

Reprinted with permission; copyright 2007 by the American Planning Association

Commentary

Community Benefits Agreements: Opportunities and Traps for Developers, Municipalities, and Community Organizations

Patricia E. Salkin

WHAT ARE COMMUNITY BENEFITS AGREEMENTS?

A Community Benefits Agreement (CBA) is a private contract negotiated between a prospective developer and community representatives. In essence, the CBA specifies the benefits that the developer will provide to the community in exchange for the community's support of its proposed development. A promise of community support may be especially useful to a developer seeking government subsidies or project approvals.¹

CBAs are generally negotiated between coalitions of community groups that often include labor, environmental, and religious organizations. Many CBA provisions are inspired by social justice issues. Common CBA benefits include living-wage provisions, first source (or local) hiring plans, guarantees that developments will include low-income housing in their plans, and assurances of minority hiring minimums.² Because the agreements are negotiated between community coalitions and interested

developers, the benefits can be tailored to meet specific community needs, such as parks, day care centers, or job training facilities.

The flexibility of the CBA has also spilled over into the process by which these agreements are negotiated. Negotiations may be initiated by a developer or a community coalition, or in some cases they may be encouraged by city officials. Negotiations for the community are generally undertaken by representatives of individual community groups, but they may also involve local government officials. Public input also plays an important role in determining community goals.

After a CBA has been completed, in some cases it will be incorporated into a development agreement made between the developer and the municipality as part of the planning process.³ This ensures a certain measure of transparency and also permits the government, as well as coalition members, to enforce the agreement. However, because most states do not authorize

local governments to enter into development agreements, many CBAs will be enforceable only by the contracting community groups.⁴

CBAs are considered by their supporters to be powerful tools for assuring that the needs of communities will not be neglected by large developers. Many developers also support the negotiating process as a method by which to obtain community support and thereby avoid government refusal of their projects. CBAs have been negotiated in relation to at least 48 major development projects in cities across the country,⁵ with California taking the lead in terms of experience and volume.

CBAS IN NEW YORK

Development agreements are not authorized by statute in New York, but that does not prevent neighbors from negotiating private CBAs with developers. The first New York CBA was completed in 2005 in relation to the \$3.5 billion development of the Atlantic Yards arena in Brooklyn, future home

Patricia Salkin is associate dean and director of the Government Law Center of Albany (New York) Law School. This commentary is excerpted from a presentation the author made at the ALI-ABA Land Use Institute in San Francisco in August 2007. This commentary focuses on several CBAs from New York, but the original presentation included a discussion of CBAs from other states as well. Salkin is grateful for the assistance of Albany Law School students Amy Lavine and Ami Orava.

1. JULIAN GROSS, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE, 9-10 (Good Jobs First 2005), available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.

2. *Id.* at 10-11.

3. 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, ensuring that the devel-

opment's construction will not be interrupted or stopped. See generally David L. Callies and 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).

4. Gross, *supra* note 1, at 11.

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

Criticism has also been aimed at the other New York City CBAs.

to the Nets basketball team, and an attached residential and office complex to be made up of several high-rise buildings.⁶ The agreement was negotiated by eight community groups⁷ and was based on the Staples Center CBA. It includes affordable housing, living wage, First Source and minority hiring provisions, and also offers the perks of free basketball tickets for neighborhood residents and the construction of a day care center.⁸

Reaction to the agreement has not been completely positive, however. First, the Atlantic Yards CBA is not incorporated into a development agreement with the city, making enforcement possibly more difficult. Second, concerns have been raised in relation to the propriety of the CBA negotiating process. It has been suggested the eight-member coalition did not adequately represent the needs of the Brooklyn community, and critics have pointed out that several of the coalition members will receive funds from the developer, Forest City Ratner, as part of the deal.⁹ Given that the Atlantic Yards project will ultimately receive more than \$200 million in state and city funds, it has even been suggested that the CBA is inherently undemocratic in its exclusion of the broader New York City and state community. As the former president

of New York City's Economic Development Corporation explained, "If the public is putting money into the project and the developer is allocating that money in private deals with the community, it is not government setting the priorities. Generally speaking, it is city taxpayer dollars that are being spent in not necessarily high priority areas. . . . It shouldn't be some local community groups making these decisions. It should be a cross-section of the community and city government."¹⁰

Criticism has also been aimed at the other New York City CBAs. For example, the 2006 CBA concerning the Bronx Terminal Market¹¹ has been faulted for not involving any grassroots community organizations.¹² While the agreement does include a number of valuable community benefits, the developer will only be fined \$60,000 for failing to comply with the CBA, weakening the value of the CBA in the eyes of many stakeholders. Critics have also drawn attention to the subtleties of some of the contract's provisions: the amount of retail space reserved for local retailers makes up only a minimal portion of the mall's square footage, and the living wage and minority hiring provisions are not expressly enforceable as to the developer's tenants. Finally,

community groups have criticized the negotiation process for being neither transparent nor inclusive. Although 18 groups representing various interests were selected by the borough president to participate in the process, they were given only about a month to prepare a draft CBA and were not given any assistance in the process. Evidently, this resulted in many of the community groups having little influence in the actual negotiations. When the organizations received copies of the completed CBA the morning of the council vote to approve the development plans, only three of them signed the agreement. At least seven organizations refused to sign the CBA.¹³

The Yankee Stadium CBA, completed in 2006, has also faced criticism. To begin with, the agreement was made between the Yankees, the Bronx borough president, and the Bronx Delegation of the New York City Council; it was not negotiated or signed by any community groups. One of the agreement's most controversial provisions is the trust fund it created to be administered by "an individual of prominence" through distributions to local nonprofit groups.¹⁴ Because the fund's trustee will be appointed by the same elected officials responsible for the CBA, it has been

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

7. The groups involved in the negotiations were the All-Faith Council of Brooklyn, the Association of Community Organizations for Reform Now (ACORN), Brooklyn United for Innovative Local Development (BUILD), the Downtown Brooklyn Educational Consortium, the Downtown Brooklyn Neighborhood Alliance, the First Atlantic Terminal Housing Committee, the New York State Association of Minority Contractors, and the Public Housing Communities. Atlantic Yards Community Benefits Agreement, <http://www.atlanticyards.com/html/community/cba.html> (last visited September 13, 2007).

8. See Mayor Bloomberg, Forest City Ratner CEO, President Ratner, Civic Leaders Sign Community Benefits Agreement, *supra* note 6. 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 35 percent of jobs will go to minorities. Fifty percent of the proposed rental units are to be affordable and the development will include a health and day care center. More than 50 tickets will be donated to people in the community annually, with priority given to children and seniors, and the project includes six acres of open space.

9. In addition to the fact that only eight groups participated in the negotiations, it has been pointed out that at least one of the groups, BUILD, was created just prior to or during the negotiations. Furthermore, critics have suggested that BUILD is not experienced enough to properly administer the CBA's provisions. Accusations of self-interest have also been made since a 2004 tax return form was found stating that BUILD expected to receive \$5 million from Forest City Ratner over the following two years (BUILD's lawyer said that this was just a "best guess estimate"). See Matthew Schuerman, *A Cool \$5 Million*, NEW YORK OBSERVER, available at <http://www.observer.com/term/29768> (last visited September 13, 2007).

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://www.observer.com/node/34377> (last visited September 13, 2007).

10. Matthew Schuerman, *The C.B.A. at Atlantic Yards: But Is It Legal?*, NEW YORK OBSERVER/THE REAL ESTATE, available at <http://www.observer.com/node/34377> (last visited September 13, 2007), hereinafter *But Is It Legal?*. Julian Gross, the legal director of California Partnership for Working Families and author of COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE, *supra* note 1, responded to the charge that CBAs are undemocratic by noting that "the argument that CBAs are anti-democratic is uninformed and somewhat ironic. Any agreement between community groups and a developer regarding particulars of a development project has to be acceptable to the local

government, or the project won't get approved. A CBA is simply the community groups saying: if we have legal assurance that it's a project we like, we'll support it; if not, we won't. What could be more democratic than that?" *Id.*

11. The Gateway Center at the Bronx Terminal Market is a retail development that will replace the old Bronx Terminal Market, which housed a number of local retailers, many of whom were ethnic food vendors. In arranging to purchase the land from the city, the developer obtained tax exemptions and also benefited from the city's agreement to pay for the demolition of the old market, to guarantee loans, and to help pay to relocate the market's vendors. Matthew Schuerman, *Battle of the Bronx Looms for Mom-and-Pop Crusader*, NEW YORK OBSERVER, 13, Nov. 14, 2005, available at <http://www.observer.com/node/37925>.

The developer, however, describes the complex as "replacing a dilapidated eyesore" and providing increased shopping opportunities for Bronx residents. Letter to the Editor, Glenn Goldstein, Executive Vice President, Related Retail Corporation, NEW YORK

OBSERVER, Nov. 21, 2005. Most of the old market's merchants opposed the development, and after a heated controversy, including litigation, they were finally forced to accept aid provided by the city and the developer for their relocation.

12. See Jimmy Vielkind, *How to Mediate Manhattanville: A New Negotiating Partner Is Born*, CITY LIMITS WEEKLY, Dec. 4, 2006, available at http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3223 (last visited September 13, 2007).

13. Heather Haddon, *Terminal Market Deal Criticized*, NORWOOD NEWS (Feb.–Mar. 2006), available at <http://www.bronxsmall.com/norwoodnews/past/022306/news/N60223page1.html>.

14. Bronx County Participation and Labor Force Mitigation and Community Benefits Program Related to the Construction of the New Yankee Stadium, at section VIII (on file with author). The Yankee Stadium CBA also contains provisions more common to CBAs, such as a 25 percent local hiring goal and funds for job training.

As of September 2007, the community trust fund has not been established, and funds have not been distributed as negotiated in the CBA, leaving some people angry.

referred to as a “slush fund” by critics who fear that funding will not be distributed impartially.¹⁵ The Yankee Stadium CBA has also been criticized due to the fact that the development will eliminate more than 20 acres of parks, leaving the city to pay for their replacement in addition to the subsidies already being given to the project. As of September 2007, the community trust fund has not been established, and funds have not been distributed as negotiated in the CBA, leaving some people angry. “It’s disgraceful,” said the president of NYC Park Advocates, who opposed the new stadium because it appropriated parkland. “It’s reprehensible these funds have not been distributed to those most impacted instead of sitting in some supposed account.”¹⁶

It is probably fair to say that the New York CBAs have been criticized more than is necessary. While they may not have satisfied all of the groups and individuals involved, New York City has not benefited from the strong presence of community organizing groups of the type that has helped to ensure the success of CBAs in California. Furthermore, New York State does not authorize development agreements, which provide a framework for local governments to participate in CBA negotiations.¹⁷ Quite the opposite is true; local officials in New York City have, until recently, been discouraged from allowing community benefits to influence land use decisions for fear of distorting the planning and review process.¹⁸ In a 1988 report that continues to reflect the is-

sues surrounding community benefits, the New York City Bar Association cautioned that:

The ad hoc payment of money or services in return for favorable government action also adversely affects the decision-making process. In egregious cases, the decision maker is corrupted. In less egregious cases, satisfying the wish list for a borough president, community board or a mayor enhances the recipient’s political power. The decision-maker may accept the project in order to get the unrelated amenities, when perhaps it should be voted down. Thus integrity is eroded, of the government in general and of the zoning laws and land use regulations in particular.¹⁹

The opposition to CBAs in New York may be at least partially attributed

15. Matthew Schuerman, *The Yankees’ \$700,000 Play: ‘It Is Not a Shakedown’*, NEW YORK OBSERVER, 10, Apr. 10, 2006, available at <http://www.observer.com/node/38670> hereinafter *The Yankees’ \$700,000 Play*.

16. Frank Lombardi, *Community’s Still Waiting for Cash from Stadium*

Deal, DAILY NEWS (New York), 47, September 5, 2007.

17. See Gross, *supra* note 1, at 9–10, 13.

18. This stance grew out of a trend of the late 1980s of developers buying off community groups in order to get endorsements for their

projects. (*The Yankees’ \$700,000 Play*, *supra* note 15) After these practices were made public, the New York City Bar Association issued an influential report in 1988 recommending that any community amenities provided by a developer be reasonably related to the project. Under this approach, ben-

efits such as off-site parks were known to be rejected as interfering with the propriety of the development process, and developers largely stopped offering these sorts of community amenities. *Id.*; see Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, THE NEW YORK TIMES, June 14, 2006, at C6.

19. Matthew Schuerman, *C.B.A.s: Coming to a Bar Near You*, NEW YORK OBSERVER/THE REAL ESTATE, Jan. 13, 2006 (quoting “The Record of the Association of the Bar of the City of New York,” Vol. 3, No.6 (1988)), available at <http://www.observer.com/node/34098>.

“A fresh perspective and penetrating legal and historical analysis of an issue that will continue to be in the forefront of land policy in the twenty-first century.”

—ANTHONY FLINT, AUTHOR OF *THIS LAND: THE BATTLE OVER SPRAWL AND THE FUTURE OF AMERICA*

ON PRIVATE PROPERTY

FINDING COMMON GROUND ON THE OWNERSHIP OF LAND

ERIC T. FREYFOGLE

\$24.95 HARDCOVER

ON PRIVATE PROPERTY FINDING COMMON GROUND ON THE OWNERSHIP OF LAND ERIC T. FREYFOGLE

“Freyfogle proves the truth about American property rights—that original intent, early court opinions, and the realities of modern society all mandate that ownership brings with it weighty but reasonable responsibilities to the larger community. This beautifully articulated book, at once bold and thoughtful, is bound to become a classic in American constitutional and property law.”

—CHARLES WILKINSON, AUTHOR OF *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST*

ERIC T. FREYFOGLE has written widely on the many links between people and land, and on the need for a more land-sensitive culture. He has written numerous books and is the Max L. Rowe Professor of Law at the University of Illinois at Urbana-Champaign.

The process of developing a CBA in relation to the Columbia expansion has been markedly different than the other New York CBAs from the start.

to these fears. This may also explain the lack of praise for the New York CBAs (other than by developers, and occasionally by elected officials); while they may not be as comprehensive as desired, the CBAs do provide community amenities that might not have otherwise been obtained.

Still, the city's response to these recent CBAs has not helped to resolve how they should be conducted in New York. Previous New York City mayors Rudy Giuliani and Ed Koch both criticized CBA-like arrangements as distorting the planning process by buying off opponents.²⁰ While Mayor Michael Bloomberg originally supported the Atlantic Yards CBA, he seemed to change his opinion of them when he charged a CBA relating to the new Mets stadium constituted "a ransom."²¹ And while the city has supported the projects being developed under the CBAs, it has not expressed any policies as to how the agreements should be negotiated.

CBA supporters are hoping, though, that a new agreement concerning Columbia University's expansion into West Harlem will provide a better model for future New York CBAs. The city and Mayor Bloomberg have been especially supportive of this CBA, providing funds and technical assistance for the negotiating process. While the city is not expressly claiming that this CBA should serve as a model for future

developments, it has recognized that CBAs are likely to become more prevalent in the future.²² And if the negotiators are successful in creating a CBA, it is likely that it will, in fact, influence future CBAs within New York City, as the negotiating processes being used are more transparent and inclusive than previous efforts.²³

The process of developing a CBA in relation to the Columbia expansion has been markedly different than the other New York CBAs from the start. Columbia University hopes to develop 17 acres in West Harlem, sometimes referred to as Manhattanville. Most of the land is already owned by either Columbia or the city, but Columbia may have to request eminent domain proceedings to obtain the remaining portions.²⁴ 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 composed of appointed community leaders who represent a broad range of constituents. The LDC's mission is 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. . . ."²⁵ Although the Community Board originally intended that the LDC would not include any elected officials, after the LDC's first meeting it revised this decision, but only after analyzing the conflicts of interest present among the elected officials who will hold voting positions on the board.²⁶

Public meetings began in September 2006 and have 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.²⁷ Negotiations with Columbia representatives began in January 2007 and are being facilitated by a mediator paid for by the city's Economic Development Corporation.²⁸

Community groups around the country have picked up on the CBA trend. Organizations in Albany (New York),²⁹ Atlanta,³⁰ Charleston (South Carolina),³¹ Pittsburgh,³² New Orleans,³³ and Seattle,³⁴ for example, have completed CBAs or are currently trying to initiate negotiations.

PRACTICAL PROBLEMS WITH CBAS

CBAs have proven to be effective tools for many communities hoping to re-

20. Erik Engquist, *Developer's deal-making escalates; Community benefits agreements become costly as Bloomberg endorses concept*, CRAIN'S NEW YORK BUSINESS, March 27, 2006.

21. Bryan Virasami, *No 'ransom' for developers?: Mayor says stadium deals not opportunity for people looking to grab some dollars; locals voice concerns*, NEWSDAY, April 7, 2006. As Jesse Masyr, a land use attorney who worked on the Bronx Terminal Market deal has noted, "I keep hearing that the Mayor is going to come out against C.B.A.s, but by the time we get rid of C.B.A.s, we will have made them official." Matthew Schuerman, *THE CBA IS DEAD, LONG LIVE THE CBA*, NEW YORK OBSERVER/THE REAL ESTATE, Feb. 27, 2006, available at <http://www.observer.com/node35160>. Confirming his suspicions, Mr. Masyr was recently appointed by the city to represent the community groups involved in negotiating the Columbia University CBA. Matthew Schuerman, *Mr. Bol-*

linger's Battle, NEW YORK OBSERVER, Feb. 19, 2007, at 48, available at <http://www.observer.com/node/36744> hereinafter *Mr. Bollingers' Battle*.

22. See *Mr. Bollingers' Battle*, *supra* note 21. The city appointed the 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. *Id.*

23. See Vielkind, *supra* note 12.

24. See generally *Mr. Bollingers' Battle*, *supra* note 21.

25. Transcript, West Harlem Development Corporation, Community Forum, Sept. 30, 2006, at 8, available at http://www.westharlemldc.org/uploads/transcript_093006.pdf. Currently, the LDC's board is composed of 20 members, including representatives nominated by the Housing Develop-

ment Fund Corporations Coalition and the Manhattanville Area Consortium of Business and representatives for community-based organizations, specific residential developments, tenant associations, area home owners, faith-based organizations, arts and cultural organizations, and commercial property owners. Government officials included on the board include the Manhattan Borough Director of Land Use, Planning and Development, and representatives of a U.S. Congressman, three State Assemblymen, and two New York City Council Members. West Harlem Local Development Corporation, Board Members, http://www.westharlemldc.org/Board_Members.html (last visited Sept. 13, 2007).

26. See *Mr. Bollingers' Battle*, *supra* note 21. As one of the LDC's board members explained, "it 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.*

27. See West Harlem Local Development Corporation, Working Groups, http://www.westharlemldc.org/Community_Benefits_Agreements.html (last visited Sept. 13, 2007).

28. Matthew Schuerman, *Columbia Expansion Negotiations to Begin*, NEW YORK OBSERVER/THE REAL ESTATE, Jan. 18, 2007, available at <http://www.observer.com/node/35611>. Community Board 9 has indicated that any CBA will have to address affordable housing, job creation and training, and access to new facilities. Vielkind, *supra* note 12.

29. See Community Benefits Proposal, <http://www.ariseorg.net/cba10-15-05.html> (last visited March 14, 2007); see also Michael DeMasi, *Neighborhood groups seek benefit package from convention center developer*, THE BUSINESS REVIEW, (Albany, N.Y.), Jan. 30, 2006, available at <http://www.bizjournals.com/albany/stories/2006/01/30/daily4.html>.

30. See *Atlanta City Council Approves BeltLine Tax Allocation*

District, CITY NEWSBYTES, Nov. 8, 2005, available at http://www.atlantaga.gov/media/citynewsbytes_110805.aspx.

31. See *Community Benefits Agreements*, THE CHARLESTON BUSINESS JOURNAL, April 18, 2005, available at http://www.charlestonbusiness.com/pub/11_8/news/4353-1.html.

32. See Mark Belko, *Hill District ministers to meet with Pens, officials*, PITTSBURGH POST-GAZETTE, Aug. 28, 2007, available at <http://www.post-gazette.com/pg/07240/812692-100.stm>.

33. See Pico National Network, *Using Community Benefits Agreements to rebuild in New Orleans*, Sept. 21, 2006, <http://www.piconetwork.org/news/page.jsp?siteID=30402650> (last visited March 14, 2007).

34. See Real Change News.org, *Say Yes to Responsible Development*, http://www.realchangenews.org/2006/2006_11_29/firstthingsfirst.html (last visited March 14, 2007).

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.

quire developers to provide amenities to the neighborhoods that they affect. However, negotiating a CBA may not be appropriate in all situations.³⁵

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 significant 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."³⁶ When these elements are missing, CBAs are often criticized as creating development barriers that encourage developers to simply find other less costly locations.

Even with the leverage created by public subsidies and prime locations, a community's interests must still be supported by a broad-based coalition of community groups in order for the coalition to retain its leverage and political capital.³⁷ Bad precedent and publicity may be created by coalitions that are poorly organized and that do not accurately represent the interests of most of the community stakeholders. The same is true of coalitions that obtain weak benefits. The "divide and conquer" techniques used by developers to balkanize coalitions also 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. Developers in this situation often spend less on CBA provi-

sions while still being able to spin their projects as being community-supported.³⁸

Building broad-based and united coalitions, however, is not a simple task. The organizational needs required by such coalitions are often daunting to community groups experienced mainly in promoting their own campaigns, and determining and prioritizing the goals shared among diverse community groups may lead to conflicts among constituents supporting different goals.³⁹

Assuming that a broad-based coalition is formed to contract a CBA with developers, the negotiation process may also raise practical problems for communities. Where a coalition is inexperienced in creating CBAs, for example, it may need guidance as to the types of benefits that it can receive. The funding required to conduct research for CBA provisions and to pay for legal counsel may also inhibit the negotiating process.⁴⁰ Furthermore, most CBAs include monitoring and enforcement provisions that require coalitions to engage in future activities related to the CBA; and for coalitions that formed for the specific purpose of negotiating a CBA, continuing this energy into monitoring and enforcement may be difficult.

LEGAL ISSUES RELATED TO CBAS

The validity and enforceability of CBAs have yet to be tested in court, but some lawyers have expressed concerns that the agreements will not hold up. 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 insufficient when compared to the extensive benefits offered by developers.⁴¹ Under contract theory, though, which does not generally inquire into the adequacy of consideration, promises not to oppose developments are likely to be deemed supported by consideration.⁴²

Questions have also been raised as to who can enforce a CBA's provisions. Because contract law generally permits only contract signatories to enforce its provisions, CBA supporters have encouraged coalitions to require each community group to separately sign CBAs. Otherwise, the dissolution of a coalition or the inability to define the coalition's agents may prevent a CBA from being enforceable.⁴³ Where local governments are authorized to enter into development agreements, CBA supporters highly encourage that CBAs be incorporated into these agreements so that they can be enforced by local governments, as well.⁴⁴ Whether or not individual community members will be considered third-party beneficiaries capable of enforcing CBAs has not been widely discussed, but precedent exists to support the argument.⁴⁵

Enforceability questions may also concern 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 CBA or a similar agreement with the developer, community groups need to ensure that the contract language used is clear and specific enough to impose these requirements.⁴⁶

Because the process of negotiating CBAs often involves local governments

35. See Madeline Janis-Aparicio and 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.

36. See Meyerson, *supra* note 5.

37. See Janis-Aparicio, *supra* note 35.

38. See Suzette Pamley, *Trump the best known city casino-game player*, THE 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").

39. See Gross, *supra* note 1, at 22-23. Conflicting community interests are well illustrated by a CBA that was negotiated between Chicago

community groups and Wal-Mart. With unemployment being a significant problem for the South Side neighborhoods involved, many stakeholders did not want to oppose the development at all. Wal-Mart may have contributed to escalating these tensions by its apparent acts of goodwill toward the community—it donated money to the NAACP and gave calculators to a local high school. See Anmol Chaddha, *Good for the 'hood'? Wal-Mart is touting not just lower prices but racial equity in its push*

for expansion into poor, urban communities, COLORLINES MAGAZINE (June 2005).

40. See Gross, *supra* note 1, at 23.

41. 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." *But Is it Legal?*, *supra* note 10.

42. See 17A AM. JUR. 2d, Contracts §124.

43. See Gross, *supra* note 1, at 23-24.

44. *Id.* at 72.

45. See *Vale Dean Canyon Homeowners Association v. Dean*, 100 Ore.App. 158 (1990) (holding that members of a home owners association had third party standing to bring suit against a subdivider that had breached its agreement with the county to improve roads).

46. *Id.* at 71.

Although the projects highlighted in this commentary are substantial in scope, smaller (and perhaps simpler) CBAs are likely to start appearing in mid-sized and smaller communities across the country.

or elected officials, CBAs may also raise legal issues related to the propriety of 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.⁴⁷ In these states, as in New York, CBAs may be criticized for distorting the planning process. Some opponents have gone so far as to characterize CBAs as “extortion.”⁴⁸ The history of exactions law in the United States, which generally prohibits local governments from requiring developers to provide benefits not substantially related to the development project, may also provide support to CBA opponents.⁴⁹ Even without invoking exactions, though, CBAs created through a process involving sig-

nificant contributions by local officials are likely to raise questions about conflicts of interests. In these situations, care must be taken 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 view, some argue that local governments should ensure that negotiating teams accurately represent community interests.⁵⁰ This may be achieved by a local government facilitating the creation of a CBA bargaining team, as happened in relation to the Columbia University CBA, or by the local government’s willingness to take a CBA’s comprehensiveness into account when evaluating it during the land use planning process.

CONCLUSION

While CBAs represent an opportunity to accomplish redevelopment projects in a manner that achieves social equity and engages all community stakeholders in the project—with an eye toward designing a process and product that can be a win-win for communities—myriad legal issues are present for all participants involved. Land use attorneys can expect to begin to hear more about these types of agreements, and may be called upon more to help negotiate and develop a CBA for interested clients. Although the projects highlighted in this commentary are substantial in scope, smaller (and perhaps simpler) CBAs are likely to start appearing in mid-sized and smaller communities across the country.

47. See Shelby D. Green, *Development Agreements: Bargained-for Zoning that is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U.L. REV. 383, 395 (2004).

48. See *Mr. Bollingers’ Battle*, *supra* note 21.

49. 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 (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); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

50. See *Mr. Bollingers’ Battle*, *supra* note 21.



Audio/Web Conference Training Series 2007–08

**Staying Out of Court
by Avoiding Pitfalls**
November 7, 2007

**Introduction to the Planning
Commission: Part One**
December 5, 2007

**Introduction to the Planning
Commission: Part Two**
January 16, 2008

Complete Streets
January 30, 2008

Mastering Density
February 13, 2008

**Design Guidelines for Small
Towns and Rural Communities**
March 5, 2008

Confronting NIMBYs
March 19, 2008

**Introduction to the Zoning
Board of Adjustment**
April 16, 2008

**Community-Based Brownfields
Redevelopment**
May 21, 2008

Planning Law Review
June 25, 2008

Register online and save \$30. www.planning.org/audioconference



American Planning Association
Making Great Communities Happen