

# COMMUNITY BENEFITS AGREEMENTS: CAN PRIVATE CONTRACTS REPLACE PUBLIC RESPONSIBILITY?

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*In an effort to hold developers accountable to the communities in which they build, residents and organizations of many such communities have negotiated with developers over their projects. The results of these negotiations are often memorialized in written Community Benefits Agreements (CBAs). However, several problems may prevent CBAs from becoming enforceable legal instruments. Nevertheless, they offer important lessons to local governments on the necessity of giving community citizens a voice on land use projects and development. Using a few major examples of CBAs, this Note discusses and analyzes their legality and the lessons to be learned from the successes and problems of negotiating CBAs.*

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## INTRODUCTION

A funny thing happened on the way to the protest rally: rather than trying to stymie unwelcome developers, the protesters joined them. In recent years, developers of large-scale real estate projects have increasingly attempted to engage with community residents and organizations representing the communities surrounding project sites. In some cases, developers and community-affiliated groups have negotiated community benefits agreements (CBAs), which community groups and residents hope will make developers more accountable to the neighborhoods surrounding their projects.<sup>1</sup>

CBAs are contracts between project developers and community organizations.<sup>2</sup> Typically, a developer agrees to modify the project or promises various benefits, in return for the community's promise to support the project through the approval processes for government permits or subsidization.<sup>3</sup>

Community groups and developers have attempted to develop or entered CBAs in Milwaukee, San Diego, Denver, Miami, and New Haven.<sup>4</sup> In 2001, a coalition of community and labor groups negotiated the country's canonical CBA by winning affordable housing and other benefits for the downtown Los Angeles community from the developers of a mixed-use project adjoining the Staples Center.<sup>5</sup> Other community and environmental groups followed suit, bargaining directly with the City of Los Angeles for community benefits in exchange for support of a proposed expansion to Los Angeles International Airport (LAX).<sup>6</sup> During negotiations, broad-based coalitions requested benefits ranging from affordable housing<sup>7</sup> to preferential hiring for residents.<sup>8</sup> The developers

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<sup>1</sup> See JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 3, <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.

<sup>2</sup> *Id.* at 9. Whether CBAs are legally enforceable, as the cited source states, is the subject of debate and of some discussion in this Note. See *infra* Part II.A.

<sup>3</sup> GROSS ET AL., *supra* note 1, at 3.

<sup>4</sup> John M. Broder, *Los Angeles Groups Agree to Airport Growth, for a Price*, N.Y. TIMES, Dec. 17, 2004, at A22. See generally Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, 1411–22, ALI-ABA Course of Study, Aug. 16–18, 2007 (describing CBA efforts across the nation).

<sup>5</sup> GREG LEROY & ANNA PURINTON, COMMUNITY BENEFITS AGREEMENTS: ENSURING THAT URBAN REDEVELOPMENT BENEFITS EVERYONE 6 (2005), available at [http://www.nfg.org/publications/community\\_benefits\\_agreements.pdf](http://www.nfg.org/publications/community_benefits_agreements.pdf).

<sup>6</sup> Broder, *supra* note 4.

<sup>7</sup> Lee Romney, *Community, Developers Agree on Staples Plan*, L.A. TIMES, May 31, 2001, at A1.

<sup>8</sup> See Broder, *supra* note 4; Jennifer Oldham, *L.A. to Fund Upgrades Near LAX*, L.A. TIMES, Dec. 4, 2004, at B1.

willingly engaged in the bargaining process, even though no government-permitting procedure formally required the developers to do so.<sup>9</sup>

The promising California agreements inspired a new round of CBAs in New York starting in 2005.<sup>10</sup> In contrast to the California CBAs, which developed a reputation for alleviating the often acrimonious public review process for public-private development projects, the New York agreements called into question the validity of CBAs. In 2005, the developer of Atlantic Yards—a mixed-use project atop railyards in a densely populated area in Brooklyn—initiated CBA negotiations with several community groups.<sup>11</sup> Critics of the project branded the resulting CBA as illegitimate because a non-representative subset of the community's organizations had agreed to them.<sup>12</sup> Others questioned the enforceability of the agreement because the government authorities in charge of approving the project were not conditioning project approval on the fulfillment of the CBA.<sup>13</sup> Indeed, rather than viewing the CBA as a means for increasing community involvement in public-private projects, many saw the Atlantic Yards CBA as a developer's tool for buying a perception of public support for a controversial project.<sup>14</sup>

Subsequent CBAs in New York have garnered similar criticism. Government officials largely drove the Bronx Terminal Market and Yankee Stadium CBAs, allowing barely any input from community groups.<sup>15</sup> New York City and community officials took a new approach to a proposed CBA with Columbia University over the university's development plans for the adjacent Manhattanville area by forming a Local Development Corporation (LDC).<sup>16</sup> However, composition of this board became a point of contention between community and city officials. Concerns arose from the start when community officials sought to bar elected city

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<sup>9</sup> See Oldham, *supra* note 8 (quoting Los Angeles World Airports (LAWA) executive director as stating that the agency felt “very strongly that [the CBA] is what we should be doing”); Romney, *supra* note 7 (quoting the senior vice president of the developer as describing community support for the project as “extremely important”). The LAX agreement differed from the Staples expansion (Staples II) CBA in that the developer—LAWA—was a government agency. See Oldham, *supra* note 8. For the LAX agreement, LAWA obtained a promise from the coalition of community and environmental groups that they would not sue the agency over the airport expansion. *Id.*

<sup>10</sup> See Salkin, *supra* note 4, at 1415–16.

<sup>11</sup> See Jarrett Murphy, *The Battle of Brooklyn*, VILLAGE VOICE, July 26, 2005, at 18.

<sup>12</sup> Nicholas Confessore, *To Build Arena, Developer First Builds Bridges*, N.Y. TIMES, Oct. 14, 2005, at A1.

<sup>13</sup> Salkin, *supra* note 4, at 1416.

<sup>14</sup> Confessore, *supra* note 12.

<sup>15</sup> See Salkin, *supra* note 4, at 1417.

<sup>16</sup> Jimmy Vielkind, *How to Mediate Manhattanville: A New Negotiating Partner Is Born*, CITY LIMITS WEEKLY, Dec. 4, 2006, [http://www.citylimits.org/content/articles/view\\_article.cfm?article\\_id=3223](http://www.citylimits.org/content/articles/view_article.cfm?article_id=3223) (last visited Jan. 17, 2009).

officials from the negotiations, only to allow them to participate later.<sup>17</sup> In addition, despite City Hall's encouragement of the Columbia CBA negotiation process, city officials have vacillated in their attitudes toward these agreements.<sup>18</sup>

New York's experience highlights that while CBAs may appear successful as private contracts when formed, there are fundamental legal issues that prevent them from being a viable alternative to the adversarial model of the public land use review process. First, CBAs pose many problems as contractual instruments.<sup>19</sup> Granted, CBA proponents could distinguish New York's experience because New York participants deviated from the successful processes followed for the Staples Center and LAX. A second problem, however, plagues private contract CBAs, compared to ones that are enacted as legislation. Private contract CBAs challenge the constitutional principle in land use law that governments can only exact from developers conditions intended to counter a project's negative impact on its surroundings. This principle is informed by U.S. Supreme Court cases such as *Penn Central Transportation Co. v. City of New York*, *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*.<sup>20</sup>

Despite these legal issues, CBAs have highlighted the failure of state and municipal governments to be responsive champions for their citizens' interests when tackling private projects needing public involvement.<sup>21</sup> The goal should be for governments who face development projects to take note of what CBAs reveal about community needs. The appearance of CBAs should spur governments to reclaim a role they have long abdicated: institutions capable of advancing vital community interests even as they engage in ambitious development proposals.

Groups working for community benefits have avoided the more problematic aspects of CBAs by including more active roles for local government's traditional economic development and land use planning functions. In Milwaukee, for example, the Park East community suc-

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<sup>17</sup> See Matthew Schuerman, *Mr. Bollinger's Battle*, N.Y. OBSERVER, Feb. 19, 2007, at 48.

<sup>18</sup> *Id.* (quoting Mayor Bloomberg as calling a proposed CBA for the new Mets stadium "a ransom," while noting that his administration later sanctioned the Manhattanville CBA to some extent).

<sup>19</sup> See Matthew Schuerman, *The C.B.A. at Atlantic Yards: But Is It Legal?*, N.Y. OBSERVER, Mar. 14, 2006, <http://www.observer.com/node/34377> (last visited Jan. 17, 2009).

<sup>20</sup> See Salkin, *supra* note 4, at 1425; Alair Townsend, *Don't Put Zoning Up for Sale in NY*, CRAIN'S N.Y. BUS., Apr. 10, 2006, at 9.

<sup>21</sup> Schuerman, *supra* note 17.

cessfully lobbied to achieve community benefits through legislation, rather than through individual, private contracts.<sup>22</sup>

The purpose of this Note is to discuss and analyze some of the troubling aspects of CBAs generally and to suggest the most important lessons learned from CBAs that may be useful in future land use planning. Part I will describe how the culture of public-private collaboration in American cities contributed to the CBA movement. Part II will examine contract and land use problems with CBAs. Part III will demonstrate that governments can return to being community-sensitive institutions by embracing the inclusive and highly participatory nature of community benefits negotiations but foregoing the private contract aspects. Part IV will discuss why CBAs, in their current form, may have appealed to different stakeholders before arguing that such reasons are hollow. This Note will then conclude that, ultimately, the CBA itself is of limited value in its current form, and that a more enduring CBA legacy would develop if governments were more sensitive to local input in their long-range and citywide land use plans.

## I. CITIES, PUBLIC-PRIVATE PROJECTS, AND CBAS

### A. *The Rise of Public-Private Partnerships*

CBAs are the latest reaction to the decades long marriage between urban America and the private sector. During the 1970s, the federal government halted many of its urban renewal efforts and decreased aid to cities.<sup>23</sup> In response, mayors in major cities sought local replacements for that aid, and joint ventures with private, for-profit entities became a common choice.<sup>24</sup> By the 1980s, the flourishing national market in commercial real estate encouraged cities to undertake development projects with private developers that neither could accomplish alone.<sup>25</sup>

Meanwhile, both the baby-boom empty-nesters and younger generations' desire for an urban lifestyle motivated them to move back to cities. City centers and downtowns, long abandoned and dismissed as decaying, once again became popular places to live and work.<sup>26</sup> The subsequent increases in urban population and sprawl forced many cities hemmed in by their surroundings to seek solutions to increasing density.<sup>27</sup> Cities that saw this increased demand as an opportunity to increase tax revenue

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<sup>22</sup> Brenda Parker, *This Land Is Our Land: The Battle for a Community Benefits Agreement in Milwaukee* (May 9, 2005) (unpublished report), available at <http://www.laborstudies.wayne.edu/power/downloads/Parkeast.pdf>.

<sup>23</sup> Lynne B. Sagalyn, *Public/Private Development: Lessons from History, Research, and Practice*, 73 J. AM. PLAN. ASS'N 7, 9 (2007).

<sup>24</sup> *Id.* at 7.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> LEROY & PURINTON, *supra* note 5, at 1717.

<sup>27</sup> *Id.*

and to revitalize long-decaying neighborhoods eagerly relied on developers' plans for such areas.<sup>28</sup>

Communities adjacent to these new developments have wondered whether these projects will provide them with spillover benefits and have often been disappointed. For the most part, these new developments must cater to high-end customers by offering luxury rentals or expensive retail and entertainment destinations to cover the high costs of building in dense, urban environments.<sup>29</sup> Inner-city development projects often cause gentrification, dispersing existing residents who cannot afford to live in surrounding neighborhoods because of increased property values.<sup>30</sup> Projects with retail or entertainment components usually provide those residents who can afford to stay only low-end service jobs, which lack meaningful fringe benefits or opportunities for advancement.<sup>31</sup>

### B. CBAs in California

In Los Angeles, local communities sensed that that their government was not willing or able to do enough to elicit development projects with more substantial benefits for them.<sup>32</sup> This led to the negotiation of the agreement many view as the model for CBAs.<sup>33</sup>

Los Angeles' city council passed a living wage ordinance in 1997 to encourage a more equitable distribution of wealth in the region.<sup>34</sup> Groups such as Los Angeles Alliance for a New Economy (LAANE) worked on living wage issues.<sup>35</sup> This prior experience prepared LAANE to bring other local community activists and other organizers together when the owners of the Staples Center arena proposed a new entertainment and retail district, the Los Angeles Sports and Entertainment District ("Staples II"), nearby.<sup>36</sup>

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<sup>28</sup> See GROSS ET AL., *supra* note 1, at 4.

<sup>29</sup> See Elaine Misonzhnik, *Northeast Nightmare*, RETAIL TRAFFIC, Dec. 2006, at 75. Northeastern cities, in particular, provide the most restrictive building environments in the country, and New York is the second most expensive market in the country in which to do business. *Id.*

<sup>30</sup> GROSS ET AL., *supra* note 1, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> See generally LEROY & PURINTON, *supra* note 5, at 6–8 (explaining how the negative effect of the Staples Center on residents and the renegeing on promises made by the developers to unions resulted in the community's support that was critical to the CBA for the development of Staples II).

<sup>33</sup> See *id.* at 6.

<sup>34</sup> Harold Meyerson, *No Justice, No Growth: How Los Angeles Is Making Big-time Developers Create Decent Jobs*, AM. PROSPECT, Nov. 2006, at 39.

<sup>35</sup> *Id.*

<sup>36</sup> James B. Goodno, *Feet to the Fire*, PLANNING, Mar. 1, 2004, at 70.

Staples project officials admitted that they had paid little attention to the surrounding community when they planned the arena.<sup>37</sup> At the same time, the community had been unprepared to offer its input on the arena.<sup>38</sup> After Staples Center events brought years of noise and parking problems to surrounding neighborhoods, a coalition of religious, neighborhood, and local labor groups, known as the Figueroa Corridor Coalition for Economic Justice, demanded that the developers and the city take into account their concerns about Staples II.<sup>39</sup>

A local councilwoman arranged the initial meeting between the developers and the Figueroa Corridor Coalition for Economic Justice, and months of intense negotiation produced a CBA in May 2001.<sup>40</sup> The city included the CBA in its development agreement with developers for Staples II, with the arena projected to need a public subsidy of \$75 million from Los Angeles.<sup>41</sup> By including the CBA in the development agreement, the city ensured that it could enforce the developer's promises to the community.<sup>42</sup>

The eighteen-page agreement required the developer to build parks and study the community's open-space needs,<sup>43</sup> help establish a residential parking permit program,<sup>44</sup> maximize the number of living wage jobs throughout the project—with a goal of maintaining at least 70 percent of such jobs,<sup>45</sup> set aside 20 percent of all housing units in the project for

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<sup>37</sup> See Romney, *supra* note 7, at A20 (“[S]taples officials now concede they were insensitive to community needs.”).

<sup>38</sup> *Id.* (“[The Staples II CBA] stands in marked contrast to the way things went down when the Staples Center rose from the ground just two years ago. Then, the community was neither organized nor informed enough to act . . .”).

<sup>39</sup> Lee Romney, *Staples Plan Spotlights ‘Invisible’ Communities*, L.A. TIMES, June 2, 2001, at C1.

<sup>40</sup> Romney, *supra*, note 7, at A1 (explaining how Councilwoman Rita Walters arranged the first meeting between community groups and the development partnership, which ultimately led to the CBA); see also Scott L. Cummings, *Between Markets and Politics: A Response to Porter’s Competitive Advantage Thesis*, 82 OR. L. REV. 901, 922–23 (2003) (“[T]he Figueroa Corridor Coalition for Economic Justice [is] a broad-based coalition of community organizations, neighborhood developers, unions, and environmental groups.”); J. Lynn Lunsford, *Staples Center Plan Required to Provide Community Services*, WALL ST. J., June 1, 2001, at B8 (“[A]ctivists amassed a coalition that included twenty-nine community groups, five labor unions and more than 300 neighborhood residents.”).

<sup>41</sup> Romney, *supra* note 7, at A1.

<sup>42</sup> GROSS ET AL., *supra* note 1, at 29.

<sup>43</sup> Figueroa Corridor Coalition for Economic Justice, Staples Center Community Benefits Program, pt. III, at A-2 to A-3, (n.d.), <http://www.saje.net> (follow “publications” hyperlink; then follow “LA Sports and Entertainment District Agreement” hyperlink) (last visited Jan. 17, 2009) [hereinafter Staples II CBA].

<sup>44</sup> *Id.* pt. IV.A, at A-3 to A-4.

<sup>45</sup> *Id.* pt. V.A, at A-4.

affordable housing,<sup>46</sup> and provide seed money in the form of interest-free loans to local non-profit developers to develop affordable housing.<sup>47</sup>

Other CBAs in Southern California followed the finalization of the Staples II CBA. Los Angeles bargained directly with community and environmental groups over a CBA for a proposed expansion to LAX.<sup>48</sup> In San Diego, the developers of a mixed-use project adjoining Petco Park entered into an agreement with community groups that included promises to provide affordable housing and to pay \$10 per hour, plus benefits, as minimum wage.<sup>49</sup>

### C. CBAs in New York

The first major CBA in New York, the Atlantic Yards CBA, was for a mixed-use real estate project. The chosen site for the complex was the state-owned Vanderbilt Yards, situated in an area neighboring Downtown Brooklyn called Atlantic Terminal.<sup>50</sup> The plans included a multi-purpose arena,<sup>51</sup> office and retail space, and housing.<sup>52</sup> Although modeled on the Staples II CBA, the Atlantic Yards CBA differed in fundamental respects.<sup>53</sup>

Atlantic Yards' developer, Forest City Ratner, engaged directly with local groups from Fort Greene and Prospect Heights to discuss community benefits, ultimately signing an agreement with eight groups in

<sup>46</sup> *Id.* pt. IX.B.1, at A-9.

<sup>47</sup> *Id.* pt. IX.C.2, at A-11.

<sup>48</sup> Salkin, *supra* note 4, at 1413–14.

<sup>49</sup> Martin Stolz, *Council Approves Giant Ballpark Village Project*, SAN DIEGO UNION-TRIB., Oct. 19, 2005, [http://www.signonsandiego.com/uniontrib/20051019/news\\_7m19village.html](http://www.signonsandiego.com/uniontrib/20051019/news_7m19village.html) (last visited Jan. 17, 2009).

<sup>50</sup> Atlantic Yards Arena and Redevelopment Project Final Environmental Impact Statement, 1-1 (Nov. 27, 2006), <http://www.nylovesbiz.com/AtlanticYards/FEIS.asp> (last visited Feb. 15, 2009).

<sup>51</sup> Atlantic Yards' developer had announced in March 2008 that the souring economy—brought on by a global crisis in credit markets—would likely delay construction of the office and housing components of the project but that construction of the arena would probably begin by the end of last year, as planned. Charles V. Bagli, *Slow Economy Likely to Stall Atlantic Yards*, N.Y. TIMES, Mar. 21, 2008, at A1. As of February 13, 2009, the developer was “hoping” to start the arena later this year. Charles V. Bagli, *Atlantic Yards Project Gets a Reprieve*, N.Y. TIMES (CITY ROOM), available at <http://cityroom.blogs.nytimes.com/2009/02/13/atlantic-yards-project-gets-a-reprieve/?scp=2&sq=atlantic%20yards&st=cse> (last visited Feb. 16, 2009).

<sup>52</sup> See Charles V. Bagli, *Arena Project for Brooklyn Wins Approval from M.T.A.*, N.Y. TIMES, Sept. 15, 2005, at B1 (“Mr. Ratner’s project includes plans to build the arena at the railyard and 7,300 apartments in 16 buildings on adjacent land, as well as office space, stores and parks.”).

<sup>53</sup> Salkin, *supra* note 4, at 1415–16 (citing differences between the Atlantic Yard CBA and the Staples II CBA, including the failure to incorporate Atlantic Yards’ CBA into the agreement with the city and the possibility of a non-representative group in negotiations with the community).



2005.<sup>54</sup> Although New York State and New York City will contribute at least \$200 million to the project,<sup>55</sup> no development agreement with either government incorporates the Atlantic Yards CBA.<sup>56</sup>

Criticism swirled immediately around the Atlantic Yards CBA, particularly from neighborhood groups who opposed the project and did not participate in the agreement.<sup>57</sup> IRS documents reveal that the developer had bankrolled one of the parties who signed the CBA.<sup>58</sup> The apparent financial misconduct led to accusations that the developer manipulated the CBA process to generate an appearance of public support to improve the project's chances of approval.<sup>59</sup> Other critics assailed the provisions giving each of the community groups that signed the CBA "terrific and creative" responsibilities over the various benefits that the developer had promised to fund, especially when the group charged with training minority construction workers lacked any experience doing so.<sup>60</sup> In addition, because the relevant governments did not memorialize the CBA in any binding documents, critics questioned the enforceability of the CBA.<sup>61</sup>

Despite the criticisms, other New York CBAs followed Atlantic Yards. A CBA for the Bronx Terminal Market project—another mixed-use development—barely involved any "grassroots community organizations" of the type that had negotiated the Staples II and Atlantic Yards agreements.<sup>62</sup> The New York Yankees and various elected bodies, not community organizations, negotiated a CBA for the construction of a new Yankee Stadium in the Bronx.<sup>63</sup> Opponents of the CBA criticized the creation of a fund to pay for some of the community benefits because the same elected officials who had worked on the CBA would be administering it.<sup>64</sup>

More recently, a Manhattan community board representing the area containing Columbia University created a Local Development Corporation (LDC) whose sole purpose was to work with university officials on a CBA addressing the university's proposed expansion into Manhattanville.<sup>65</sup> Some community representatives on the LDC worried that elected city and federal officials' presence on the board would weaken

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<sup>54</sup> Salkin, *supra* note 4, at 1415.

<sup>55</sup> *Id.* at 1416.

<sup>56</sup> *Id.*

<sup>57</sup> Chris Smith, *Mr. Ratner's Neighborhood*, N.Y. MAGAZINE, Aug. 14, 2006, at 24, 26.

<sup>58</sup> Juan Gonzalez, *BUILD Admits Ratner Funding*, DAILY NEWS, Oct. 18, 2005, at 22.

<sup>59</sup> Smith, *supra* note 57, at 29.

<sup>60</sup> *Id.*

<sup>61</sup> Salkin, *supra* note 4, at 1409–10.

<sup>62</sup> *Id.* at 1417.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1417–18.

<sup>65</sup> Schuerman, *supra* note 17, at 48.

the corporation's resolve to bargain firmly with the university because of various conflicts of interest.<sup>66</sup> Columbia and the LDC eventually reached an agreement on community benefits just before the New York City Council approved the school's rezoning proposal.<sup>67</sup> The CBA's existence did not necessarily clarify whether the project would progress with the community's interests in mind, nor did it clarify who was championing those interests: at the same time that the city approved the rezoning plan supported by Columbia, it also approved an older, alternate, and contradictory rezoning proposal by the local community board, which had rejected Columbia's plan in a non-binding vote months before, and some of whose very members assisted in the creation of the LDC.<sup>68</sup>

#### D. A CBA in Wisconsin

In 2002, Milwaukee tore down an old highway spur in the Park East neighborhood.<sup>69</sup> This opened up sixty-four acres of land, which local community leaders saw as a chance for development that would offer job opportunities to local residents and revitalize the inner-city neighborhood.<sup>70</sup> The result was the first CBA in the country enacted through legislation instead of a contract negotiated between community groups and private developers.<sup>71</sup>

The city of Milwaukee owned four of the acres, while the county owned sixteen.<sup>72</sup> Community groups lobbied the city aggressively to require developers to adhere to a CBA.<sup>73</sup> The proposed CBA, the Park East Redevelopment Compact (PERC), required developers to offer jobs paying minimum wage with health insurance, affordable housing, and preferential hiring for residents, minorities, and women.<sup>74</sup> After vacillating between supporting the CBA and hesitating to restrict future developers, the city's legislature ultimately voted against the PERC.<sup>75</sup>

Community leaders persisted, however, and successfully persuaded the county legislature to require buyers of its parcels to adhere to the PERC.<sup>76</sup> The PERC requires developers of county parcels to pay the

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<sup>66</sup> *Id.*

<sup>67</sup> Timothy Williams & Ray Rivera, *\$7 Billion Columbia Expansion Gets Green Light*, N.Y. TIMES, Dec. 20, 2007, at A1.

<sup>68</sup> *Id.*; see also Vielkind, *supra* note 16.

<sup>69</sup> Jamie Loo, *Benefits Agreements Touted by Speaker at IUSB Conference; Milwaukee Economic Leader Discusses Development to Help Communities*, S. BEND TRIB., May 13, 2007, at B3.

<sup>70</sup> *Id.*

<sup>71</sup> Parker, *supra* note 22, at 1.

<sup>72</sup> LEROY & PURINTON, *supra* note 5, at 15.

<sup>73</sup> Loo, *supra* note 69.

<sup>74</sup> LEROY & PURINTON, *supra* note 5, at 15.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

county's prevailing wage on construction work and to follow policies that give preference to historically underrepresented businesses.<sup>77</sup> The PERC also created a fund to provide backup financing for the agreement's provisions, and the PERC's requirements apply to any parties who bought parcels from the original buyers.<sup>78</sup>

## II. PROBLEMS WITH CBAS

### A. *Contract-based Problems*

CBAs are recent innovations, and courts have not yet examined whether they are valid and enforceable as private contracts.<sup>79</sup> Many in the legal profession question whether CBAs would pass muster in front of a judge.<sup>80</sup>

Some legal experts express concerns that community groups do not offer valid consideration for their part of the CBA bargain, consideration that is essential for an enforceable contract.<sup>81</sup> They doubt that the promise given by community groups to give up their democratic right to object or by their members to give up their right as citizens to vote against a project constitutes a valid promise at all.<sup>82</sup> Generally, citizens cannot bargain to vote—or refrain from voting—in return for private gain.<sup>83</sup>

Even if courts hold that such promises are valid, the imbalance between what communities promise and the substantial promises that developers must make in return could render community signatories' consideration insufficient.<sup>84</sup> Under contract theory, courts will not question the adequacy of consideration exchanged in a contract if the consideration is proper otherwise.<sup>85</sup> An exception exists in the extreme case where the discrepancy in the relative values of consideration shocks the conscience of the court.<sup>86</sup>

Although commitments that community groups make may escape scrutiny under the doctrine of consideration, those commitments, such as the ones made by groups party to the Atlantic Yards CBA, may still

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<sup>77</sup> Loo, *supra* note 69, at B3; Parker, *supra* note 22, at 5.

<sup>78</sup> LEROY & PURINTON, *supra* note 5, at 15.

<sup>79</sup> Salkin, *supra* note 4, at 1424.

<sup>80</sup> *Id.*

<sup>81</sup> Salkin, *supra* note 4, at 1424; *see also* Schuerman, *supra* note 17 (discussing a New York City Bar Panel's observation that CBAs may not be legal since community groups have not given up anything (consideration) to take part in the agreement).

<sup>82</sup> Schuerman, *supra* note 19.

<sup>83</sup> RESTATEMENT OF CONTRACTS § 567 cmt. a (1932).

<sup>84</sup> Salkin, *supra* note 4, at 1424.

<sup>85</sup> *Id.*

<sup>86</sup> 4 SAMUEL WILLISTON, LAW OF CONTRACTS § 7:21 (4th ed. 1992).

constitute illusory promises.<sup>87</sup> The groups could not incur a legal detriment by lawfully signing away their individual or collective rights to participate in democracy.<sup>88</sup> Nor did they provide any real benefit to the developer, since the eight community groups that signed the CBA did not represent the entire community,<sup>89</sup> let alone the universe of likely public opposition that the developers were probably hoping to contract away.<sup>90</sup> Organizations critical of the proposal and who remained free to voice public opposition included Develop Don't Destroy Brooklyn, the Fifth Avenue Committee, and the Pratt Area Community Council.<sup>91</sup> Some may praise the Atlantic Yards CBA because it brought benefits to the surrounding community it otherwise would not have gained.<sup>92</sup> However, CBA proponents discourage agreements where a developer gains the backing of just a few groups while ignoring the concerns of others in an attempt to gain just enough public support to appease the necessary government authorities.<sup>93</sup>

Under the Atlantic Yards CBA, if any community group signatory fails to perform its share of tasks related to the amenities that the developer has promised in the CBA, that group defaults.<sup>94</sup> If the group does not cure the default within 60 days, and the mediation procedure provided for fails, the developer may be able to suspend its responsibilities under the CBA if the committee composed of both developer and community representatives does not elect to replace the defaulting community group with another non-profit entity.<sup>95</sup> But the CBA does not

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<sup>87</sup> *Id.* § 7:7 (“Where an illusory promise is made . . . it would impose no obligation, since the promisor always has it within his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee.”).

<sup>88</sup> Schuerman, *supra* note 19.

<sup>89</sup> See Michael Freedman-Schnapp, *Communities: A New Dynamic: Atlantic Yards Challenges Brooklyn Progressive Politics*, NEXT AM. CITY, Summer 2006, <http://americancity.org/magazine/article/communities-a-new-dynamic-schnapp> (last visited Jan. 17, 2009).

<sup>90</sup> *Id.*

<sup>91</sup> See Murphy, *supra* note 11, at 19 (quoting a member of Develop Don't Destroy Brooklyn as saying that Ratner's proposal is harmful).

<sup>92</sup> See Salkin, *supra* note 4, at 1418.

<sup>93</sup> See GROSS ET AL., *supra* note 1, at 22.

<sup>94</sup> Atlantic Yards Community Benefits Agreement, pt. XIII.D, June 27, 2005, <http://atlanticyards.com/downloads/cba.pdf> [hereinafter Atlantic Yards CBA].

<sup>95</sup> *Id.* Under the agreement, each coalition member would be responsible for a component of the agreement: Association of Community Organizations for Reform Now (ACORN) for the Affordable Housing component, Brooklyn United for Innovative Local Development (BUILD) for the Workforce and Small Business Development components, Downtown Brooklyn Neighborhood Alliance (DBNA) for the Community Facilities and Amenities component, First Atlantic Terminal Housing Committee (FATHC) for the Environmental Assurances component, All-Faith Council of Brooklyn (AFCB) for forming an “all-faith” council to solicit community input on all aspects of the program, New York State Association of Minority Contractors (NYSAMC) for the Small Business Development component, Public Housing Communities (PHC) for the Public Housing component, and Downtown Brooklyn Educational Consortium (DBEC) for the Educational component. *Id.* pt. III.B, at 7–8.

explicitly detail the groups' political obligations to publicly support the project through various regulatory and legal approval processes.<sup>96</sup> Separate agreements outside of the CBA, such as the memorandum of understanding (MOU) between the developer and the Association of Community Organizations for Reform Now! (ACORN), a non-profit housing organization, may further reveal the political obligations community groups undertook in the CBA.<sup>97</sup>

In reality, extrinsic documents such as MOUs may fail to clarify the intended responsibilities of community groups under the CBA. In ACORN's MOU, for example, the group simply promises to help the developer negotiate with government agencies to obtain modifications to existing housing programs that are necessary to implement the CBA's Affordable Housing component.<sup>98</sup> It also promises to take "reasonable steps" to support the project publicly, including appearances before government agencies, community groups, and the media.<sup>99</sup> However, the MOU does not spell out what remedies the developer may pursue if ACORN reneges on these promises.<sup>100</sup> Nor are the promises themselves particularly clear; rather than establishing concrete duties, the MOU provides vague standards that do not aid courts in determining whether a party has satisfied its obligations.<sup>101</sup>

It is also uncertain whether the parties to a CBA can enforce the agreement in court.<sup>102</sup> Contract theory generally permits only signatories to enforce a contract's provisions.<sup>103</sup> Having a loose, unincorporated collection of organizations and individuals sign a CBA could pose problems later in determining the allocation of rights and remedies under the CBA.<sup>104</sup> For this reason, one legal expert on CBAs recommends that each constituent organization in a coalition sign the CBA on its own behalf.<sup>105</sup>

Even if this measure improves a CBA's chances of enforceability, poorly drafted provisions may still undermine the agreement. The Atlantic Yards CBA, for example, includes some provisions that critics say Forest City Ratner cannot fulfill.<sup>106</sup> They contend that the agreement

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<sup>96</sup> *See id.*

<sup>97</sup> *See* Memorandum of Understanding Between Atlantic Yards Development Company and ACORN, May 17, 2005, [http://atlanticyards.com/downloads/mou\\_acorn.pdf](http://atlanticyards.com/downloads/mou_acorn.pdf).

<sup>98</sup> *Id.* ¶ 2, at 1.

<sup>99</sup> *Id.* ¶ 3, at 2.

<sup>100</sup> *Cf. id.* ¶ 4, at 2 (delineating only the developer's rights and remedies should ACORN violate confidentiality provisions of the MOU).

<sup>101</sup> *See id.*

<sup>102</sup> Salkin, *supra* note 4, at 1424.

<sup>103</sup> *Id.*

<sup>104</sup> *See* GROSS ET AL., *supra* note 1, at 23.

<sup>105</sup> *Id.*

<sup>106</sup> Murphy, *supra* note 11, at 19.

does not require the developer's tenants to hire nearby residents or low-income applicants; it merely requires the developer to discuss the prospect of such hiring with its tenants.<sup>107</sup> The CBA expressly prevents any non-affiliated party that acquires a stake in the project from having to bear the same obligations that the current developer has under the agreement unless it voluntarily assumes such obligations.<sup>108</sup> Both the developer and the community groups can only encourage the new entity to adhere to the CBA.<sup>109</sup> If it refuses, the developer can free itself of its obligations after paying liquidated damages to support the agreement's employment provisions, and the CBA, for all intents and purposes, will terminate.<sup>110</sup>

The Staples II CBA bypassed some of these enforceability issues when the City of Los Angeles incorporated it into its development agreement with the developer.<sup>111</sup> Yet even such incorporation did not rescue the CBA from difficult-to-enforce provisions. Similar to the Atlantic Yards CBA, the finalized Staples II CBA did not require tenants of the project to participate in the CBA's living wage program or its health insurance incentive program.<sup>112</sup> The CBA did require the developer to adhere to living wage guidelines, but that requirement was superfluous since Los Angeles' current law requires any developer receiving more than \$1 million in economic development funding from the city to adhere to its living wage guidelines anyway.<sup>113</sup>

Discussion about signatories and enforcement lends itself to a broader policy issue: who speaks for the community? In the Atlantic Yards project, one community group openly dismissed the complaints of other groups opposing the development and unilaterally approached Forest City Ratner to negotiate the inclusion of low and middle income housing in the plan in exchange for the group's public support.<sup>114</sup> In San Diego, some local residents decried the heavy influence that labor unions played in the Ballpark Village CBA.<sup>115</sup> These residents pointed out that the agreement gave preferences for hiring and affordable housing oppor-

<sup>107</sup> *Id.*

<sup>108</sup> Atlantic Yards CBA, *supra* note 94, pt. XIV.E, at 49.

<sup>109</sup> *Id.* pt. XIV.E, at 49–50.

<sup>110</sup> *See id.* at 50.

<sup>111</sup> GROSS ET AL., *supra* note 1, at 29.

<sup>112</sup> Staples II CBA, *supra* note 43, pt. V.A.6.d, at A-6.

<sup>113</sup> *See* LOS ANGELES CAL., ADMIN. CODE §§ 10.37.1(c), .37.2 (1997), available at [http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:laac\\_ca](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:laac_ca) (last visited Jan. 17, 2009); Renee Montagne, *Gauging the Benefits of a Living Wage in L.A.* (NPR Radio Broadcast Apr. 10, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5331348> (last visited Jan. 17, 2009).

<sup>114</sup> Smith, *supra* note 57, at 104.

<sup>115</sup> Gary Smith & Linville Martin, *No. This Is Part of Labor's Regional Land Use Agenda*, SAN DIEGO UNION-TRIB., Oct. 14, 2005, available at [http://www.signonsandiego.com/uniontrib/20051014/news\\_1e14smith1.html](http://www.signonsandiego.com/uniontrib/20051014/news_1e14smith1.html) (last visited Jan. 17, 2009).

tunities to individuals from neighborhoods outside Ballpark Village's vicinity.<sup>116</sup> Parties to a CBA may claim to represent the community, but critics claim that no mechanism exists to ensure that they truly do represent the community's interests and opinions.<sup>117</sup> Without any safeguards, the CBA process may depend on undemocratic methods for ensuring that communities participate actively in planning processes.<sup>118</sup>

CBAs also implicate third-party issues when the city government takes an active role in their promulgation. Such issues have not yet appeared widely in legal discussions over CBAs.<sup>119</sup> Although the experience with the Staples II CBA suggests that cities will always be open to enforcing CBAs, it masks the fact that cities' interests may not always align with those of community coalitions asking for CBAs. Although New York City allocated \$350,000 through its economic development agency to pay for mediation and other expenses related to the Columbia CBA, the outgoing deputy mayor for economic development did not necessarily think that this agreement would serve as a model for future, large scale development in the city.<sup>120</sup>

#### B. Land Use Law Problems

Even when governments sanction CBAs as Los Angeles did, CBAs may violate the land use law principle that governments can only exact conditions from developers that are designed to counter a development project's negative impact on its surroundings, as defined in *Penn Central*,<sup>121</sup> *Nollan*,<sup>122</sup> and *Dolan*.<sup>123</sup> Development exactions occur when municipalities compel a developer to build improvements, set aside land, or pay fees before proceeding with the project, largely to offset the increased demands on public infrastructure and services that the project will bring.<sup>124</sup> Linkages, or requirements that developers construct affordable housing or sponsor various social programs, also fall under the rubric of development exactions.<sup>125</sup> Municipalities justify linkages as remedies for the social impact of a proposed project.<sup>126</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> Posting of Lance Freeman to Planetizen Interchange Blog, *Atlantic Yards and the Perils of Community Benefit Agreements*, <http://planetizen.com/node/24335> (May 7, 2007, 04:57 EST).

<sup>118</sup> *Id.*

<sup>119</sup> Salkin, *supra* note 4, at 1425.

<sup>120</sup> See Schuerman, *supra* note 17.

<sup>121</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>122</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>123</sup> *Dolan v. City of Tigard*, 512 U.S. 687 (1994).

<sup>124</sup> 36 AM. JUR. 3D *Proof of Facts* § 1 (1996) [hereinafter *Proof of Facts*].

<sup>125</sup> *Id.* § 7, at 431.

<sup>126</sup> *Id.*

The Supreme Court has scrutinized development exactions to determine if they amount to regulatory takings: that is, regulations that place so onerous a restriction on a property that the restrictions resemble a taking by the government.<sup>127</sup> Under the Fifth Amendment, the government must provide just compensation to the owner of property that it has taken for public use.<sup>128</sup> The *Penn Central* Court laid out factors that it would examine before deeming a regulation a taking.<sup>129</sup> One factor is how much the regulation interferes with a property owner's reasonable investment-backed expectations.<sup>130</sup> But the Court did not stop there. In *Nollan v. California Coastal Commission*, it required the government to show a nexus, or close relationship, between the public purpose the regulation purportedly serves and the project's direct hindrance of that purpose.<sup>131</sup> In *Nollan*, the Court struck down the Commission's imposition of a beach access requirement on a property owner because the requirement did not appear to achieve the Commission's avowed public purpose of preserving visual access.<sup>132</sup> An Arkansas federal court, commenting on *Nollan* years later, deemed it extortion when a municipality taxed a "plaintiff to recoup the costs of the negative externalities that its increased business activities cause: [w]ithout a showing of such externalities."<sup>133</sup>

The Court clarified how tight the nexus must be when it struck down two municipal requirements and announced the "rough proportionality" test in *Dolan v. City of Tigard*.<sup>134</sup> In *Tigard*, it held that the city did not adequately show why the greenway it required a property owner to set aside from her property, ostensibly to comply with floodplain requirements, had to be public instead of private.<sup>135</sup> In addition, the Court struck down a bicycle path requirement, reasoning that while the public purpose that the city had offered—controlling traffic congestion—was valid, the city failed to demonstrate that the path would actually serve that purpose.<sup>136</sup>

While courts have traditionally deferred to local governments by presuming the constitutionality of their regulations and ordinances,<sup>137</sup>

<sup>127</sup> *Id.* § 11, at 439.

<sup>128</sup> U.S. CONST. amend. V, cl. 1.

<sup>129</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124; *see also Proof of Facts*, *supra* note 124, § 1.

<sup>130</sup> *See Proof of Facts*, *supra* note 124, § 1.

<sup>131</sup> *Id.* § 12.

<sup>132</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838–39 (1987).

<sup>133</sup> *Proof of Facts*, *supra* note 124, § 12 (citing *William J. Jones Ins. Trust v. City of Fort Smith* 731 F. Supp. 912 (W.D. Ark. 1990)).

<sup>134</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>135</sup> *Id.* at 393; *Proof of Facts*, *supra* note 124, § 13, at 445.

<sup>136</sup> *Dolan*, 512 U.S. at 395; *Proof of Facts*, *supra* note 124, § 13, at 445.

<sup>137</sup> *Proof of Facts*, *supra* note 124, § 13, at 447.



these Supreme Court cases indicate governments bear an increased burden when justifying the conditions and exactions they place on developers.<sup>138</sup> The less direct the connection between a project's impacts and the regulations imposed to control that impact, the more likely it is that a court might view the regulation as a taking.<sup>139</sup> In addition, if a particular regulation disproportionately burdens one property owner for the sake of the public good, a court may view that regulation as unreasonable.<sup>140</sup>

Under this line of decisions, courts may find that CBA adopted by or enforced by a municipality violates the nexus and rough proportionality principles if the community benefits requested from the developer of a project are unrelated to that project. Take the example of a provision in the Atlantic Yards CBA, which called for an Intergenerational Community Program that would require childcare, youth, and senior citizen centers to be built on the project site.<sup>141</sup> The declared purpose of the center is to "emphasize the benefits of intergenerational contact" by facilitating that contact between the various age groups through this proposed center.<sup>142</sup> However, nothing in the CBA suggests that the Atlantic Yards development might exacerbate generational gaps between senior citizens and youth in the surrounding community.<sup>143</sup> While the parties to the CBA have not, thus far, asked New York City to enforce the agreement, if they ever did call for such enforcement, the city might decline to do so for fear of violating *Dolan*. The city would need to demonstrate that the regulation met the rough proportionality test by showing (1) that maintaining close, intergenerational ties was a valid public purpose, (2) that the project would work against that purpose, and (3) that the intergenerational community center would remedy this problem.

If the city did choose to enforce the community center requirement, the developer itself could later seek to escape it by suing and claiming that the center violated *Dolan*. Though the benefits in a CBA may only constitute a voluntary promise, cities may condition regulatory approval on provision of the benefits, as in the Atlantic Yards CBA. Thus, a city could argue that requiring construction of the center satisfied the *Penn*

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<sup>138</sup> *Id.* § 11.

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* § 2, at 425.

<sup>141</sup> Atlantic Yards CBA, *supra* note 94, pt. VII.C, at 28.

<sup>142</sup> *Id.*

<sup>143</sup> The Final Environmental Impact Statement (FEIS) for Atlantic Yards discusses an intergenerational center as part of the proposed development. Atlantic Yards Arena and Redevelopment Project Final Environmental Impact Statement, *supra* note 50, at 5-34 to 5-38 (Nov. 27, 2006). However, the FEIS only discusses the center in its capacity as a day care center and its impact on day care center supply in the area, were the project to be built. *Id.* The FEIS chapters on socioeconomic conditions and on community facilities do not discuss the project's impact on the area's senior citizen population, senior citizen centers, or intergenerational relationships. *See id.* chs. 4-5.

*Central* requirement of meeting the developer's investment-backed expectations because the developer actually accepted it during CBA negotiations. However, the developer might respond by arguing that his expectations did not envision a local municipality enforcing the center requirement, thereby converting it from a voluntary promise into an unreasonable tax on the developer.<sup>144</sup>

However, a municipality could defend a CBA provision under *Dolan*'s rough proportionality test by showing that the provision satisfied a preexisting requirement. In *Dolan*, the Court recognized that the city could legally ask the property owner to set aside 15 percent of its property as open space because it fell within the city's already-present central business district.<sup>145</sup> Similarly, Los Angeles' requirement that the Staples II developers implement a living wage program might also survive constitutional muster if the city could show that the requirement was in keeping with its already existing policy of requiring all of its contractors to pay living wages.<sup>146</sup>

That all the parties representing community interests in the Staples II CBA happened to eagerly negotiate its terms in good faith masks the potential for nexus problems that may arise should any of the parties' agendas cease to align. An aggrieved board from another community envious of the Figueroa Corridor's benefits from its CBA could sue the city, claiming that the city's support of the CBA for Staples II amounted to ad hoc city planning, or an endorsement of unrelated public amenities where the city did not need to pay for them, not where the city needed them most.<sup>147</sup> The unfairness of this situation would be most acute where the very benefits brought about by the CBA require funding from the city to operate, maintain, or otherwise continue those benefits into the future. An example would be a library promised by a developer but that would require the city to support its operating expenses on an ongoing basis, diverting those operating funds from being used for a library in a neighborhood that really needed it.<sup>148</sup>

### III. MOVING BEYOND THE PRIVATE CONTRACT

CBAs have somewhat improved the position of communities bargaining with governments and developers and made it difficult for these entities to ignore community concerns about projects slated for their

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<sup>144</sup> See *Proof of Facts*, *supra* note 124, § 17; ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE ROLE OF AMENITIES IN THE LAND USE PROCESS 14 (1988) [hereinafter NYC BAR REPORT].

<sup>145</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>146</sup> See *supra* note 113 and accompanying text.

<sup>147</sup> See NYC BAR REPORT, *supra* note 144, at 14.

<sup>148</sup> See *id.*

neighborhoods. But CBAs negotiated as private contracts threaten to undermine the progress that these communities have made in getting other stakeholders in a project to respect their views. The uncertain status of CBAs as enforceable contracts may render the victories of community groups symbolic ones.

Neighborhood leaders and community organizations can build coalitions and negotiate effectively with developers and governments over elements of a project without private CBAs, opting instead to navigate traditional political processes less fraught with legal questions and uncertainty. Community groups in Milwaukee did just that, successfully achieving a CBA through legislation rather than through private contract.<sup>149</sup>

Because the Good Jobs and Livable Neighborhoods Coalition (GJLN), the coalition of community organizations that fought for the Park East Redevelopment Compact (PERC) CBA in Milwaukee, eschewed the traditional private contract model seen previously, the coalition avoided contract-based problems. The PERC took the form of legislation (a resolution passed by the Milwaukee County Board) that would apply evenly to the redevelopment area to any developer and its successors. In this sense, it resembled the type of legislative decisions about land use and zoning that courts have generally deferred to, thereby circumventing land use related problems associated with private contract CBAs.<sup>150</sup>

The coalition successfully negotiated the PERC CBA by engaging in many of the same practices of the Figueroa Corridor coalition in Los Angeles: extensive community outreach, broad-based coalitions, and frequent contact with legislators and other political officials.<sup>151</sup> The coalition did benefit from having enough time to prepare early; the demolition of the freeway spur was a conspicuous announcement to all that the future of the land was open to debate.<sup>152</sup> The experience of the PERC community groups shows that it is possible for communities to mobilize and petition the local government when residents disagree with the government's development plans. Park East succeeded, despite lacking the kind of prior experience that the Figueroa Corridor had with the Staples Center to teach it about the perils of not seeking a seat at the table. And when the coalition's first attempt at progress through traditional legislative channels failed,<sup>153</sup> the coalition persisted in seeking a resolution

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<sup>149</sup> See Parker, *supra* note 22, at 1.

<sup>150</sup> MILWAUKEE COUNTY BOARD, PARK EAST REDEVELOPMENT COMPACT (2004); see also *supra* note 137 and accompanying text.

<sup>151</sup> See Parker, *supra* note 22, at 2–3.

<sup>152</sup> *Id.* at 1.

<sup>153</sup> See *id.* at 3 (noting that the Common Council of Milwaukee rejected the PERC).

through those channels, eventually persuading county representatives to adopt the community's demands. In the end, Park East achieved an agreement that should endure many of the legal tests that CBAs negotiated as private contracts risk facing.

#### IV. THE APPEAL OF CBAS

##### A. *To Developers*

CBAs can be useful, and have encouraged more efficient economic development practices. While many developers might currently oppose these agreements as another regulation or cost, they may eventually embrace CBAs if the agreements prove to be a reliable means of disarming opposition to controversial projects. The developer of Staples II recognized the importance of gaining public support insofar as it facilitated the project's passage through the city's municipal and regulatory channels, especially since its previous project had produced frustration and hostility in the surrounding community.<sup>154</sup> The developer was likely going to need the City of Los Angeles to provide at least \$75 million in subsidies for the entertainment district, in addition to other city permits and authorizations that were also subject to approval by public bodies.<sup>155</sup>

But a developer can just as easily hijack the CBA process, yielding just enough concessions to targeted segments of a community to manufacture a semblance of public support and earn the needed permits and approvals from government entities. Opponents to the Atlantic Yards development leveled such criticisms at the project's developer.<sup>156</sup> In other cases, developers may acquiesce to the extra conditions or exactions a CBA imposes on them, because developers can simply pass these costs along to the ultimate end-users of the project—as they do with many other costs that municipalities shift to them.<sup>157</sup> Community groups involved in such an agreement may actually seek that arrangement if the end users will bring gentrifying effects to the community.<sup>158</sup> But what if the end users come from the same constituency fighting for community benefits?

##### B. *To Community Interests*

Participating in CBA negotiations can provide a focal point for grassroots community interests to channel various concerns regarding a project into one visible movement. The original Staples Center develop-

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<sup>154</sup> See Romney, *supra* note 7, at A1 (discussing the initial community opposition that eventually dissipated following a mutual agreement).

<sup>155</sup> *Id.*

<sup>156</sup> See *supra* note 57–61 and accompanying text.

<sup>157</sup> *Proof of Facts*, *supra* note 124, §1.

<sup>158</sup> See Murphy, *supra* note 11, at 18.

ment, among other causes, provided dislocated individuals with uneven relocation experiences<sup>159</sup> and subjected nearby residents to acute and costly parking problems.<sup>160</sup> Also, the developer had earlier reneged on several promises made to the community in return for public support during the Staples Center's approval process.<sup>161</sup> The local community had intended the CBA to be a means of preventing the developer from being able to renege again by extracting contractual assurances of its promises.<sup>162</sup> But Milwaukee's experience with a legislated CBA shows that community members keen on influencing nearby development do not need to rally around a private agreement with developers to have the desired impact.

Community groups would argue that they generally are not asking for superfluous or extravagant items when negotiating a community benefits agreement; they are merely asking for items that the community would require as a result of the proposed project or that it has long lacked. But while *Dolan* allows municipalities to ask developers to compensate for project impacts, governments should not use regulatory approval to coerce developers into financing the city's unmet infrastructural needs.<sup>163</sup> Governments could use mechanisms already in place—and which require only a little updating—to address the impact that projects have on surrounding communities. For example, amenities required to mitigate the deleterious effects directly caused by a project have long been recognized as legitimate in environmental impact statements.<sup>164</sup> A prominent report even called for greater community involvement in New York City's environmental review process from its beginning stages.<sup>165</sup> This would ensure that the community would get amenities related directly to the project's impact while providing an objective assessment of a community's needs and limiting the community's ability to ask for amenities that do not remedy actual impacts of the project.<sup>166</sup>

However authorities attempt to ensure relatedness in the amenities that parties agree to in CBAs, such measures are necessary not just to avoid violating *Nollan* and *Dolan*, but also to maintain integrity in local governments' planning and budgeting processes. Even if private developers could provide city needs better than governments could, the distor-

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<sup>159</sup> Carla Rivera, *Staples Center's Displaced Have New Homes and New Worries*, L.A. TIMES, Oct. 9, 1999, at B1.

<sup>160</sup> Romney, *supra* note 39.

<sup>161</sup> Salkin, *supra* note 4, at 1412.

<sup>162</sup> *Id.*

<sup>163</sup> NYC BAR REPORT, *supra* note 144, at 13.

<sup>164</sup> *Id.* at 20.

<sup>165</sup> See NYC BAR REPORT, *supra* note 144, at 44.

<sup>166</sup> *Id.*

tions in government decision-making perceived because special interest groups like private developers are involved and the injury to the integrity of that decision-making would outweigh such benefits.<sup>167</sup> Governments themselves should not only avoid exacting unrelated promises from developers, but should also discourage requests for unrelated benefits publicly. Although municipalities cannot regulate private agreements between community groups and developers, showing that they will not condone them could discourage community groups from coercing developers into promising unrelated amenities.<sup>168</sup>

### C. *The Community Impact Report*

On the heels of high profile, successful CBAs like Staples II and LAX, agreement proponents called for something similar to an environmental impact statement: a community impact report (CIR).<sup>169</sup> A formalized CIR process would help bring the positive effects of a CBA to more projects while eliminating the ad hoc nature of requiring amenities and ensuring that only related amenities are requested. Despite developers' possible, gradual warming to the idea of CBAs,<sup>170</sup> similar acceptance of CIRs is currently absent; for example, Los Angeles' business community publicly stated its opposition against CIRs.<sup>171</sup> If proponents of community-centered planning ever convince local governments to embrace CIRs, authorities should work to prevent them from becoming controversial documents chronically ensnared by political maneuvering and litigation as environmental impact statements have been.<sup>172</sup>

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<sup>167</sup> *Id.* at 15.

<sup>168</sup> *Id.* at 18.

<sup>169</sup> Jan Breidenbach et al., Op-Ed., *A Liberal Push in L.A. City Hall*, L.A. TIMES, June 22, 2003, at M2.

<sup>170</sup> See *supra* note 34 and accompanying text.

<sup>171</sup> Carol E. Schatz, Letter to the Editor, *L.A. Business Is Taking the Lead*, L.A. TIMES, May 15, 2005, at C5.

<sup>172</sup> Dennis Hevesi, *Traversing the Regulatory Maze*, N.Y. TIMES, May 11, 1997, at R1 (stating that the environmental review process in New York is just as torturous as the land use planning process and quoting an environmental lawyer as describing the end of the environmental review process usually as the beginning of the litigation process); see also Anthony DePalma, *In Stadium Fight, Both Sides Wield the Environmental Statement*, N.Y. TIMES, Apr. 16, 2005, at B1 (The article quotes an urban affairs specialist as saying, "I would hope there'd be a better way than this regulatory paralysis to achieve a balance between legitimate civic objections and whatever is the purpose of the developer, either private or government." It also mentions Westway, the massive highway project proposed in the 1970s that was defeated by opponents who pointed out the environmental impact statement's failure to include the highway's impact on the striped bass in the adjacent Hudson River). See generally Diane Cardwell, *Red Hook Resident Group Sues to Block an Ikea Store*, N.Y. TIMES, Feb. 11, 2005, at B6 (basing suit on a faulty environmental impact statement).

## CONCLUSION

CBAs, as private contracts, bear contract-based and land use based legal issues that prevent them from becoming viable alternatives to the adversarial model of the public land use process. Instead, activists should exercise elements of the CBA process, such as increased community awareness, broad-based community organization, and a conciliatory negotiation process, while navigating traditional local democratic and legislative channels. Likewise, local governments should make private contracts less enticing by adopting processes that include and take into account community perspectives on land use and development before and during negotiations with a prospective developer.

Ultimately, the CBAs, as communities and cities currently negotiate them, are of limited versatility. Their success depends on whether the relevant government either controls the land or otherwise has a major stake in it, the project is large enough, and the local real estate market is popular with developers.<sup>173</sup> Instead, communities should seek zoning-type provisions and other comprehensive, broadly applicable legislation to achieve more durable resolutions to meet their needs and demands.

The most lasting impact of the CBA movement has been prodding local governments to respond to communities that surround development projects. Every type of municipal government could benefit from such prodding. While New York City, with its strong and centralized mayoral system, would seem the logical birthplace for a movement emphasizing power in the communities, CBAs emerged in Los Angeles,<sup>174</sup> where the mayor is weak and each council member is considered a “mini-mayor” of the council district.<sup>175</sup>

Realistically, given the localized and intense nature of the activity behind a CBA campaign, council members probably could not help but pay attention and support the campaign. Los Angeles’ first CBA could not have occurred without the efforts of council member Jackie Goldberg,<sup>176</sup> and it was the Figueroa Corridor neighborhood’s council member who had arranged the initial meeting between community groups and the developer’s president.<sup>177</sup> The fact that these public officials still played pivotal roles in what was supposedly contract negotiations between private parties illustrates how essential local, representative democracy remains in hashing out land use and economic development decisions. That constituents had to initially bypass their

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<sup>173</sup> See Meyerson, *supra* note 34, at 39.

<sup>174</sup> See Salkin, *supra* note 4, at 1412.

<sup>175</sup> Sara Catania, *You Get What You Vote for: Why Does L.A. Keep Electing Dull Mayors?*, L.A. TIMES, Feb. 27, 2005, (Magazine), at I-10.

<sup>176</sup> See Meyerson, *supra* note 34, at 39.

<sup>177</sup> Romney, *supra* note 7, at A1.

traditional political channels before their elected officials would work for them indicates the degree to which local governments have abdicated their responsibilities to constituents.

While CBAs have reinvigorated municipal sensitivity to citizens' needs, as demonstrated by the legislative CBA in Milwaukee, ultimately, local governments must become more adept at balancing community needs with economic development priorities on their own. It is through a traditional, yet stronger, model of participatory democracy, and not through legally uncertain private contracts, that communities will truly benefit in the long run.