

Community Benefits Agreements*

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Introduction

In recent years, many large urban development projects have gone forward in conjunction with community benefits agreements (CBAs). CBAs have generated tremendous excitement among community groups and advocates of equitable development, as well as substantial interest in local government, academia, the media, planning circles, and philanthropic foundations. This new approach has led to exceptional results in some cases, and it holds tremendous promise as a means of ensuring delivery of community benefits on controversial development projects. However, CBAs have the potential for misuse and have substantial limitations as a long-term strategy in community economic development. For these reasons, CBAs should not supplant broader efforts to improve the land use development process, especially in low-income urban areas.

The first several CBAs were negotiated in California in the early 2000s, most frequently in Los Angeles. In 2008, prominent CBAs came to fruition in several more cities around the country, including Seattle, Pittsburgh, and San Francisco. The San Francisco CBA, addressing issues of affordable housing and job training funds in a large project in the low-income Bayview

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SUPPORT FOR CBAS BY PUBLIC OFFICIALS

Several prominent public officials have emphasized CBAs' role in improving development projects and building community consensus. San Francisco Mayor Gavin Newsom said about the 2008 Bayview CBA: "[B]uilding support for a large, mixed-use project in a disadvantaged neighborhood is a real challenge. . . . By bringing a coalition of labor and community groups to the table, the CBA process built trust, support, and credibility for this vital project." Similarly, Seattle Mayor Greg Nickels said of the 2008 Dearborn Street CBA: "I applaud the parties for coming to an agreement on the Dearborn Goodwill project. This Community Benefits Agreement is a new approach, bringing together the interests of community, housing, labor and business." Other officials have emphasized CBAs' ability to create accountability around developers' commitments. Pittsburgh City Council member Tonya Payne stated: "Without a CBA in place, we ran the risk of the developer making promises, then saying, 'sorry, but things have changed' With a CBA, there are consequences if the developer doesn't come through."

neighborhood, contained over \$100 million of commitments on behalf of Lenar, one of the nation's largest housing developers.¹ Also in recent years, New York City has seen several controversial projects go forward in conjunction with agreements termed CBAs, but coming under widespread criticism.²

CBAs have been written about extensively, with many articles setting forth detailed case studies.³ Community groups' interest in CBAs has in many cases been matched by that of public officials (see sidebar), who see CBAs as a way to bring many parties to the table and generate support for important projects, helping get beyond the bitter conflicts that have often characterized urban redevelopment efforts.

This chapter provides an overview of the CBA approach, briefly discusses several legal issues that may arise in CBA drafting and implementation, describes political factors underlying the emergence of this approach, and discusses appropriate roles for public and private actors in CBA negotiations. Endnotes and a "Resources" section point toward additional sources of information; the endnotes contain many examples of best practices and illustrative language.

Definition and Overview

A community benefits agreement is a legally binding, private contract between a developer and community-based organizations, under which the developer commits to providing specified community benefits through a proposed development project, and participating community groups agree to support the project in the governmental approval process.⁴ Community groups generally agree to release legal claims regarding the proposed project as well.

CBAs have included commitments by developers to institute local hiring programs, provide affordable housing, ensure payment of living wages, provide funds for job training or other community needs, provide

parks or open space, and provide environmental benefits and mitigations.⁵ Many CBAs include community benefits narrowly relevant to the project in question—like project-specific design standards, or space for community-serving nonprofits. The community benefits contained in any particular CBA are the result of the priorities of community-based organizations, the developer, and sometimes local government; parameters of the project, financial and otherwise; and of course, the outcome of the negotiation process.

Developers' commitments made in CBAs are legally binding and are enforceable by the signing community groups. Also, to fulfill the purposes of a CBA, developers' commitments often need to run against other parties such as subsequent landowners, commercial tenants in the completed project, and various contractors that will operate in the project during construction and after opening. CBAs therefore need to contain complex contractual language regarding differing responsibilities of these entities; see the discussion under "Successors, Assigns, and Agents."

CBAs always contain obligations of support for the project on the part of signing community organizations. This support can include explicit, affirmative support steps, such as hearing attendance and testimony, support letters, or media efforts; general obligations not to oppose the project, privately or publicly; and a release of administrative claims regarding the project. CBAs usually require signing community organizations to release specified legal claims regarding the project as well. These support obligations are legally binding and enforceable by the project developer.

CBAs have been most frequently negotiated regarding large, multiuse urban redevelopment projects. Such projects have a range of potential impacts and benefits that are likely to affect many constituent groups within the surrounding community, such as affordable housing advocates, labor unions, neighborhood organizations interested in local jobs, and environmental justice advocates. Many urban areas have had a strong development market during the past decade, enhancing the ability of both local government and community advocates to negotiate with developers. In addition, urban areas are more likely than rural areas to have a range of active, engaged community advocates—and elected officials willing to consider their views. These factors and others make a large housing and retail project in an urban area the prototypical development project for CBA negotiations.

Because the term "CBA" has been used to describe many different things, it is important for practitioners and advocates to understand what things are *not* CBAs. The following types of policies or programs, while related to land use development and community benefits, should not be considered CBAs:

- *Ordinances or policies imposing specific requirements on a range of projects around a city.* Examples include inclusionary zoning ordinances, local hiring or living-wage policies that cover multiple development projects, and so forth.⁶
- *Policies requiring specified community benefits on projects in a specific redevelopment area.*⁷ Such policies are not specific to a particular development

project; and to take effect, they almost always need additional legal steps such as negotiation into a development agreement.⁸

- *Unenforceable statements of policy or intention regarding community benefits on a specific development project.* Examples include agreements to negotiate in the future⁹ and general statements regarding intention to hire local workers in a project. If a document does not purport to be legally enforceable, or if the commitments it specifies are so vague and qualified as to be unenforceable or meaningless in practice,¹⁰ it should not be considered a CBA.

CBAs have varying relationships to development agreements. Development agreements often contain commitments that clearly should be considered community benefits, and these terms may overlap with terms negotiated in a private CBA. Indeed, in several cases, development agreements have explicitly incorporated as material terms the slate of community benefits that was originally negotiated in a private CBA.¹¹ Nonetheless, it is important to remember that even on a project with both a CBA and a development agreement, these are separate documents with different parties negotiating them and possessing enforcement rights.

Despite the crucial contextual importance of governmental control over approval of the proposed project, CBAs remain private contracts that are voluntary for the developer. Developers enter into CBAs to generate public support for their projects and to obtain a release of potential legal claims, but they are not required to do so; they are always free to make their arguments for project approval without the support of community advocates. The legal status of CBAs as private contracts frees them from the range of limitations on governmental action, such as the takings clause and various other constitutional and statutory restrictions. The broad legal and practical flexibility of the CBA approach gives parties tremendous opportunity to develop innovative, mutually beneficial solutions to the complex range of potential conflicts inherent in planning large urban development projects.

Legal Issues Presented by CBAs

While CBAs arise in a very specific setting, framed by the elaborate legal requirements of land use development involving multiple public and private parties, the primary legal issues relevant to CBAs are simply those relevant to private contracts—albeit complex, multiparty contracts. Intention of the parties, successorship and assignment, enforcement mechanisms, consequences of noncompliance or partial compliance, joint and several liability, and application of contract language to changed circumstances are some issues that will be relevant to interpreting and enforcing a CBA. Contract law in the various states will govern interpretation of these issues and may present other issues as well.

Several of these issues are discussed briefly below, in a manner necessarily general in light of variance between the laws of different states and

of differences in language and factual circumstances surrounding different CBAs. In addition, because community groups generally negotiate a CBA as a coalition, the legal status of the coalition and related contractual issues are addressed.

Consideration

Because private CBAs are a new legal tool, some observers have raised questions about the basics of the bargain involved. Some scholars and commentators have asked whether the consideration provided by community groups under a private CBA is sufficient to support a contract.¹² Given the high hurdles for legal claims based on insufficiency of consideration—and the substantial nature of the consideration provided in most private CBAs—such a claim would be highly unlikely to succeed.

The commitments made by community groups in a typical CBA—support for the project in public settings, and release of legal claims—clearly constitute valid consideration because they are bargained for by the developer and are of value to the developer. See *2008 Restatement (Second) of Contracts* § 71:

(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, [or] (b) a forbearance. . . . (4) The performance or return promise may be given to the promisor or to some other person.

See also § 72: “Except as stated in §§ 73 and 74, any performance which is bargained for is consideration”; and § 74(2):

The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

In most states, courts will not scrutinize the sufficiency or adequacy of consideration provided.¹³ Given the weakness—if not frivolousness—of a legal claim based on invalidity or insufficiency of consideration, it seems likely that the persistence of this concern stems from the novelty of the real-world bargain made by the parties.

Successors, Assigns, and Agents

While a CBA may be negotiated between community groups and a developer, a huge number of other parties may have responsibilities in implementing the CBA requirements. These would include the following:

- New development entities that come into the project to work with, or replace, the original developer

- Parties to whom the original developer sells parcels of the property
- Management companies responsible for leasing, contracting, and other aspects of project operation
- Tenants renting space within the project
- Construction contractors or service contractors retained by developers, subsequent landowners, tenants, or other contractors

From a legal perspective, some of these parties may be successors-in-interest, some may be assignees, some may be agents, and some may simply be parties to a relevant contractual relationship, like a service contract. There may be many “links” in the contractual “chain” between the parties to a CBA and the entity eventually charged with implementing certain CBA terms, like a custodial contractor retained by a tenant in the project. Requirements related to employment of workers in the project, like living-wage or local hiring policies, always present these issues and are usually among the highest priorities for community coalitions negotiating a CBA.

This situation is fraught with potential for difficulty in implementation of a CBA. Late-arriving parties like project employers may have responsibilities under a CBA, but none of them is likely to have a direct contractual relationship with the community groups. Since a CBA is negotiated before project approval, neither the identity of these many parties nor the particulars of the many contractual relationships will be known before CBA execution. None of these parties will have developed a working relationship with the signing community groups at the time they are asked to take on CBA responsibilities—and those community groups will already have performed their responsibilities under the CBA, before project approval, so parties coming into the project at a later date may have little need for continued community support.

It is therefore essential that CBAs contain clear language delineating which responsibilities flow to which entities, and what contractual steps are necessary on the part of the original developer to ensure that all relevant parties take on their obligations in an enforceable manner. Several existing CBAs contain detailed language in this regard.¹⁴

Unfortunately, the law is complex and at times unclear in this area, presenting challenging issues of legal drafting and eventual interpretation. Situations where an entity comes in as a formal successor to an original developer, as regards the entirety of the development, present the simplest situation; in such cases, general principles of successorship should be plainly applicable, and CBA benefits and burdens will clearly be transferred to the successor without express assumption necessary. In the many situations where complete successorship has not occurred—for example, sale of a single parcel in a large project, or assignment of certain development rights to a third party—legal analysis will be more complicated.

One especially difficult issue is determining when express assumption of a predecessor’s obligation is necessary and when an assumption can be implied. Treatises and case law, even within a single state, are complex

and arguably conflicting.¹⁵ Unsurprisingly, this area generates much litigation. Applying these principles of law to the implementation of a large development project involving multiple entities and many different types of contractual relationships will be challenging. To avoid conflict during implementation, CBAs should be drafted to require all relevant parties to expressly assume relevant responsibilities under the CBA at the time they become involved with a development project.

Unincorporated Associations

Most CBAs have been negotiated by informal coalitions of community groups. Both the developer and community groups have incentive during negotiations to involve as many community groups as possible—the developer to broaden its community support, and the community groups to increase their leverage. Commentators have devoted some effort to discussing formal structures for coalitions negotiating CBAs, possibly involving incorporation.¹⁶

However, in virtually every CBA negotiation that has resulted in a signed agreement, the coalition of community groups has not been incorporated and has not established a formal voting or membership structure. Successful coalitions have typically aimed for consensus-based decision making and have allowed organizations to participate in varying ways as negotiations progress. Legally, these coalitions are usually considered unincorporated, nonprofit associations.¹⁷

Of course, regardless of coalition structure, the text of a CBA needs to specify which coalition members are parties and define their concomitant rights and responsibilities. While in most states an unincorporated association can enter into a contract, in practice it may be unclear whether and when legal responsibilities of unincorporated associations apply to their members. In California, for example, in most circumstances members of an unincorporated, nonprofit association are liable for contractual commitments of the association only when “[w]ith notice of the contract, the member receives a benefit under the contract.”¹⁸ It is unclear how this statutory provision would apply to members of an unincorporated association signing a CBA, since the developer’s commitments usually benefit the community broadly rather than benefiting coalition members in a particular way.

Further, since membership standards for an unincorporated association are often uncertain, it may not even be clear against whom CBA responsibilities run and who can enforce the developer’s commitments. Given the scope of financial and practical commitments at issue in CBAs, and the lengthy implementation period, precisely defining rights and responsibilities is crucial. Most CBAs therefore do not include coalitions as a whole as parties, but rather include as parties solely the individual organizations comprising the coalition, even though they negotiated through a unified coalition structure. This approach avoids the legal uncertainty that would arise from utilizing an unincorporated association as a party.

Ordinances Requiring CBAs

Some elected officials and community groups have expressed interest in passage of ordinances requiring CBAs. While this desire is a strong indication of the positive interest CBAs have generated, several issues make problematic the possibility of an ordinance requiring CBAs.

Most obvious is the question: With what community group or groups will the developer be required to negotiate a CBA? Any official designation by local government of a group or coalition as the preferred community representative will exclude other groups. This dynamic is clearly in tension with a main benefit of CBAs—the value of inclusiveness. Moreover, there is no guarantee that the government will select as the preferred community representatives groups that are strongly pressing for community benefits, as opposed to groups likely to facilitate project approval simply by agreeing to minimal benefits or unenforceable language. The New York City experience, described below, does not bode well in this regard.

Further, if the developer is actually *required* to enter into a CBA with a designated group or coalition, then the developer would have a strong argument that terms of the CBA were essentially requirements imposed by the government and thus subject to analysis under the takings clause and any other relevant restrictions on governmental action. For this reason, as well as for the political and practical reasons described above, it is preferable for local government to stay within its established role in the land use process: allowing the CBA approach to arise in an organic and flexible manner, where any party may attempt to come to the table, and allowing developers to enter CBA negotiations where they see them as beneficial.

Local governments wishing to facilitate community involvement in land use development have better options available. Several communities have required “community impact reports” or broad cost/benefit analyses before project approval.¹⁹ These types of policies, providing the public a range of information on project benefits and impacts as well as an opportunity to weigh in publicly before project approval, promote inclusiveness, transparency, and informed, accountable decision making in major land use decisions.

Political Context and the Role of Government

Proactive Engagement and Coalition-Based Advocacy

Two important factors have fueled the interest in CBAs among community-based organizations. First is low-income neighborhoods’ newly receptive posture toward potential development in their communities. Negotiation of a CBA reflects a perspective on behalf of community-based organizations that is at least potentially pro-development. For community groups that are

simply opposed to a particular project, there is no value in participating in CBA negotiations; such negotiations make sense only for groups that are willing to support a project under certain conditions.

This proactive, optimistic engagement strategy has in many cases replaced a reactive, damage-control posture that has characterized community attitudes in many development controversies in past years. This paradigm shift in community perspective and engagement reflects both the strengths of the CBA model and a new recognition of the potential that redevelopment projects hold for revitalization of underserved urban neighborhoods.

A second factor fueling the interest in CBAs among community groups is the demonstrated success of a coalition-based approach to political and public advocacy regarding land use decisions. In the first several successful CBA negotiations, community groups formed semiformal coalitions and agreed to support or oppose projects in unison. For example, the coalition that negotiated the groundbreaking Staples CBA, the Figueroa Corridor Coalition for Economic Justice, had over 20 member organizations at various times. Despite the wide range of interests and viewpoints represented, the coalition remained cohesive. Members entered into the CBA and, with few exceptions, supported the project in unison. The coalition has remained active throughout years of implementing the Staples CBA and has been involved with many redevelopment issues affecting downtown Los Angeles.

The success of the coalition-based approach to advocacy is understandable. When a large number of prominent, engaged community advocates—representing interests as disparate as organized labor, environmental justice, affordable housing, and local employment—are working together through an organized coalition, it is difficult for elected officials and developers to ignore that unified voice. The widespread use of this strategy is clearly a factor in the spread of CBAs to cities around the country.

Of course, holding a coalition together poses substantial challenges for community groups. The central tenet of coalition-based advocacy in this context—that coalition members will support or oppose the proposed project in unison—can seriously conflict with the mission of any particular coalition member. Despite such challenges, the coalition-based approach is now standard procedure for community-based organizations interested in shaping large development projects, thus reflecting a widespread assessment of the political soundness of this approach. A strength of the CBA tool is that in a single instance, it is potentially adaptable to the needs of parties as diverse as the many members of a typical coalition—not to mention meeting the needs developers and public officials as well.

Appropriate Role of Private Parties

Because the CBA concept is relatively new, and because this type of negotiation and advocacy can change power dynamics around development, some have alleged that this type of community involvement in the land use

development process is invalid or inappropriate. A typical characterization is that of New York City Mayor Michael Bloomberg, who complained that CBAs constitute community groups attempting to “grab something” from projects.²⁰

Such complaints seem misguided because community groups have only one real source of leverage in CBA negotiations: their ability to publicly support or oppose a proposed project, generally through public hearings designed for the very purpose of receiving community input. Community groups are well within their rights to support a project only when conditions they feel are important are met (i.e., if the developer commits to providing certain benefits, and does so in a legally enforceable vehicle such as a CBA). Elected officials deciding whether a project should go forward obviously have the right, and many would say the duty, to consider the views of interested community members.

Of course, there is no guarantee that private community groups wanting to negotiate a CBA do in fact reflect the community. However, several real-world factors serve to minimize this concern. Only a broadly inclusive coalition, composed of organizations whose views carry some weight with governmental decision makers, is likely to have any success persuading a developer to negotiate with it. Elected officials presumably are unlikely to care about the views of unrepresentative, self-interested organizations. A CBA coalition has every incentive to bring in as many community interests as possible—again, to build leverage. When the CBA approach is used in an inclusive rather than an exclusive manner, fostering broader public understanding of and involvement in the land use process, concerns about the appropriateness of the approach are hard to support.

Misuse of CBAs

Because the value of a CBA lies in its inclusiveness and accountability, CBAs that fall short in these areas rightly come in for criticism. CBAs negotiated in New York City have been widely disparaged by the public and the legal community, engendering controversy and criticism not evident among CBAs in other areas of the country.

These problems seem to have arisen due to the heavy-handed involvement of public officials. In the past few years, New York City has seen public officials

- set up a nominally private entity designated as the sole community representative for CBA negotiations;²¹
- act outside their official capacities to negotiate an unenforceable “community benefits agreement” for a project receiving a huge public subsidy;²² and
- orchestrate a one-sided community benefits agreement between a developer and a coalition-in-name-only, composed of only three organizations, that reportedly had no independent legal representation in the negotiations.²³

Each of these cases has come under extensive criticism. In each situation, governmental control over the CBA process acted to exclude and minimize the power of community groups and members of the public who were not brought in—and, not coincidentally, facilitated approval of the large, controversial projects in question.

This dynamic points to what should be a touchstone in any assessment of the validity or credibility of a CBA: the degree of community involvement leading to that agreement. While in any particular case the validity and degree of community involvement will be a matter of debate, scrutiny of this aspect of negotiations is essential to evaluation of any agreement touted as a CBA. An agreement that constitutes an attempt by developers and public officials to control public participation, occupying political space that might have been used for a more inclusive CBA effort, constitutes a misuse of the CBA approach and should not be taken as a valid indication of community support for a proposed project.

Conclusion

Even aside from clear misuses of the CBA approach, CBAs are substantially limited as a long-term strategy for shaping economic development. CBAs are quite resource intensive for all parties, given that a lengthy negotiation governs only a single development project. In addition, CBAs generally address issues being presented by most large, urban multiuse projects in low-income areas: local hiring, job quality, environmental mitigations, levels of affordable housing, and so forth. Arguments presented by community advocates regarding the importance of these issues to their communities, and the need for government to subsidize only projects with positive impacts in these areas, apply similarly to many projects.

Rather than having all parties fight these battles on a project-by-project basis, a better solution would be to have local governments establish a slate of community benefits policies governing all large urban development projects, at least when subsidies are being provided. Local hiring policies, job quality requirements, environmental mitigations, and provision of affordable housing should be standard conditions of approval (or at least of subsidy) of large, multiuse projects in low-income urban areas. Such policies could set baseline standards while providing flexibility for unusual circumstances. Policy language generally should provide for enforcement through private causes of action, letting intended beneficiaries of community benefits policies enforce those policies, to minimize the enforcement burden on local government.²⁴ With the bulk of obvious issues handled through widely applicable policies, CBA negotiations could then be reserved for issues that are truly project specific: the desire of a community for open space or design changes in a project, for example, or the need for a grocery store or other particular community service at a certain location.

It is worth noting that if community advocates had confidence that public officials and their staff would more strongly consider community input in imposing community benefits requirements on developers, and would then enforce those requirements, we would not have seen the widespread interest in negotiation of private CBAs. In that sense, the interest in CBAs can only be taken as a criticism of urban land use development as practiced by local government to date. Hopefully, the issues raised by advocates of CBAs, their arguments as to what types of development projects should receive public support, and the newly engaged, positive attitude of low-income communities toward these projects, will lead to improved development processes and end results across the board, making CBAs less and less necessary over time.

Resources

- Annie E. Casey Foundation. 2007. *Community benefits agreements: The power, practice, and promise of a responsible redevelopment tool*. Baltimore, MD.
- Baxamusa, Murtaza H. 2008. Empowering communities through deliberation: The model of community benefits agreements. *Journal of Planning Education & Research* 27:261–76.
- Beach, Benjamin. 2007–08. Strategies and lessons from the Los Angeles community benefits experience. *Journal of Affordable Housing & Community Development Law* 17(1–2):17–112.
- Bechtel, Debra A. 2007–08. Forming entities to negotiate community benefits agreements. *Journal of Affordable Housing & Community Development Law* 17(1–2):145–54.
- Cummings, Scott. 2007–08. The emergence of community benefits agreements. *Journal of Affordable Housing & Community Development Law* 17(1–2):5–6.
- Cummings, Scott. 2007–08. Mobilization lawyering: Community economic development in the Figueroa Corridor. *Journal of Affordable Housing & Community Development Law* 17(1–2):59–76.
- Gross, Julian. 2007–08. Community benefits agreements: Definitions, values, and legal enforceability. *Journal of Affordable Housing & Community Development Law* 17(1–2):35–58.
- Gross, Julian, with Madeline Janis and Greg LeRoy. 2005. “Community benefits agreements: Making development projects accountable.” *Good Jobs First and the Partnership for Working Families*.
- Ho, William. 2007–08. Community benefits agreements: An evolution in public benefits negotiation processes. *Journal of Affordable Housing & Community Development Law* 17(1–2):7–34.
- Kaye, Laurie, and Jerilyn Lopez Mendoza. 2008. *Everybody wins: Lessons from negotiating community benefits agreements in Los Angeles*. New York: Environmental Defense.
- Leavitt, J. 2006. “Linking housing to community economic development with community benefits agreements: The case of the Figueroa Corridor

AU: Is this an article or a book? If article, more information is needed.

- Coalition for Economic Justice." In *Jobs and economic development in minority communities*, edited by P. Ong and A. Loukaitou-Sideris, 257–76. Philadelphia, PA: Temple University Press.
- LeRoy, Greg, and Anna Purinton. 2005. *Community benefits agreements: Ensuring that urban redevelopment benefits everyone*. Washington, D.C.: Neighborhood Funders Group.
- Marcello, David A. 2007. Community benefits agreements: New vehicle for investment in America's neighborhoods. *Urban Lawyer* 39(3):657.
- Meyerson, Harold. 2006. No justice, no growth: How Los Angeles is making big time developers create decent jobs. *American Prospect* 17(11):39.
- Mitnik, Pablo. 2008. *Cities and jobs: Local strategies for improving job quality and access*. Madison, WI: Center on Wisconsin Strategy.
- Parks, Virginia, Dorian Warren, and Margy Waller. 2008. *Community benefits agreements: Policy for the twenty-first century economy*. Washington, D.C.: The Mobility Agenda.
- Rigling Gallagher, Deborah, and Sarah E. Jackson. 2008. Promoting Community Involvement at Brownfield Sites in Socio-Economically Disadvantaged Neighborhoods. *Journal of Environmental Planning & Management* 51(5):615–30.
- Salkin, Patricia E. 2007. Community benefit agreements: Opportunities and traps for developers, municipalities and community organizations. *Planning & Environmental Law* 59(11).
- Salkin, Patricia E., and Amy Lavine. 2007. Negotiating for social justice and the promise of community benefits agreements: Case studies of current and developing agreements. *Journal of Affordable Housing* 17(1–2):113–44.
- Salkin, Patricia E., and Amy Lavine. 2008. Understanding community benefits agreements: Equitable development, social justice and other considerations for developers, municipalities and community organizations. *UCLA Journal of Environmental Law & Policy* 26.

Notes

1. This CBA, entitled "Core Community Benefits Agreement" to reflect that it addresses only "core" community benefits issues, is available online at <http://communitybenefits.org/downloads/Bayview%20Hunters%20Point%20CBA.pdf> (last viewed Dec. 22, 2008).

2. See, e.g., J. Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMM. ECON. DEV. L. 1–2, 59–76 [hereinafter Gross, *Definitions and Values*], and commentary cited therein; see also discussion of New York CBAs in Patricia Salkin & Amy Lavine, *Understanding Community Benefits Agreements, Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENV'TL L. & POL'Y [hereinafter Salkin & Lavine, *Understanding Community Benefits Agreements*].

3. See the preceding "Resources" section.

4. This article discusses only "private CBAs," i.e., private contracts meeting the above definition. Most of the interest in the legal aspects of CBAs concerns private

CBAs, and the most prominent CBAs have been private CBAs. Gross, *Definitions and Values*, *supra* note 2, contains extensive discussion of “public CBAs,” *i.e.*, agreements that, like private CBAs, advance values of enforceability and inclusiveness in the development process but involve different types of contractual relations with a more central role for local government. Examples of public CBAs include the commitments related to the Cherokee-Gates Rubber redevelopment project in Denver, FRESC, <http://www.fresc.org/article.php?id=59> (last visited Feb. 17, 2009); the Yale Cancer Center project in New Haven, <http://www.communitybenefits.org/article.php?id=1284> (last visited Feb. 17, 2009); and the Oak-to-Ninth project in Oakland, <http://www.urbanstrategies.org/programs/econopp/oaktoninth.html> (last visited Feb. 17, 2009).

5. Several CBAs have also included labor peace requirements for both construction and nonconstruction jobs; the Staples CBA in Los Angeles, the Ballpark Village CBA in San Diego, and the Dearborn Street CBA in Seattle are examples. In the construction context, labor peace requirements are set forth in a project labor agreement requiring all project construction to occur under the terms of established collective bargaining agreements and ensuring that there will be no organized strikes or picketing by construction trades unions. For nonconstruction jobs, labor peace agreements usually contain provisions requiring employers to accept the “card check” method of validating union representation and to remain neutral regarding any unionization effort; in exchange, labor unions trying to organize the workplace agree to refrain from collective action such as picketing. Labor peace commitments are generally contained in a contract separate from the primary CBA and signed by relevant labor unions and the developer but are executed in conjunction with the primary CBA.

6. *E.g.*, Fairfax County (VA) Zoning Ordinance, pt. 2-800 *et seq.*, “Affordable Dwelling Unit Program” (inclusionary zoning ordinance); San Francisco Administrative Code, ch. 83, “First Source Hiring Program” (requiring local hiring on certain projects and contracts).

7. *E.g.*, the Atlanta Ordinance 05-O-1733 § 19 (regarding the Beltline Redevelopment Area Tax Allocation District) requiring that “capital projects that receive funding from TAD bond proceeds . . . reflect, through the development agreements or funding agreements that accompany such projects, certain community benefit principles, including but not limited to: prevailing wages for workers; a ‘first source’ hiring system to target job opportunities for residents of impacted low-income ‘BeltLine’ neighborhoods; establishment and usage of apprenticeship and pre-apprenticeship programs for workers of impacted BeltLine neighborhoods.” *See also* the slate of community benefits policies, enacted by resolution, to govern the Park East Redevelopment Corridor in Milwaukee in 2004, *available at* <http://www.communitybenefits.org/article.php?id=593> (last visited Dec. 23, 2008).

8. This chapter uses “development agreement” as shorthand for any legally binding contract between a local government entity and a developer, setting forth the terms on which the development may proceed and any contractual responsibilities of the local government, such as supportive infrastructure, public subsidies, permitting, etc. This definition includes owner participation agreements, disposition and development agreements, “incentive agreements,” and agreements entered into pursuant to a statutory scheme enabling a developer to obtain an early vested right to certain permits or approvals, *e.g.*, California Government Code § 65864 *et seq.*; Florida Statutes §§ 163.3220–163.3243.

9. See, e.g., the Columbia University “Memorandum of Understanding,” discussed in detail in Gross, *Definitions and Values*, *supra* note 2.

10. See, e.g., the Bronx Terminal Market agreement, discussed in detail in Gross, *Definitions and Values*, *supra* note 2.

11. See, e.g., the Hollywood and Vine CBA, the Marlton Square CBA, and the Staples CBA, each described in Gross, *Making Development Projects Accountable*, available at <http://www.communitybenefits.org>.

12. See Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 2: “Chief among the questions as to validity of CBAs is whether community groups provide any real consideration for these contracts” (Salkin and Lavine ultimately conclude that a claim based on adequacy of consideration is likely to fail). See also public comment by William Valetta, former general counsel for the New York City planning department, at a New York City Bar Association panel on CBAs: “What is the community giving up in order to take part in the agreement? Presumably, they can’t sell their vote on participation in a democracy.” (reported in *The CBA at Atlantic Yards: But Is It Legal?*, N.Y. OBSERVER, Mar. 14, 2006).

13. See 2008 RESTATEMENT (SECOND) OF CONTRACTS § 79: “If the requirement of consideration is met, there is no additional requirement of . . . a gain, advantage, or benefit to the promisor, or a loss, disadvantage, or detriment to the promise . . . or equivalence in the values exchanged.”

14. See, e.g., Dearborn Street CBA and Ballpark Village CBA, both available at <http://www.communitybenefits.org/legal> (last visited April 7, 2009).

15. Compare WILLIAM LINDSLEY, CALIFORNIA JURISPRUDENCE 3D ASSIGNMENTS § 18 (2008): “Where a bilateral contract expressly provides that its terms are to apply to and be binding on assigns, assignment of his or her contractual rights by one party also transfers that party’s contractual burden, regardless of whether it is expressly assumed by the designee” (citing *Weidner v. Ziegler*, 218 Cal. 345 (1933); *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal. App. 2d 666 (Cal. Ct. App. 1966); *Brady v. Fowler*, 45 Cal. App. 592 (Cal. Dist. Ct. App. 1920)) with B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 10TH CONTRACTS § 740 (2005): “The assignee ordinarily does not become bound to perform the obligations of the assignor by a mere acceptance of the assignment. The assignee does become liable, however, by an express ‘assumption’ or promise to perform, made to the assignor, which is enforceable by the creditor as a third-party beneficiary.”; and 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 74:35 (2008): “If an assignee of rights under a bilateral contract does not expressly assume the obligations of the assignor it becomes a question of interpretation whether the assignee impliedly promises to perform the duties under the contract.”

16. See Debra A. Bechtel, *Forming Entities to Negotiate Community Benefits Agreements*, 17 J. AFFORDABLE HOUSING & COMM. ECON. DEV. L. 1–2, 145–54. The Public Law Center at Tulane University School of Law has released various materials for formalizing operations of CBA coalitions. See <http://www.law.tulane.edu/assets/0/260/262/F98F3712-C294-4730-8DFD-D9B73D264650.pdf> (last visited Dec. 23, 2008).

17. See, e.g., Cal. Corp. Code §§ 18020, 18035.

18. Cal. Corp. Code § 18610.

19. See policy requiring cost-benefit analysis of certain subsidized projects in San Jose, related documents available at <http://www.sanjoseca.gov/clerk/TaskForce/SRTF/SRTF.asp> (last visited Dec. 22, 2008). See also policies requiring impact analyses and conditional use permits for certain big-box retailers in California. E.g., Los Angeles Municipal Code § 12.24.U.14 *et seq.*; Inglewood Municipal Code § 12-95.5.J; Karen

Holzmeister, *Alameda Supervisors Clear Way for Superstores*, OAKLAND TRIB., Mar. 16, 2006, available at <http://www.workingeastbay.org/article.php?id=66> (last visited Dec. 22, 2008).

20. See Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, at C6. The article quotes the mayor as saying, "Every development project in this city is not going to be a horn of plenty for everybody else that wants to grab something." *Id.* See also a NEW YORK POST editorial deriding a call for a CBA as a "legal shakedown." Editorial, *Willets Point Shakedown*, N.Y. POST, Nov. 13, 2008; and community advocacy characterized as "blackmail" in comments, available at <http://www.pittsburghcitypaper.ws/gyrobase/Content?oid=oid%3A33964> (last visited Dec. 22, 2008).

21. The nonprofit corporation established to negotiate community benefits regarding the Columbia University expansion; see discussion in Gross, *Definitions and Values*, *supra* note 2.

22. The unenforceable Yankee Stadium document entitled "Community Benefits Agreement"; see discussion in Gross, *Definitions and Values*, *supra* note 2.

23. The Bronx Terminal Market CBA; see discussion in Gross, *Definitions and Values*, *supra* note 2; see also *CBA: Carrion's Benefit Agreement*, <http://momandpoppnyc.blogspot.com/2006/02/cba-carrions-benefit-agreement.html> (last visited Dec. 22, 2008).

24. See Gross, *Definitions, Values*, *supra* note 2, for a discussion of the many ways governmental enforcement of commitments in development agreements can fall short. Private enforcement mechanisms are already standard in certain community benefits policies, such as living-wage policies, prevailing-wage policies, and affordable housing requirements.