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Legal & Contractual Issues of
Community Benefits Agreements

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Amy Lavine

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Legal & Contractual Issues of Community Benefits Agreements

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A Community Benefits Agreement, or CBA, is a private contract negotiated between a real estate developer and a coalition of community groups that will be affected by the development. The community offers to support the project, and to refrain from actively opposing it, in exchange for development amenities such as affordable housing, local hiring and job training programs, environmental design, and community facilities.¹ At their best, CBAs are win-win arrangements: the developer receives the public backing necessary to obtain quick permit approvals and subsidies, and the community obtains a strong voice in the planning process, as well as economic, housing, environmental and other benefits.² CBAs can also be a boon for local governments, as they provide a vehicle for the community to negotiate for benefits over and above those that a municipality can legally require.

With CBAs coalitions being established in cities across the country, land use attorneys should be aware of how CBAs can help their clients, and their communities. Moreover, land use lawyers play an integral role in formulating the often complex provisions included

in CBAs, and they should have a firm understanding of the contractual provisions that should be included in a CBA to ensure that it is effective and enforceable. This is especially true given that there a number of unresolved questions about the enforceability and interpretation of CBAs, due to the general lack of legislative or judicial action concerning CBAs.

Following a short description of the origins and values of the CBA movement, this article will highlight some of the basic legal and contractual considerations related to CBAs, including the question of whether CBAs are supported by adequate consideration, the proper role of government involvement in CBAs, questions related to standing to enforce CBAs, concerns about the enforceability of CBAs against a developer's tenants, contractors, and successors in interest, and issues related to implementation and remedies.

The Community Benefits Movement

The first major CBA was negotiated in Los Angeles in 2001 in relation to the \$2.5 billion L.A.Live sports

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and entertainment complex. The Staples Center CBA, as the agreement is known (after the adjacent Staples Center arena), contains an impressive array of benefits, including \$1 million for parks, funding for a residential parking program, a living wage commitment, job training and local hiring programs, and affordable housing provisions.³ While the Staples CBA was the first agreement to be recognized as a “full-fledged” CBA, a few similar agreements existed prior to 2001, such as the CBA related to the Hollywood and Highland development in Los Angeles.⁴ Other types of community-corporate contracts, such as Good Neighbor Agreements (GNAs), originated in the 1980s, but unlike CBAs, which encompass an array of community benefits, GNAs are generally limited to provisions relating to environmental impacts.⁵

Like many projects that are subject to CBAs, L.A.Live was proposed for an economically depressed urban area home to many low income and minority residents.⁶ These residents, fearing displacement, gentrification, and congestion, turned to the CBA model to help gain a seat at the table and to ensure that the L.A.Live project would benefit them as well as downtown Los Angeles business interests. A coalition of diverse community groups was formed, including organizers, community associations, health advocacy groups, immigrants’ rights groups, and unions. Using the possibility of litigation as leverage during negotiations, as well as the clout of its union partners, the coalition was ultimately able to win many (but not all) of the benefits that its members sought.⁷ With the community’s support, the developer was able to quickly obtain the land use approvals it needed, and the third and final phase of the project is now on track to be completed by 2010.⁸

To date, implementation of the Staples CBA has “gone according to schedule, and with few problems.”⁹ Because of its success, it has served as a model for CBAs negotiated around the country by coalitions seeking to link real estate development to community improvement.¹⁰ CBAs, however, have been negotiated not only for large development projects like L.A. Live located in major cities, but also for some smaller projects and developments in weak market cities.¹² And the flexibility of CBAs has allowed these diverse communities to bargain for the particular community improvements and amenities that are important to them. Some of the varied provisions included in CBAs, for example, include the commitment to attract a grocery store,¹² a prohibi-

tion on renting project facilities to pay-day lenders,¹³ funding to sound-proof schools and residences that would be affected by increased noise from expanded airport operations,¹⁴ and the use of transit oriented development techniques.¹⁵

While CBA successes such as the Staples CBA have resulted in community empowerment and cooperation among the players in the development process, other CBAs have met with less positive results. Several New York City CBAs have demonstrated that CBAs negotiated with “astroturf” community groups (i.e. groups organized or heavily influenced by the developer), or with no community groups at all, might not be accepted as representative of their communities, and might not have the effect of minimizing opposition to controversial projects.¹⁶ In response to these less successful agreements, advocates have attempted to define the core values of CBAs, focusing on inclusiveness in the negotiation process, accountability in the development context, and legal enforceability. As explained by Julian Gross, a leading legal expert on CBAs:

Inclusiveness here means that the CBA negotiation process provides a mechanism to ensure that a broad range of community concerns are heard and addressed prior to project approval In context of a development deal, [*accountability*] means that promises made by redevelopment agency staff, public officials, and developers regarding community benefits should be treated seriously, made legally binding, and enforced against the party that committed to them.¹⁷

Legal and Contractual Issues: Consideration

In a typical CBA, a developer will commit to providing significant community benefits in exchange for the coalition members’ promises not to institute litigation to block or delay the project. This bargain can at times seem lopsided, given the relative monetary worth of these promises, and for this reason, the question has been raised whether CBAs are supported by adequate consideration.¹⁸ However, consideration is generally defined as “an act, a forbearance, or a return promise, bargained for and given in exchange for the promise[.]”¹⁹ and a strong argument can be made that the exchange of a release of claims or a covenant not to sue constitutes sufficient consideration on the part of a community coalition. As

the Seventh Circuit has explained, “[e]ven 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.]’”²⁰

Some CBAs also impose affirmative obligations on the community coalition, and these agreements should more easily be found to be supported by consideration. Examples of such commitments include promises to testify in favor of the development at government hearings or public forums,²¹ to issue favorable press releases or other media communications,²² or to take an active role in the agreement’s monitoring and implementation.²³

Government Involvement in CBAs

CBAs are typically private contracts, but because of their intimate connection with the development review process, government officials have often played a role in their negotiation. The proper role of government in developing CBAs, however, is unclear, as no judicial decisions have discussed the topic.

Connecticut is the only state or local jurisdiction to have enacted legislation related to CBAs.²⁴ The law attempts to define “Community Environmental Benefits Agreements,” (CEBAs) and it requires the developers of “affecting facilities” (e.g., power plants, waste incinerators, sewage treatment plants, and other projects with significant environmental impacts) to meet with local officials and develop plans for adequate public participation in the planning process, which may include the negotiation of a CEBA. However, because of the law’s focus on environmental justice and major industrial operations, it is not likely to apply to the variety of developments normally associated with CBAs.²⁵

Even in Connecticut, local government CBA requirements are limited by the doctrine of unconstitutional exactions, which was developed by the Supreme Court in *Nollan v. California Coastal Commission*²⁶ and *Dolan v. City of Tigard*.²⁷ In *Nollan*, the Court held that conditions placed on development projects must share an “essential nexus” with the property owner’s proposed use of the land, and in *Dolan*, the Court extended that decision by requiring any such conditions to be “rough[ly] proportional” to the project’s impacts. Some CBA provisions, such as living wage standards and the development of job training programs, can be characterized as only in-

directly related to the governmental interests in enforcing land use regulations (e.g., promoting orderly development, protecting property values, conserving natural resources, etc.). Without a sufficiently defined nexus to planning objectives or clear statutory authority, these types of community benefits could possibly be characterized as unconstitutional exactions if they were attached to development permits.²⁸ CBAs, moreover, are negotiated on a case by case basis, and in the eyes of many state courts, this makes them more likely to effect unconstitutional exactions than general legislative requirements because they pose a higher likelihood of extortion.²⁹ Even where CBAs are not mandated by a local government, the participation of local officials in CBA negotiations may be problematic because “[a] developer might argue that [the] CBA commitments [were] made under the ‘duress’ of pressure by elected officials ..., or are invalid as resulting from governmental action outside of the established approval process.”³⁰

In California, where the CBA concept originated, and in about a dozen other states, the exactions doctrine is tempered by statutory authority for local governments to enter into development agreements with project owners.³¹ Essentially, a development agreement contemplates a governmental guarantee of development rights in exchange for a developer’s agreement to provide certain public benefits.³² Because development agreements are voluntary, they allow local governments to seek exactions that would otherwise be invalid under *Nollan* and *Dolan*.³³ Accordingly, where development agreements are permitted, a local government should have the discretion to become a party to a voluntary CBA by incorporating it into a development agreement negotiated with the project’s owner.

While local governments in states without development agreement statutes may be limited in their ability to negotiate and/or require CBAs, public officials need not be wholly excluded from the negotiation process. In a few cases, local officials have sought to encourage CBA negotiations by facilitating the negotiation process.³⁴ And in cases where local governments hold property rights in the land slated for development, or are offering subsidies for multiple related parcels, municipalities have resolved to include CBA provisions in requests for proposals (RFPs) or similar project agreements.³⁵ Moreover, “it is plainly legitimate for an elected official to make clear to a developer that he or she will consider the degree of community support for a project in deciding

whether to grant discretionary project approvals.”³⁶ Public education about the development review process, and outreach to make it more accessible to lay people, can also help to engage communities and inform them of opportunities to negotiate CBAs.³⁷

Standing to Enforce CBAs

Because a contract is generally enforceable by the parties that have signed it, CBA supporters have encouraged all community groups participating a CBA coalition to sign the completed contract separately. Were the individual community groups to become an incorporated organization and sign jointly, on the other hand, enforcement could be problematic because “[f]ew coalitions have structured systems for determining who are official members, and who can speak or act on their behalf.”³⁸ The dissolution of a coalition, moreover, could render a CBA practically unenforceable if it was the sole party to the contract. Having multiple organizations sign guards against this possibility.

In states where local governments are permitted to enter into development agreements, CBAs are often incorporated into these agreements. This allows the local government, in addition to the coalition groups, to enforce the CBA against the developer in the case of a breach, further bolstering the contract’s effectiveness.³⁹

Another enforcement issue relates to the rights of third party beneficiaries. Generally, non-parties may only qualify as third party beneficiaries with standing to enforce a contract if the promise at issue was made directly and primarily for his or her benefit.⁴⁰ Some legal authority exists supporting the availability of enforcement measures to individual community members affected by a CBA,⁴¹ but the question is often obviated by CBA provisions limiting or disclaiming the existence of any third party beneficiaries.⁴² CBAs can also take the opposite approach and specify the claims, if any, available to particular third parties.⁴³

Enforcement of CBA Provisions Against a Developer’s Tenants, Subcontractors, and Successors in Interest

Because project developers often subcontract construction, operation and maintenance tasks, rent facilities to office or commercial tenants, or sell com-

pleted development buildings, CBAs must include provisions making them applicable to these parties if they are to be effective. This “chain of contract” requires the inclusion of contract language such that “(1) each business is informed of and agrees to the substantive requirements that apply to it, (2) each business agrees that it will include these requirements in other contracts it enters into, and (3) each business agrees that community groups, the local government, or affected individuals can enforce the requirements.”⁴⁴

Another possible method of ensuring enforceability against parties not involved in original CBA negotiations is to embody the contract provisions in real covenants attached to the land.⁴⁵ This approach was discussed in one of the few court decisions to have involved CBA-like agreements, *Riverside South Planning Corp. v. CRP/Extell Riverside, LP*.⁴⁶ The case involved an incorporated coalition attempting to enforce an agreement that gave it the ability to specify certain design guidelines as part of a development plan for the project.⁴⁷ Originally negotiated by Donald Trump, title to the property was subsequently transferred to another developer. While the court ultimately held that the agreement was expired, and thus unenforceable, it suggested that real covenants running with the land may have altered the result, were it not for the fact that the contract specifically stated that no such covenants would be recorded.⁴⁸

The *Riverside South* case provides a clear example of the importance of including strong enforceability language in CBAs. The contract at issue had a term of only 10 years, which, in the words of the lower court, was “an inconceivably short amount of time within which to develop a project as large as Riverside South.”⁴⁹ Despite the coalition’s likely intentions, however, the court made it abundantly clear that it would not, “in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties.”⁵⁰

Oversight

CBAs are usually applicable for a term of about 30 years, and given this timeframe, they must contemplate some sort of monitoring and oversight process to ensure the continuance of ongoing benefits. Most CBAs establish some sort of advisory or monitoring committee to oversee project implementation, as well as requirements that the developer submit compliance information on a regular basis.⁵¹ Where a

CBA is incorporated into a development agreement, oversight may be easier because it can be handled by government entities (assuming the political will-power to do so), but the coalition generally retains some role.⁵² Public oversight mechanisms have also been included in a few CBAs.⁵³

Remedies

In order to be effective, CBAs must also provide for appropriate remedies in the case of default. CBA advocates have counseled coalitions to insist upon contract language authorizing the courts to grant specific performance, rather than monetary damages, reasoning that “community groups will generally be more concerned with ensuring that promised benefits are in fact provided.”⁵⁴

But specific performance may be an unobtainable remedy if a development project is canceled or significantly scaled back due to unforeseen events; construction jobs and affordable housing, for example, simply cannot be provided if there is no development project. The recent economic crisis has brought this concern to the forefront, with a few pending projects covered by CBAs having been canceled or rumored to be threatened.⁵⁵ Although contract law usually does not excuse performance based on changed economic circumstances,⁵⁶ under extraordinary circumstances it is possible that a court could hold economic events to constitute a frustration of purpose.⁵⁷

Some CBAs include provisions specifically addressing the possibility that a project will be indefinitely delayed or unilaterally modified by the developer.⁵⁸ Where these provisions are included, the developer is generally permitted to walk away from the CBA before any benefits have accrued to the community. Given such contract terms, it may be appropriate for CBA coalitions to consider negotiating for limited liquidated damages to cover their operational expenses if the contract is not implemented, while still insisting on specific performance for breaches of implemented CBAs. Another possibility would be for CBAs to require a developer to post a performance bond at the time of signing.

Conclusions

CBAs hold great promises for communities, developers, and local governments, but their complex nature and the lack of relevant case law or legisla-

tion leaves a variety of legal questions open. Nevertheless, precise contract drafting can help to alleviate most legal concerns related to the enforceability of CBAs. Contracts should include clear recitals of consideration, government officials should be aware of exactions doctrines and perceived problems with their involvement in CBAs, contracts should specify whether enforcement is available to any third party beneficiaries, they should include clear and definite language binding the developer's tenants, contractors and assigns, and provisions should be included regarding oversight and remedies. With these considerations in mind, both coalition groups and developers can help to ensure that CBA obligations are definite and enforceable.

NOTES

1. See generally Gross, Community Benefits Agreements: Definitions, Values, and Legal Enforceability, 12 Aff. Housing & Comm. Dev. L. 35 (2008); Gross, LeRoy & Janis-Aparicio, Community Benefits Agreements: Making Development Projects Accountable (Good Jobs First 2005), available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.
2. See Laurie Kaye & Jerilyn Lopez Mendoza, *Everybody Wins: Lessons From Negotiating Community Benefits Agreements in Los Angeles* 1.2-1.3 (Environmental Defense 2008), available at http://www.edf.org/documents/7675_CBA_Everybody_Wins.pdf.
3. Los Angeles Sports and Entertainment District Project CBA [hereinafter Staples CBA], available at <http://www.communitybenefits.org/downloads/Los%20Angeles%20Sports%20and%20Entertainment%20District%20Project.pdf>.
4. See Salkin & Lavine, Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements, 17 J. Aff. Housing & Comm. Dev. L. 113, 116 (2008).
5. See Gross, Community Benefits Agreements: Definitions, Values, and Legal Enforceability, 12 Aff. Housing & Comm. Dev. L. 35, 40 (2008) (distinguishing CBAs from other "single-issue" agreements). For a general overview of GNAs, see Lewis & Henkels, *Good Neighbor Agreements: A Tool For Environmental and Social Justice*, Social Justice (Winter 1996), available at <http://www.cpn.org/topics/environment/goodneighbor.html>. Another similar contract model is the project labor agreement, which "is a prebid contract between a construction project owner and a labor union (or unions) establishing the union as the collective bargaining representative for all persons who will perform work on the project." *New York State Chapter, Inc. v. New York State Thruway Authority*, 88 N.Y.2d 56, 643 N.Y.S.2d 480, 666 N.E.2d 185, 151 L.R.R.M. (BNA) 2891 (1996).
6. Laurie Kaye & Jerilyn Lopez Mendoza, *Everybody Wins: Lessons from Negotiating Community Benefits Agreements in Los Angeles* 2.4 (Environmental Defense 2008), available at http://www.edf.org/documents/7675_CBA_Everybody_Wins.pdf. ("In the neighborhoods that surround Los Angeles' Figueroa Corridor, 36% of residents live below the federal poverty level. According to 1990 Census data for the 90015 zip code (where the Staples Arena is located), 91% of housing units are occupied by renters, not homeowners. The median household income for the area is \$15,656—half of the median household income for Los Angeles City (\$30,925). Nearly nine in ten residents are classified as Hispanic, and half have less than a ninth-grade education.")
7. Laurie Kaye & Jerilyn Lopez Mendoza, *Everybody Wins: Lessons from Negotiating Community Benefits Agreements in Los Angeles* 2.5-2.11 (Environmental Defense 2008), available at http://www.edf.org/documents/7675_CBA_Everybody_Wins.pdf.
8. L.A.Live, About L.A.Live, Timeline, <http://www.la-live.com/content.php?section=about&page=timeline>.
9. See Laurie Kaye & Jerilyn Lopez Mendoza, *Everybody Wins: Lessons from Negotiating Community Benefits Agreements in Los Angeles* 2.11 – 2.12 (Environmental Defense 2008), available at http://www.edf.org/documents/7675_CBA_Everybody_Wins.pdf.
10. See Salkin & Lavine, Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements, 17 J. Aff. Housing & Comm. Dev. L. 113, 116 (2008) (providing case studies of CBAs that have been negotiated in Los Angeles, San Diego, San Jose, Oakland (Cal.), New York City, New Haven (Conn.), Milwaukee, Minneapolis, Denver, Pittsburgh, and Washington, D.C.).
11. Examples of CBAs related to smaller projects located in areas with low to moderate real estate demand include the Pacoima Plaza CBA, which involves a big box development in a Los Angeles suburb, and the Peninsula Compost Co. CBA, which involves an organic waste composting facility in Wilmington, Delaware. For a description of the former, see Kerry Cavanaugh, *Mayor Saw Potential in Costco, Pacoima Pairing*, Los Angeles Daily News, Jul. 28, 2008. A copy of the Peninsula Compost Co. CBA is available at http://www.docs.google.com/Doc?id=dg97n44w_0gtm6vt77 [hereinafter Peninsula Compost Co. CBA].
12. Ballpark Village Project Community Benefits Agreement § 6.3, available at <http://www.communitybenefits.org/downloads/Ballpark%20Village%20CBA.pdf> [hereinafter Ballpark Village CBA] (requiring

- the developer to use diligent, good-faith efforts to leasing part of the development to a grocery store); Mark Belko, *Hill District leaders see a new beginning as arena agreement is signed*, Pittsburgh Post-Gazette, Aug. 20, 2008, available at <http://www.post-gazette.com/pg/08233/905581-53.stm> (noting that the Pittsburgh Penguins and the city and county contributed \$2 million under the CBA for a new stadium to go toward the development of small grocery store).
13. Plaza Pacoima Project Community Benefits Agreement § IX [hereinafter Pacoima Plaza CBA] (obligating the developer not to lease any space to check cashing businesses or payday lenders, and to market the site to traditional banking institutions).
 14. Community Benefits Agreement LAX Master Plan Program § III [hereinafter LAX CBA] (providing \$8.5 million for soundproofing and requiring the airport to limit nighttime departures).
 15. Purina Site Development Community Benefits Agreement, Art. 8, available at <http://www.amy.m.lavine.googlepages.com/FINALPDFLongfellowCBA-Feb.242008.pdf> [hereinafter Purina Mills CBA] (requiring the developer to comply with the city's traffic demand management plan; to provide new residents with a free one month transit pass and to make transit passes available for sale within the development; to provide bicycle parking and storage areas; to limit parking spaces and to separate parking rents from residential rents; to provide dedicated parking spaces for car sharing vehicles; and to include pedestrian and bicycle paths).
 16. The Atlantic Yards CBA was negotiated by eight community groups, piling in comparison to the number of community groups that have opposed the project, and the development itself has been stalled in litigation since it was announced in 2003. Of the groups that signed the CBA, several have either received funding from the developer or were created just prior to completion of the agreement. See Salkin & Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. Aff. Housing & Comm. Dev. L. 113, 121-122 (2008); Norman Oder, *Atlantic Yards Report, More criticism of the Atlantic Yards Community Benefits Agreement: it (mostly) doesn't apply if Ratner sells the project*, Mar. 30, 2009, <http://www.atlanticyard-report.blogspot.com/2009/03/more-criticism-of-atlantic-yards.html> (discussing other problems with the Atlantic Yards CBA). The Atlantic Yards CBA is available at <http://www.atlanticyards.com/downloads/cba.pdf>. Other problematic New York CBAs include the "CBA" for the new Yankee Stadium, which was negotiated without the participation of any community groups (being signed only by a few elected officials), and the CBA for the Bronx Terminal Market, which was signed by only three community groups that were not significantly involved in negotiations. Both of these CBAs have been criticized for their lack of public participation. See Salkin & Lavine, *supra*, at 122-123; Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 12 Aff. Housing & Comm. Dev. L. 35, 40 (2008).
 17. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 12 Aff. Housing & Comm. Dev. L. 35, 37-39 (2008).
 18. See *The C.B.A. at Atlantic Yards: But Is It Legal?*, The New York Observer, Mar. 14, 2006, <http://www.neptune.observer.com/node/34377> ("All we know about the C.B.A.'s is that they are a record of a political process and whatever legal status they may have over time we don't know yet," said William Valletta, a former general counsel for the New York City planning department. Contracts, he said, only make sense "when something is given up on both sides. What is the community giving up in order to take part in the agreement? Presumably, they can't sell their vote or their participation in democracy.").
 19. 17A Am. Jur. 2d Contracts § 114.
 20. *Hakim v. Payco-General American Credits, Inc.*, 272 F.3d 932, 935-936, 87 Fair Empl. Prac. Cas. (BNA) 555 (7th Cir. 2001) (some brackets in original) (quoting *Intamin, Inc. v. Figley-Wright Contractors, Inc.*, 605 F.Supp. 707 (N.D. Ill. 1985)). See also 17A Am. Jur. 2d Contracts § 124 ("Where a party contracts..., his or her estimate of value should be left undisturbed, unless there is evidence of fraud.").
 21. See, e.g., *Peninsula Compost Co. CBA*, *supra* note 12, at VIII (obligating the coalition members to "actively support [Peninsula Compost Co.] in all of its permitting and business activities with all local, City, State, and Federal permitting agencies"); *Ballpark Village CBA*, *supra* note 13, at § 8.1 - 8.2 (requiring each coalition member to send a letter of support to the city council and other public entities and to send at least one person to the first public meeting, and at other meetings if requested by the developer); *Purina Mills CBA*, *supra* note 16, at Art. 11 (requiring the coalition to send a letter of support to the several government entities, to send at least one coalition representative to hearing, and to encourage other coalition representatives to attend).
 22. *Ballpark Village CBA*, *supra* note 13, at § 8.3 (providing that the coalition will work with the developer "to prepare a collaborative media strategy regarding shared support for the Project"); *Purina Mills CBA*, *supra* note 16, at Art. 11 (same).
 23. See, e.g., *Atlantic Yards CBA*, *supra* note 17, at § III (designating implementation roles for each of the community groups in the coalition).

24. Conn. Pub. Act No. 08-94, available at <http://www.cga.ct.gov/2008/ACT/PA/2008PA-00094-R00HB-05145-PA.htm>.
25. In this sense, the legislation more closely parallels the related movement for Good Neighbor Agreements. See Lewis & Henkels, *Good Neighbor Agreements: A Tool For Environmental and Social Justice*, Social Justice (Winter 1996), available at <http://www.cpn.org/topics/environment/goodneighbor.html> and related text. See also Amy Lavine, Community Benefits Agreement Blog, *Connecticut statute defines CBAs, sort of*, Jan. 22, 2009, <http://www.communitybenefits.blogspot.com/search?q=connecticut> (explaining how the Connecticut legislation functions).
26. *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Env't. L. Rep. 20918 (1987).
27. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, 38 Env't. Rep. Cas. (BNA) 1769, 24 Env't. L. Rep. 21083 (1994).
28. While the government may have valid interests in promoting labor standards, this does not mean that these interests can be furthered in the form of conditions on land development. See *Nollan*, 438 U.S. 825 (holding that the aesthetic interests of land use regulation did not permit the government to condition a residential development permit on the dedication of a beach easement to allow pedestrians to cross over the property from one public beach to another; the two interests were not sufficiently related).
29. See Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 390-394 (2002) (discussing courts' greater skepticism of adjudicative exactions than generally applicable, legislatively imposed exactions).
30. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 12 Aff. Housing & Comm. Dev. L. 35, 44 (2008).
31. Callies & Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case W. Res. L. Rev. 663, 671 n. 32 (2001) (listing states that authorize development agreements).
32. See generally Callies & Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case W. Res. L. Rev. 663, 664 (2001) (explaining that "The purpose of the development agreement ... is to vest certain development rights in the landowner/developer in exchange for construction and dedication of public improvements").
33. Callies & Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case W. Res. L. Rev. 663, 692 (2001) ("The question is whether the local government may go further since the development ... agreement is indeed a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is indeed voluntary, the answer is almost certainly yes.").
34. In New York, for example, Community Board 9 helped to establish a local development corporation (LDC) to negotiate a CBA for the proposed expansion of Columbia University, the city appointed an attorney to assist the LDC, and the city economic development corporation contributed \$350,000 to pay for a mediator and other expenses. Salkin & Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. Aff. Housing & Comm. Dev. L. 113, 123-124, and n.99 (2008). Elected officials in Pittsburgh helped to convince the Pittsburgh Penguins to negotiate a CBA for the team's new stadium even after the development plans were approved by the planning commission. Salkin & Lavine, *supra* at 127. Eventually, the city and county agreed to contribute a significant amount of funding for the CBA's provisions as a means of convincing the parties to finalize the agreement. See Mark Belko, *Hill District leaders see a new beginning as arena agreement is signed*, Pittsburgh Post-Gazette, Aug. 20, 2008, available at <http://www.post-gazette.com/pg/08233/905581-53.stm>. While in reality the government officials in each of these cases may have had a somewhat overbearing influence on the CBA negotiations, some of the techniques that they used, such as hiring mediators, providing neutral space for negotiations, and offering discretionary financial incentives, represent non-coercive, facilitative approaches.
35. In Milwaukee, the county government passed a resolution requiring CBA provisions to be included in RFPs for county-owned parcels made available when a freeway spur was torn down. Park East Redevelopment Compact, available at <http://www.communitybenefits.org/article.php?id=593>. The Atlanta Beltline Project, which provides funding incentives through tax allocation district bond proceeds, similarly involves a city resolution to include CBA provisions in agreements for selected projects. City of Atlanta, Ord. 05-O-1733, § 19, available at <http://www.apps.atlantaga.gov/citycouncil/2005/images/adopted/1107/05O1733.pdf>.
36. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 12 Aff. Housing & Comm. Dev. L. 35, 45 (2008).
37. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 12 Aff. Housing & Comm. Dev. L. 35, 45 (2008).

38. Gross, LeRoy & Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* (Good Jobs First 2005) at 23, available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.
39. Gross, LeRoy & Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* (Good Jobs First 2005) at 72, available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.
40. 17A Am. Jur. 2d *Contracts* § 425.
41. See, e.g., *Vale Dean Canyon Homeowners Ass'n v. Dean*, 100 Or. App. 158, 785 P.2d 772 (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). An individual is much more likely to be found to be an intended third party beneficiary if a CBA obligation is owed directly to him or herself. Thus, a local job applicant would have a better chance of demonstrating standing to sue if the employer failed to honor a local hiring provision in a CBA than would a neighborhood resident seeking enforcement of a CBA provision with more dispersed beneficiaries, such as a requirement to build a park. See, e.g., *Pettus v. Olga Coal Co.*, 137 W. Va. 492, 72 S.E.2d 881, 31 L.R.R.M. (BNA) 2599, 22 Lab. Cas. (CCH) P 67336 (1952) (holding that individual employees were third party beneficiaries to a collective bargaining agreement and had standing to enforce the requirement that they receive 30 minute lunch breaks, because the promisee had a duty under the contract to provide this obligation directly to the employees).
42. See, e.g., *Peninsula Compost Co. CBA*, *supra* note 12, at XI.H (“Nothing 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.”); *Cooperation Agreement Los Angeles International Airport Master Plan Program*, § 1.I (“This Agreement has no third party beneficiaries and no one other than the Parties shall have any rights to enforce any of the obligations created in this Agreement.”), available at http://www.laxmasterplan.org/commBenefits/pdf/LAX_CooperationAgreement_120804.pdf; *Atlantic Yards CBA*, *supra* note 17, at XIV.H.
43. The Ballpark Village CBA, for example, makes provisions for covered employees to sue for violations of the wages and benefits section. *Ballpark Village CBA*, *supra* note 13, at § 4.1.3.
44. Gross, LeRoy & Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* (Good Jobs First 2005) at 71, available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.
45. See, e.g., *Executed Settlement Agreement between Puget Sound Sage, the Washington Vietnamese American Chamber of Commerce, the Jackson Place Community Council, Hod Carriers and General Laborers Union Local 242 and Developers* at para. 37 (stating that “[t]he obligations of Developers set forth herein shall constitute covenants running with the Project Site for the life of the Project”) [hereinafter *Seattle Goodwill CBA*].
46. *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 869 N.Y.S.2d 511 (1st Dep’t 2008). The development plans “focused on environmental sustainability and design criteria for the buildings and called for parks, open spaces and public arts programs.”
47. *Riverside South Planning Corp.*, 60 A.D.3d at 62.
48. *Riverside South Planning Corp.*, 60 A.D.3d at 68.
49. *Riverside South Planning Corp.*, 60 A.D.3d at 66 (quoting 2008 N.Y.Slip Op. 30836[U]).
50. *Riverside South Planning Corp.*, 60 A.D.3d at 66 (quoting 2008 N.Y.Slip Op. 30836[U]).
51. See generally Salkin & Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 J. Envtl L. 291, 324 (2008).
52. See, e.g., *Pacoima Plaza CBA*, *supra* note 14, at X (providing for a “community oversight committee,” to be composed of government official and coalition representatives, with the ability to compel meetings with the developer as frequently as once every quarter and to access the site); *Staples CBA*, *supra* note 4, at XI (establishing an advisory committee to be made up of representatives of the developer and coalition, to meet quarterly).
53. See, e.g., *Peninsula Compost Co. CBA*, *supra* note 12, at VI.A. (establishing a community hotline to report complaints about violations of the CBA’s traffic provisions).
54. See Gross, LeRoy & Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* (Good Jobs First 2005) at 72-73, available at <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.
55. The Dearborn Street Goodwill redevelopment project, for example, was canceled in April, 2009, due to the developer’s economic problems. Emily Heffter, *\$300M project at Seattle Goodwill site cancelled*, *The Seattle Times*, Apr. 24, 2009, <http://www.seattletimes.nwsourc.com/html/localnews/2009116421webgoodwill24.html>. And in New York, there has been speculation about whether the proposed Atlantic Yards project will be built as originally envisioned, and whether it will provide the benefits, such as affordable housing, that are promised in the CBA. While the developer maintains that it has the resources to outlast the current economic downturn, it is likely that the promised housing will not be completed according to the project’s timeline. See Norman Oder, *Atlantic Yards Report*, *At conference*

call, *Forest City executives say "we are prepared to move forward" on Atlantic Yards arena*, Mar. 31, 2009, <http://www.atlanticyardsreport.blogspot.com/2009/03/at-conference-call-forest-city.html>.

56. See, e.g., *U.S. v. Great Plains Gasification Associates*, 819 F.2d 831, 4 U.C.C. Rep. Serv. 2d 1442 (8th Cir. 1987) (refusing to excuse breach because "the parties clearly contemplated the likelihood of changing economic conditions including fluctuation in fuel prices, and such fluctuation was not the kind of completely unforeseeable event required to invoke the doctrine of frustration of purpose.")
57. See generally 17A Am. Jur. 2d Contracts § 651 ("The doctrine of commercial frustration is based upon the fundamental premise that relief should be given where the parties could not reasonably have protected themselves by the contract's terms against contingencies that later arose. The essential elements of the defense of frustration of purpose are frustration of the principal purpose of the contract, the frustration being substantial, and the nonoccurrence of the frustrating event was a basic assumption on which the contract was made. Accordingly, it has been held that an event that substantially frustrates the objects contemplated by the parties when they made the contract excuses a failure to perform it.")
58. See, e.g., *Seattle Dearborn CBA*, *supra* note 46, at para. 42 (allowing the CBA to be indefinitely suspended, or to be terminated if the developer abandons the project); *Atlantic Yards CBA*, *supra* note 17, at III.H. (permitting the developers to unilaterally "change the Development Phases in their sole discretion prior to commencement of the first Development Phase; provided that they shall provide advance notice to the Executive Committee as soon as reasonably practicable.").

Recent Cases

California Court of Appeals rules certificate of compliance is properly denied for a lot in a 1909 subdivision.

Antiquated subdivisions—those recorded years ago under earlier subdivision laws—can be problematic for communities today. In California, the Subdivision Map Act provides a mechanism for a property owner to seek a certificate of compliance for a parcel or parcels in an antiquated subdivision.

In 1909, the "Wm. Pierce Subdivision No. 1" map was recorded in Solano County, pursuant to the 1907 statewide subdivision map law. The cur-

rent owner was denied a certificate of compliance from the Board of Supervisors in 2006. The board directed staff "to only approve those maps filed after the 1929 Map Act," the first modern subdivision law in California. The trial court ordered the county to issue the certificate, concluding that the 1909 parcel was grandfathered under Government Code §66499.30, subd.(d).

The court of appeals reversed. The current grandfather provision applies to a parcel in "compliance with or exempt from any law (including a local ordinance), regulating the *design and improvement* of subdivisions in effect at the time the subdivision was established." The court concluded there were no laws in 1909 "regulating the design and improvement of subdivisions" and so this parcel could not be grandfathered.

The owner argued that the Subdivision Map Act does not authorize the county to deny a request for a certificate of compliance because of the mandatory "shall" contained in the statute. He believed the county could only approve or conditionally approve the certificate of compliance. The court rejected that interpretation and ruled an application for certificate of compliance may be denied "where the effect of issuing a certificate would be to effectively subdivide the property without complying with the Act." *Abernathy Valley, Inc. v. County of Solano*, 173 Cal. App. 4th 42, 2009 WL 1027185 (1st Dist. 2009).

Idaho Supreme Court reverses district court's decision to grant "after-the-fact" variances for decks built on waterfront property.

Two couples built their decks without obtaining variances or building permits. Their properties are located on Coeur d'Alene Lake, each with 100 feet of frontage and only accessible from the water because of the steep and rocky terrain. The Army Corps of Engineers first notified them of problems in June 2005 and then Kootenai County issued code violation notices. The couples applied for variances from the county's twenty-five foot front setback requirement, but the hearing examiner recommended the requests be denied because the "variances would be in conflict with the public interest." The Board

of Commissioners conducted a hearing in June 2006 and denied the variance requests.

The district court allowed the couples to augment the record to include information about another variance application for a staircase built without a building permit and in violation of the setback requirements, but which the board approved. Following oral argument, the district court concluded the couples would suffer an undue hardship with the literal enforcement of the setback requirement, and the board's decision was arbitrary and capricious.

The state's highest court reversed in favor of the county. The district court erred when it allowed the record to be augmented and that decision was prejudicial to the county. The board's decision was valid under state law and it was not acting outside the scope of its authority when it denied the variance requests. The court examined the board's findings and the testimony of the commissioners during the public hearing. "The board was clearly concerned with legitimizing the construction of structures that are in clear violation of county ordinances ... and determined that granting the variances on these existing structures would not be in the public interest." The district court's award of attorney fees was also reversed. *Wohrle v. Kootenai County*, 2009 WL 987410 (Idaho 2009).

Dismissal of second *pro se* civil rights complaint elicits warning of Rule 11 sanctions.

Owner of Lot 15A in the Cayo Costa subdivision on the Gulf of Mexico, adjacent to land claimed for the creation of Cayo Costa State Park filed a *pro se* complaint in federal district court alleging, among other things, an unconstitutional taking due to the creation of the state park on part of his property, and destruction of his land through the failure to prevent fires during a drought, in violation of the Takings and Due Process Clauses. A similar complaint was filed in January 2008 concerning the same property and nearly identical allegations, with the exception of the April 2008 fire. One new appellant was added to the current case.

The district court dismissed the first complaint for lack of subject matter jurisdiction and failure to state a claim. The Eleventh Circuit affirmed. *Busse v. Lee*

County, Florida, 2009 WL 549782 (11th Cir. 2009). The second action fared no better. The *pro se* appellant filed multiple motions to recuse the district judge because he had ruled against him in the first case, and argued the judge must be biased. After refusing to recuse himself, the district judge was asked by one of the appellees to sanction the owner pursuant to Federal Rule of Civil Procedure 11(c). The court denied the motion but warned the owner that he might be sanctioned in the future if he filed another complaint with similar allegations.

The Eleventh Circuit affirmed the dismissal for the same reasons given in its first opinion. After reviewing those reasons, the court concluded the district court did not abuse its discretion in refusing to recuse himself, but the issue about Rule 11 sanctions was closer. The district court was in the "best position to determine whether Rule 11 sanctions were appropriate" after being "intimately familiar with the appellants' claims in both cases and their conduct throughout the litigation." *Prescott v. Florida*, 2009 WL 1059631 (11th Cir. 2009).

Appellate Court of Illinois concludes village's impact fees are void.

The village ordinance requires developers to pay impact fees as a condition of obtaining a building permit. A homebuilder obtained 43 building permits from the village between 1988 and 1997, and sought a refund for the impact fees it paid for 19 building permits between 1993 and 1997. The village ordinance states the impact fees will be used for the "acquisition, maintenance, preservation, and operation of open space" (emphasis added). The homebuilder argued, among other things, that the state law authorizes the village to collect impact fees for school grounds, but impact fees are not authorized for the school district's general operation funds. The trial court decided the village impact fee ordinance was unenforceable and awarded judgment in his favor in the amount of \$114,700.

The appellate court affirmed, holding that the village had exceeded its authority when it enacted ordinances assessing school impact fees. The *Rosen* test requires that the impact fees must be within the statutory grant of power to the municipality, and must be

“specifically and uniquely attributable” to the developer’s activity. *Rosen v. Village of Downers Grove*, 19 Ill. 2d 448, 453, 167 N.E.2d 230 (1960). In this case, the use of impact fees for funding the general school operations was not authorized by sec. 11-12-5 Illinois Municipal Code. The flat fee was not specifically and uniquely attributable to the developer’s building activity but applied across the board to all building permits regardless of the development’s impact. *Raintree Homes, Inc. v. Village of Long Grove*, 2009 WL 1040296 (Ill. App. Ct. 2d Dist. 2009).

Minnesota Court of Appeals affirms city’s denial of LED sign permit.

The sign company has a nonconforming use permit for its sign lit by external lights. The use of internal light emitting diode (LED) lights on the sign violates the city’s sign code. The company challenged the planning commission’s denial of its application to add LED, but the trial court granted summary judgment in favor of the city. The company argued that the city’s sign code illumination standards should not apply to it because the city failed to acquire a “stat-

utorily-mandated” certification from the state pursuant to Minn. R. 8810.1400 (2007) which requires the state commissioner of transportation to certify local zoning requirements that deviate from the state zoning requirements.

The Minnesota Court of Appeals affirmed, not finding the company’s arguments persuasive. First, the state law prohibits signs which have “distracting, flashing or moving lights so designed or lighted as to be a traffic hazard” and provides a conflict of laws provision that defers to the local sign code if it is more restrictive than the state law. Second, the court rejected the company’s argument that the city does not have the authority to regulate its nonconforming sign because “billboards” are not specifically mentioned on a table in the sign code. The court also rejected the company’s argument that the city’s lighting restrictions are improperly motivated entirely by aesthetics. The sign code’s stated purpose includes both aesthetics and public safety, but the court noted that “aesthetics are a valid purpose for enacting a zoning ordinance.” *Clear Channel Outdoor, Inc. v. City of Arden Hills*, 2009 WL 1119238 (Minn. Ct. App. 2009).