Recent Developments in Land Use, Planning and Zoning Law

Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods

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DEVELOPERS AND CITY OFFICIALS NEED TO KNOW about a new vehicle for community involvement in the land use planning process for major public-private developments.[1] If they have not already arrived in your town, Community Benefit Agreements may be coming soon to a neighborhood near you.

I. What Is a Community Benefits Agreement?

A Community Benefit Agreement (CBA) is a legally enforceable contract negotiated and executed directly between the developer and a community coalition of neighborhood associations, faith-based organizations,[2] unions, environmental groups, and others representing the interests of

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1. Although they have been on the scene since the dawn of the new millennium, Community Benefit Agreements have attracted little attention in the scholarly literature to date. *See* Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 37 (2006). Though Bezdek mentions community benefit agreements by name only twice, *id.* at 107, the article is rich with relevant research and observations that led to many valuable insights.

2. Community Benefit Agreements are regarded by diverse religious communities as a tool for social justice. *See* Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, 144 SHELTERFORCE ONLINE (Nov.-Dec. 2005), http://www.nhi.org/online/issues/144/powerinnumbers.html (last visited on May 9, 2007) (describing "A New Model for Social Justice" and crediting as a "critical partner" the religious community that succeeded in bringing "Catholics, Episcopal, Lutheran, Methodist, Unitarian, Jewish, Muslim, Buddhist and other denominations into the battle for social justice"). CBAs have also been mentioned in the context of international human rights. *See* Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and the United States*, 39 VAND. J. TRANSNAT'L L. 435, 462 n. 143 (2006); Justin D. Cummins, *Invigorating Labor: A Human Rights Approach in the United States*, 19 EMORY INT'L L. REV. 1, 61–62 n.273 (2005).

people who will be impacted by proposed new developments.[3] The community obtains important benefits, and in return, developers receive crucial public support for the project through the community coalition's testimony before land use planning and economic development agencies, city councils, and bond financing entities.

The pioneering model for CBAs was the Staples Center expansion in Los Angeles. The original Staples Center, completed in 1999 after little or no consultation with the neighboring community, subjected area residents to increased crime, congestion, reckless driving, and danger to children whose recreational opportunities were already limited by a lack of nearby public parks.[4] When the Los Angeles Sports and Entertainment District announced plans for a $1 billion expansion including a hotel, arenas, shops, and apartments, the local residents mobilized and provoked a dialogue with developers Philip Anschutz and Rupert Murdoch, seeking "community benefits" to ameliorate adverse impacts and affirmatively improve the quality of life in their neighborhoods.[5] The developers agreed to "an unprecedented package of concessions"[6] demanded by community groups, environmentalists and labor:

> [A] goal of 70 percent of new jobs at the officially recognized living wage; a hiring program to give local residents and those displaced by construction first shot at the new jobs, along with training; community consultation on the selection of the project's commercial tenants; a 20 percent set-aside of affordable housing within the complex; and a commitment of $1 million for community parks and recreation to offset the disruptive effects of massive development.[7]

The developers also agreed to finance a residential parking permit program that reserved street parking for area residents, and they provided $650,000 in interest-free loans for nonprofit housing developers in the area.[8]

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3. Julian Gross, Greg LeRoy & Madeline Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* (2005), *available at* http://www.communitybenefits.org (last visited May 9, 2007); *see also* Judith Bell, Carl Oshiro & Harry Snyder, *Advocating for Equitable Development: A PolicyLink Manual* 22 (2004), *available at* http://www.policylink.org/pdfs/AdvocatingForED.pdf (last visited on April 1, 2007); Janis-Aparicio & Tynan, *supra* note 2.

4. *See* Peter Ross Range, *L.A. Confidential: How Community Activists Are Making Big Developers Their Partners in Fighting Poverty*, *in* Ford Foundation Report (Winter 2004), *available at* http://www.laane.org/pressroom/stories/laane/laane04winterFordFound.html (last visited on March 24, 2007) [hereinafter *Ford Report*].

5. *See* Lee Romney, *Community, Developers Agree on Staples Plan*, L.A. TIMES, May 31, 2001, at A-1.

6. *Id.* (" 'I've never heard of an agreement that's as comprehensive as this,' said Greg LeRoy, director of the Washington-based Good Jobs First, a national clearinghouse that tracks the public benefits of economic development projects.")

7. Range, *supra* note 4. The full text of the Staples Center CBA may be reviewed at http://www.communitybenefits.org/downloads/Los%20Angeles%20Sports%20and%20Entertainment%20District%20Project.pdf.

8. Romney, *supra* note 5.

II. What Factors Provide the Impetus for CBA Negotiations?

The public subsidies[9] so often sought by large developers provide a principal point of leverage for community groups in CBA negotiations. The L.A. Sports and Entertainment District, for example, received an estimated $70 million in public subsidies.[10] Madeline Janis-Aparicio, who serves as executive director of the Los Angeles Alliance for a New Economy (LAANE), summed it up this way: "If public money is used to subsidize private development, then the developer has to guarantee community benefits like good jobs, affordable housing, child care, all the things that communities need."[11]

Public approvals by land use planning and economic development agencies provide another pressure point for provoking CBA negotiations with developers. In Denver, for example, community activists opposed redevelopment of a brownfields site until the developer agreed to invest in the neighborhood.[12] The developer wanted Denver's Urban Renewal Authority to declare the site blighted, creating an urban renewal district that would qualify for financial redevelopment incentives. Denver's Planning Board delayed its decision when faced with community opposition, however, because it regarded the developer's plans as incomplete. Three years of negotiations among city representatives, the developer, and the Campaign for Responsible Development produced a CBA in February 2006 that included commitments on affordable housing, wages and benefits, local hiring, neighborhood cleanup activities, and controls on big-box development.[13]

9. Bezdek, *supra* note 1, at 61 (identifying "a host of financing devices . . . deployed to attract developers to state-favored projects, including tax exempt development bonds, public finance and mixed-public/private finance ventures. . . ."); *see also* SUSAN L. GILES & EDWARD J. BLAKELY, FUNDAMENTALS OF ECONOMIC DEVELOPMENT FINANCE 86 (Sage Publications 2001); GARY STOUT & JOSEPH VITT, PUBLIC INCENTIVES AND FINANCING TECHNIQUES FOR CODEVELOPMENT (ULI-The Urban Land Institute 1982).

10. Romney, *supra* note 5.

11. *Id.*; *see also* GILES & BLAKELY, *supra* note 9, at x (asserting that "good reasons" exist for developers to provide "community benefits as a requirement to use public assets or receiving public licenses or assistance. The most compelling rationale for requiring a developer to pay fees or provide an offsetting public benefit is that the person receiving public largesse is using irreplaceable civic assets to increase personal wealth.").

12. *See* Mark P. Couch, *Invest in Area, Group Urges Gates Redevelopers*, DENVER POST, April 18, 2003, at C3.

13. *See* Front Range Economic Strategy Center, http://www.fresc.org/index.cfm?zone=/unionactive/private_view_page.cfm&page=The20Campaign20for20Responsible20Development (last visited May 9, 2007).

Another opportunity for CBA negotiations arises when developers ask a city to clean up the site or make infrastructure improvements.[14] In 2001, the Valley Jobs Coalition signed a CBA with a developer who stood to benefit from the City of Los Angeles' commitment to clean up a toxic waste site.[15] The developer of SunQuest Industrial Park accepted a CBA that included $150,000 for a neighborhood improvement fund, allocations of 4,000 square feet of interior space and 10,000 square feet of outdoor space for a youth center, a first source hiring policy, and a goal of seventy percent living wage jobs at the development.[16]

Some CBA negotiations rely for their efficacy on direct communication between community coalitions and the public sector. In Milwaukee, for example, community organizers sought an ordinance from the Common Council to require affordable housing and prevailing wage commitments whenever developers received direct financial assistance from the city or purchased city-owned land.[17] Community activists in Los Angeles negotiated their CBA directly with a city entity, the Los Angeles World Airports, and won a $500 million package of environmental mitigation and jobs-related benefits from the LAX expansion.[18]

CBA negotiations do not work well when the existing zoning comfortably accommodates a proposed project, when no public infrastructure improvements are needed, and when developers have all the necessary financing in hand. Without the leverage afforded by public approval of zoning changes, financial subsidies, or infrastructure improvements, community coalitions have less opportunity to engage developers in a meaningful dialogue.

III. How Do CBAs Compare with Public-Private Partnerships?

A CBA differs significantly from a development agreement[19] that is entered into between a developer and a city and is commonly called a

14. Bezdek, *supra* note 1, at 39 (observing that increasingly across the nation, "local government agencies trade essential infrastructure at low or no cost in exchange for a profit-sharing stake or other return on the city's investment").

15. SunQuest CBA, http://www.communitybenefits.org/article.php?id=572 (last visited May 9, 2007).

16. SunQuest CBA, http://www.communitybenefits.org/downloads/cba_sunquest.pdf, at 4–5 (last visited May 9, 2007).

17. Tom Daykin, *Plans Advance for Park East Area*, MILW. J.-SENT., Jan. 8, 2004, *available at* http://www.jsonline.com/bym/news/jan04/198603.asp (last visited Mar. 24, 2007).

18. Sheila Muto, *Residents Have Their Say On LAX Expansion Plans*, WALL ST. J., Dec. 15, 2004. CBA text is available at http://communitybenefits.org/downloads/LAX%20Community%20Benefits%20Agreement.pdf.

19. Douglas R. Porter, *The Relation of Development Agreements to Plans and Planning*, in DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS 149 (Douglas R. Porter & Lindell L. Marsh eds., 1989) (hereinafter "Porter & Marsh").

Public-Private Partnership (PPP).[20] CBAs, for example, are negotiated and executed directly between community representatives and a developer; by contrast, community members are frequently nowhere to be found in the bilateral PPP negotiations between a developer and a municipal entity[21]:

> The eclipse of traditional land use planning procedures by cities' wholehearted embrace of development agreements and similar bilateral negotiated approaches leaves next to no room for the public. State enabling statutes eliminate substantive restrictions that previously applied to negotiations between cities and developers, in order to provide exceptional bargaining flexibility. Public participation is perfunctory and futile: By design it is too little and too late, disproportionate to the complexity of the undertaking and to the preferential access of bidding developers. The negotiated processes of most states utilizing development agreements are not covered by due process requirements of a public hearing, findings of fact, or prohibitions on ex parte communications between developer applicants and local officials. As a consequence, current procedures allow officials to relegate affected community interests to after-the-fact comments, the timing of which precludes meaningful exchanges of information between the public and local government officials. Conversely, the bilateral negotiation model accords to developers early, active and substantively significant opportunity for preliminary negotiation within the project approval process, wherein the developer applicant's input is both critical to the local government actors' decision-making, and analogous to the negotiation of private real estate deals.[22]

The traditional public planning process afforded at least a semblance of public participation,[23] but PPPs have undermined even that modicum of citizen input by fostering direct and private communication between developers and public officials over a wide and flexible array of land use choices.[24] CBA negotiations can restore a measure of balance by

20. *See*, *e.g.*, GILES & BLAKELY, *supra* note 9, at 42; Robert H. Freilich, *Public/Private Partnerships in Large-Scale Development Projects, in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS 15–22 (Rachelle L. Levitt & John J. Kirlin eds., 1985).

21. *See*, *e.g.*, Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, *Installment One*, 24 STAN. ENVTL. L.J. 3, 6 (2005); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J. LAW REFORM 689, 720 (1994).

22. Bezdek, *supra* note 1, at 59 (footnotes omitted).

23. *See* Camacho, *supra* note 21, at 36–37. The constitutional requirements of procedural due process demand notice and hearing opportunities for parties affected by a government decision. *See* JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 452–55 (West Group 2003). Model zoning legislation and most state and local zoning laws impose similar public participation opportunities. *See* Standard State Zoning Enabling Act (1926), *reprinted in* DAVID L. CALLIES et al., CASES AND MATERIALS IN LAND USE 36–39 (3d. ed. 1999); DANIEL L. MANDELKER, LAND USE LAW 2–51 (Lexis-Nexis 5th ed. 2003); GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE § 8-701(6)(c), at 8–197 (Stuart Meck ed., American Planning Association 2002).

24. *See generally* Camacho, *supra* note 21, at 36–42, (noting that this "system affords a developer and local government wide latitude to prenegotiate the extensive

empowering the community to participate meaningfully in the planning process through a direct dialogue with developers.[25]

Some early PPP negotiations did include a dialogue between the developer and neighborhood residents, but these discussions focused on "physical and operational" elements of the proposed development (e.g., permitted uses, density, height and setback requirements, landscaping and buffering, lighting).[26] CBA negotiations precipitated a substantially different dialogue that moved beyond the narrow focus on a project's physical and operational aspects to address a broader agenda of living wage and local hiring commitments, affordable housing, and direct community benefits such as park or playground improvements, community centers, and funding to aid area residents.[27]

CBAs generally are contracts between two private parties—a developer and a community coalition.[28] Consequently, they are not subject to the legal problems that confront public entities, such as a city, when entering into a development agreement with the same developer.[29] Unlike CBAs, PPPs must be legally evaluated in terms of their impact on the municipality's exercise of its police powers[30]

and intricate terms of their agreements outside of public forums, excluding affected third parties from the extensive information exchanges and substantive trading that occur during negotiations and severely limiting these parties' abilities to challenge the decisions that emerge from such contacts," and observing that "negotiations are conducted solely by the local government's executive or administrative personnel, such as the city attorney, mayor's staff, or a planning department head").

25. *See* sources cited *supra* note 3.

26. Malcolm D. Rivkin, *Negotiating with Neighborhoods, in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 20, at 68.

27. GILES & BLAKELY, *supra* note 9, at ix-x (using the term "linkage programs" to describe a broader agenda that "require[s] specific project funds from the developer in exchange for the right to develop within the city core. The developer may be required to provide funding for a community arts program, recreation, housing, senior care, a youth orchestra, youth soccer, or other public benefits.").

28. The CBA executed in connection with expansion of the Los Angeles Airport was unique for its time in that the community coalition negotiated directly with a public entity, the Los Angeles World Airports.

29. The public sector legal problems have been well identified over the years and have received extensive discussion. *See* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663 (2001); Daniel J. Curtin, Jr. & Sanford M. Skaggs, *Legal Issues and Considerations, in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS, *supra* note 19, at 121; Robert H. Freilich, *Legal Constraints on Public/Private Negotiations: A Checklist of Issues and Cases, in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 20, at 139; Katherine E. Stone & Cristina L. Sierra, *Case Law on Public/Private Written Agreements, in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 20, at 99.

30. The general long-standing rule is that states and localities may not "bargain away" their free exercise of the police power. Stone v. Mississippi, 101 U.S. 814 (1879). When states enact legislation to authorize development agreements, however, states can

and with regard to possible unconstitutional impairment of contracts.[31]

PPPs often exert considerable adverse impacts on the neighborhoods in which their developments are located.[32] Yet state[33] and local[34] laws authorizing and implementing development agreements fail to provide for third-party participation in negotiating PPPs.[35] CBA negotiations create a forum to address these otherwise neglected third-party interests.

IV. How Do Community Coalitions Organize for CBA Negotiations?

The essential first step in pursuing CBA negotiations is to organize a broad-based coalition of community interests. In New Orleans,

give localities a sounder legal basis on which to make commitments that may limit their future exercise of police powers by enacting legislation that expressly authorizes development agreements: "Specific statutory authorization is helpful so as to make clear that these agreements effectuate a public purpose recognized by the state." Callies & Tappendorf, *supra* note 29, at 671. Development agreements enjoy further legal support when a local government passes an ordinance or resolution implementing the state enabling legislation. *Id.* at 682–83. *See also* OSBORNE M. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW § 167, at 672–75 (West Group 2001). These dual state and local enactments have significantly strengthened the hand of municipalities: "The few reported cases discussing development agreements have found that these agreements do not constitute an impermissible bargaining away of the police power." Camacho, *supra* note 21, at 25 & n.101. Among commentators, "the vast majority apparently accept that local governments may legally negotiate provisions in such agreements that differ from or exceed those legally permitted through regulatory exactions." *Id.* at 31 & n.128.

31. Development agreements between a private developer and a public entity may be sustained by the contracts clause of the United States Constitution, Art. 1, § 10, cl. 1, which has been interpreted to prohibit subsequent laws from impairing the obligations of a contract executed by a public entity. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

32. Bezdek, *supra* note 1, at 64 ("When PPPs target, take, or forego taxes and select the redeveloper for tracts of residential terrain, the impacts on the social community may be as relentless and ineluctable as they are on the built environment. . . . [M]uch of the change in neighborhoods is created not by homesteaders but by private developers anointed by local government, which assembles land not to build roads or stadia, but to offer to private developers in a frank bid to remake space in its preferred, high-end vision. This is no unfettered market; this is Urban Renewal Reprised.").

33. Fifteen states have adopted "legislation specifically authorizing local governments to enter into development agreements. Courts in two states have also upheld the use of development agreements in the absence of an enabling act, and these agreements are regularly employed in at least one other state without express statutory authorization." Camacho, *supra* note 21, at 23–24.

34. Local ordinances have proved no more responsive to the representation of third-party interests than the state development laws they are implementing, according to a now somewhat dated study in which "researchers could not find a single jurisdiction in California that had by ordinance established a procedure for including affected third parties, such as neighborhood associations, good government groups, chambers of commerce, fair housing councils, or environmental groups, in the formal bargaining process for negotiating development agreements." Richard Cowart, *Experience, Motivations and Issues*, in MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 19, at 35.

35. Camacho, *supra* note 21, at 41 (decrying the public's "complete exclusion that is currently the norm" in bilateral land use negotiations).

these diverse interests formalized their relationship by executing a Community Benefits Coalition Operating Agreement,[36] which committed the initial coalition members to an ongoing search for additional stakeholder organizations that might be recruited as members.

In executing the Operating Agreement, members also agreed to be bound by the following "Operating Principles":[37]

- A member who seeks or may receive a direct benefit from the proposed CBA may not serve on the negotiating team.
- A member may not act individually to negotiate with the developer.
- A member may not work for or derive any benefit from the developer for a period of one year after execution of the CBA.
- Disagreements with other coalition members will not be aired publicly.
- A member may not speak out individually against a project under CBA negotiations without first resigning from the coalition.
- Questions or concerns about implementation of the Operating Agreement and Operating Principles will be brought to an ethics committee for resolution.

These Operating Principles serve the dual purposes of promoting harmonious relations among coalition members and immunizing the coalition and its members from potential conflicts of interest.

Because of its broad-based and inclusive nature, the community coalition lends a degree of democratic legitimacy to bilateral negotiation of land use decisions—a strategy that relies for its legitimacy "on the faulty assumption that professional planners can represent the interests of an entire community with little input from those affected by a particular decision."[38] PPP negotiations have historically failed the test of democratic legitimacy under either a "pluralist"[39]

36. The Public Law Center, http://www.law.tulane.edu/PLC/home.html (last visited Apr. 11, 2007).

37. *Id.*

38. *See* Alejandro E. Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENVTL. L.J. 269, 271 (2005).

39. *See* Camacho, *supra* note 21, at 46–47. The pluralist model assumes that government's role in resolving land use disputes is to inventory the clashing interests of all affected parties and maximize aggregate welfare, but "this theory assumes that the development approval process actually integrates the interests of all affected parties into decisions. In fact, bilateral land use negotiation approaches are essentially designed to discount the preferences of many of those affected by the ultimate land use decision." *Id.*

or a "civic republican"[40] model of governmental decision making.

> [Development agreements often] force local governments to place the interests of real estate developers above those of other affected parties [by requiring the municipality] to cooperate with the developer in securing all future discretionary permits [and] to cooperate with a developer in the event another affected party sues to challenge project approval.[41]

Even independent of such binding contractual commitments, by the time they have negotiated the development agreement, "both the developer and local government administrative officials often have a significant stake in preserving the agreement as drafted."[42] Governmental staff, who are supposed to represent the public as a reliable proxy in bilateral negotiations from which members of the public are routinely excluded,[43] thus find themselves more often than not in league with developers and at odds with citizens. In this context, CBA coalitions are absolutely vital to restore democratic legitimacy by affording community groups a voice in deliberations from which their third-party interests would otherwise be wholly excluded.

V. How Do CBA Negotiations Enhance Honesty and Openness?

CBAs respond to what might be characterized by some developers as the "Graft Problem," occasionally manifested in the form of individuals or community groups who threaten to oppose the project unless their demands are quietly met by developers.[44] The best solution is to put these

40. The civic republican model assumes that "public interest" emerges from "a deliberative political process that focuses on collective self-determination and the interdependence of citizens, rather than through competing private interests," but the reality of bilateral negotiations is quite different: "Adversarialism and self-interest, rather than cooperative problem solving, are the mainstays; none of the agreement-based or negotiated zoning regimes offer a sense of community engagement or cohesion." *Id.* at 49.

41. *Id.* at 59.

42. Camacho, *supra* note 21, at 44.

43. *Id.* at 50–51 (asserting that "the bilateral negotiated model shifts much of the burden of representing the many varied interests in the locality and region to land use planning staff," leaving staff with a nearly insurmountable challenge: "When other affected parties are excluded from negotiations and other components of the decision process, local government administrative staff must guess, with respect to every facet of the project, what resolution would best balance and serve these various affected (and often conflicting) interests.").

44. The "Graft Problem" is not limited to community groups, but it seems to "come with the turf" in the municipal land use decision-making process, adversely impacting the conduct of some local elected officials and city employees. *See* Camacho, *supra* note 21, at 42–43 & n.174; *see also* ALAN G. ALTSHULER et al., REGULATING FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 59 (Brookings Institution & Lincoln Institute of Land Policy 1993).

discussions into a transparent context. CBA negotiations change a *sub rosa* one-on-one dialogue between a developer and individual community groups (or even individual community members) into a publicly acknowledged dialogue between the developer and a coalition of responsible community organizations. Developers benefit from this increased transparency: When developers negotiate a community benefit with the coalition, they get to announce a "win" publicly; they get no favorable publicity for unsung payments arising out of private communications with potential opponents of the project.

Community coalitions impose strict safeguards on their members in order to protect CBA negotiations against corruption. Conflict-of-interest principles prohibit coalition members from participating in CBA negotiations if they or their organization stand to gain any direct benefit from the negotiations.[45] There's nothing wrong with a benefit going to a community group—say funds to support a child care center—but that group should not serve on the team negotiating for benefits with the developer.

VI. Who Enforces CBAs and How?

The CBA is an enforceable contract between the developer and a community coalition.[46] Although the contract can be enforced in court by the coalition or its individual members, numerous mechanisms militate against litigation to resolve disputes.[47] First, within the coalition itself, member organizations agree not to take individual action in court against a project but to be bound by the coalition's decisions.[48] Most CBAs also create an Implementation Committee that serves as a forum for monitoring compliance and addressing noncompliance issues at the earliest stages.[49] Many CBAs provide for a right to cure[50] and for mediation or other ADR processes as alternatives to litigation.[51] When CBAs are incorporated into the public-private partnership agreement executed between the city and a developer, municipal officials can also bring

45. *See* CBA Operating Principles, *supra* note 36, at 11.
46. *Id.* at 10.
47. *Id.* at 11.
48. CBA Operating Agreement (on file with the author).
49. *See*, *e.g.*, Article 7 of the Ballpark Village CBA, http://www.communitybenefits.org/downloads/Ballpark%20Village%20CBA.pdf (last visited May 9, 2007).
50. *See*, *e.g.*, *id.* art. 9, § 9.5.2 (last visited May 9, 2007).
51. *See*, *e.g.*, *id.* art. 9, §§ 9.5.3 & 9.5.4.1 (last visited May 9, 2007).

their own conciliation and enforcement strategies to assist in resolving disputes.[52]

It works the other way around as well. Community coalitions can help cities monitor compliance when, because of inadequate municipal resources, development agreement "implementation and enforcement are neglected altogether or relegated to developer self-reporting."[53] A properly negotiated CBA establishes enforceable reporting and monitoring obligations that enable a coalition to hold developers accountable for the commitments they make while in hot pursuit of public subsidies. An exclusive reliance on public sector personnel to monitor compliance by developers "overburdens local governmental planning staff and undervalues the capacity of nongovernmental groups to participate in implementation and enforcement."[54]

VII. Why Should City Officials and Developers Support CBA Negotiations?

We've already reviewed several good reasons—enhanced compliance and monitoring measures, stronger democratic legitimacy for land use decisions, greater openness and honesty in the treatment of developers. Here are three more good reasons why CBA negotiations make sense:

1. *Equity*—Neighborhoods threatened by large-scale development deserve the opportunity to discuss directly with developers any measures that could ameliorate adverse impacts and affirmatively strengthen the area.[55] Additionally, developers have a shared interest in protecting and enhancing the quality of life within neighborhoods adjacent to their multi-million dollar investments.
2. *Economic Development*—CBAs that assure living wages and benefits for employees of the new development[56] increase earnings and

52. *See*, *e.g.*, the NoHo Commons CBA, http://www.communitybenefits.org/article.php?id=571 (last visited May 9, 2007) (incorporated into the Los Angeles Community Redevelopment Agency's agreement with the developer).

53. Camacho, *supra* note 21, at 52.

54. *Id.* at 64.

55. *See generally* Bezdek, *supra* note 1, at 43–73 (reviewing the history of redevelopment strategies and their inequitable impact on the poorest and politically weakest neighborhoods in cities).

56. Despite large public subsidies, these public-private developments have frequently failed to live up to their billing in terms of new jobs at good wages. *See*, *e.g.*, CENTER FOR COMMUNITY CHANGE, BRIGHT PROMISES, QUESTIONABLE RESULTS: AN EXAMINATION OF HOW WELL THREE GOVERNMENT SUBSIDY PROGRAMS CREATED JOBS 9–11 (1990) (concluding that enterprise zones, industrial revenue bonds, and Urban Development

spending power among area residents, particularly if accompanied by a local hiring commitment that favors employment of area residents. These additional dollars "roll over" several times in the local economy, generating multiple waves of economic development. Many dollars go to existing small businesses whose customer base may be eroded by new large-scale developments. Thus, CBAs support economic development by enhancing the well-being of area residents and strengthening their ability to buy locally at existing small businesses in the community.

3. *Functionality*—The development process simply works better when all parties are on the same page. A successful CBA negotiation wins support for a proposed new development from community groups that might otherwise challenge the project.[57] Developers hate risk, and if they can eliminate or minimize it in the development process, that's worth something to them. When community groups sign a CBA, they acquire a shared interest with the developer in seeing the development built, because that's the only way their community will receive the negotiated benefits.

From this last principle flows another truth about CBAs: They have little or nothing to do with the NIMBY ("not in my back yard") problem. Area residents who are unalterably opposed to a proposed development simply will not enter into CBA negotiations because that would commit them to support the development. CBAs are not an "antidote" to NIMBY concerns; they essentially inhabit two different worlds.

VIII. Conclusion

In order for public officials to appreciate the positive impacts that CBA negotiations offer cities and their affected neighborhoods, we must reframe their perceptions of "economic development" to encompass broad community concerns. If "economic development" is narrowly defined to mean attracting new businesses into the local economy, CBAs

Action Grants yielded rather modest returns on public sector investments); GREG LEROY & TYSON SLOCUM, ECONOMIC DEVELOPMENT IN MINNESOTA: HIGH SUBSIDIES, LOW WAGES, ABSENT STANDARDS (1999) (finding that corporations receiving large public subsidies in Minnesota paid low wages to employees); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Gras-roots Movement for Economic Justice*, 54 STAN. L. REV. 399, 449 & nn.261–62 (2001) (noting the disparity between $97 million in community development bank loans within an empowerment zone that produced 249 jobs for empowerment zone residents).

57. Janis-Aparicio & Tynan, *supra* note 2 ("The CBA process offers developers an attractive alternative to litigation and polarizing public debates, which can delay or doom a project.").

may be viewed unfavorably as mere "speed bumps"[58] that increase costs and deter developers from investing in a community. But economic development also means paying a city's residents good wages, thereby enabling them to support local businesses with their increased buying power. Economic development means sustainable development that protects and enhances the long-term environment of cities and neighborhoods.[59]

Sound economic development policy might also assess the impact of new development on existing businesses and plan strategies to reduce any adverse impacts on established businesses.[60] An analogy may be drawn from the realm of state administrative rulemaking.[61] When agencies propose new regulations, they must prepare and publish a fiscal and economic impact statement assessing the proposed new rule's impact on state revenues (the "fiscal" component) and on competition in the private sector (the "economic" analysis).[62] A similar analysis of fiscal and economic impacts should perhaps accompany proposed public-private developments as they make their way through the system of public approvals. The soundness of this analysis could also be tested through public comment opportunities similar to those guaranteed in APA-style notice-and-comment rulemaking.[63]

City officials, developers, and community organizations all share an interest in negotiating and executing Community Benefit Agreements. Land use lawyers need to know how they can assist their public, private, and nonprofit clients in navigating CBA negotiations. A significant number of cities have already produced a sufficient body of CBAs to invite closer scrutiny by both the legal academy and the practicing bar. All of these factors suggest that whether or not Community Benefit Agreements have yet arrived in your town, they have "arrived" on the land use scene and promise to be an enduring feature of land use planning and development for many years.

58. Camacho, *supra* note 21, at 38 ("Unfortunately, local officials often treat public participation as if it obstructs or provides only marginal benefits to the decision process, rather than embracing it as an essential element of decisionmaking.").

59. Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271 (2002).

60. Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.C.L. 901, 956–57 (proposing a socioeconomic impact statement for comprehensive assessment of impacts on a community).

61. ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING (Little, Brown & Co. 1986).

62. *See*, *e.g.*, LA. REV. STAT. ANN. §§ 49:953(A)(1)(a)(ii) and (iii), (3)(a) and (b), and (E) (2006).

63. *See*, *e.g.*, *id.* §§ 49:953(A)(1)(c) and (2)(a).