structural elements, such as non-reflective windows;
- mitigation, monitoring and reporting programs to reduce pollution during construction;
- a living wage requirement for the developer’s employees and the employees of its service contractors;
- a local hiring program;
- \$1.5 million in funds set aside for job training programs for community residents;
- plans for on and off-site affordable housing, with the total number of units exceeding the city’s minimum affordable housing requirement;
- a commitment to attract a grocery store to the community that would offer living wages and provide benefits; and
- funding for a gentrification study and for community arts, youth, and cultural programs.<sup>62</sup>

## 5. Other California CBAs

In addition to these four CBAs, an agreement was entered into in 2001 related to the redevelopment of an environmentally contaminated industrial site in Los Angeles, but the plans for the project were tabled after the developer went bankrupt.<sup>63</sup> The Marlton Square CBA involves another less than ideal situation. The community benefits that were to be provided by the developer pursuant to the agreement have yet to be realized due to difficulties in attracting tenants to the project development.<sup>64</sup>

60. Stolz, *supra* note 58.

61. See, e.g., *Ballpark Village Project Sets New Standards for Affordable Housing and Jobs in San Diego*, CENTER ON POLICY INITIATIVES, available at <http://www.onlinecpi.org/article.php?list=type&type=131>.

62. The Partnership for Working Families: Ballpark Village CBA – San Diego 2005, <http://www.communitybenefits.org/article.php?id=575>.

63. See Salkin & Lavine, *supra* note 1. The SunQuest site was bought by another developer and it is now unclear whether the CBA will apply. Interview with Roxana Tynan, *supra* note 33.

64. See Salkin & Lavine, *supra* note 1; Marlton Square, Los Angeles, <http://communitybenefits.blogspot.com/2008/01/marlton-square-cba.html> (Jan. 28, 2008, 22:13 EST).

In contrast, the NoHo Commons project in Los Angeles was successful in providing affordable housing, job training, living wages and first source hiring for community residents while enabling the developer to receive significant city subsidies for the development.<sup>65</sup> The NoHo Commons developer has been cooperative, and implementation of the CBA has progressed smoothly.<sup>66</sup>

The CBA emanating from a downtown development of a residential retail and entertainment complex in San Jose is also proving to be successful as the developer continues to fulfill commitments under the CBA, including living wage provisions, project labor agreements and affordable housing requirements.<sup>67</sup> In an Oakland CBA, ongoing litigation surrounding a waterfront redevelopment project has delayed the implementation of a 2006 CBA designed to provide affordable housing.<sup>68</sup>

## B. *New York City*

Communities in New York did not begin to utilize CBAs until 2005, about eight years after they were initially used in California. The California experience has influenced both the process and substance of CBAs in New York, but it appears as though the actual negotiation of CBAs in New York has been somewhat more controversial. Two of the CBAs emanated from proposed stadium development projects,<sup>69</sup> one from a proposed university expansion,<sup>70</sup> and one from a mall development.<sup>71</sup> Other CBA

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65. See Salkin & Lavine, *supra* note 1. See also NoHo Commons CBA, <http://communitybenefits.blogspot.com/2008/01/2001-deal-in-relation-to-large-mixed.html> (Jan. 28, 2008, 22:10 EST).

66. Interview with Roxana Tynan, *supra* note 33.

67. See Salkin & Lavine, *supra* note 1; See San Jose CIM Project CBA, <http://communitybenefits.blogspot.com/2008/01/san-jose-cim-project-cba.html> (Jan. 28, 2008, 22:18 EST).

68. See Salkin & Lavine, *supra* note 1; See Oak to Ninth CBA, <http://communitybenefits.blogspot.com/2008/01/oak-to-ninth-cba.html> (Jan. 28, 2008, 22:35 EST).

69. The two CBAs associated with stadium developments include the Atlantic Yards project, discussed *infra*, and the new Yankees' Stadium, discussed in Salkin & Lavine, *supra* note 1 and in Yankee Stadium CBA, <http://communitybenefits.blogspot.com/2008/01/yankee-stadium-cba.html> (Jan. 30, 2008, 06:20 EST).

70. See Salkin & Lavine, *supra* note 1; Columbia Expansion CBA, <http://communitybenefits.blogspot.com/2008/01/with-atlantic-yards-and-yankee-stadium.html> (Jan. 30, 2008, 06:56 EST).

71. See Salkin & Lavine, *supra* note 1; Bronx Terminal Market CBA, <http://communitybenefits.blogspot.com/2008/01/bronx-terminal-market-cba.html> (Jan. 29, 2008, 15:32 EST).

campaigns are currently underway in the Bronx and in Albany.<sup>72</sup> The following two case studies highlight two current controversial development projects: the Atlantic Yards arena project and the Columbia University expansion.

### 1. Atlantic Yards

The first New York CBA<sup>73</sup> was completed in 2005 in relation to the multi-billion dollar Atlantic Yards arena project, future home to the New Jersey Nets. In addition to the basketball arena, the proposal includes an attached residential and office complex to be made up of several high-rise buildings that will radically alter Brooklyn's skyline.<sup>74</sup> Since its inception, the project has faced broad opposition from Brooklyn residents, primarily because the project is to involve the use of eminent domain.<sup>75</sup>

The Atlantic Yards CBA was negotiated by eight community groups<sup>76</sup> and was purportedly based on the Staples Center agree-

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72. See 'It's Our Armory,' Declares Bronx Community; Elected Officials, Labor, Community and Religious Leaders Demand Armory Developer Sign Community Benefits Agreement, PR NEWSWIRE, Oct. 27, 2007; Meeting of Minds Ends Push for Protest, TIMES UNION (Albany, N.Y.), Oct. 5, 2007, at D3.

73. Atlantic Yards was at least the first New York CBA to be identified as such. In 2001, Donald Trump entered into a rather CBA-like agreement in order to get approval to develop Riverside Park South (located on the western side of Manhattan). The deal was made with six non-profit civic groups and requires the developer to fund the creation and maintenance of a twenty-one acre park. See *Parks Reclaims Manhattan Waterfront Property*, 16 THE DAILY PLANT 3341 (N.Y.C. Dep. of Parks & Recreation, New York, N.Y.), Apr. 11, 2001, available at [http://www.nycgovparks.org/sub\\_newsroom/daily\\_plants/daily\\_plant\\_main.php?id=9125](http://www.nycgovparks.org/sub_newsroom/daily_plants/daily_plant_main.php?id=9125).

74. See *Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement*, US STATE NEWS, June 27, 2005.

75. Opposition to the project has spawned several lawsuits and attracted the help of hundreds of New Yorkers and a few local celebrities. See *Develop - Don't Destroy Brooklyn*, <http://www.dddb.net>; *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (dismissing the plaintiffs' eminent domain challenge). The project has also spurred the creation of several blogs devoted to dismantling the developer's claims and exposing a more realistic projection of the development's likely impacts. See, e.g., Nicholas Confessore, *A Blogfest Over a Project in Brooklyn*, N.Y. TIMES, Apr. 16, 2006, available at <http://www.nytimes.com/2006/04/16/nyregion/16yards.html>; Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com>; noLandGrab, <http://www.nolandgrab.org>. Journalist and blogger Norman Oder of the Atlantic Yards Report has become a veritable expert on the project, often picking up details missed by the mainstream media.

76. The groups involved in the negotiations were the Faith in Action, the Association of Community Organizations for Reform Now (ACORN), Brooklyn United for Innovative Local Development (BUILD), Brooklyn Voices for Children, the Downtown Brooklyn Neighborhood Alliance (DBNA), Brooklyn Endeavor Experience (BEE), the New York State Association of Minority Contractors (NYSAMC) and the Public Housing Communities (PHC). Atlantic Yards Community Benefits

ment. It includes affordable housing, living wage, first source, and minority hiring provisions, a commitment to build a day care center, and the perk of free basketball tickets for neighborhood residents.<sup>77</sup>

The CBA includes a number of important benefits, but actual and perceived improprieties in the negotiating process have spurred negative reactions to the agreement.<sup>78</sup> Critics have pointed out that several of the coalition's member groups were created expressly for the purpose of negotiating the agreement.<sup>79</sup> Numerous other community groups expressed opposition to the development and to the CBA, claiming that the developer never had any intention of bargaining in good faith.<sup>80</sup> One of the coalition's member groups also reported receiving \$5 million from the developer, creating a conflict of interest that has clearly tarnished the CBA's integrity.<sup>81</sup> Additionally, several chairpersons from local community boards protested statements made by the devel-

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Agreement, <http://www.atlanticyards.com/html/community/cba.html> (last visited Mar. 14, 2007).

77. See *Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement*, *supra* note 74. Some of the promises made in the agreement include a provision to give hiring preference to low and moderate income area residents and a requirement that thirty-five percent of jobs go to minorities. Atlantic Yards Community Benefits Agreement at § V, available at <http://www.atlanticyards.com/downloads/cba.pdf>. Fifty percent of the proposed rental units are to be affordable and the development will include a health and day care center. *Id.* at §§ VI-VII. More than fifty tickets will be donated to people in the community annually, with priority given to children and seniors. *Id.* at § VII (E). The project also includes eight acres of open space. *Id.* at § VII (D).

78. For praise of the CBA, see, e.g., Nicholas Confessore, *To Build Arena in Brooklyn, Developer First Builds Bridges*, N.Y. TIMES, Oct. 14, 2005, available at <http://www.nytimes.com/2005/10/14/nyregion/14yards.html?ex=1286942400&en=1d1165c2fb2c214f&ei=5090&partner=rssuserland&emc=rss%20target->. For other articles that offer more mixed views, see, e.g., Chris Smith, *Mr. Rather's Neighborhood*, N.Y. MAG., Aug. 7, 2006, available at <http://nymag.com/news/features/18862/>; Jennifer Egan, Op-Ed., *A Developing Story*, N.Y. TIMES, Feb. 24, 2007, available at [http://www.nytimes.com/2007/02/24/opinion/24egan.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/02/24/opinion/24egan.html?_r=1&oref=slogin).

79. One news report indicates that only two of the eight signatory organizations were incorporated before the CBA negotiations began. Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, N.Y. OBSERVER, Dec. 4, 2005, available at <http://www.observer.com/node/38021>.

80. The Pratt Area Community Council, for example, "didn't believe that [the developer]. . . was willing to compromise." And the leader of a group of black ministers expressed a belief that the CBA was merely "meant to buy support with favors." Matthew Schuerman, *supra* note 79 (quotes are from the article's author, not the organizations' representatives).

81. If the conflict of interest wasn't bad enough, the same group, BUILD, was selected to operate the project's job referral program, but it has very little experience conducting similar services. See Matthew Schuerman, *A Cool \$5 Million*, N.Y. OBSERVER, Sept. 29, 2005, available at <http://www.observer.com/term/29768>; Mat-

oper that they had played an advisory role in the negotiations. The chairpersons contended, to the contrary, that their involvement with the CBA ended very early in the process and well before a final draft was prepared.<sup>82</sup> A representative of Good Jobs New York also expressed serious misgivings about the CBA, claiming that the negotiations were “marked by secrecy” and that they “contributed to a fragmentation of community responses.”<sup>83</sup>

It seems that the fundamental problem with the Atlantic Yards CBA is that the coalition has been perceived by many people as not truly representative of the community. A significant portion of Brooklyn residents are opposed to the project due to the extensive impacts that it will have on their neighborhoods,<sup>84</sup> and because they were not invited to participate in negotiations. Rather, the talks were led by community members who were seemingly already on the developer’s side.<sup>85</sup> Without input from

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thew Schuerman, *Ratner Sends Gehry to Drawing Board*, N.Y. OBSERVER, Dec. 4, 2006, available at <http://www.observer.com/node/38021>.

82. Norman Oder, Atlantic Yards Report, CBs say Ratner “Overstates our Participation” in Community Benefits Agreement, <http://atlanticyardsreport.blogspot.com/2006/05/cbs-say-ratner-overstates-our.html> (May 4, 2006, 12:04 EST).

83. Comments by Bettina Damiani, Project Director, Good Jobs New York, before the New York City Council Committee on Economic Development on the proposed Brooklyn Atlantic Yards project (May 16, 2005), [http://www.goodjobsny.org/testimony\\_bay\\_5\\_05.htm](http://www.goodjobsny.org/testimony_bay_5_05.htm). At least one community group has been particularly vehement in criticizing the Atlantic Yards CBA, calling it “a sham and a fraud that reaches new lows in killing community participation[.]” Press Release, Develop— Don’t Destroy, Ratner “Community Benefits Agreement” (CBA) is DOA and Brooklyn Community Board Chairs Helped Kill It (Nov. 18, 2004), available at <http://dddb.net/php/press/pdfs/111804CBAdoa.pdf>.

84. See *Develop Don’t Destroy Brooklyn*, [www.dddb.net](http://www.dddb.net); *Develop Don’t Destroy Brooklyn v. Urban Development Corp.*, 2008 N.Y.Misc. LEXIS 551 (2008) (dismissing plaintiffs’ claims under the State Environmental Quality Review Act that the project would have substantial adverse environmental effects on the area).

85. As was explained by Bettina Damiani, the project director of Good Jobs New York (which is affiliated with Good Jobs First):

Perhaps the most striking [difference] is that elsewhere CBAs are negotiated by one broad coalition of groups that would otherwise oppose a project, a coalition that includes labor and community organizations representing a variety of interests. The coalition hammers out its points of unity in advance and then each member holds out on settling on its particular issue until the issues of the other members are addressed. This way, the bargaining power of each group is used for the benefit of the coalition as a whole. In the Brooklyn Atlantic Yards (BAY) case, several groups, all of which have publicly supported the project already, have each engaged in what seem to be separate negotiations on particular issues. Damiani, *supra* note 83.

In more colorful language, Jordi Reyes-Montblanc, a community board member involved with the Columbia CBA (discussed below), has stated that “Ratner and the city got together with one big, national not-for-profit and a set of local sycophants

the stakeholders who have the most concerns about the project's effects on the community, the CBA is likely weaker than it otherwise might have been. Interestingly, another Brooklyn community group lobbied the developer to reopen the CBA for further negotiations in 2006. The developer refused, but offered instead to consider a second agreement to be called a "Neighborhood Benefits Agreement." Little seems to have come of this initiative.<sup>86</sup>

Construction of the Atlantic Yards arena has been significantly delayed by litigation over the proposed condemnations needed to enable the project to continue,<sup>87</sup> and the major provisions of the CBA have yet to be implemented.<sup>88</sup> The developer did ad-

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and put something together which doesn't seem to have satisfied too many people, except for those who are benefiting directly from it." Matthew Schuerman, *Mr. Bolinger's Battle: Can Harlem and Colombia Ever Agree on the Benefits of a Bigger Campus*, N.Y. OBSERVER, Feb. 18, 2007, available at <http://www.observer.com/node/36744>.

It should also be noted that the developer was able to avoid New York City's comprehensive public review process because the project is being built on state-owned land. This has provided additional reason for project opponents to believe that the developer did not intend to engage in any meaningful dialogue with the community about the plans. See *Doctoroff's Disaster*, BROOKLYN PAPER, Dec. 15, 2007, available at [http://www.brooklynpaper.com/stories/30/49/30\\_49editorial.html](http://www.brooklynpaper.com/stories/30/49/30_49editorial.html).

86. Norman Oder, Times Ratner Report, After the CBA, Will Ratner Negotiate a Neighborhood Benefits Agreement?, <http://timesratnerreport.blogspot.com/2006/01/after-cba-will-ratner-negotiate.html> (Jan. 6, 2006, 07:45 EST); e-mail communication with Norman Oder, Reporter, Atlantic Yards Report (Jan. 29, 2008).

87. However, on February 1, 2008 the Second Circuit Court of Appeals appears to have paved the way for the project to continue in *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (upholding the District Court's dismissal of a complaint filed by fifteen property owners whose homes and businesses were slated for condemnation, finding that the use of eminent domain by the Empire State Development Corporation for the proposed 22-acre Atlantic Yards and Redevelopment Project in and around the Metropolitan Transit Authority's Vanderbilt Yards in the heart of downtown Brooklyn, NY was a valid public use under the Fifth Amendment of the U.S. Constitution). The plaintiffs intend to appeal the case to the United States Supreme Court. Another case brought in relation to the project, *Develop Don't Destroy Brooklyn v. Urban Development Corp.*, 2008 N.Y.Misc. LEXIS 551 (2008), will be heard by a New York appellate court in the fall of 2008. Email communication with Daniel Goldstein, lead plaintiff, Mar. 20, 2008.

88. A recent flier circulated in Brooklyn by the developer describes how the coalition member groups are starting to implement the CBA, but the brochure does not provide particularly detailed information. See Norman Oder, *In Seventh Slick Brochure, Forest City Ratner Touts "Historic" CBA*, Atlantic Yards Report, <http://atlanticyardsreport.blogspot.com/2008/03/in-seventh-slick-brochure-forest-city.html> (Mar. 3, 2008, 06:03 EST). The flier notes, for example, that BUILD, one of the coalition groups, is "implementing initiatives to prepare adults and youth for and connecting them to construction and permanent employment opportunities created by Atlantic Yards. . . BUILD is also identifying and providing technical assistance to qualified business owners for contracting, retail, concession and other business op-

vertise that it was seeking an Independent Compliance Monitor in 2007, as required by the CBA, but some have questioned just how independent the monitor will be.<sup>89</sup>

Recent news that the Atlantic Yards project may be facing serious financial difficulties has also raised questions about whether “it was reasonable to expect the benefits from the Community Benefits Agreement when it was signed[.]”<sup>90</sup> Forest City Ratner has indicated that it will continue construction work on the arena, but plans for many of the project’s other buildings appear to have been indefinitely delayed—including the affordable housing, retail and office space that were key components of public and governmental support for the project.<sup>91</sup> The CBA does not require any minimum amount of affordable housing to be built,<sup>92</sup> and the possibility that very little will be built in the near future has made apparent a significant shortcoming of the agreement.

One upside of the Atlantic Yards situation is that with so many people opposed to the project and the manner in which the CBA was made, there will likely be some heightened public scrutiny of the developer’s compliance with its agreements.<sup>93</sup> Moreover,

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portunities created by Atlantic Yards and other development projects.” Another coalition group is “working to help identify qualified contractors for business opportunities relating to the Atlantic Yards Projects.”

89. Norman Oder, Atlantic Yards Report, CBA “Watchdog” Sought to Ensure “History Making” Benefits “for Local Community,” <http://atlanticyardsreport.blogspot.com/2007/03/cba-watchdog-sought-to-ensure-history.html> (Mar. 19, 2007, 07:32 EST).

90. Norman Oder, Atlantic Yards Report, A (somewhat speculative) FAQ on the Atlantic Yards news, <http://atlanticyardsreport.blogspot.com/2008/03/speculative-faq-on-atlantic-yards-news.html>.

91. Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, New York Times, Mar. 21, 2008, available at [http://www.nytimes.com/2008/03/21/nyregion/21yards.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/03/21/nyregion/21yards.html?_r=1&oref=slogin). The New York Times’ architecture critic made the point that building the arena without the rest of the development may be worse than building nothing at all: “Postpone the towers and expose the stadium, and it becomes a piece of urban blight—a black hole at a crucial crossroads of the city’s physical history. . . . Without the towers the arena is likely to become an enormous eyecore. . . . [I]ts looming presence will have a deadening impact of a lively area. . . . The atrium, once a vital public space, will be reduced to a barren strip of pavement. No development at all would be preferable to building the design that is now on the table.” Nicolai Ouroussoff, *What Will Be Left of Gehry’s Vision for Brooklyn?*, New York Times, Mar. 21, 2008, available at <http://www.nytimes.com/2008/03/21/arts/design/21atla.html?ref=nyregion>.

92. See [http://www.atlanticyards.com/downloads/mou\\_acorn.pdf](http://www.atlanticyards.com/downloads/mou_acorn.pdf).

93. Norman Oder of the Atlantic Yards Report is more skeptical that implementation will be subject to heightened public scrutiny. He suggests that it will be difficult to measure compliance in many cases. For example, a press release issued by

fears that the Atlantic Yards CBA will establish “bad precedent” for future CBAs have died down somewhat. The Atlantic Yards CBA process has been criticized so much<sup>94</sup> that other New York CBA negotiators have expressly chosen to “avoid[ ] the Brooklyn model.”<sup>95</sup>

## 2. Columbia University Expansion

CBA supporters were hoping that an agreement concerning Columbia University’s expansion into West Harlem would provide a better model for the future of CBAs in New York. The project, in which Columbia will put up sixteen to eighteen new buildings, is estimated to cost about \$6 billion and is likely to span about twenty years. The project is also expected to create about 6,000 jobs, and “transform a shabby enclave of auto-repair shops, warehouses and small manufacturing plants into a pedestrian-friendly environment with more open space, restaurants and shops.” Columbia also argues that the expansion is necessary to its educational mission, as it is now cramped and its spread-out facilities do not allow it to be as competitive as universities such as Harvard and Princeton.<sup>96</sup>

The City and Mayor Bloomberg have been especially supportive of Columbia’s interest in creating a CBA, providing funds and technical assistance for the negotiating process.<sup>97</sup> The process, in this case, was also markedly different than the other New York CBAs from the start.<sup>98</sup> Rather than being driven primarily by the developers or elected officials, County Board 9 authorized the creation of a local development corporation (LDC) to be

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the developer stating that a certain number of people have received job training might be difficult to validate. E-mail communication, Jan. 29, 2008.

94. See, e.g., Damiani *supra* note 83; Patrick Arden, *City’s Brand of CBA, Bad for Rest of Nation?*, METRO NEW YORK, Jan. 14, 2008, available at [http://ny.metro.us/metro/local/article/Citys\\_brand\\_of\\_CBA\\_bad\\_for\\_rest\\_of\\_the\\_nation/11409.html](http://ny.metro.us/metro/local/article/Citys_brand_of_CBA_bad_for_rest_of_the_nation/11409.html).

95. Whether other New York CBA models have proved much better than the Atlantic Yards approach is another matter. See Mathew Schuerman, *Ratner-Style dear with Colombia University?*, N.Y. OBSERVER, Aug. 15, 2005, available at <http://www.observer.com/node/33803>.

96. Judith Messina, *Colombia Expansion Forges Ahead, Despite Opposition*, CRAIN’S NEW YORK BUSINESS.COM, Dec. 22, 2007, available at <http://www.crainnewyork.com/apps/pbcs.dll/article?AID=/20071223/FREE/303249700/1010/toc>

97. The city appointed attorney Jesse Masyr, who represented the developer in the Bronx Terminal Market CBA to work pro bono for the Columbia Local Development Corporation, and the city’s Economic Development Corporation has contributed \$350,000 to pay for a mediator and other expenses. Matthew Schuerman, *Mr. Bollinger’s Battle*, *supra* note 85.

98. *Id.*

composed of appointed community leaders representing a broad range of constituents.<sup>99</sup> Public meetings began in September 2006 and continued on a weekly basis with working groups devoted to housing, business and economic development, employment, education, historic preservation, community facilities and social services, arts and culture, environmental stewardship, transportation, research and laboratory activities and green spaces.<sup>100</sup>

Although the Community Board originally intended that the LDC would not include any elected officials, after the LDC's first meeting it reconsidered this decision.<sup>101</sup> However, including elected officials proved detrimental to the process, as perceptions arose that these individuals were not representing the true interests of the community and that they were inappropriately controlling negotiations. Moreover, Columbia did not have any representatives on the LDC and was not very involved with the negotiations.<sup>102</sup>

The situation took a turn for the worse in November 2007 when three members of the LDC resigned, citing conflicts of interest among the elected officials on the board and a lack of transparency in the negotiations.<sup>103</sup> Two other members resigned

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99. Transcript, West Harlem Development Corporation, Community Forum at 8 (Sept. 30, 2006), available at [http://www.westharlemldc.org/uploads/transcript\\_093006.pdf](http://www.westharlemldc.org/uploads/transcript_093006.pdf). The LDC's mission was to "win support of and leverag[e] the community-base planning of Community Board 9, provide an organizational structure to focus community input in order to negotiate and monitor a community benefits agreement with developers of large scale developments in Community District 9 in a manner that is both transparent and accountable to the West Harlem community. . . ." *Id.*

100. See West Harlem Local Development Corporation, Working Groups, [http://www.westharlemldc.org/Community\\_Benefits\\_Agreemen.html](http://www.westharlemldc.org/Community_Benefits_Agreemen.html) (last visited Mar. 14, 2007).

101. Schuerman, *Mr. Bollinger's Battle*, *supra* note 85, at 24. As one of the LDC's board members explained, "[i]t was absolutely clear to us. . . that if we didn't include [elected officials] on the board as voting members, that we would be doing so at our own peril[.]" *Id.*

102. Telephone interview with Nick Sprayregen, former member of the LDC (Jan. 31, 2008).

103. Daniel Amzallag, *Three Members Resign From LDC*, COLUMBIA SPECTATOR, Nov. 29, 2007, available at <http://www.columbiaspectator.com/?q=node/28368>. Tom DeMott, one of the resigning members and a representative of tenants groups, stated that negotiating sessions were held without his being informed of them, and Nick Sprayregen, the largest property owner in the project's footprint, complained that the CBA was a "sell-out of the community. . . that represents something that is not what the community wants." Matthew Schuerman, *Resignations Over Columbia Harlem Expansion*, N.Y. OBSERVER, Nov. 29, 2007, available at <http://www.observer.com/2007/will-columbia-three-get-any-respect>.

shortly thereafter, claiming that there had been misrepresentations and secrecy.<sup>104</sup> These resignations left the LDC with fifteen members, of which seven were elected officials.<sup>105</sup>

Despite these troubles, a memorandum of understanding<sup>106</sup> was completed in December 2007 just in time for the City Council to approve of the expansion plan and Columbia's request for rezoning.<sup>107</sup> The agreement commits Columbia to providing \$150 million in benefits, including \$30 million for a university-run public school, \$20 million of in-kind services and \$24 million for an affordable housing trust fund. But the bulk of the money, \$76 million, was set aside for as-yet undetermined community programs to be implemented over the next twelve years. The agreement has been described as "one-and-a-half non-legally binding pages," and criticism has been directed at the LDC for rushing the CBA process and punting the specifics of the agreement to a later date.<sup>108</sup>

It appears as though the Columbia CBA negotiations began in good faith, with intentions to be as inclusive of divergent community interests as possible. Regardless of the LDC's continuing pledges of support for community interests, by some accounts it has not succeeded in instilling much faith in its efforts among Harlem residents. The resignations and hastily drawn up agreement have not helped. Nor has the controversy about the use of eminent domain and the possibility of gentrification in the area.<sup>109</sup> Even though Columbia did agree last fall that it would not seek to evict any residents through the use of eminent do-

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104. Daniel Amzallag, *Community Benefits Agreement Will Include School, Funds for Affordable Housing*, COLUMBIA SPECTATOR, Dec. 20, 2007, available at <http://www.columbiaspectator.com/node/28615>.

105. Patrick Arden, *City's Brand of CBA Bad for Rest of the Nation?*, METRO, Jan. 14, 2008, available at [http://ny.metro.us/metro/local/article/Citys\\_brand\\_of\\_CBA\\_bad\\_for\\_rest\\_of\\_the\\_nation/11409.html](http://ny.metro.us/metro/local/article/Citys_brand_of_CBA_bad_for_rest_of_the_nation/11409.html).

106. Memorandum of Understanding between the West Harlem Local Development Corporation and Columbia University on Columbia University's Financial Commitment to Community Benefits (Dec. 19, 2007), available at <http://amy.m.lavine.googlepages.com/MOU-12.19.07.pdf>.

107. Daniel Amzallag, *Community Benefits Specifics Remain Up in the Air*, COLUM. SPECTATOR, Jan. 22, 2008, available at <http://www.columbiaspectator.com/node/28669>.

108. *Id.*; Timothy Williams & Ray Rivera, *Columbia Expansion Gets Green Light*, N.Y. TIMES, Dec. 20, 2007, available at <http://www.nytimes.com/2007/12/20/nyregion/20columbia.html?ref=us>.

109. Daniel Amzallag, *In and Out of Expansion Zone, Development Booms in Harlem*, COLUM. SPECTATOR, Jan. 22, 2008, available at <http://www.columbiaspectator.com/node/28693>.

main, some residents have expressed displeasure with the relocation provisions and it is still unknown what will happen to local businesses. The prospect that eminent domain will be used at all has been viewed negatively by many in the neighborhood, including some who support the expansion, creating tension over the CBA.

Nevertheless, Columbia may still resolve the eminent domain issue with the few remaining business owners in the expansion area,<sup>110</sup> and the finalized CBA may deal with the uncommitted \$76 million in a manner that is satisfactory to most of the community. The difficulties surrounding the CBA, moreover, should not eclipse the fact that the agreement does commit Columbia to providing extensive benefits to the community.

### C. Other Notable CBAs

While the volume of existing CBAs and current negotiations over new CBAs are most prevalent in California and New York, interest in using CBAs is spreading throughout the country. Proposed expansion projects for institutions of higher education,<sup>111</sup> the creation of a municipal-wide wireless internet access program,<sup>112</sup> brownfields remediation projects,<sup>113</sup> stadiums<sup>114</sup> and housing initiatives<sup>115</sup> have all provided the impetus for CBA negotiations. Some of the states where these CBAs are developing authorize development agreements, but most do not.<sup>116</sup> The

110. Daniel Amzallag, *Three Private Property Owners Hold Out in Negotiations*, COLUM. SPECTATOR, Jan. 22, 2008, available at <http://www.columbiaspectator.com/node/28671>.

111. For example, the Yale University campus. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Yale-New Haven CBA, <http://communitybenefits.blogspot.com/2008/01/yale-new-haven-cba.html> (Jan. 30, 2008, 13:30 EST).

112. Minneapolis Digital Inclusion CBA. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Minneapolis Digital Inclusion CBA, <http://communitybenefits.blogspot.com/2008/01/minneapolis-digital-inclusion-cba.html> (Jan. 30, 2008, 15:49 EST).

113. For example, see Salkin & Lavine, *supra* note 1, and Amy Lavine, Gates-Cherokee Redevelopment CBA, <http://communitybenefits.blogspot.com/2008/01/gates-cherokee-redevelopment-cba.html> (Jan. 30, 2008, 16:22 EST).

114. A new arena for the Penguins in Pittsburgh. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Penguins Update, [http://communitybenefits.blogspot.com/2008/02/penguins-update\\_05.html](http://communitybenefits.blogspot.com/2008/02/penguins-update_05.html) (Feb. 5, 2008, 06:34 EST).

115. For example, the Shaw District in Washington, D.C. See Salkin & Lavine, *supra* note 1, and Amy Lavine, Washington D.C. Shaw District CBA, <http://communitybenefits.blogspot.com/2008/01/washington-dc-shaw-district-cba.html> (Jan. 30, 2008, 18:40 EST). Another example is the proposed redevelopment of Cramer Hill in New Jersey. Salkin & Lavine, *supra* note 1.

116. See *supra* note 6 and accompanying text (noting that the states that currently authorize development agreements include Arizona, California, Colorado, Florida,

community groups beginning to experiment with CBAs are located around the country. Stakeholders in Albany (New York),<sup>117</sup> Atlanta,<sup>118</sup> Pittsburgh,<sup>119</sup> Charleston (South Carolina),<sup>120</sup> Miami,<sup>121</sup> Milwaukee,<sup>122</sup> San Francisco,<sup>123</sup> Santa Rosa (California),<sup>124</sup> Seattle,<sup>125</sup> Syracuse (New York),<sup>126</sup> the Twin Cities,<sup>127</sup> and Wilmington (Delaware),<sup>128</sup> for example, have completed CBAs or are currently trying to initiate negotiations.

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Hawaii, Louisiana, Nevada, New Jersey, Oregon, South Carolina, Virginia, and Washington).

117. See Community Benefits Proposal, <http://www.ariseorg.net/cba10-15-05.html> (last visited Mar. 14, 2007); see also Michael DeMasi, *Neighborhood Groups Seek Benefit Package from Convention Center Developer*, BUS. REV. (Albany, NY), Jan. 30, 2006, available at <http://www.bizjournals.com/albany/stories/2006/01/30/daily4.html>; Robert Gavin, *Jobs Plan Draws Praise; County Lawmaker Encouraged by Sen. Schumer Proposal to Fight Joblessness Among Black Males*, TIMES UNION (Albany, NY), Nov. 21, 2007.

118. See Atlanta City Council Approves BeltLine Tax Allocation District, CITY NEWSBYTES, Nov. 8, 2005, available at [http://www.atlantaga.gov/media/citynewsbytes\\_110805.aspx](http://www.atlantaga.gov/media/citynewsbytes_110805.aspx); Georgia Stand-up, Community Benefits 101, [http://www.gastandup.org/community\\_benefits.html](http://www.gastandup.org/community_benefits.html).

119. See Salkin & Lavine, *supra* note 24; Penguins arena, <http://communitybenefits.blogspot.com/2008/01/penguins-arena.html>.

120. See *Community Benefits Agreements*, CHARLESTON BUS. J., Apr. 18, 2005, available at [http://www.charlestonbusiness.com/pub/11\\_8/news/4353-1.html](http://www.charlestonbusiness.com/pub/11_8/news/4353-1.html).

121. See Tides Foundation, Bridging the Economic Divide, <http://www.tidesfoundation.org/services-strategies/tides-initiatives/bridging-the-economic-divide/bed-strategies-in-action/index.html> (last visited Mar. 14, 2007).

122. See Salkin & Lavine, *supra* note 24; Milwaukee Park East Redevelopment CBA, <http://communitybenefits.blogspot.com/2008/01/milwaukee-park-east-redevelopment-cba.html>.

123. See Lennar Construction Workshops Providing Valuable Advice to Community, *Construction Workers and Business*, BUS. WIRE, July 24, 2007.

124. See New Economy Working Solutions, <http://www.neweconomynorthbay.org/programs.php#acco>.

125. See Real Change News.org, *Say Yes to Responsible Development*, [http://www.realchangenews.org/2006/2006\\_11\\_29/firstthingsfirst.html](http://www.realchangenews.org/2006/2006_11_29/firstthingsfirst.html) (last visited Mar. 14, 2007); Sharon Pian Chen, *Local Activists Want Developers To Provide Community Benefits, Too?*, SEATTLE TIMES, Dec. 6, 2006.

126. See Mark Spadafore, *Syracuse Alliance for a New Economy: A Year of Growth and Partnership for Central New York*, <http://communitybenefits.org/article.php?id=983> (last visited Feb. 22, 2008); *Community Benefits: New Group Wants to be Ready when Developers Come Knocking*, POST STANDARD (Syracuse, NY), Sep. 3, 2007.

127. See Minneapolis Digital Inclusion CBA, Salkin & Lavine, *supra* note 24, and Amy Lavine, *Minneapolis Digital Inclusion CBA*, <http://communitybenefits.blogspot.com/2008/01/minneapolis-digital-inclusion-cba.html> (Jan. 30, 2008, 15:49 EST); Longfellow CBA, <http://communitybenefits.blogspot.com/2008/03/longfellow-cba.html>; Harrison Neighborhood, Minneapolis CBA, <http://communitybenefits.blogspot.com/2008/02/harrison-neighborhood-minneapolis-cba.html>.

128. See Peninsula Compost Co. CBA, <http://communitybenefits.blogspot.com/2008/03/peninsula-compost-co-cba.html>.

CBA's are also appearing outside of the U.S. in cities, including Toronto and Dublin.<sup>129</sup>

Recent developments on the West Coast indicate that the CBA concept may be changing. In 2007, Tesco, a British grocery chain and the world's third largest retailer, announced plans to open hundreds of neighborhood markets in California and other western states. A coalition was quickly formed to demand a CBA, primarily because Tesco does not have a unionized workforce. Tesco has shown no interest in negotiating, despite media pressure and threats of a boycott from community and labor groups.<sup>130</sup> Tesco has argued that a CBA is unnecessary because it already provides well-paying jobs, has environmentally-friendly policies and has pledged to locate stores in underserved areas. It has asked the public to allow it "to begin a relationship based on [its] deeds[.]" implying that pressuring it to sign a CBA would be "no way to build trust between neighbors."<sup>131</sup> The situation is notable because the coalition has relied primarily on its ability to influence consumers for leverage, and not on its ability to provide support in the land development approval process. Tesco does not seem to believe that refusing to negotiate a CBA will interfere with its business, which underscores a fundamental weakness of CBA's—they may not work when the developer does not believe that it needs them.<sup>132</sup>

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129. Laurie Monsebraaten, *Advisor Warns Residents to Avoid 'Divide and Conquer' Tactics*, TORONTO STAR, May 10, 2007, at R04.

130. See, e.g., Jerry Hirsch, *Activists Protest Tesco's Fresh & Easy*, LOS ANGELES TIMES, Nov. 27, 2007, at 3.

131. Simon Uwins, *Fresh & Easy Promises Accountability and Social Responsibility*, LOS ANGELES BUS. J., Nov. 26, 2007.

132. A similar, less widely publicized campaign is being waged against Western Union. In opposition to practices that it believes to be harmful to immigrant communities that rely on money transferring services, the Transnational Institute for Grassroots Research and Action (TIGRA) sought to obtain an agreement from Western Union that it would reduce its fees, provide a fair exchange rate, commit a portion of its revenues to a community reinvestment fund and adopt human rights screens in its investment practices. After Western Union refused to negotiate such a "Transnational Community Benefits Agreement," TIGRA called for a worldwide boycott, which is currently ongoing. See TIGRA, *About the Campaign*, <http://www.boycottwesternunion.net/En/about.html> (last visited Feb. 22, 2008); Andrea Chang, *Groups Boycott Western Union; Immigrant Advocates Say it Charges Exorbitant Fees for Money Transfers While Failing to Reinvest in the Community*, LOS ANGELES TIMES, Sep. 11, 2007. In January 2008, Western Union filed a challenge against a shareholder resolution calling for an agreement with the Securities and Exchange Commission, making it less likely that any agreement will be reached in the near future. See TIGRA, *Western Union Fights Community Reinvestment Proposal by Shareholders*, <http://www.boycottwesternunion.net/En/timeline.html> (last visited Feb. 22, 2008).

## V.

## PRACTICAL PROBLEMS WITH CBAS

CBAs have proven to be effective tools for many communities hoping to obligate developers to provide amenities to the neighborhoods that they affect. However, negotiating a CBA may not be appropriate in all situations,<sup>133</sup> and experience with CBAs has shown that negotiating these agreements can be a difficult task. The following discussion attempts to discern several of the most common practical problems with CBAs.

A. *Community Organizing*

The first step of any campaign is to start a CBA coalition.<sup>134</sup> But community organizing is not easy. It takes money and strong leadership, both of which may be difficult to find.

The coalition negotiating on behalf of the community must be representative of the community's residents and property owners to retain and enhance its political capital. Ideally, it should be inclusive of all interests that may be impacted by the proposed development. As the experiences with Atlantic Yards and Columbia illustrate, a CBA coalition that leaves out stakeholders may not be fully accepted by the community. For this reason, community organizers need to take an active role in seeking out community participants. Some of the best CBA campaigns have involved posting flyers, sending out mailers, and going door-to-door, in addition to speaking with already established community groups and holding public meetings.<sup>135</sup>

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133. See Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, SHELTERFORCE ONLINE (Nov./Dec. 2005), available at [http://www.laane.org/pressroom/stories/community\\_benefits/cbNovDec2005shelterforce.html](http://www.laane.org/pressroom/stories/community_benefits/cbNovDec2005shelterforce.html).

134. See David Marcello, *A "Concentric Circles" Model for Organizing Community Benefits Agreements*, TULANE PUBLIC LAW CENTER, Mar. 15, 2007, available at <http://www.law.tulane.edu/WorkArea/showcontent.aspx?id=5746>.

135. One example of a CBA campaign that has involved this type of active community organizing is the Minneapolis Digital Inclusion CBA. The Digital Inclusion Advisory Team collected information about the needs and desires of the community through individual and community surveys, community/stakeholder sponsored meetings, neighborhood meetings, telephone, email and mail inputs, city sponsored meetings and open houses. This information was synthesized into priorities and relayed to the Digital Inclusion Advisory Team, one of six community teams that were formed to advise the negotiating team. For more information about the CBA and community organizing process, see The Digital Access Project, <http://www.digitalaccess.org/>, and particularly the Wireless Minneapolis Digital Inclusion Task Force Final Report, available at <http://www.digitalaccess.org/documents/MDITF%20complete.pdf>.

The next step for a coalition is to formulate its priorities. For a broad-based coalition, this may be the hardest part of making a CBA. Community groups with different agendas will inevitably have to compromise over the benefits to be sought, and internal politics may arise within the coalition, making cooperation and unity difficult. One way for a coalition to stay cohesive in its goals is to conduct thorough surveys of the community to assess its needs. This type of research can be costly and time consuming, but it may be worthwhile.

Another method for large and diverse coalitions to build cohesiveness is the development of a "Community Benefits Coalition Operating Agreement" and a list of "Coalition Operating Principles." This type of operating agreement defines membership qualifications, addresses how collective decisions will be made, outlines procedures for dealing with conflicts of interest, and addresses other coalition issues. The process of developing these guiding documents will help a coalition to formulate its goals and will introduce a measure of formality into the coalition's working order that can help to prevent internal disputes. The Public Law Center at Tulane Law School has produced a model Coalition Operating Agreement and Principles,<sup>136</sup> as well as guidance for using them.<sup>137</sup>

### B. *Bargaining Power and Bargaining Tactics*

For a CBA to be fair and effective, it is necessary that the community negotiating the CBA have adequate leverage to obtain meaningful promises from a developer. In some situations, a developer's need to locate the project in a specific place or the possibility of obtaining public subsidies will provide a large amount of leverage to community groups. As the executive director of the Los Angeles Community Redevelopment Agency has remarked, CBAs "work best when there is substantial agency money invested, when they're big projects, and when they're in hot markets or emerging markets."<sup>138</sup> When these elements are missing, CBAs are often criticized as creating development barriers that encourage developers to simply find other, less costly,

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136. Community Benefits Coalition Operating Agreement, <http://www.law.tulane.edu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=5750>.

137. Marcello, *supra* note 134.

138. *See* Meyerson, *supra* note 9.

locations.<sup>139</sup> This does not mean that CBAs will not work in such situations, but coalitions may have more difficulty convincing developers to negotiate.

When developers do choose to engage in talks with community groups, they may persist in attempts to weaken the coalition's bargaining power. The "divide and conquer" techniques used by developers to balkanize coalitions require community groups to be united and to have coherent goals. Otherwise, a developer may attempt to appease some community groups without meeting others' needs—to "buy off" the minimum number of stakeholders to be able to spin the project as being community-supported.<sup>140</sup> As the Atlantic Yards case shows, such tactics may be used before a coalition has even formed, making a cohesive community response especially difficult. When a coalition has already formed, it may protect itself against such tactics by requiring coalition members to agree not to bargain separately with the developer.<sup>141</sup> In other cases, fragmentation of a coalition may be caused indirectly by the benefits that the developer is or is not willing to put on the table. This is particularly true when negotiations concern controversial developments. For example, the issue of eminent domain led to the resignation of a number of members from the Columbia negotiating team who refused to compromise.<sup>142</sup>

While developers may try to damage coalitions' reputations or seek to win over constituent groups, CBA coalitions have developed some tactics of their own to boost their bargaining power. From the start, coalitions must develop a language to frame the issues in their favor. This often involves emphasizing positive visions of the community's future, win-win solutions, inclusiveness, the grassroots character of the campaign and the nature of the CBA as fostering equitable development rather than preventing

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139. See The Partnership for Working Families and Spin, *Words that Work: Communications Messaging for Community Benefits Agreements* 10 (2007) available at [http://www.communitybenefits.org/downloads/CB%20Communications%20Toolkit\\_1.pdf](http://www.communitybenefits.org/downloads/CB%20Communications%20Toolkit_1.pdf) (noting that "Chambers of Commerce typically argue that Community Benefits advocates are hostile to business. Their classic argument is that tax revenues and jobs will be lost").

140. See GROSS, *supra* note 2 at 22; see also Suzette Parmley, *Trump the Best Known City Casino-game Player*, PHILADELPHIA INQUIRER, Dec. 15, 2006 (describing how Donald Trump "pulled five or six 'marginal' groups away from the Multi-Community Alliance. . . and, through deceptive marketing, made it appear as if the entire alliance embraced the project").

141. Community Benefits Coalition Operating Agreement, *supra* note 136.

142. See discussion *supra*, Part IV.B.2.

development altogether.<sup>143</sup> These positions reflect strong social values, and they may draw more community members to the coalition and attract positive media attention. If the strength of a campaign is not enough to convince a developer to bargain, however, some community groups have engaged in more forceful tactics. In New Haven, Connecticut, for example, 800 people marched through the neighborhood on the first anniversary of the coalition's formation to demand negotiations.<sup>144</sup> And, in Pittsburgh, a coalition member publicly burned a copy of a draft CBA offered by the city to protest its vague provisions. The following day, coalition members arranged a bus tour through the neighborhood. Both events were highly publicized.<sup>145</sup>

### C. Money

The costs of negotiating a CBA can be high. Organizing a coalition, holding meetings, conducting community research and preparing reports will all require funding. Coalitions that have no experience with CBAs, moreover, will likely need technical and legal assistance throughout the negotiation process. The funding required for all of this may inhibit the process.<sup>146</sup>

However, resources are available. Beyond the grants and funding programs normally used by community groups, a CBA coalition should take advantage of the talents of neighborhood residents. Volunteers are often willing to hand out surveys, post signs and spread the word about public meetings. Local lawyers and other professionals may be willing to offer their services for free or at a reduced cost. Regional and national organizations such as LAANE and Good Jobs First may also be able to provide information about CBAs and other resources. The faith-based community has also emerged as another source of financial and staff support for these efforts.

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143. The Partnership for Working Families and Spin, *Words that Work: Communications Messaging for Community Benefits Agreements* 7 (2007).

144. Connecticut Center for a New Economy, Community Organized for Responsible Development (CORD), <http://www.ctneweconomy.org/CORD.html>.

145. See, e.g., Jeremy Boren, *Hill District leaders closer to goal of grocery store*, PITTSBURGH TRIBUNE REV., Jan. 12, 2008; Jeremy Boren, *Hill District Activists Rally*, PITTSBURGH TRIBUNE REV., Jan. 8, 2008; Mark Belko, *Hill Leaders Push for Arena Accord*, PITTSBURGH POST-GAZETTE, Jan. 9, 2008.

146. See GROSS, *supra* note 2, at 23.

#### D. *Enforcement and Monitoring*

Most CBAs include monitoring and enforcement provisions that require coalitions to engage in future activities related to the CBA. For coalitions that formed for the specific purpose of negotiating a CBA, sustaining the energy for monitoring and enforcement may be difficult. Even for established community groups, the test of time may be difficult as the neighborhood changes and populations fluctuate, leading to an evolution of the community's goals and development priorities. Requiring a developer to set aside seed money for the maintenance of a coalition is one way to ensure that the CBA will be monitored. However, conflicts of interest (perceived or actual) may arise if the developer funds enforcement efforts and inadequate assurances of independence are made.<sup>147</sup> Coalitions that are affiliated with larger, established nonprofits like LAANE or SAJE may have an easier time enduring the life of a CBA. Further, legal issues related to enforcement, discussed in the next section, can present significant unanticipated challenges.

### VI.

#### LEGAL ISSUES RELATED TO CBAS

The validity and enforceability of CBAs has yet to be tested in court, but some lawyers have expressed concerns that the agreements may not pass constitutional or contract law requirements.

#### A. *Consideration*

Since CBAs may be analogized to a bilateral contract,<sup>148</sup> chief among the questions as to the validity of CBAs is whether community groups provide any real consideration for these contracts. While supporters argue that a coalition's promise to support a development before land use authorities constitutes sufficient consideration, others have argued that such promises may be considered to be insufficient when compared to the extensive benefits offered by developers.<sup>149</sup> This argument has particular

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147. See Oder, *supra* note 89 and accompanying text.

148. A bilateral contract represents an exchange of promises and bargained for consideration. See 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.23, at 87 (West Publishing 1993) (1963).

149. At a New York panel on CBAs, for example, William Valletta, former general counsel for the New York City planning department asked: "What is the community giving up in order to take part in the agreement? Presumably, they can't sell their vote on their participation in democracy." Matthew Schuerman, *The C.B.A. at*

resonance in cases where community support is, in reality, unnecessary for the developer to obtain needed approvals. Similarly, where the community is fragmented and the developer obtains the support of only one faction, it may be doubted whether the support of such a limited portion of the community actually provided any help to the developer in receiving project approvals or improving its public image.

Under contract theory, which does not generally inquire into the adequacy of consideration, promises not to oppose developments are likely to be deemed supported by consideration.<sup>150</sup> In some cases, CBA coalition members have also made agreements not to bring legal actions to block developments. As “the forbearance of a right to a legal claim,” this would seem to constitute sufficient consideration. “Even if, in hindsight, the legal claim was improbable or nonexistent, ‘it would be enough if at the time of [agreement] [the party] believed in good faith it was vulnerable to a claim by [the other party.]’”<sup>151</sup> The forbearance of legal claims is a stronger basis for consideration than promises to support a development before land use agencies, and it should be included in CBAs whenever possible.

### B. *Standing to Enforce*

Numerous questions have been raised as to who can enforce provisions in a CBA. Because contract law generally permits only contract signatories to enforce a contract, CBA supporters have encouraged coalitions to require each community group to separately sign the agreement. Otherwise, the dissolution of a coalition or the inability to define the coalition’s agents may prevent a CBA from being enforceable.<sup>152</sup>

Where local governments are authorized to enter into development agreements, CBA supporters encourage the incorporation of CBAs into these agreements so that they can be enforced by local governments.<sup>153</sup> In at least one case, a CBA was completely incorporated into a development agreement, with no freestanding CBA signed by community groups. This arrangement is probably not ideal, as complicated legal problems might arise if

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*Atlantic Yards: But Is It Legal?*, N.Y. OBSERVER, Mar. 14, 2006, available at <http://www.observer.com/node/34377>.

150. 17A AM. JUR. 2D *Contracts* § 124.

151. *Hakim v. Payco-General Am. Credits*, 272 F.3d 932, 935-36 (7th Cir. 2001)

152. GROSS, *supra* note 2, at 23-24.

153. *Id.* at 72.

the coalition were to believe that the developer was in breach but government officials refused to bring an enforcement action.<sup>154</sup>

Whether or not individual community members will be considered third-party beneficiaries capable of enforcing CBAs has not been widely discussed, but some limited precedent exists to support the argument.<sup>155</sup> The third party beneficiary rule generally holds that a person not a party to a contract may nevertheless enforce it if the contract was made directly and primarily for his or her benefit.<sup>156</sup> Still, it may be questioned whether CBAs are intended to benefit individual persons, or whether they are intended to benefit the community at large, thus making individual community members mere incidental beneficiaries incapable of enforcing CBAs. In some cases, the question may be moot, as a number of CBAs specifically disclaim the existence of third party beneficiaries.<sup>157</sup>

Enforceability questions may also center on which parties are bound by developers' promises. Many CBAs contain language indicating an intent that a CBA's provisions will be binding upon the development's future tenants, contractors or buyers. If a CBA does not require these future parties to sign the original CBA or a similar agreement with the developer, community groups may have difficulties enforcing the CBA's terms against developers' subcontractors, tenants and successors in interest.<sup>158</sup>

In states where development agreements are not specifically authorized by state statute, and where a CBA is negotiated between community groups and a government entity engaged in development activities, the coalition needs to be wary that the agreement may not be enforceable against government officials elected in the future. Constitutional questions remain as to

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154. See Laura Kurtzman, *City Center Project Ok'd - 6-5 Vote Includes Labor-Backed Plans if Developer Agrees to Deal, Shopping, Entertainment District Gets More Affordable Homes, Among Other Things*, SAN JOSE MERCURY NEWS, Dec. 11, 2002, at A1 (quoting City Attorney Rick Doyle as having these concerns). See also GROSS, *supra* note 2, at 25.

155. See *Vale Dean Canyon Homeowners Ass'n v. Dean*, 100 Ore. App. 158 (Or. Ct. App. 1990) (holding that members of a homeowners association had third party standing to bring suit against a subdivider that had breached its agreement with the county to improve roads).

156. See, e.g., 17A AM. JUR. 2D *Contracts* § 425.

157. See, e.g., *Atlantic Yards Community Benefits Agreement*, *supra* note 77, at 51 (stating that "[n]othing in this agreement, express or implied, is intended to confer upon any person other than the parties hereto, and their permitted successors and assigns, any rights or remedies under or by reason of this Agreement").

158. GROSS, *supra* note 2, at 71.

whether a court might view long term agreements as a bargaining away of the police power. Local governments are prohibited from contracting away their police powers because to do so would empower one legislative body to bind future legislative bodies.<sup>159</sup>

### C. *Issues Related to the Planning Process*

Because the process of negotiating CBAs often involves local governments or elected officials, CBAs may also raise legal issues related to the propriety of the planning process. Development agreements may provide a framework for incorporating CBAs into this process, but most states do not authorize local governments to enter into these agreements.<sup>160</sup> Thus, in the majority of states, if local governments become involved in the CBA process they may be subject to challenges that such agreements are not authorized by law.

Moreover, when local officials are involved in negotiations, CBAs may begin to look somewhat like disguised exactions, a term used to describe the situation in which local officials improperly condition project approvals on the provision of benefits not closely related to the project's impacts.<sup>161</sup> In accordance with this line of reasoning, some CBA opponents have gone so far as to characterize the agreements as "extortion."<sup>162</sup> Even without invoking the concept of illegal exactions, CBAs created through a process involving local officials may, in some cases, raise questions about conflicts of interests. In these situations, care must be taken so that CBA negotiators are not too involved with planning or other political decisions.

At the same time, local governments may be faulted for not involving themselves enough in CBA negotiations. Under this

159. See JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE IN A NUTSHELL* 128 (Thomson West 2006).

160. See Callies and Tappendorf, *supra* note 6.

161. See Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 999-1000 (1987) (noting that the purposes of many development agreements, to provide infrastructure and other public benefits, may "arguably [be] above and beyond that which a local government could exact under the police power"). Whether CBA provisions constitute exactions, however, is dependent on the local government being significantly involved in developing the CBA, and on the provisions not sharing a sufficient nexus with the project. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nolan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

162. Schuerman, *Mr. Bollinger's Battle*, *supra* note 85, at 24

view, some argue that local governments should ensure that negotiating teams accurately represent community interests.<sup>163</sup> This may be achieved by a local government facilitating the creation of a CBA bargaining team, as happened with the Columbia University CBA,<sup>164</sup> or by the local government's willingness to take a CBA's comprehensiveness into account when evaluating the developer's application during the land use approval process. These issues will likely become more important as states and municipalities begin to adopt legislation governing CBAs.<sup>165</sup>

## VII.

### CHECKLIST OF ISSUES TO REVIEW IN CONSIDERING THE USE OF CBAS

What follows is a checklist to use in identifying a number of preliminary issues appropriate for consideration when CBAs are contemplated by developers, local governments and/or community groups. The benefits and remedies are typically items that are all "on the table" when negotiating the agreement. In addition, depending upon whether the government is a party to the agreement and/or is assigned responsibilities under the agreement, the threshold question of whether state statutory authority exists for such involvement is critical.

#### *Community Organizing:*

- Is the coalition inclusive of diverse community stakeholders, including faith-based organizations, unions, civic, environmental and social groups, residents' and local business associations and youth groups?
- How have community goals been identified?
  - Through input from coalition members?
  - Public meetings?

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163. *Id.*

164. See discussion *supra*, Part IV.B.2. Whether or not local governments should be involved in determining who will be part of negotiating teams is a difficult question. A CBA bill recently proposed in Allegheny County, Pennsylvania, was criticized in part because it would give the county too much control over who could negotiate CBAs. Telephone interview with Thomas Hoffman, Pittsburgh UNITED, Mar. 27, 2008.

165. The 2008 report of the Connecticut Responsible Growth Task Force recommended that the state adopt legislation authorizing CBAs. Report of the Responsible Growth Task Force to Governor M. Jodi Rell, at 9 (Feb. 4, 2008), available at [http://www.ct.gov/opm/lib/opm/igp/org/rgtf\\_report\\_2-4-08.pdf](http://www.ct.gov/opm/lib/opm/igp/org/rgtf_report_2-4-08.pdf). CBA legislation has also been proposed in Allegheny County, Pennsylvania (where Pittsburgh is located). See CBA legislation to be discussed in Pittsburgh, <http://communitybenefits.blogspot.com/2008/03/cba-legislation-to-be-discussed-in.html>.

- From active community research, like surveys, door-to-door canvassing and socio-economic studies?
- How have the issues been framed? Can issues of equitable development, the positive prospects for the community, and the ability to create a win-win situation be emphasized to attract more community members and positive press attention?
- Have coalition constituents signed a coalition operating agreement and agreed to a list of operating principles? Are there procedures for choosing negotiators, resolving internal disputes, dealing with conflicts of interest among coalition members, etc.?

*Parties:*

- Is there more than one developer?
- How many community groups should/will be parties to the agreement? Will any individuals from the community sign the agreement?
- Is the municipality a party to the agreement?
- Who has the authority to speak for and/or sign for each party?

*Developer Benefits:*

- What are the benefits to the developer?
- Has the coalition agreed not to institute legal action to block the development?
- Are the developer's benefits described in the CBA in a manner that satisfies the consideration requirement of contracts?

*Community Benefits:*

- What benefits will the developer promise the community?
- Is a needs assessment or study required that will determine the extent of the benefits (e.g., the amount of environmental remediation may be based on the results of a study)?
  - Who will finance the assessment?
  - Who will conduct the assessment? Are there safeguards to ensure independence?
- What is the scope of the developer's responsibility or financial obligation?
  - When does it begin and how long does it last?
- Do the obligations transfer to subsequent project owners, or other third parties such as tenants, sub-contractors, or on-site vendors?

*Monitoring:*

- What is the implementation process and timeline?
- How will the process be monitored?
  - Will an individual community organization or committee be responsible for the oversight?
  - Will an independent monitor be hired?
  - How will monitoring be financed? If the developer funds the monitoring, are there safeguards in place to ensure neutrality?
  - How often will monitoring reports be made?
  - How will monitoring reports be made available to the community?
- Is there a process to amend the terms of the benefit or program?

*Enforcement:*

- Is the CBA incorporated into a development agreement?
  - Where development agreements are not authorized by law, does the agreement contain an indication of who may enforce the document on behalf of the community?
- Has the CBA been signed by each individual community group making up the coalition?
- Is there an arbitration or mediation clause?
- Is there a third-party beneficiary clause?

*Remedies:*

- What constitutes a breach on the part of the developer and on the part of the community?
  - Has breach been defined in the contract?
- What are the remedies in the event of a breach?
  - Are the remedies specific to each benefit?
  - Is the right to request specific performance included?
  - Is equitable relief permitted in the event of an irreparable injury?
- Will the other clauses of a CBA remain in effect in the event of a breach?
- What type of notice is required before relief is sought?
- Who is responsible for attorney's fees in the event of a court action?

## VIII.

## CONCLUSION

While CBAs represent an opportunity to accomplish development projects in a manner that achieves social equity and engages community stakeholders in projects with an eye towards designing processes and results that can be win-win for communities and developers, myriad practical and legal issues are present for all involved participants. Land use and municipal attorneys can expect to hear more about these types of agreements, and may be called upon with more frequency to help negotiate and develop CBAs for interested clients. Although the projects highlighted in this article are substantial in scope, much smaller and perhaps simpler CBAs are likely to start appearing in mid-sized and smaller communities across the country.

