Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?

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Community benefits agreements (CBAs) are the latest in a long line of tools neighbors have used to protect their neighborhood from the burdens of development, and to try to secure benefits from the proposed development. This Article canvasses the benefits and drawbacks various stakeholders perceive CBAs to offer or to threaten, and reviews the legal and policy questions CBAs present. It recommends that local governments avoid the use of CBAs in land use approval processes unless the CBAs are negotiated through processes designed to ensure the transparency of the negotiations, the representativeness and accountability of the negotiators, and the legality and enforceability of the CBAs' terms.

INTRODUCTION

A community benefits agreement (CBA) results from negotiations between a developer proposing a particular land use and a coalition of community organizations that claims to represent the individuals and groups affected by the proposed development.[1] In a typical CBA, community members agree to support the developer's proposed project, or at least promise not to oppose the project or to invoke procedural devices or legal challenges that might delay or derail the project. In return, the developer agrees to provide to the community

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1 Julian Gross, Greg LeRoy, and Madeline Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* 9 (Good Jobs First and the California Partnership for Working Families, May 2005), online at http://www.goodjobsfirst.org/pdf/cba2005final.pdf (visited Nov 9, 2009).

such benefits as assurances of local jobs, affordable housing, and environmental improvements.[2]

CBAs are a relatively recent phenomenon across the United States, although they grow out of a long history of negotiations among developers, land use authorities and public officials, and the affected community and various stakeholder groups (such as environmental groups or organized labor) over development proposals that require governmental approval.[3] The first major CBA, the Los Angeles Staples Center agreement, was signed in 2001.[4] Since then, scores of CBAs have been negotiated across the country.[5]

Because most CBAs are relatively new, there is scant evidence (either empirical or anecdotal) to evaluate whether CBAs are a net benefit to the parties who enter into these agreements. Similarly, little is known about the impact CBAs have on individuals or community groups in the neighborhood of the development that are not parties to the agreements. Nor is it yet clear what effect CBAs will have on the land use process or on local governments' economic development policies more generally.

Given the rising popularity of CBAs, it is important to evaluate the benefits and drawbacks of these agreements in light of both the experience (albeit limited) of parties who have entered into CBAs and more theoretical concerns about the impact that CBAs may have on the processes of land use regulation and real estate development. Those theoretical concerns are grounded in a long history of efforts by communities, developers, and local governments to find flexible ways to address neighbors' concerns about development proposals. Conditional rezonings, development agreements, negotiated exactions, conditional negative declarations in environmental impact review, and compensated siting agreements between industries needing to develop locally undesirable land uses (LULUs) and host communities have been used for decades.[6] The debates about, and experiences under, such progenitors of CBAs offer important insights into the possible advantages and disadvantages of CBAs.

This Article begins by briefly summarizing the structure, history, and political and legal context of CBAs. Part II evaluates the benefits

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2 Id at 9–10.

3 William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Process*, 17 J Affordable Hous & Comm Dev L 7, 9 (2008); Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 Fordham Urban L J 787, 794–95 (1994).

4 See text accompanying notes 11–20.

5 See generally Harold Meyerson, *No Justice, No Growth: How Los Angeles Is Making Big-Time Developers Create Decent Jobs*, 17 Am Prospect 39 (Nov 5, 2006) (noting that CBAs have been negotiated for at least forty-eight development projects).

6 See Been, 21 Fordham Urban L J at 800–22 (cited in note 3).

and drawbacks various stakeholders perceive CBAs to offer or to threaten. Part III surveys some of the thorny legal and policy questions presented by CBAs. Part IV argues that local governments should avoid the use of CBAs in the land use process unless they are subject to various constraints designed to ensure their transparency, representativeness, legality, and enforceability.

I. Overview of Community Benefits Agreements

A. What Are CBAs?

CBAs are agreements that detail the conditions a developer will provide in order to secure the cooperation, or at least forbearance, of community organizations regarding the developer's application for permission to develop a particular project. Community opposition to a proposed development obviously may influence whether regulatory bodies will approve the project. Community opposition also may affect whether government agencies are willing to help fund the project. A developer's ability to secure community acceptance of the project through a CBA accordingly may significantly affect the chances that the project will make it through various regulatory and funding hurdles.

In some cases, the developer initiates discussion about a CBA; in others, community groups approach the developer. At times, regulatory authorities or elected officials have suggested that the parties negotiate a CBA.

The benefits developers offer through a CBA vary with the particular development and community. Common promises include commitments to use local residents or businesses for the labor and material needed for the project; assurances that a certain number or percentage of housing units will be affordable to low- or moderate-income workers; agreements to pay living wages (or other benefits) to workers employed on the project; stipulations that the development be designed and constructed in an environmentally friendly fashion; and promises to correct existing environmental problems.[7] In return, coalitions of community groups promise the cooperation or forbearance necessary to allow the developer to get through the government approval processes as expeditiously as possible.

The final agreement is usually a private agreement between the developer and a coalition of community groups or individual groups. In a few recent cases, though, local government officials have participated

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[7] Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 10–11 (cited in note 1).

in the negotiations[8] or signed the agreement as witnesses,[9] and in many cases, the local government has incorporated the agreement (or its terms) into its own development agreement with the property owner.[10]

B. The Rise and Spread of CBAs

While CBAs have roots in other land use tools, as described in Part I.C, the modern CBA movement began in California. The first CBA involved the $4.2 billion Los Angeles Sports and Entertainment District development, which abuts the Staples Center, home of the NBA's Los Angeles Lakers.[11] The Staples CBA was negotiated by a consortium of developers that already had constructed the Staples Center itself, and the Figueroa Corridor Coalition for Economic Justice (FCCEJ), a local coalition of twenty-nine community groups and five labor unions.[12]

The development as proposed included an entertainment plaza, a 7,000-seat theater, a 250,000-square-foot expansion of the Los Angeles convention center, retail businesses, a housing complex, and a 45-story hotel, supported by at least $150 million in public subsidies as well as the use of eminent domain.[13] In an effort to get the project approved before the mayor and several city council members who supported the project reached the end of their limited terms, the developers reached out to the Los Angeles County Federation of Labor, which joined

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8 See, for example, Matthew Schuerman, *Mr. Bollinger's Battle*, NY Observer 48 (Feb 19, 2007).

9 See, for example, Atlantic Yards Development Co, *Community Benefits Agreement* 54 (Brooklyn United for Innovative Local Development, June 27, 2005), online at http://www.buildbrooklyn.org/pr/cba.pdf (visited Nov 9, 2009) (showing Mayor Michael Bloomberg signing as "witness"). See also Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J Affordable Hous & Comm Dev L 35, 42 (2008) (noting that the Bronx borough president and three members of the city council signed the New York Yankees CBA).

10 See, for example, Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 29 (cited in note 1).

11 Negotiations in 1998 regarding the Hollywood and Highland Center (which hosts the annual Academy Awards in its Kodak Theater) also might qualify as a CBA. However, because those negotiations involved a city council member, the agreement may be more appropriately characterized as an exaction. See Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, in *Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation* 1407, 1412 (ALI-ABA 2007). In any event, the Staples agreement is considered by many to be the first CBA. See Patricia E. Salkin and Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J Envir L & Pol 291, 301 n 26 (2008).

12 Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 14, 114 (cited in note 1).

13 Id.

forces with FCCEJ to negotiate the CBA.[14] The city encouraged the negotiations, but did not participate directly.[15]

After just five months of negotiations,[16] FCCEJ agreed to support the rezonings and public subsidies needed for the project, and the developers agreed to:

- fund an assessment of community park and recreation needs, and commit $1 million toward meeting those needs;
- make "reasonable efforts" to maintain 70 percent of the 5,500 permanent jobs generated by the project as "living wage" jobs;
- adopt a "first source" hiring program, giving preference to certain target groups, including individuals whose home or place of employment was displaced by the development; low-income individuals living within three miles of the development; and low-income individuals from the poorest census tracts throughout the city;
- construct 100 to 160 affordable housing units, representing approximately 20 percent of the total number of units created by the project;
- provide $650,000 in interest-free loans to nonprofit housing developers for the creation of additional affordable housing;
- provide funding of up to $25,000 per year for five years toward the cost of implementing a residential permit parking program in the neighborhoods surrounding the development;
- establish an advisory committee to monitor the implementation of the agreement and to enforce its terms.[17]

The City of Los Angeles and the Los Angeles Community Redevelopment Agency both approved the CBA, and the agreement was integrated into a development agreement between the developer and the Redevelopment Agency, making it enforceable by both the city and the community groups.[18]

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14 Ho, 17 J Affordable Hous & Comm Dev L at 20–21 (cited in note 3).

15 Id at 21.

16 Id.

17 *Community Benefits Program for the Los Angeles Sports and Entertainment District Project* A2–A11 (Strategic Actions for a Just Economy, May 29, 2001), online at http://www.saje.net/atf/cf/%7B493B2790-DD4E-4ED0-8F4E-C78E8F3A7561%7D/communitybenefits.pdf (visited Nov 9, 2009).

18 Greg LeRoy and Anna Purinton, *Community Benefits Agreements: Ensuring That Urban Redevelopment Benefits Everyone* 8 (Neighborhood Funders Group, Aug 2005), online at http://www.nfg.org/publications/community_benefits_agreements.pdf (visited Nov 9, 2009).

The perceived success of the Staples expansion agreement led to a number of subsequent CBAs in Los Angeles, including the CBA for the Los Angeles International Airport's (LAX) $11 billion modernization plan.[19] The economic downturn makes it difficult to assess whether CBAs have or will become a permanent fixture in the city's urban development process, but at the very least, they regularly are on the agenda in public discussions about major projects involving public subsidies.[20]

CBAs quickly spread across California.[21] Community groups in Atlanta,[22] Boston,[23] Charleston,[24] Chicago,[25] Denver,[26] Milwaukee,[27] Minneapolis/St. Paul,[28] Miami,[29] New Haven,[30] New Orleans,[31] Seattle,[32]

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19 For a reprint of the SunQuest Industrial Park Community Benefits Agreement, the NoHo Commons Community Benefits Agreement, and the Marlton Square Community Benefits Agreement, see the Partnership for Working Families website, online at http://www.communitybenefits.org/article.php?list=type&type=155 (visited Nov 9, 2009). See also *Community Benefits Agreement: LAX Master Plan Program* 6–33 (Los Angeles Alliance for a New Economy, 2004), online at http://communitybenefits.org/downloads/LAX%20Community%20Benefits%20Agreement.pdf (visited Nov 9, 2009). For discussions of the LAX CBA, see Salkin and Lavine, 26 UCLA J Envir L & Pol at 304–06 (cited in note 11); Salkin, *Understanding Community Benefit Agreements* at 1413–14 (cited in note 11).

20 Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 32 (cited in note 1) (arguing that CBAs are now the "norm for large, subsidized projects in the city").

21 In San Diego, for example, twenty-seven housing, labor, community, environmental, and religious groups formed ACCORD (A Community Coalition for Responsible Development) and entered into a CBA in 2005 with the developer of the new stadium for the San Diego Padres, PETCO Park. Salkin, *Understanding Community Benefit Agreements* at 1414–15 (cited in note 11). See *Ballpark Village Community Benefits Agreement* 5–19 (Center on Policy Initiatives, Sept 20, 2005), online at http://www.onlinecpi.org/downloads/BPV%20CBA%20text.pdf (visited Nov 9, 2009).

22 Amy Lavine, *Atlanta Beltline Community Benefits*, Community Benefits Agreements Blog (May 19, 2008), online at http://communitybenefits.blogspot.com/2008/05/atlanta-beltline-community-benefits.html (visited Nov 9, 2009).

23 Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5 (cited in note 1).

24 Salkin and Lavine, 26 UCLA J Envir L & Pol at 318 (cited in note 11).

25 A CBA was negotiated in Chicago, contingent on the city being selected as the host for the 2016 Olympic Games. The Chicago negotiations were nullified when Rio de Janeiro was chosen to host the Olympics. See Angela Caputo, *Chicago 2016 Benefits Agreement a "Good Start,"* Progress Illinois Blog (Mar 27, 2009), online at http://www.progressillinois.com/2009/3/27/benefits-agreement-good-start (visited Nov 9, 2009) (explaining that community activists negotiated the CBA, which would have required the development of affordable housing and jobs for the residents living near the planned 2016 Olympic Games host site).

26 See Ho, 17 J Affordable Hous & Comm Dev L at 21–23 (cited in note 3).

27 See Ann K. Pikus, *Wanted: Affordable Housing in Wisconsin*, 2007 Wis L Rev 201, 217–18. See also Brenda Parker, *This Land Is Our Land: The Battle for a Community Benefits Agreement in Milwaukee* *1 (unpublished paper, University of Wisconsin-Madison, May 2005), online at http://www.laborstudies.wayne.edu/power/downloads/Parkeast.pdf (visited Nov 9, 2009).

28 See Salkin, *Understanding Community Benefits Agreements* at 1421–22 (cited in note 11) (discussing a CBA related to creating a citywide Wi-Fi network).

and Washington, DC[33] also have begun to negotiate CBAs.[34] Most are tied to real estate development, and the community groups' ability to insist on a CBA is based on their power to slow down or block required land use approvals. Some CBAs, however, are tied instead to subsidies, franchises, or contracts that the developer wants to win from the government, so the community groups' leverage lies in their influence over those processes.[35]

C. CBAs in Context: The Role of Negotiated Mitigation and Amenities in Land Use Regulation

The drafters of the first zoning ordinances and the standard state zoning enabling act believed that once enacted, the zoning ordinance would resolve most issues, and exceptions to the zoning would be rare. That has not proved to be the case, for many reasons.[36] Planners and zoners are not omniscient, of course, and cannot write zoning ordin-

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29 Oscar Pedro Musibay, *Miami Commissioners OK Museum Leases at Bicentennial Park*, South Florida Bus J (Dec 19, 2008), online at http://southflorida.bizjournals.com/southflorida/stories/2008/12/22/story11.html (visited Nov 9, 2009).

30 Amy Lavine, *Yale-New Haven CBA*, Community Benefits Agreements Blog (Jan 30, 2008), online at http://communitybenefits.blogspot.com/2008/01/yale-new-haven-cba.html (visited Nov 9, 2009).

31 Jaime Guillet, *Historic Lincoln Beach Needs City OK for New Era*, New Orleans City Business (Jan 15, 2008), online at http://www.neworleanscitybusiness.com/viewFeature.cfm?recid=966 (visited Nov 9, 2009).

32 A CBA was successfully negotiated in Seattle, but the development project was canceled due to deteriorating economic conditions. See Emily Heffter, *$300M Project at Seattle Goodwill Site Cancelled*, Seattle Times (Apr 24, 2009), online at http://seattletimes.nwsource.com/html/localnews/2009116421_webgoodwill24.html (visited Oct 29, 2009); Stuart Eskenazi, *Coalition Talks Reach Deal on Goodwill Site*, Seattle Times B1 (Sept 2, 2008).

33 Amy Lavine, *Washington D.C. Shaw District CBA*, Community Benefits Agreements Blog (Jan 30, 2008), online at http://communitybenefits.blogspot.com/2008/01/washington-dc-shaw-district-cba.html (visited Nov 10, 2009).

34 Salkin and Lavine, 26 UCLA J Envir L & Pol at 318 (cited in note 11); Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5, 85–87 (cited in note 1). The best source of information about CBAs currently in force or being negotiated is the excellent blog maintained by Amy Lavine, a staff attorney at the Government Law Center of Albany Law School. See Amy Lavine, Community Benefits Agreements Blog, online at http://communitybenefits.blogspot.com (visited Nov 10, 2009).

35 In Minneapolis, for example, the winner of the bid to develop a citywide wireless Internet service negotiated a CBA with the Digital Inclusion Coalition that commits the developer to contribute to a Digital Inclusion Fund to promote affordable Internet access, low-cost hardware, local content, and training. The Digital Inclusion Coalition, *Recommendations for the Wireless Minneapolis Community Benefits Agreement* 9–15 (June 2006), online at http://www.digitalaccess.org/pdf/CBA_Two-Sided_6-27.pdf (visited Nov 10, 2009).

36 See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L Rev 1, 3 (2000); Judith Welch Wegner, *Moving toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 NC L Rev 957, 977–78 (1987); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal L Rev 837, 879 (1983).

ances that anticipate a fast-paced real estate market that must adapt to new technology such as cell phones or new consumer fads such as the coffee bar craze. In addition, buyers want more variety than the cookie-cutter development that rigid zoning tends to produce, and developers want more flexibility to address special characteristics of the land than rigid end-state zoning allows. Regulators (and their constituents) want flexibility to adapt to evolving information about how land development affects wildlife habitat, water quality, air quality, services and infrastructure in neighboring areas, and a range of other interests that are typically considered as part of an environmental review process. Further, land use regulators often see their role as mediating conflicts among the various stakeholders who have legitimate interests in the use of the land, and that role requires flexibility.[37]

Accordingly, zoning has moved from a set of rigid prescriptive rules about land use to a more flexible set of standards, which allow the specifics of the requirements imposed on each proposed development to vary with the threatened impacts of the project and the concerns of the various interest groups affected by the proposal. That flexibility creates dangers, however, that the negotiations surrounding land use development may be unfair to the developer or to those affected by the development, or that the negotiations may stand in the way of a development that would increase the overall social welfare by producing more benefits than costs.

The courts and state legislatures first responded to the advent of "negotiated" zoning with horror.[38] Early decisions struck down "contract" zoning, for example, when the local government conditioned rezonings on so many particulars that the arrangement resembled a contract.[39] But courts eventually realized that negotiation over the details of the land use proposal and its impacts on the surrounding community is an entrenched feature of the land use regulation scheme and shifted from rejecting the practice to instead minimizing the possibility that the negotiations would be unfair. While tolerating negotia-

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37 Rose, 71 Cal L Rev at 894–900, 908–10 (cited in note 36).

38 See, for example, *Midtown Properties, Inc v Township of Madison*, 172 A2d 40, 44 (NJ Super Ct 1961) (recognizing that contract zoning allows the "zoning power … [to be] prostituted for the special benefit" of the developer), affd, 189 A2d 226, 227 (NJ Super Ct 1963); *City of Knoxville v Ambrister*, 263 SW2d 528, 530 (Tenn 1953) (asserting that contract zoning destroys "that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society"). For more recent expressions of such concerns, see *Snyder v Board of County Commissioners*, 595 So 2d 65, 73 (Fla App 1991) ("[L]ocal governments frequently use governmental authority to make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer."), revd, 627 So 2d 469, 476 (Fla 1993).

39 Wegner, 65 NC L Rev at 982–86 (cited in note 36); Bruce R. Bailey, Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L Rev 897, 898–900 (1965).

tions over local improvements that were meant to address burdens the development will impose on the local community, courts draw lines about what are proper "quid pro quo[s]," and have made clear that "government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items."[40]

Perhaps the best example of the courts' approach is their treatment of exactions and impact fees. Exactions are conditions that a local government imposes on a developer in return for the local government agreeing to allow a land use that it otherwise could prohibit.[41] Exactions are a means of ensuring that developers, rather than taxpayers, bear the costs and risks of development, use publicly funded resources efficiently, and mitigate any harmful consequences of development.[42] Typically, the condition is that the developer supply, or fund, a public facility or amenity. For example, exactions may include impact fees to defray the cost of roads or congestion management needed because of the traffic generated by the development, or may require land or easement dedications for the property needed to provide schools or parks for the development.[43]

Initially, courts were suspicious of local governments' authority to impose exactions and of the danger that the governments were simply "rent-seeking," or attempting to extract some of the developer's profits in exchange for the government's approval.[44] Eventually, however, the courts' approach became one of managing the dangers of negotiations over exactions.[45] To ensure that governments were not simply "extorting" developers, the Supreme Court imposed a "nexus" requirement: the benefit the government seeks to exact from a developer must have an "essential nexus" to the legitimate state interest that the government would have invoked to justify rejecting the proposed

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40 *Municipal Art Society v City of New York*, 522 NYS2d 800, 803–04 (NY S Ct 1987) (voiding the city's sale of a site to a developer because the developer was promised a $57 million price reduction if the city did not provide a zoning bonus to allow for increased floor space).

41 Vicki Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum L Rev 473, 478–83 (1991) (providing an overview of exactions).

42 Id.

43 Id.

44 See, for example, *Pioneer Trust and Savings Bank v Village of Mount Prospect*, 176 NE2d 799, 803 (Ill 1961) (finding that an ordinance requiring a landowner to dedicate part of his property for the construction of a school in exchange for receiving a permit to construct residential units was "an unreasonable condition" and "purports to take private property for public use without compensation"); *Gulest Associates v Town of Newburgh*, 209 NYS2d 729, 733 (NY S Ct 1960), affd, 15 AD2d 815 (NY App 1962) (holding an ordinance requiring that a landowner pay for a park, playground or other recreational space to be built before the town granted permission to build on his property "permits the taking of property without due process of law and . . . must therefore be declared illegal, null and void").

45 See Been, 91 Colum L Rev at 475 (cited in note 41).

development.[46] Further, the amount of the benefit the government seeks has to be roughly proportional to the impact that the particular development would impose.[47] Within those strictures (as well as others imposed by state law), however, governments are allowed to impose exactions that seek benefits from developers to offset the impacts the proposed development will have on the local community.

Similarly, the courts have recognized that local governments can impose conditions upon developers through the environmental impact review process. In New York, for example, a negative declaration is a finding by the relevant government entity that a proposed development or project would have no significant effect on the environment and therefore a full environmental impact review is not necessary. Agencies may issue "conditional negative declarations" when they conclude that the developer can adopt measures to mitigate any harmful environmental impacts the proposed development might cause.[48] Indeed, developers try to avoid the need for a complete environmental impact statement (EIS) by offering mitigation measures designed to keep the project's impacts below the threshold that would trigger full review.[49] Further, agencies confronted with a final EIS that identifies environmental harm that will result from the development may approve the development conditioned upon various measures to mitigate the harms.[50]

Community benefits agreements must be seen against the backdrop of these doctrines the courts (and legislatures) have adopted to cabin negotiations over the approval of proposed land development. Although the doctrines may not apply directly to CBAs (depending upon how involved land use regulators are in the CBAs, and upon how they are structured), they help to illuminate some of the dangers CBAs pose.[51]

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46 See *Nollan v California Coastal Commission*, 483 US 825, 837 (1987).

47 *Dolan v City of Tigard*, 512 US 374, 391 (1994) ("'[R]ough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

48 NY Envir Conserv Law § 8-0109 (McKinney) (setting out the procedure for "preparation of environmental impact statements").

49 Consider Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum L Rev 903, 908 (2002) (by redefining a project's impact through backdoor incorporation of mitigation measures).

50 See, for example, *Town of Henrietta v Department of Environmental Conservation*, 430 NYS2d 440, 445–48 (NY App 1980).

51 CBAs also should be viewed against the doctrines limiting the reach of neighborhood consent provisions in zoning ordinances. Such provisions require developers to secure the consent of some percentage of neighboring property owners before they can develop the property. The requirements have met with considerable skepticism, and the Supreme Court's limited jurisprudence on neighbors' consent provisions suggests that they are unconstitutional if neigh-

II. WHAT DO COMMUNITIES, DEVELOPERS, AND LOCAL GOVERNMENTS FIND ATTRACTIVE ABOUT CBAS?

A. Communities

1. CBAs may give neighborhoods a more meaningful role in the development process than the opportunities the existing land use process provides for public participation.

Those who champion CBAs on behalf of local communities articulate several justifications for the agreements. First, they argue that the local government's normal land use procedures often fail to ensure that the concerns of the neighborhood most affected by the proposed development are considered and adequately addressed.[52] They worry as well that the representatives of the neighborhood are not effective in advocating for the community. In New York City, for example, community boards' recommendations are advisory only and may be ignored by the appointed planning commission or elected officials.[53] Others in the land use approval process could disregard a community board's recommendations for appropriate reasons, such as the City's need for a particular type of development, but also may be perceived as disregarding the community's concerns because they depend upon developers for campaign contributions or other political support.[54] Further, the community boards are given few resources and little training to evaluate development proposals. Members serve at the pleasure of the borough president, who sometimes replaces mem-

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bors are able to exercise unbridled discretion, at least if the proposed use is not a noxious one. See *Seattle Title Trust Co v Roberge*, 278 US 116, 120–22 (1928) (determining that an ordinance which allows for the erection of a philanthropic home for children or the elderly only when two-thirds of the nearby property owners consent violates the Fourteenth Amendment); *Eubank v City of Richmond*, 226 US 137, 140–44 (1912) (holding that the Fourteenth Amendment is violated by a measure allowing neighboring property owners to impose building restrictions on adjoining lots). But see *Thomas Cusack Co v City of Chicago*, 242 US 526, 527–31 (1917) (holding that an ordinance allowing the placement of buildings only when written consent is obtained from the neighboring property owners is constitutional and attempting to distinguish this holding from *Eubank*). See also A. Dan Tarlock, *An Economic Analysis of Direct Voter Participation in Zoning Change*, 1 UCLA J Envir L & Pol 31, 37–41 (1980).

52 Communities in many cities have turned to CBAs out of frustration with the lack of meaningful opportunities for communities to participate in the planning and design of federal urban renewal projects, community economic development programs, and land use decisions more generally. See, for example, Ho, 17 J Affordable Hous & Comm Dev L at 11–19 (cited in note 3).

53 See New York City Charter § 2800(d). See also Community Board Assistance Unit, *Handbook for Community Board Members* 23–48 (NYC Mayor's Office, 2009), online at http://www.nyc.gov/html/cau/downloads/pdf/handbook_2009.pdf (visited Nov 10, 2009).

54 See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 4 (cited in note 1).

bers whose views he or she does not like. Finally, while New York City gives communities the power to propose their own plans, there is widespread dissatisfaction with that process.[55]

Similar complaints are heard in many cities and towns across the country.[56] Perhaps not surprisingly, then, neighborhoods wishing to have a more significant role in the land use process see CBAs as a more direct and powerful way for residents to shape their neighborhood's development.

2. CBAs give neighborhoods a role in the development process when the local government's typical land use processes are preempted.

Communities complain that they have even less input into the land use approval process when their local government's normal processes are preempted because the project involves the county, state, or federal government or special authorities. In those situations, the processes for approval often do not provide the local community an opportunity to participate that the community finds satisfying.[57] Often, the only hearing open to the public is in the environmental impact review process, and community groups complain bitterly that the

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55 See, for example, Frank Lombardi, *Back off Bloomy! Rally at City Hall Rips Community Board Cuts*, NY Daily News 29 (June 10, 2009) (describing how elected officials and community leaders protested the mayor's proposed 11 percent decrease for community board budgets); Helen Rosenthal, *Cutting Back on Democracy*, Gotham Gazette (Mar 16, 2009), online at http://www.gothamgazette.com/article/fea/20090316/202/2854 (visited Nov 10, 2009) (quoting a community board chairwoman as saying that "community boards have received no meaningful increases in their budgets since 1980 making it impossible for them to . . . keep up with rising costs" and that budget cuts will "diminish the boards' ability to develop zoning and infrastructure plans, [ ] to analyze and conduct public review of development proposals . . . [and] reduce the boards' ability to communicate with and involve residents, businesses and institutions"); Lincoln Anderson, *Stringer Wants Reform, New Blood on Community Boards*, The Villager (Feb 22, 2006), online at http://www.thevillager.com/villager_147/stringerwantsreform.html (visited Nov 10, 2009) ("[P]roblems with community boards have included vacancies left too long unfilled, as well as a highly politicized appointment process and 'ad-hoc removals' of board members. . . . Other problems . . . include unreported lobbying and lax oversight and enforcement of conflict-of-interest rulings."); Robin Shulman, *Report Finds Disparity in City Aid to Community Boards*, NY Times B2 (June 20, 2005) ("A report on Manhattan community boards found that there is a wide disparity in resources and services across the borough, and that poorer districts sometimes receive far less city money than wealthier ones."); Derek Alger, *Issue of the Week: Community-Based Planning*, Gotham Gazette (Mar 25, 2002), online at http://www.gothamgazette.com/iotw/communityboards (visited Nov 10, 2009) (discussing the problems New York City communities have encountered in trying to develop plans for their own future development).

56 See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreement* at 3–5 (cited in note 1).

57 New York Public Interest Research Group, *Memo: ULURP Should Apply to the Atlantic Yards Project* (June 18, 2004), online at http://www.developdontdestroy.org/public/nypirg_ULURP.pdf (visited Nov 10, 2009).

hearings are focused on the minutia of dense and technical environmental impact statements and provide little meaningful opportunity for community members to have an impact on the project.[58] CBA advocates accordingly argue that CBAs especially are necessary to ensure that the community's needs are voiced and addressed when a local government's typical land use processes do not apply.[59]

3. CBAs give neighborhoods an opportunity to address issues, such as wage rates or employment practices, that the local government does not typically address in the normal land use process.

Advocates of CBAs believe that CBAs give the residents affected by a development a say regarding all the ways in which a proposal may change the local community, without regard to whether those impacts fit neatly within the current definition of "land use" or environmental "impacts." The normal land use process, advocates claim, focuses on traditional land use concerns, such as the height and bulk of a project, and accordingly does not always ensure that those most affected by the development have a voice in shaping all the ways in which the development could affect or benefit the community.[60] CBAs allow neighborhoods to negotiate their own mitigation and benefits without having to worry about the *Nollan*[61]*-Dolan*[62] nexus and proportionality requirements, which might apply if the city were involved in the negotiations.

Many CBAs, for example, address the percentage of the development's construction jobs that will be reserved for minority, women, or local workers, as well as the wage rates of those hired for the jobs.[63] Such requirements might not pass muster under *Nollan-Dolan*, but advocates believe that because CBAs are private agreements, they will not trigger the *Nollan-Dolan* nexus or proportionality requirements. As discussed in Part III.D, to the extent that CBAs are required by or incorporated into the land use approval processes, they may implicate *Nollan-Dolan*, so this "advantage" of CBAs may be illusory.

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58 *Urban Renewal: Up in Arms about the Yards*, Economist 33 (Sept 23, 2006).

59 See, for example, Tom Angotti, *Bronx Terminal Market and the Subverting of the Land Use Review Process*, Gotham Gazette (Dec 2005), online at http://www.gothamgazette.com/article/landuse/20051213/12/1680 (visited Nov 10, 2009) (discussing the trend for large-scale development projects to be approved outside of the normal land use process).

60 See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5–6 (cited in note 1).

61 See *Nollan v California Coastal Commission*, 483 US 825, 837 (1987).

62 See *Dolan v City of Tigard*, 512 US 374, 391 (1994).

63 See text accompanying notes 16–18.

4. CBAs allow neighborhoods to control the distribution of at least some of the benefits of the development.

The normal land use process does not necessarily ensure that those most affected by a development proposal will receive their fair share of the benefits of the development. In many cases, one of the direct benefits of a development is the creation of new jobs. The land use approval process may take into account the permanent benefits that a development will bring to a community in weighing whether to allow the development. But the land use process generally does not address which community, or group within the community, should get jobs (or other benefits) the development creates.[64] Proponents of CBAs believe that they can help give community groups "a united voice"[65] that can help them secure promises that jobs (and other benefits) will be offered first to the residents of the neighborhoods in which the development is being built.

B. Developers

1. CBAs may garner community support for the project and therefore increase the chances that the project will be approved.

A developer's success in obtaining regulatory approvals and financial support from the government in a timely fashion is influenced, of course, by community support for the project. Some developers therefore have accepted and even embraced the use of CBAs because they may secure some measure of community support for, or at least reduce opposition to, the development. Even if the developer believes the project will be approved without a CBA, by gaining support (or reducing opposition) for the project in the community, a CBA may reduce the risk of rejection or save the developer time in the approval process.

2. CBAs may be a more cost-effective way of sharing some of the benefits of the development than other means used in public approvals processes.

Developers also may embrace CBAs because they understand that they will be asked to contribute benefits at some point in the public process and believe that negotiating a CBA with community groups will result in lower costs than negotiating with elected or appointed officials. Or they may believe that promises made through CBAs are less likely

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64 See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 5–6 (cited in note 1).

65 Ho, 17 J Affordable Hous & Comm Dev L at 9 (cited in note 3).

to be strictly enforced (in terms of the quality of amenities constructed or offered, for example) than if elected or appointed officials were to require the benefits at issue. Or, developers may believe that they will get greater public relations benefits from CBAs than from any benefits that they provide during a public process.

3. CBAs may provide more certainty that a project will not be challenged in court.

Even after a project has received the requisite regulatory approvals, a developer might still have to consider the likelihood that dissatisfied community groups may sue to challenge the approvals. Developers (and their lenders) are unlikely to expend any significant dollars until the applicable statute of limitations has expired. A CBA will reduce the chances of a lawsuit being filed; the more inclusive the CBA is, the more certainty a developer will have that a project will proceed on a timely basis.

C. City Officials and Local Politicians

1. CBAs may allow municipalities to bypass legal constraints on land use regulation imposed by statute and judicial precedent.

As noted above, the Supreme Court's decisions in *Nollan v California Coastal Commission*[66] and *Dolan v City of Tigard*[67] preclude municipalities from imposing exactions on proposed projects unless those exactions have a substantial nexus to impacts of the developments that would otherwise justify rejection of the development proposal, and unless the exaction is roughly proportional in amount to those impacts.[68] The restrictions established by *Nollan* and *Dolan*, however, only constrain actions taken by the government. Thus, community groups may be able to convince a developer that the agreement is not constrained by *Nollan* or *Dolan* and secure concessions the courts might view as unrelated to the development's land use impacts. To the extent that local government officials are unhappy about their inability to address local concerns because of the strictures of *Nollan* and *Dolan* and other legal constraints, those officials also may wish to see CBAs fill the void. As noted above, however, and discussed more fully in Part III.D, if CBAs are required by or incorporated into the land use approval processes, they in fact may implicate *Nollan* and *Dolan*.[69]

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66 483 US 825 (1987).
67 512 US 374 (1994).
68 See text accompanying notes 46–47.
69 See text accompanying notes 46–47, 99–105.

2. CBAs may allow elected and appointed officials to distance themselves from politically unpopular community demands or from politically unpopular developments.

Local government officials may see CBAs as a way to deflect the ire of developers to the community when the developers believe they are being asked to contribute too many, or inappropriate, benefits in exchange for permission to develop. A local government may wish to appear welcoming to development in order to maintain the jurisdiction's growth, and local officials may need to secure developers' campaign contributions to support electoral campaigns, so officials may wish to avoid being seen as overly demanding. By tacitly allowing community groups to bargain with the developer through CBAs that are outside of the land use process, municipalities are able to address community needs while blaming forces outside the land use approval process for the demands made of developers.

CBAs negotiated outside of the land use process also provide cover for local officials who vote to approve a development that is unpopular with their constituents. By citing the CBA, local officials are able to point to the benefits the community will receive and therefore justify the officials' support for the development.

3. CBAs may allow local officials to secure more for their own constituents than the public approval processes might allow.

Politicians who represent the district in which a proposed development falls may believe their constituents should get more of the benefits of the proposed development, because those constituents are likely to bear more of the impacts than others in the community. As discussed in Part II.A.3, CBAs may confer benefits better tailored to the local community's needs than concessions the developer makes in the public approval process because CBAs may not be constrained by the laws applicable to the public processes and because the public approval process involves many other constituencies that must be satisfied.[70] Local politicians accordingly may see the CBA process as a way for them to "deliver" benefits specific to their communities that is easier for them to use than the normal land use processes.[71]

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[70] Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 10 (cited in note 1).

[71] Salkin and Lavine, 26 UCLA J Envir L & Pol at 292 (cited in note 11).

III. THE LEGAL AND POLICY ISSUES POSED BY CBAS

Many participants in the land use process have expressed concern about the unregulated nature of the CBA negotiations process. Because CBAs are a recent phenomenon, the concerns summarized in this Part are not based on empirical studies of the agreements or their implementation, but instead are based on observations about CBAs currently in operation and on the history of negotiations over land use approvals among city officials, developers, and members of the host community described in Part II.C. This Part draws upon several New York City CBAs to illustrate various points, but examples could be drawn from many jurisdictions around the country.

A. Will "Community" Groups Involved in CBAs Represent the Community?

One of the most common criticisms leveled at CBAs is that the agreements may not represent the wishes of the majority of the community. Under New York City's Uniform Land Use Review Process (ULURP), for example, community boards, borough presidents, the City Planning Commission (CPC), the city council, and the mayor all are involved in the decision whether to grant or deny development approval.[72] The borough president, city council members, and the mayor are elected every four years. Members of community boards and the CPC are appointed by elected officials (borough presidents appoint community board members,[73] and the mayor, borough presidents, and the public advocate appoint the members of the CPC[74]). Thus, the actions of all those involved in ULURP are subject to the political process: communities affected by development can express support for, or opposition to, the land use decisions made by elected officials and their appointees at the ballot box, and those officials and appointees are accountable to the electorate.

On the other hand, in most cases, the people who negotiate CBAs are neither elected nor appointed by the community or its elected representatives.[75] In those instances, community members have no way of

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72 NYC Rules, title 62, ch 2. See generally, New York City Department of City Planning, *The Uniform Land Use Review Procedure (ULURP)*, online at http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml (visited Nov 10, 2009).

73 New York City Charter § 2800(a)(1). The borough president must fill at least half of the seats with nominees from the council members representing the community district.

74 New York City Charter § 192(a).

75 See Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 11 (cited in note 1) ("CBAs are negotiated between leaders of community groups and the developer," but noting that government agencies and staff may play a role in negotiations, especially "[i]n un-

holding the negotiators accountable for the conduct or outcome of the negotiations. Negotiators who are not well organized, who are weak or unskilled bargainers, or who do not represent the community's interests can dominate the negotiations unchecked. Further, the lack of accountability may allow developers to choose to work with or appease some groups and ignore others.

CBA negotiations are not subject to requirements and procedures designed to ensure access to the policymaking process for all affected constituencies. For example, New York City's ULURP specifically provides for two public hearings, first before the affected community board[76] and then before the City Planning Commission.[77] Legal rules govern the notice that must be provided to the affected communities to inform them of these hearings.[78] CBAs, on the other hand, may be negotiated privately, and the parties to the CBA may not give other affected interests either notice or an opportunity to be heard about the terms of the CBA.[79] CBAs are rarely (if ever) put to a vote of the community as a whole. Indeed, some of the CBAs negotiated in New York City in recent years were not even publicly available until just recently.[80]

The Atlantic Yards CBA in New York City is illustrative of the problem. In December 2003, Forest City Ratner (FCR) announced plans to construct a 19,000-seat arena for the NBA's New Jersey Nets, along with housing, office and retail space, a hotel, and a parking garage, in Atlantic Yards in downtown Brooklyn. The twenty-one acre development would be the largest development in New York City outside of Manhattan in a quarter century.[81] Not surprisingly, the FCR proposal generated immediate skepticism and controversy. FCR embarked on a campaign to win support for the project, and as part of

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usual circumstances, [when] a government entity may in fact be the 'developer' of a project . . . [and therefore] be central to the negotiations and a party to the CBA.").

76 NYC Rules, title 62, § 2-03(a)(1).

77 NYC Rules, title 62, § 2-06(a).

78 NYC Rules, title 62, § 2-02(a)(2).

79 Some, perhaps most, of the community groups negotiating CBAs, however, have tried to maintain transparency regarding their negotiation process and the substance of those negotiations. See, for example, Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 22 (cited in note 1).

80 Some of the CBAs negotiated in New York City have not been made readily accessible to the public. If they are kept in the files of government agencies as part of the review process, they may be subject to state freedom of information laws. See *Washington Post Co v New York State Insurance Department*, 463 NE2d 604, 606 (NY 1984) (holding that under the plain text of the state's Freedom of Information Law, the term public records includes any "information kept, held, filed, produced . . . by, with or for an agency"). Other states allow access to records only when the records "have some relation to the official duties of the public officer that holds the record." *Salt River Pima-Maricopa Indian Community v Rogers*, 815 P2d 900, 907 (Ariz 1991).

81 Charles V. Bagli, *Deal Is Signed for Nets Arena in Brooklyn*, NY Times A1 (Mar 4, 2005).

that campaign, raised the idea of a community benefits agreement. FCR convened a meeting of community groups, including the New York chapter of Association of Community Organizations for Reform Now (ACORN), Brooklyn United for Innovative Local Development (BUILD), the Downtown Brooklyn Advisory and Oversight Committee (DBAOC), as well as members of the community boards[82] in whose jurisdictions the land fell. These groups began meeting regularly with FCR.[83] Other groups that had come out against the arena, such as Develop Don't Destroy Brooklyn and Prospect Heights Action Coalition, did not participate in the discussions,[84] although there is disagreement about whether they were excluded or refused to participate.

Within months, eight community organizations signed the Atlantic Yards CBA, while more than fifty community groups aligned in opposition.[85] Many interested observers have expressed concern that the signatory groups are not representative of the impacted constituencies. Lance Freeman, an assistant professor of Urban Planning at Columbia University, for example, criticized the Atlantic Yards CBA on the grounds that "there is no mechanism to insure that the 'community' in a CBA is representative of the community."[86]

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82 Some have criticized members of the community boards who negotiated with FCR, arguing that their participation granted FCR's negotiations an appearance of greater legitimacy. See Hugh Son, *Owner Neglecting Nets, Say Critics*, NY Daily News 1 (Nov 29, 2004) ("Several community board members have protested their leadership's involvement in talks with Forest City Ratner to secure neighborhood benefits, a move some view as lending support to the controversial project.").

83 Mafruza Khan and Brad Lander, eds, *Slam Dunk or Airball? A Preliminary Planning Analysis of the Brooklyn Atlantic Yards Project* 14 (Pratt Institute Center for Community and Economic Development, Mar 2005), online at http://dddb.net/documents/whitepapers/PICCED/bay-report.pdf (visited Nov 10, 2009).

84 See id at 16; Develop Don't Destroy Brooklyn, *About the Ratner Plan: What is Bruce Ratner's "Atlantic Yards" Proposal?* (June 11, 2009), online at http://www.dddb.net/php/aboutratner.php (visited Nov 10, 2009); Bagli, *Deal Is Signed for Nets Arena*, NY Times at A1 (cited in note 81) (quoting the leader of the Prospect Heights Action Coalition, who explained the group's view that the "project is too big," would amount "to supersiz[ing] Brooklyn[,]" and would result in "1,000 people [ ] los[ing] their jobs or homes because of the project").

85 See Develop Don't Destroy Brooklyn, *Organizations That Are Opposed to or Deeply Concerned about the Proposed Forest City Ratner Nets Arena, 16 Highrise Tower Proposal for Brooklyn* (2009), online at http://www.dddb.net/php/opposition.php (visited Nov 10, 2009); Nicholas Confessore, *The People Speak (Shout, Actually) on Brooklyn Area Project*, NY Times B1 (Oct 19, 2005).

86 Lance Freeman, *Atlantic Yards and the Perils of Community Benefit Agreements*, Planetizen Contributor Blog (May 7, 2007), online at https://www.planetizen.com/node/24335 (visited Nov 10, 2009) (criticizing the Atlantic Yards CBA). See also New York City Council Committee on Economic Development, Public Hearing on the Proposed Brooklyn Atlantic Yards Project (May 6, 2005) (comments of Bettina Damiani, Project Director, Good Jobs New York) ("Damiani Comments"), online at http://www.goodjobsny.org/testimony_bay_5_05.htm (visited Nov 10, 2009) ("The BAY project has so far demonstrated one of the major weaknesses of CBAs—in terms of 'community' input, they are only as broadly representative as the groups that negotiate them.").

The problem of representativeness is compounded by the taint of conflict of interest. The cooperation of at least one community group that signed the Atlantic Yards CBA, BUILD, followed closely behind FCR's financial contribution to the organization.[87] Indeed, BUILD was not incorporated until days before it announced its support for the development.[88] Shortly after the CBA was signed, FCR gave BUILD $100,000, provided space and overhead for a BUILD office in the vicinity of Atlantic Yards, and donated computer equipment and furniture to the group.[89] FCR has since given BUILD additional funds and has provided funds for other signatories.[90]

Many groups negotiating CBAs have taken care to involve the community, protect against conflicts of interest, and insure an inclusive bargaining process. But there are no safeguards in place other than those the groups impose upon themselves: no mechanism for ensuring that those who claim to speak for the community actually do so; no guaranteed forum through which the community can express its views about the substance of the CBA or the wisdom of entering into a CBA; and no formal means by which the community can hold negotiators accountable for the success or failure of a CBA. These gaps give rise to a fear that developers will use CBAs as part of a divide and conquer strategy to "buy" off a few community activists in order to create the impression of broader community support than actually exists.[91]

B. Will Those Who Negotiate for the Community Drive an Appropriate Bargain?

Even if those at the bargaining table do indeed speak for the community, there is no guarantee that they will secure a good bargain.[92] Representatives of the community may be hampered by inex-

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87 Juan Gonzalez, *BUILD Admits Ratner Funding*, NY Daily News 22 (Oct 18, 2005).

88 Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, NY Observer 13 (Dec 5, 2005) (reporting that only two of the eight groups that signed the Atlantic Yards CBA were incorporated prior to the negotiations).

89 Nicholas Confessore, *To Build Arena in Brooklyn, Developer First Builds Bridges*, NY Times A1 (Oct 14, 2005).

90 Matthew Schuerman, *Out of the Woods?*, NY Observer (Oct 19, 2005), online at http://www.observer.com/node/33929 (visited Nov 10, 2009). See also Matthew Schuermann, *Ratner's Gift*, NY Observer (June 9, 2006), online at http://www.observer.com/node/34828 (visited Nov 10, 2009).

91 Amy Lavine, *Atlantic Yards CBA*, Community Benefits Agreements Blog (Jan 29, 2008), online at http://communitybenefits.blogspot.com/2008/01/atlantic-yards-cba.html (visited Nov 10, 2009). See also Freeman, *Atlantic Yards* (cited in note 86); Kenneth Fisher, *Complex Policy Choices in Managing Growth*, 237 NY L J S8 (Jan 16, 2007).

92 *Damiani Comments* (cited in note 86); Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 22–23 (cited in note 1). For evidence of how communities fared in similar negotiations over undesirable land uses, see Been, 21 Fordham Urban L J at 811–22 (cited in note 3).

perience in negotiating with developers who have made a life's work out of hard bargaining. Community representatives may lack the resources to ascertain what would be the best terms for the community. The terms of CBAs are not always made public, so it is difficult for the bargainers to assess what is an appropriate agreement.[93] Further, negotiators likely are members of community groups who stand to benefit from the terms of the CBA (even if not from direct contributions from the developer[94]) and therefore may have conflicts of interest in assessing what the community should ask for.

The benefits obtained also are not always easy to value. Negotiations sometimes requires valuation of parkland, trees, parking spaces, and other amenities that are being lost to the development, and a comparison of the value of those amenities to the value of substitutes. Such valuations and comparisons are notoriously problematic and controversial.[95]

C. Will Negotiations over a CBA Result in Neighborhood-by-Neighborhood Solutions to Problems That Would Better Be Addressed on a Citywide Basis, or Otherwise Harm the Interests of the Local Government as a Whole?

The terms of a CBA very well may affect negotiations between the developer and elected or appointed officials in the public approval process, depending upon how the timing of the CBA negotiations relates to the land use process. The community negotiating the CBA may capture benefits that would have gone instead to the broader community if CBAs were not allowed. Or the community may bargain for one type of benefit and thereby reduce the ability of elected officials in the public approval process to get a different kind of benefit that would have been more appropriate for the city as a whole.

Further, while the benefits incorporated into CBAs may address important needs, such as affordable housing, critics contend that these issues should be confronted citywide, rather than on a neighborhood-by-neighborhood basis.[96] A citywide approach would be more likely to

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93 See Been, 21 Fordham Urban L J at 825–26 (cited in note 3) (discussing how confidentiality agreements over compensated siting agreements hampered communities bargaining over such agreements).

94 See text accompanying notes 87–90.

95 See, for example, Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 55–129 (Oxford 2008) (discussing various theoretical challenges to accurate measurement of benefits); Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L Rev 821, 846–53 (2009) (discussing cost-benefit analysis in the context of land valuation).

96 *Damiani Comments* (cited in note 86) ("Community residents who have not been part of the negotiation, but have expressed concerns about [negotiated benefits] . . . have not had a way to

channel resources into the neighborhoods that need them most, which may not be the neighborhoods that happen to be getting development. Indeed, it may often be the case that the neighborhoods in which developments are proposed are among the least needy of a local government's communities.

A jurisdiction-wide approach to the local government's needs is likely to be more comprehensive, better planned, and better integrated with the local government's other initiatives. The Atlantic Yards CBA, for example, promises to provide affordable housing but envisions that the housing will draw upon various public subsidy programs.[97] Those public subsidies are limited resources, and the provision of affordable housing of a particular type and in a particular neighborhood pursuant to a CBA may distort local, state, or federal government priorities for spending those resources. The subsidies might go much further if used for other developments, but local government officials understandably might be reluctant to refuse to subsidize affordable housing promised in a particular CBA and thereby risk having to take "blame" for the development's failure to provide community benefits.[98]

Diversion of benefits from the local government as a whole to the host neighborhood also may result in greater inequality among the local government's neighborhoods. Many neighborhoods within a local government will not be zoned for major development or will not have the infrastructure or underused land required for such development. Those communities may share in any benefits of development that are obtained in the public approval process. If CBAs divert benefits from the local government as a whole, however, those

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include these concerns in the negotiation process .... [W]ithout broad, cross-cutting organizing, such 'CBAs' can become a mechanism for dividing the community rather than uniting it.").

97 See Atlantic Yards Development Co, *Community Benefits Agreement* at § VI(B)(2)(b) (cited in note 9) (relying on "governmental contributions for site development and affordable housing subsidies"); id at exhibit D, annex A:

> [T]he ACORN/ATLANTIC YARDS 50/50 Program will utilize existing Housing Development Corporation (HDC) bond programs and Department of Housing Preservation and Development (HPD) programs, with necessary modifications. The program may also utilize existing Housing Finance Agency (HFA), Affordable Housing Corporation (AHC) or Housing and Urban Development (HUD) programs, with necessary modifications.

98 It is telling that those charged with administering New York City's affordable housing programs, such as the Department of Housing, Preservation and Development, were silent about the city's willingness to provide the subsidies that the Atlantic Yards CBA anticipated would enable the developer to provide the affordable housing "promised" in the agreement. See generally New York City Department of Housing Preservation and Development, *Mayor Michael R. Bloomberg, Forest City Ratner CEO and President Bruce Ratner and Civic Leaders Sign Community Benefits Agreement* (June 27, 2005), online at http://www.nyc.gov/html/hpd/html/pr2005/mayors-release248-05-pr.shtml (visited Nov 18, 2008).

neighborhoods may see little of the benefits from the local government's growth.

D. Will CBAs Considered in the Land Use Process Trigger *Nollan* and *Dolan* and Other Legal Limits on Exactions—Are They Legal?

As noted in Part I.C, the Supreme Court's decisions in *Nollan* and *Dolan* imposed nexus and proportionality requirements on local governments' demands for exactions in the land use approval process, at least where those exactions are negotiated on a case-by-case basis.[99] The state courts have imposed additional restrictions on the use of exactions.[100] While the courts do not seem to have been confronted yet with a claim that CBAs trigger those same restrictions, such a claim would have at least a reasonable basis in the law in some circumstances. If the "leverage" community groups have to convince developers to enter into negotiations stems from an explicit or implicit requirement that the landowner enter into a CBA before seeking government approval of the land use proposal, the courts may view the negotiations as posing no less (and perhaps more) risk of "extortion," to use the *Nollan* Court's term,[101] than the local government's processes at issue in that case. Government officials reportedly sometimes have suggested the need for the agreements,[102] and indeed, even have been involved in the negotiations.[103] Further, the agreements often have been reached and announced at the eleventh hour before crucial government votes on the land use proposals.[104] Courts therefore

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[99] For a discussion of whether, and how, *Nollan* and *Dolan* apply to takings challenges brought against development impact fees, see Michael B. Kent, Jr, *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 Wm & Mary L Rev *37–50 (forthcoming 2010), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456371 (visited Oct 29, 2009) (proposing a hybrid test combining *Nollan* and *Dolan* with standard non-exaction takings claim analysis and then applying this test to three hypothetical fact patterns).

[100] Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L J 729, 762–63 (2007). See also Andrea B. Pace, Note, *Utah Leads the Way in Regulating Land Use Exactions through Statute but Still Has Room to Improve*, 21 BYU J Pub L 209, 221–25 (2007).

[101] 483 US at 837 (referring to a requirement that an owner provide an easement across part of his property as a condition of granting a permit to build a house as "an out-and-out plan of extortion").

[102] See, for example, Bill Egbert, *Coalition Waging Battle with Armory Developer for Kingsbridge Benefits*, NY Daily News 72 (Apr 25, 2008).

[103] See, for example, Alex Kratz, *Diaz Stalls on Amory [sic] Project, Waits for Response on Draft Benefits Agreement from Developer*, Bronx News Network (Aug 21, 2009), online at http://www.bronxnewsnetwork.org/2009/08/diaz-stalls-on-amory-project-waits-for.html (visited Nov 10, 2009).

[104] See, for example, Timothy Williams and Ray Rivera, *$7 Billion Columbia Expansion Gets Green Light*, NY Times A1 (Dec 20, 2007); Columbia Office of Communications and Public Affairs, *Columbia, Local Development Corporation Reach Long-Term Collaboration Agreement on Enhanced Education, Health Care, Jobs, Affordable Housing and Other Civic Programs* (Dec 19, 2007), online at

may find sufficient government involvement in the negotiations themselves to trigger the legal restrictions that apply to the government. To the extent that there are formal or informal "requirements" that developers enter into CBAs prior to seeking government approval of their land use plans, the courts' prohibitions on neighborhood consent requirements also may be applicable.[105] Finally, to the extent that elected officials suggest that administrative agencies such as the local planning commission should not approve proposals unless the developer has entered into a CBA, as some are reported to do, courts may find that the elected official's participation in any subsequent council vote on the agency's decision creates an appearance of bias.[106]

The purpose of this Article is not to answer those questions definitively. The questions are sufficiently well grounded, however, to raise considerable concern about the legality of CBAs.

E. Will CBAs, Even if "Legal," Compromise Sound Planning and Land Use Regulation?

In *Nollan*, the Supreme Court cautioned that the use of land use exactions could paradoxically lead to underenforcement of the jurisdiction's land use regulations.[107] The Court suggested that a municipality that enacts strict regulations but waives those regulations in exchange for the benefits secured by exactions might achieve fewer of its genuine land use objectives than if it enacted a less strict but nonwaivable regime.[108] In similar fashion, in local governments whose

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http://www.columbia.edu/cu/news/07/12/agreement.html (visited Nov 10, 2009); Scott M. Stringer, *BP Stringer Announces Agreement with Columbia University to Protect and Enhance West Harlem Community as Part of Columbia Expansion Proposal* (Sept 26, 2007), online at http://neighbors.columbia.edu/pages/manplanning/pdf-files/Stringer%20AnncPrposl%20SP.pdf (visited Nov 10, 2009) (announcing the Manhattan borough president's support for Columbia University expansion and that Columbia agrees to provide specific benefits to the neighboring area).

105 See, for example, *Seattle Title Trust Co v Roberge*, 278 US 116, 120–22 (1928) (holding that an ordinance requiring the consent of neighboring property owners before a building permit would be issued violated the Due Process Clause by delegating authority over permits from the government to local landowners); *Thomas Cusack Co v City of Chicago*, 242 US 526, 527–31 (1917) (holding to be constitutional an ordinance restricting the erection of billboards but providing for an exception if one-half of the neighboring property owners choose to lift the restriction because the restriction was imposed by the government rather than the neighbors); *Eubank v City of Richmond*, 226 US 137, 140–44 (1912) (holding that an ordinance allowing two-thirds of the property owners on a street to regulate how other owners could use their property on that street, without any standards or government oversight, violated the Equal Protection and Due Process Clauses).

106 See generally, for example, *Prin v Council of Municipality of Monroeville*, 645 A2d 450 (Pa Commw Ct 1994) (holding that a councilman's appearance before an administrative body to oppose property development plan should have precluded him from participating in the council's vote on the applications).

107 483 US at 837 n 5.

108 Id.

neighborhoods become dependent on the benefits conveyed by CBAs, both the local government and community groups may lose sight of larger, long-term land use objectives and "sell" development approval too cheaply, leaving the community insufficiently protected from the harms that urban developments may impose.

Indeed, critics of various projects that involved CBAs assert that the existence of the CBA led land use officials to approve developments that otherwise might not have been approved, at least without significant modification.[109] Opponents point to provisions such as the Atlantic Yards CBA's provision of sports tickets and decry those benefits as essentially "buying" support.[110]

F. Will CBAs Chill Appropriate Development?

In some instances, a community's insistence that the developer enter into a CBA to provide benefits to the community may deter development that the neighborhood or the local government as a whole actually might prefer to have.[111] Negotiators must exercise judgment about how hard to push for benefits, and such judgments require negotiating experience, information about competitor cities, analysis of market trends, and other forms of expertise that community groups bargaining over a CBA may not have.

G. Will CBAs Be Difficult to Enforce Legally, or Will They Contain Terms That Would Be Time-Consuming and Costly to Monitor or That Are Too Vague to Be Enforced?

Monitoring and enforcing promises made to host communities pose significant challenges for those communities.[112] In some cases, CBAs are phrased in aspirational terms that make it hard to determine exactly what is being promised. In the Atlantic Yards CBA, for example, the developer's commitments often are phrased in terms, such as "the developers agree to work . . . towards the creation of a [h]igh [s]chool"[113] or the developers "will seek to"[114] and "intend" to do various things but do not actually commit the developers to do those

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109 Confessore, *The People Speak*, NY Times at A1 (cited in note 89).

110 Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, NY Times C6 (June 14, 2006); *BUILD: Bribe Us in Large Denominations*, noLandGrab Blog (Sept 29, 2005), online at http://www.nolandgrab.org/archives/2005/09/nolandgrab_comm_1.html (visited Nov 10, 2009).

111 Salkin, *Understanding Community Benefits Agreements* at 1423 (cited in note 11).

112 Salkin and Lavine, 26 UCLA J Envir L & Pol at 324 (cited in note 11); Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 69–72 (cited in note 1).

113 Atlantic Yards Development Co, *Community Benefits Agreement* at 16 (cited in note 9).

114 Id at 17.

things.[115] Other provisions defer specifics, noting, for example, that FCR will provide space for a community health center "at rent and terms to be agreed upon."[116] Further, some promises are subject to liquidated damages clauses—FCR can "buy-out" its obligation to provide a pre-apprentice training program, for example, by making a one-time payment of $500,000 to the community coalition.[117]

Some CBAs do not include terms such as the timeframe for commitments to be fulfilled, who will monitor performance, how and when information on performance will be made available, and what will happen if the commitment is not fulfilled.[118] In other instances, community groups may have lacked the legal expertise to negotiate usable enforcement provisions.[119] Even when monitoring and enforcement terms are included in CBAs, tracking benefits more complex than one-time financial payments, such as living wage and local hiring requirements, presents practical administrative challenges.[120] Finally, because there oftentimes remains mutual skepticism between community groups and developers, monitoring may be especially costly.[121] Community groups may be reluctant to rely on a developer's reports, for example, and attempt to verify figures independently.[122] Such independent analysis could be burdensome for a number of reasons, including the fact that the relevant information may be contained in a developer's private records of wages and hiring decisions.[123]

Finally, while CBAs may meet the legal requirements for contracts, the remedies for a breach of the contract are unclear.[124] There are no federal or state cases yet squarely addressing legal issues involving the enforcement of CBAs. Numerous problems arise: if the public approval process was influenced by the existence of a CBA, for example, and the developer later breaches the CBA, should the reme-

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115 Id at 13 ("The Developers will use good faith efforts to meet the overall goal . . ."); id at 16 ("Developers . . . will work . . . to the extent feasible, to have [Minority and women] employees . . . "); id at 40 ("Developers will use good faith efforts to meet the overall goal . . . be seeking to employ persistently unemployed young people."); id at 41 ("Developers shall . . . dedicate such resources as it seems reasonably necessary to fulfill its obligations hereunder.").

116 Id at 27 (describing the agreed upon "Community Amenities and Facilities").

117 Atlantic Yards Development Co, *Community Benefits Agreement* at 14 (cited in note 9).

118 Gross, Leroy, and Janis-Aparicio, *Community Benefits Agreements* at 69–72 (cited in note 1).

119 See id at 23.

120 Id at 70–71.

121 Id.

122 See Gross, Leroy, and Janis-Aparicio, *Community Benefits Agreements* at 70–71 (cited in note 1).

123 Id.

124 Erik Engquist, *Developers' Deal-Making Escalates: Community Benefit Agreements Become Costly as Bloomberg Endorses Concept*, Crain's NY Bus 1 (Mar 27, 2006).

dy for the community be revocation of any approvals given in the public process?[125]

In a small percentage of cases, CBAs are folded into a development agreement, and in these instances local governments assume monitoring and enforcement responsibilities.[126] Usually, however, community groups are on their own to ensure that the promises contained in the agreement are kept.[127]

IV. THE APPROPRIATE ROLE FOR CBAS

Many local governments have been inconsistent in their stance on CBAs. During the heated real estate boom of the early 2000s, some local governments suggested (or even informally required) that developers negotiate CBAs with communities in order to gain support for ambitious projects. At the same time, concerns that CBAs are tantamount to "zoning for sale" and may run afoul of the *Nollan-Dolan* "essential nexus" test have led many local governments to be wary of appearing to approve or be involved in the agreements. The result is considerable confusion about how local governments will respond to CBAs.

Local governments basically have three broad options. First, they can announce that they will not consider CBAs in the land use process, will give no "credit" to developers for benefits they have provided through CBAs, and will play no role in monitoring or enforcing the agreements. Second, they can agree to consider CBAs, but only if the agreement and the process by which it was negotiated meets certain standards. Third, they can agree to consider CBAs (with the standards specified) only in decisions relating to subsidies that the local government is providing to the proposed development.

A. Refusing to Consider CBAs in the Land Use Approval Process

Local governments may announce that consideration of CBAs in the land use process is inappropriate and that all elected or appointed officials with a role in the land use approval process are prohibited from suggesting that developers seeking land use approvals enter into CBAs, participating in discussions between developers and communi-

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125 See Nolan M. Kennedy, Jr, Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 Hastings L J 825, 836–37 (1972). Consider *City of Knoxville v Ambrister*, 263 SW2d 528, 530–31 (Tenn 1953) (holding that a developer's promise to dedicate land for use as a park in exchange for an amendment to the city zoning ordinance was illegal and would not be enforced).

126 Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 10 (cited in note 1); Salkin, *Understanding Community Benefit Agreements* at 1409 (cited in note 11).

127 Gross, LeRoy, and Janis-Aparicio, *Community Benefits Agreements* at 70–71 (cited in note 1) (recognizing that it is difficult for local governments to monitor and enforce CBAs that have not been incorporated into development agreements).

ty groups about CBAs, or considering the existence of a CBA or the specific terms of the CBA in deciding whether to approve a developer's request for a map or text amendment, special permit, variance, or other discretionary land use approval. The ban would have to extend to environmental review processes: local governments would need to refuse to take into account the terms of any CBAs in assessing the impact of the proposed project (unless those terms are incorporated in the development agreement between the developer and the local government, and otherwise meet the requirements for environmental mitigation measures).

To ensure that the existence or terms of CBAs are not considered inappropriately, local governments should require developers seeking any discretionary approval (such as rezonings, variances, and special permits) to report, in their application, any agreements negotiated with individuals or community groups and to make public the terms of those agreements before the final public hearing on the proposal.

B. Considering CBAs in the Land Use Process if the CBA and the Processes by Which It Was Negotiated Meet Certain Standards

A local government may decide that CBAs are inexorable or that they are helpful adjuncts to the land use process. The dangers outlined above suggest, however, that local governments considering CBAs in the land use process should impose safeguards that address the following issues:

1. Nexus to land use concerns.

Local governments should allow consideration in the land use process only of those CBAs (or portions of a CBA) that impose requirements that seek to directly address impacts the development will impose on the local community that fall within the jurisdiction of land use authorities. Agreements (or provisions of agreements) that address matters falling outside the local government's land use authority (as living wage requirements or union labor requirements might) should not be allowed to influence the land use review process.

2. Transparency.

Local governments should require developers seeking any discretionary approval to report, in their application, any agreements negotiated with individuals or community groups, and to make public the terms of those agreements, before the final public hearing on the proposal.

3. Representativeness.

Local governments should consider only those CBAs that are negotiated by groups selected through a transparent process that opens the negotiations to as many community groups as possible, ensures that the developer is not "cherry picking" the groups the developer thinks will be easiest to negotiate with, and provides some check on the legitimacy of a group's claims to represent the neighborhood. At the same time, the process for ensuring that negotiators are representative of the community must not enable elected or appointed officials to "pack" the negotiations with groups favorable to the officials' stance on the proposed development.

4. Accountability.

It is difficult to make those who negotiate CBAs accountable to the community because they are not elected. Should a local government decide to allow CBAs to be considered in the land use process, it should consider whether the elected officials closest to the community should be required to approve any community benefit agreements that will be taken into account. Of course, local governments should conduct a thorough analysis of the implications of having such elected officials "approve" the agreement. That analysis should consider whether such participation would trigger *Nollan* and *Dolan* in circumstances that otherwise would not implicate those restrictions, implicate conflict of interest restrictions, or trigger requirements for public hearings.

5. Ensuring that citywide interests are not compromised.

As discussed in Part III, CBAs may compromise the interests of the local government as a whole in several ways: by diverting resources that the local government might otherwise have received from the developer and chosen to spend in other neighborhoods or on other issues; by making it more likely that the local government will approve development that is inappropriate; and by committing the local government's own resources to projects that the it might not have prioritized absent the CBA. To limit the ability of CBAs negotiated as part of the subsidy process to have such effects, the relevant agencies should be required to certify that they have reviewed any promises in a CBA that implicate the local government's resources or are based upon assumptions about government subsidies, and to reveal whether they plan to devote the resources required for the project pursuant to a citywide plan to address the need at issue.

6. Ensuring enforceability of the agreement.

To address the difficulty community groups may have enforcing the CBA, the local government should require that the terms of any CBA be made part of the development agreement (or similar codification of promises) between the local government and the developer. Inclusion of the terms in a development agreement or other official agreement would allow the local government to enforce those terms without precluding the ability of community groups to enforce the CBA as well.

C. CBAs in the Land Use Regulatory Process versus CBAs in the Economic Development Practices

In many local governments, the agency charged with economic development provides various incentives for developers to encourage projects the local government believes will benefit the jurisdiction. Some such agencies have required or encouraged developers receiving those subsidies to enter into CBAs with the host community. CBAs negotiated as a condition for the receipt of government subsidies raise very different issues from the CBAs negotiated as part of the process of land use review. When a local government chooses to provide subsidies to developers, it is free to condition those subsidies in any way it thinks appropriate (subject to general prohibitions on discrimination, corruption, and so on). Developers who object to the conditions imposed are free to decline to be involved in the project. Those who do seek subsidies from the public must take the bitter with the sweet; if they do not like the conditions, they can simply forego the subsidies (or seek to convince the government that it cannot accomplish its economic development goals if it conditions the subsidies).

The difficulty, however, is that land use processes and economic development processes often are not so easily separated. Subsidies provided for economic development often include transfers of a local government's land or the use of eminent domain to assemble land, and will almost always involve a rezoning or other land use approval. Accordingly, if CBAs are used in the economic development process, safeguards must be in place to ensure that their influence in the land use process is appropriate.

If a local government refuses to recognize CBAs in the land use process, it may nevertheless decide that CBAs are appropriate considerations in its decisions to grant subsidies or contracts to developers through the economic development process. In that case, the local government should make clear that, to the extent possible, the CBA will be considered only in the decision whether and to whom to award the subsidy, not in any decisions relating to land use approvals for spe-

cific projects. It also should impose the safeguards discussed above on the CBAs negotiated as part of the subsidy process.

If a local government instead recognizes CBAs in the land use process, it should apply the same safeguards to CBAs negotiated as a requirement for subsidies that it applies to those considered in the land use process.

CONCLUSION

CBAs are the latest in a series of tools that local governments and community groups have used to try to ensure that development pays its way, mitigates the harms it causes, and provides benefits to the communities it burdens. The goal is appropriate, but the history of such tools shows that negotiations between developers on the one hand, and either land use officials or community groups on the other, may lead to real or perceived conflicts of interest, compromise land use approval processes, and foster rent-seeking. CBAs accordingly must be carefully circumscribed. While they may be appropriate conditions to impose upon developers in return for economic development subsidies, local governments should reject any consideration of CBAs in the land use approval process or recognize only those CBAs that meet both substantive and procedural standards designed to limit their potential threats. Where the economic development process and the land use process will be inextricably intertwined, such that it will be difficult to ensure that a CBA negotiated in exchange for economic development subsidies has not infected the land use process, the local government again should put into place safeguards that will limit the dangers the CBAs pose.

The advent of CBAs is an important signal that neighborhoods do not believe that current land use processes are adequately protecting their interests. Local governments pressured to allow CBAs, therefore, should take the opportunity provided by the economic downturn to thoughtfully consider that dissatisfaction and to refine their land use approval processes to ensure a more effective and satisfying role for community input early in the approval process.