

Community Benefits Agreements: Definitions, Values, and Legal Enforceability

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I. CBA Definition and Values.....	37
A. Inclusiveness, Democracy, and Accountability	37
B. Elements of the CBA Definition	39
1. A CBA concerns a single development project.....	39
2. A CBA is legally enforceable contract.....	39
3. A CBA addresses a range of community interests.....	40
4. A CBA is the product of substantial community involvement.....	40
C. Definitions, Values, and the New York Experience.....	40
1. The Bronx Terminal Market agreement	41
2. The Yankee Stadium agreement.....	42
3. The Columbia University agreement	43
D. Roles of Elected Officials and Community Groups.....	44
II. Private versus Public CBAs.....	45
A. Private CBAs: Enforceable Stand-Alone Agreements Between Community Groups and Developers	46
B. Public CBAs: Enforceable Agreements Between Governmental Entities and Developers, Resulting from a CBA campaign.....	47
C. Enforcement Issues with Public CBAs	47
1. Mechanisms for Private Enforcement of Commitments in Development Agreements	48
2. Enforceable Agreements Between Community Groups and Governmental Entities	49
3. Summary of Private Enforcement Options for Commitments in Development Agreements.....	51

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Introduction

In the past few years, many large land use development projects have gone forward in conjunction with a community benefits agreement (CBA).¹ Several CBAs have improved the development process by engaging the affected communities, incorporating a wide range of community benefits, and building support for large projects that are often highly controversial. However, the success and prominence of past CBAs has led to widespread, unconsidered use of the term, diluting the tool's effectiveness—and in some cases actually working against the values advanced by successful CBAs.

This article hopes to clarify the term *CBA* by proposing a definition that would limit its use to describing agreements that reflect the essential values of past CBAs: inclusiveness and accountability. *Inclusiveness* here refers to the process through which a CBA is negotiated, and *accountability* refers to the outcome—in particular whether CBA commitments are specific and legally enforceable.

Encouraging careful use of the term *CBA* is much more than an abstract, academic effort. As is vividly illustrated by recent New York processes described in this article, the CBA concept is at risk of being co-opted and utilized to develop support for controversial projects, without providing the independent legal enforcement rights and community engagement that are hallmarks of successful CBAs. An agreement or document that does not replicate these key attributes of past CBAs should not gain credibility from association with them, even simply through terminology.

Part I of this article² discusses the values of inclusiveness and accountability, proposes a definition of the term *CBA*, and discusses three recent New York agreements that have been called CBAs but that appear to hinder, rather than advance, these values. This section also looks at the proper roles of elected officials in CBA negotiations.

Part II of this article discusses the shortcomings of reliance on governmental enforcement of community benefits commitments and explores various mechanisms for private enforcement, including private CBAs and a range of alternative mechanisms.

Tying together parts I and II of this article is an emphasis on legal enforceability of community benefits commitments. When developers and local government entities place importance on a commitment another party is making, they rightly demand that the commitment be set forth, with specificity, in a document they can enforce. Many community groups are now demanding that commitments made to them be treated with the same seriousness and accountability, reasoning that a "handshake deal" is not a deal at all.³

When promises are not enforceable, community groups that care about those promises are justly skeptical as to whether they will be kept—and are wise to take that into account when considering whether to support or oppose a project. This concern has been part of the impetus toward CBAs, which are only one of several viable legal mechanisms that can create private enforcement rights with regard to community benefits commitments.

During a CBA negotiation, many issues arise that would benefit from additional analysis and attention. These include: whether a CBA coalition should have an official structure;⁴ best approaches to drafting language binding contractors, subcontractors, tenants, and successor landowners in a development project;⁵ optimal monitoring, dispute resolution, and enforcement techniques;⁶ and procedural changes to the development process that will increase inclusiveness and accountability.⁷ Perhaps future commentators will build on the scholarship contained in this special issue to explore these and other aspects of CBAs and the development process.

I. CBA Definition and Values

Various players in the development process, including elected officials, community advocates, developers, and the media, have used the term *CBA* to mean different things in different contexts. This widespread awareness of the term and the tool itself is likely due to the success and widely publicized nature of the early Los Angeles CBAs.⁸ Community-based organizations sometimes use the term to describe any community benefits outcome for which they have successfully campaigned—perhaps because of the similarity of a coalition-based community benefits campaign to past CBA campaigns, or perhaps because they drew initial inspiration from past CBA campaigns.

In addition, local government officials and developers sometimes use the term *CBA* to describe any set of community benefits commitments on which they agree. A charitable view is that this is a convenient term for commitments of interest to the community; a less charitable view is that project proponents hope to fill the political space a community-driven CBA campaign would occupy, thus easing project approval and marginalizing opposition.

This article discusses as a CBA, and the author urges that the term *CBA* be reserved for, only those agreements that meet the following definition:

A CBA is a legally binding contract (or set of related contracts), setting forth a range of community benefits regarding a development project, and resulting from substantial community involvement.

The elements of this definition are discussed below. CBAs that satisfy the above definition promote the core values of inclusiveness and accountability.⁹ While the traditional land use approval process may also reflect those values to some degree, the nationwide interest in CBAs¹⁰ demonstrates a substantial level of public dissatisfaction with existing processes.

A. *Inclusiveness, Democracy, and Accountability*

Inclusiveness here means that the CBA negotiation process provides a mechanism to ensure that a broad range of community concerns are heard and addressed prior to project approval. Although some cities do a good job of seeking and responding to community input, many do not. Community-based organizations often assert that low-income neighborhoods, non-English-speaking areas, and communities of color have little voice in

the development process. Laws concerning public notice and participation are sometimes poorly enforced, and official public hearings are often held during the workday.

In short, few observers would argue that the views of individual members of the public, speaking during open sessions of public hearings, have a lot of influence on ultimate development decisions. The CBA negotiation process helps to address these problems by providing a forum for many interests in an affected community to be addressed through real, substantive, detailed negotiations—a process not remotely replicated in public hearings or through the media.

While there is of course no guarantee that private community groups wanting to negotiate a CBA are in fact reflective of the community, several real-world factors might minimize this concern. Only a broadly inclusive coalition, composed of organizations whose views carry some weight with the governmental decisionmakers, 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 in order to build leverage.

In addition, the existence of a coalition trying to negotiate a CBA does not prevent other community interests or representatives from themselves making their views known, or even negotiating with the developer as well; there should be no official designation of certain groups as the only valid community representatives.¹¹

Because the CBA concept is relatively new—and because this type of negotiation and advocacy can change power dynamics around development—there has understandably been some pushback on the concept, including allegations that this type of community participation is invalid or inappropriate. A typical characterization is that of New York City Mayor Michael Bloomberg, who complained that these agreements constitute community groups attempting to “grab something” from projects.¹²

Such complaints seem misguided, as community groups have only one real source of leverage in CBA negotiations: their ability to publicly support or oppose a proposed project. Community groups are well within their rights to support a project only under conditions that they feel are important—i.e., if the developer commits to 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.

Denigration of this dynamic as inappropriate seems indefensible. Close scrutiny of government decisions and public dissemination of views on public issues are core activities of civic engagement, of which the CBA process is an expression. Thus can the CBA process advance the value of inclusiveness in the purest democratic sense.

As important as inclusiveness is the value of *accountability*. In context of a development deal, this means that promises made by redevelopment

agency¹³ staff, public officials, and developers regarding community benefits should be treated seriously, made legally binding, and enforced against the party that committed to them. Development agreements¹⁴ at times treat community benefits such as local hiring programs like poor stepchildren, by including only vague aspirations and nonbinding goals, rather than the detailed, enforceable language used on traditional land use issues like project design and infrastructure—not to mention project financing requirements. An important aspect of the CBA approach is that it advances accountability by requiring that community benefits commitments are specific and enforceable.

B. Elements of the CBA Definition

Following are more detailed discussions of the elements of the CBA definition set forth above.

1. A CBA concerns a single development project

This requirement excludes policies and documents setting forth required conditions for a range of projects. Such policies and documents include redevelopment plans, general plans, specific plans, zoning laws, and other land use documents that might encourage or require specified community benefits for particular geographic areas.¹⁵ This requirement also excludes from the definition of CBA single-issue policies that cover a range of projects, such as typical inclusionary housing policies or local hiring policies.¹⁶ Similarly laudable community benefits commitments or reforms that should not be considered CBAs include ordinances or resolutions that make procedural improvements in the approval processes for specified projects.¹⁷

These types of policies and documents are generally enacted through an ordinance or resolution, and are legally and conceptually distinct from CBAs—even if an advocacy campaign that engenders a new policy can look much like a traditional CBA campaign.¹⁸ This element of the CBA definition is aimed less at preserving the CBA values described above, and more at fostering clear analysis and real-world understanding of different legal structures.

2. A CBA is legally enforceable contract

Whether CBA commitments can be enforced by a redevelopment agency, by community-based organizations, or by members of the public, legal enforceability should be a prerequisite for something to be termed a CBA. This requirement excludes documents laying out developers' aspirations on issues of interest to the community, such as unenforceable and voluntary local hiring programs. It also excludes agreements to negotiate benefits in the future, especially when such negotiations are pushed to a date after the project has been approved.¹⁹ Finally, this requirement excludes documents that appear to be enforceable agreements but whose enforceability is plainly suspect, such as the Yankee Stadium agreement discussed in part I.C.2, below. All three of these types of documents have been circulated by developers or elected officials before project approval²⁰ or at time of approval.²¹

3. A CBA addresses a range of community interests

To be termed a CBA, an agreement should address a range of issues of concern to the community. This requirement excludes single-issue commitments, such as an affordable-housing requirement built into a development agreement, a local hiring plan negotiated by a developer and a job training organization, or a monetary payment by a developer to a local nonprofit for provision of services. Such single-issue commitments, while usually valuable, have long been commonplace, and share little in common politically or practically with multi-issue, broad-based CBAs.²²

4. A CBA is the product of substantial community involvement

One of the core purposes of a CBA is to enable a wide range of community members to help shape a development that will affect them. Broad coalitions were behind the CBAs that put the concept on the map and gave the movement momentum.

The requirement of a broadly inclusive process excludes any set of commitments that are simply negotiated directly between a redevelopment agency and a developer as part of a larger deal, with such portion designated a CBA by the agency.²³ This requirement also excludes agreements that are arranged and negotiated wholly by elected officials, even if one or more private organizations sign them at the end of the day. Also excluded are agreements for which elected officials exerted so much control over purportedly private negotiations that they were in effect negotiating the agreements themselves, and pressuring community groups to sign. The Bronx Terminal Market agreement, the Yankee Stadium agreement, and the Columbia University agreement all suffer from some version of these procedural defects, and are discussed below.

Application of this requirement necessitates scrutiny of the actual process that resulted in a CBA—a fact-intensive inquiry into dynamics that may be open to various interpretations. Nonetheless, engaging in this inquiry with regard to purported “CBAs” is necessary in order to protect perhaps the most important value of a CBA: its inclusiveness and democratic nature.

C. Definitions, Values, and the New York Experience

As can be seen from the types of commitments excluded by the elements of the definition set forth above, application of these criteria may help protect the CBA concept from being gutted of content and used by developers and elected officials to dampen community participation and facilitate approval of a project. If a purported CBA is not legally enforceable, was negotiated primarily by elected officials, or does not address a wide range of issues, then it likely has a negative impact on the inclusiveness and accountability of the approval process. Neither the public nor the media—nor elected officials themselves—should consider such agreements an assurance that stated community benefits will be delivered.

Several recent high-profile development projects in New York City demonstrate the reality of this concern. In the past three years, three large and controversial developments have been approved in New York in

conjunction with agreements that project proponents called CBAs. In each case, the negotiation process, at least allegedly, did not satisfy one or more of the definitional elements described above; and the resulting documents fall short on inclusiveness, accountability, or both.

1. The Bronx Terminal Market agreement

In early 2006, the New York City Council approved a large, subsidized development called the Gateway Center, at the site of the Bronx Terminal Market.²⁴ The project, like most large urban development efforts, was controversial.²⁵ At time of project approval, the councilmember whose district included the site publicly proclaimed the benefits of a “community benefits agreement” executed just prior to the project’s approval.²⁶ The developer likewise publicized the agreement on its website regarding the project.²⁷ The agreement was signed by the developer, a local community college, the local chapter of the chamber of commerce, and a nonprofit housing developer.²⁸

Critics alleged that one elected official “handpicked” these groups to sign the agreement,²⁹ and that the signing groups executed it without the benefit of independent legal counsel.³⁰ An inquiry into the facts of the negotiation process is beyond the scope of this article, but the final agreement does demonstrate some important deficiencies.

First, the bulk of the agreement’s commitments are voluntary or aspirational, rather than concrete and enforceable. The agreement contains a detailed description of a “first source” program designed to promote local hiring—but does not require the project’s tenants or contractors to participate.³¹ Retention of local minority- or woman-owned contractors is similarly voluntary³² as is payment of living wages.³³ Several provisions require the developer merely to “work with” the coalition in the future to develop programs that are described in general terms. Other provisions are otherwise strongly qualified and well short of a firm commitment.³⁴ Although almost every CBA contains some imprecise commitments or agreements to cooperate in the future, a lengthy agreement in which almost all of the commitments contain this type of qualifying language bears the hallmarks of a one-sided negotiation.

Second, of the few commitments that are precise enough to be meaningfully enforceable, injunctive relief is generally unavailable. With regard to the overwhelming majority of the commitments, the coalition’s only remedy is to obtain liquidated damages from the developer—with the amount capped for all violations over the life of the project, and no effort to specify damages for specific breaches.³⁵ The Ballpark Village CBA³⁶ and several of the Los Angeles CBAs, in contrast, are enforceable through injunctive relief, thus giving the community groups ability to ensure that benefits are actually delivered.³⁷

Third, none of the agreements is enforceable by the coalition against contractors or tenants in the project; this is important for the few commitments the developer is required to impose on contractors, such as the hiring and subcontracting efforts in project construction. In contrast, the Ballpark

Village CBA and several of the Los Angeles CBAs allow direct enforcement against the legal entities that are actually responsible for performance, through incorporation of third-party enforcement rights into relevant contracts such as leases and construction contracts.³⁸ This limitation becomes especially important in combination with unavailability of injunctive relief against the developer: the Bronx Terminal coalition cannot require the developer to enforce relevant terms of its leases and contracts, which would be the natural fallback remedy where direct enforcement against contractors and tenants is unavailable.

The vagueness of the commitments and the limitations on enforcement options both work against the value of accountability. Although the agreement is technically enforceable, a casual reader such as a neighborhood resident or member of the media would be unlikely to untangle the document's severe limitations without legal assistance.

Similarly, the short list of signing organizations—a "Coalition" in name only—works against the value of inclusiveness. In combination, these deficiencies raise serious concerns about the impact this CBA had on the approval process, even if questions about the handling of the negotiation are put aside.

2. The Yankee Stadium agreement

In 2006, New York City approved construction of a new stadium for the New York Yankees.³⁹ The project had long been controversial.⁴⁰ In conjunction with project approval, several elected officials in New York signed a "community benefits agreement" with the Yankees, setting forth certain commitments from the Yankees with regard to construction of a new stadium.⁴¹ This document smoothed the approval process for the stadium.⁴²

No community-based organizations signed the agreement. While the agreement contains a statement by the Yankees that it is enforceable against them,⁴³ the agreement contains no commitments whatsoever by any other entity, raising the question of whether a lack of consideration makes the agreement unenforceable.⁴⁴

This legal issue points directly to the real-world question of what exactly the Yankees were getting in exchange for their commitments. The slate of elected officials who signed the document includes the Bronx borough president and three members of the city council representing districts in the Bronx. An obvious assumption is that the Yankees bargained for the political support of these politicians in obtaining approval for their stadium application, but the agreement contains no such assurances.

In fact, it is unclear in what capacity these officials signed this agreement. They of course were not free to bind the city or any governmental entity through this non-publicly-approved document; nor does the document claim to deliver their support through city council votes.

These questions about the enforceability and basic nature of the agreement raise obvious questions of accountability. Simply put, the obligations the city took seriously with regard to the stadium were set forth through

the official, properly conducted land use process. Including these community benefits only in a side agreement of questionable enforceability that was not publicly approved demonstrates a lack of commitment to these issues, and hinders accountability and inclusiveness.

At the time the agreement was executed, it was billed as guaranteeing certain community benefits, an assertion the local media did not question.⁴⁵ However, as of early 2008, it appears the agreement has not been implemented.⁴⁶ It seems likely that enforcement rights by community members, and a legal document of clearer enforceability, would have avoided this failure of implementation.

3. The Columbia University agreement

In late 2007, the New York City Council approved plans for a large expansion of Columbia University.⁴⁷ Although the project was extremely controversial,⁴⁸ city officials strongly supported project approval.⁴⁹

A day before the project was approved, Columbia University had entered into a "Memorandum of Understanding" ("MOU") with the West Harlem Local Development Corporation (WHLDC), a nonprofit entity established for the purpose of negotiating a community benefits agreement with Columbia, as described in Debra Bechtel's article in this issue.⁵⁰ Columbia University has stated that it was asked by the city to negotiate community benefits with the WHLDC.⁵¹ This MOU was publicized by city officials at time of project approval, and was described in the media as a "community benefits agreement" that had been "completed."⁵²

However, the process and outcome of the negotiations to date raise serious questions about both inclusiveness and accountability. As a New York nonprofit, the WHLDC is controlled by its board of directors.⁵³ The WHLDC's by-laws allot nine seats on the board to persons designated by local elected officials, out of a board of up to twenty-eight members.⁵⁴ In order for the WHLDC to take action, the bylaws specify that for most matters a majority plus two of the board is needed—and that a supermajority of two-thirds is needed for approval of a community benefits agreement.⁵⁵

These provisions combine to provide the elected officials sitting on the board with tremendous influence over any WHLDC action—and possibly veto power over a CBA approval, depending on the size of the board at a given time, and how many of the elected-official seats were filled.⁵⁶ The WHLDC therefore cannot be taken as a vehicle for independent community involvement in the CBA negotiation process. Columbia nonetheless characterizes the WHLDC as "comprised of representative members from various community constituencies" with no mention of the major role of elected officials.⁵⁷ Several WHLDC board members representing community-based organizations and local landowners resigned during the negotiation process, citing "concerns with the WHLDC's alleged disconnectedness with the community and lack of transparency."⁵⁸

The MOU itself is not an enforceable promise of community benefits. It describes a series of benefits—mostly monetary payments—on which there

is “agreement in principle,” and states that those benefits “shall be provided to the local community in a CBA setting forth the specific and various benefits that shall be executed.”

The substance of the MOU is thus simply an agreement to negotiate in the future—but of course, there is no guarantee that future negotiations will result in an agreement. Columbia has already received its project approval, so its incentive to negotiate in good faith is diminished. The MOU may function as a political commitment on the substance of the benefits described, but it does not provide a legal means to hold the university to the substantive terms set forth therein.⁵⁹

However, by having the surface appearance of a legal agreement on community benefits, and the imprimatur of a private nonprofit, the MOU sends the message that the community was heavily involved and that community benefits were obtained prior to project approval. The WHLDC trumpeted the MOU’s enforceability, characterizing it to the press as an “enforceable document.”⁶⁰ However, this MOU, nonbinding on the substantive benefits it describes, and negotiated with a nonprofit heavily influenced by elected officials working outside their established roles in the land use development process, works against the CBA values of inclusiveness and accountability.⁶¹

As with the Yankee Stadium process, one presumes that commitments from Columbia that were taken seriously by the city were addressed through the land use approval process prior to project approval, rather than left for future negotiations with a powerless and semiprivate entity while the project moves forward.

D. Roles of Elected Officials and Community Groups

While this article does not undertake an extensive inquiry into motives and processes regarding the above-described agreements in New York City, a few points are clear from media accounts and the agreements themselves. In all three of these agreements, elected officials were very closely involved in negotiations, to the point of actually signing the Yankee Stadium agreement. The documents resulting from these processes suffer from serious questions of enforceability, as described.

Close involvement of elected officials in CBA negotiations can cause problems in addition to the obvious issues of inclusiveness and accountability discussed above. There are serious issues of propriety and legality when governmental officials try to influence the land use process by acting outside their legally-defined roles. A developer might argue that CBA commitments made under the “duress” of pressure by elected officials constitute improper governmental takings, or are invalid as resulting from governmental action outside of the established approval process. When an elected official with no designated role in the land use approval process attempts to negotiate a contractual agreement with a developer regarding terms of a land use development project, it raises questions of use and misuse of governmental power. These questions bear further analysis.

However, it is plainly legitimate for an elected official to make clear to a developer that he or she will consider the degree of community support for a project in deciding whether to grant discretionary project approvals; to encourage governmental staff to require certain developer commitments through the accepted land use approval process; to inform the developer, governmental staffers, and the public of factors that the elected official will consider relevant in voting on discretionary approvals for the project; to keep apprised of the status of private CBA negotiations; and to facilitate CBA negotiations by keeping the developer, coalition members, and the public informed as to project parameters and community benefits that the government is demanding.

When elected officials respect these roles, community groups benefit because they are free to make their views known to the public and all relevant elected officials, they have good information about the project, and they can negotiate in good faith with an amenable developer. Developers benefit in their negotiations with local government because all such negotiations occur through well-established land use approval processes and staff contacts; developers also benefit in their community engagement because they can choose to negotiate freely with community-based organizations in order to obtain broad community support where a deal is possible—or to decline to do so if they feel they do not need community support. Local government benefits because projects with CBAs can go forward with broad public support, enforceable community benefits, and a minimal risk of litigation.

This is not to say that every attempted CBA negotiation will result in an agreement. However, all parties in land use development can benefit from the CBA process when roles are respected, the process is inclusive, and there is a shared goal of legitimate commitments on all sides. Past CBAs that met the definition set forth above advanced the values of inclusiveness and accountability; the recent New York City agreements stand in sharp contrast.

II. Private versus Public CBAs

This section describes the two most common types of agreements that have been called CBAs. Private CBAs are enforceable agreements between community-based organizations and developers. Public CBAs are community benefits commitments set forth solely in a development agreement, but resulting from a broadly inclusive, focused process.

Not every CBA meeting the definitions set forth in Part I will fit neatly into one of these two categories, but differentiating between them, and understanding the important legal ramifications of each arrangement, will assist all parties in thinking through options, and also will foster clear discussion and analysis in academic and planning circles.

The central distinction between the types of CBAs discussed here is whether private community groups can enforce the commitments regarding the project. Public CBAs, while laudable, fall short in this regard, requiring

ongoing political pressure and involvement by the public to ensure that community benefits commitments are in fact implemented. This section discusses the real-world importance of that issue and describes several legal mechanisms through which community groups might obtain enforcement rights to community benefits regarding a project.

Ability to enforce legal commitments is especially important in this context because the community organizations are the first "side" to perform in the essential CBA bargain: community support at time of approval in exchange for specified community benefits as the project is built out. Once a project has been approved, the influence of a community group (and even of local government) over the project is substantially diminished. Contractual enforcement rights therefore may be the only way to ensure that developers follow through on community benefits commitments.

This dynamic is especially apparent when successor landowners, tenants, and contractors become involved; these entities were not present for the initial negotiations, and likely have no relationship with community-based organizations, regardless of continued good intentions of the initial developer. Legal enforcement rights are thus even more important with regard to these parties.

A. Private CBAs: Enforceable Stand-Alone Agreements Between Community Groups and Developers

A private CBA is a legally enforceable contract, signed by community groups and by a developer, setting forth a range of community benefits that the developer agrees to provide as part of a development project. In exchange, the community groups agree to support the project through the approval process, to refrain from lobbying against it, and/or to release legal claims regarding the project. Each party can enforce the other side's promises, and the developer commits to passing relevant commitments on to successors, tenants, contractors, and so forth. The redevelopment agency overseeing the development is not a party to this type of agreement although it may incorporate some terms of the agreement into its deal with the developer.

From a legal perspective, this type of CBA clearly provides the strongest result for signing community groups, as they obtain the right to enforce the commitments contained therein, as well as final approval of CBA language (subject to the negotiation process, of course).

Although the public approval process provides the backdrop for negotiation of a private CBA, these purely private agreements are not subject to the wide range of legal strictures on governmental action. Thus the substance of a private CBA is not restricted by the Takings Clause, Equal Protection Clause, Privileges and Immunities Clause, statutory preemption concerns, or state and local land use laws. One can hypothesize circumstances in which governmental pressure on a developer to enter into a CBA would cause a CBA that is technically private to constitute governmental

action; but in absence of such circumstances, the typical private CBA does not implicate the laws that constrain local governments. Examples of privately-enforceable, stand-alone CBAs include:

- Ballpark Village CBA, San Diego, 2005
- Atlantic Yards CBA, New York City, 2005
- Los Angeles International Airport CBA, Los Angeles, 2004
- Hollywood & Vine CBA, Los Angeles, 2004
- Marlton Square CBA, Los Angeles, 2002
- SunQuest Industrial Park CBA, Los Angeles, 2001
- The “Staples” CBA, Los Angeles, 2001
- NoHo Commons CBA, Los Angeles, 2001

This list is nonexhaustive. Details on these CBAs can be found elsewhere.⁶²

B. Public CBAs: Enforceable Agreements Between Governmental Entities and Developers, Resulting from a CBA Campaign

A public CBA is a series of community benefits commitments that are contained within a development agreement (and perhaps other documents, resolutions, or permits related to the approval process). Distinguishing these commitments from routine development agreements—which frequently contain aspects that can fairly be called “community benefits”—is that these commitments result from substantial community participation by a broad-based coalition, they address a range of issues, and they are treated in the development agreement and other public documents as detailed and enforceable.

Because development agreements are contracts entered into by public entities, commitments contained within them are subject to the range of restrictions on governmental actions, often including federal constitutional restrictions like the Takings Clause and the Equal Protection Clause; federal statutory proscriptions like the preemption doctrines written into ERISA⁶³ or derived from the National Labor Relations Act;⁶⁴ and the various strictures of state and local law, including widely divergent land use and development codes, redevelopment laws, and so forth.

Examples of public CBAs include the commitments related to the Cherokee-Gates Rubber redevelopment project in Denver,⁶⁵ the Yale Cancer Center project in New Haven,⁶⁶ and the Oak-to-Ninth project in Oakland.⁶⁷ (This list is also nonexhaustive.)

C. Enforcement Issues with Public CBAs

In general, a redevelopment agency that enters into a development agreement is the only entity likely to be able to enforce it (although, as discussed below, private enforcement possibilities may occasionally exist). However, failure of a redevelopment agency to enforce its negotiated commitments is a real possibility.⁶⁸

Several factors contribute to this danger. As staff of planning departments and redevelopment agencies move on to subsequent projects,

monitoring and enforcement of community benefits commitments in past development agreements projects may receive inadequate attention. This natural shift in focus may combine with an institutional bent toward maintaining cooperative relations with developers, which is in tension with a firm monitoring posture. In addition, elected officials and staff members who negotiated the community benefits may have left local government by the time those commitments need to be enforced.

Aside from simple lack of enforcement, there is always the possibility that the redevelopment agency will amend the development agreement after project approval. A developer may assert changed conditions and request an amendment to any aspect of its deal, and rolling back certain community benefits could easily be folded into such a request. Although amendment of a development agreement would require public notice (at least in most states, for most types of public entities), an agenda item describing such an amendment could easily be phrased in anodyne terms, buried in a consent calendar, or both. Even if interested community groups are alert to the possible amendment, the political dynamic is completely different once a project has already been approved, and it may be difficult to hold on to community benefits victories achieved years ago at the time of project approval.

For these reasons, community groups interested in seeing strong implementation of public CBAs will need to closely monitor developer and redevelopment agency performance and may need to bring political pressure on the redevelopment agency to maintain and enforce terms of its development agreement. There is no guarantee of success in these efforts.

1. Mechanisms for Private Enforcement of Commitments in Development Agreements

Because of the uncertainty of governmental enforcement, a public CBA is clearly not as good a result for community-based organizations as a private CBA. There is simply no substitute for enforcement rights by the groups that advocated for the commitments in question. The reporting and meeting requirements that can be folded into a private CBA are also crucial to ensuring strong implementation.

Most community benefits coalitions understand this, and press for private enforcement rights; however, such rights are not always winnable. Any CBA is a result of a complex set of factors, including particulars of the development such as: the various costs and benefits of the project; particular project components; financial projections on both the developer side and the public side (such as amount of subsidy and/or infrastructure requirements); attitude of the elected officials and staff; developer willingness to negotiate with multiple parties; breadth of the community coalition; strength of community advocacy; local media coverage; and so forth. In difficult political environments, a private CBA may well be unattainable for interested community groups, due to factors well beyond their control. In such settings, a public CBA may constitute a huge win, and with sustained political pressure should deliver the promised benefits even without private enforcement rights.

However, community groups wishing to be able to enforce commitments of a public CBA have a few options, even if they have not been able to win a contractual commitment directly from the developer (i.e., a private CBA). First, local or state law might give affected members of the public a limited right to force the redevelopment agency to enforce its contractual commitments made for the benefit of the public, either through a writ action or otherwise.⁶⁹ Such litigation would likely be difficult and expensive for community-based organizations, however, and subject to the limitations of the law that provides the right of action. This possibility also does not address the danger that after a project has been approved, a redevelopment agency and the developer could amend the development agreement to reduce community benefits.

Second, public CBA commitments could be made enforceable by private individuals or organizations through a private enforcement clause in the development agreement, in essence making the public (or even a designated organization) an intended third-party beneficiary of specified terms of the development agreement. A CBA in San Jose reflects this approach.⁷⁰ State law in California actually requires use of this approach for certain affordable housing covenants.⁷¹

Community-based organizations might therefore consider pressing for third-party enforcement rights in the development agreement when a developer refuses to negotiate a private CBA. It is likely to be a rare situation where this can be achieved, however, since the developer will still have to agree to such language. In addition, few redevelopment agencies will want to designate a particular organization as having enforcement rights greater than that of the general public; and few developers will want to give unspecified members of the public the right to bring a lawsuit to enforce terms of the development agreement.

A third option, potentially more attractive to all parties, is an enforceable agreement between the redevelopment agency and community-based organizations, as described below.

2. Enforceable Agreements Between Community Groups and Governmental Entities

Community-based organizations can themselves enter into a binding, enforceable contract with a redevelopment agency that is overseeing a large development. In this type of agreement, the redevelopment agency agrees to certain community benefits commitments related to the project, and in exchange the community-based organizations release legal claims regarding the project.

From a strictly legal perspective, this is a well-established settlement agreement. Governmental entities facing litigation over the legality of their actions routinely enter into settlement agreements with private parties; and these settlement agreements can and usually do contain enforceable commitments regarding future governmental action. And of course there is no requirement that a party has to wait until a lawsuit is filed in order to enter into a contract releasing claims.⁷²

Contents of such a settlement agreement could include things that the community groups want the redevelopment agency to do, as well as those that they want the redevelopment agency to ensure that a developer does. Both of these types of commitments are reflected in two recent agreements between the City of Oakland's redevelopment agency and various community-based organizations.

These contracts, styled "Cooperation Agreements," concern the affordable housing commitments in the Uptown development project, approved in 2004,⁷³ and the Oak to Ninth project, approved in 2006.⁷⁴ The primary subject of each agreement is the actions the redevelopment agency will take regarding affordable housing at the project in question.⁷⁵ The Uptown cooperation agreement requires the agency to itself develop an affordable housing project on a particular parcel of land, with specified time frames, financing amounts and sources, affordability levels, and so forth.⁷⁶

The Oak to Ninth cooperation agreement likewise requires the agency to develop affordable housing projects on specified land, with certain conditions and funding sources.⁷⁷ In exchange for these commitments, each cooperation agreement includes a release of claims regarding the project from each signing community group.⁷⁸

Of particular importance, however, is the fact that these cooperation agreements go beyond simply including agency assurances regarding its own actions, to include enforceable commitments regarding the agency's relationship with the developer of the larger project that surrounds the parcels dedicated to affordable housing. The Uptown agreement describes key terms of the agency's agreement with the developer, including amount of subsidy and the affordable housing requirements placed on the developer's units; it then sets forth the agency's commitment not to amend the development agreement in a way that would (1) reduce the developer's affordability commitments, (2) increase the financial assistance provided to the developer, or (3) interfere with the agency's obligations with regard to the affordable units it will develop under the remainder of the cooperation agreement.⁷⁹

The Oak to Ninth cooperation agreement is less detailed on these points, but it does contain the agency's commitment that it will not permit the developer to develop commercial portions of a specified parcel in a manner that would interfere with the agency's fulfillment of its responsibility to construct affordable housing on other portions of that parcel.⁸⁰

Through these provisions, both of these agreements grant community groups legally enforceable rights with regard to actions of both the redevelopment agency and the developer—even though the developer did not enter into a contract directly with the community groups in either case.⁸¹ Although the primary focus of these agreements is on the actions of the redevelopment agency that signed them, they provide legal assurance that the agency's deal with a developer cannot be changed after the project is approved (at least on certain key points).

The Oakland redevelopment agency's entry into this kind of agreement is a laudable effort to provide accountability to the public and interested

community members. By providing this accountability with regard to its community benefits commitments—i.e., by making these commitments enforceable, rather than merely aspirational—the agency was able to generate stronger public support for its projects, and forestall litigation as well.

There are other examples of community groups entering into settlement agreements that require governmental entities to provide community benefits. The 2004 CBA covering the modernization of Los Angeles International Airport (the LAX CBA) was entered into by multiple community-based organizations and the Los Angeles World Airports Authority (LAWA), the governmental entity that operates the airport. The basic dynamic was very similar to that of a standard private CBA negotiation: LAWA was in effect the developer of the program of improvements at issue, and it needed approval from the Los Angeles City Council before the program could move forward. In these respects, the standard three-way dynamic among a coalition, a developer, and a decisionmaker was in effect.⁸² Technically, however, the LAX CBA was a settlement agreement, as the coalition's primary consideration under the agreement was a release of claims regarding airport modernization projects.

In 2007, four community-based organizations signed a "term sheet" specifying in general language the community benefits to be provided in the Grand Avenue redevelopment project in Los Angeles. (The project's development agreement spells out those terms in greater detail.) Both the redevelopment agency and the developer also signed the term sheet, which included a limited release of claims and a nonopposition clause binding on the community groups. This document thus contains aspects of both a private CBA and the settlement agreement approach described in this section.

Because the settlement agreement approach offers a way around a recurring accountability problem, it bears consideration by community-based organizations advocating for a CBA, especially when the developer will not negotiate directly with private organizations.

3. Summary of Private Enforcement Options for Commitments in Development Agreements

In sum, the author sees four possible mechanisms for private, community-based organizations to enforce community benefits commitments that would usually be contained in a development agreement. First, private organizations can negotiate a private CBA as discussed in part II.A, replicating and/or going beyond the commitments set forth in the development agreement. This provides the strongest and most direct enforcement mechanism.

Second, state law might provide a private cause of action to force a redevelopment agency to enforce terms of its deal with a developer, as discussed briefly in part II.C.1. However, the availability of such a cause of action would not prevent the redevelopment agency and the developer from simply amending the development agreement after the project has been approved.

Third, a development agreement itself could contain a private enforcement mechanism, such as a public right of action or a standard third-party-beneficiary clause, as discussed in part II.C.1. Again, however, the existence of such a clause at time of project approval would not prevent subsequent amendment of the development agreement—perhaps even an amendment to remove that enforcement clause.

Finally, as discussed in part II.C.2, private parties such as community groups could enter into an agreement with a redevelopment agency regarding a project, requiring the agency (1) to execute a development agreement only if it contains certain terms, (2) to refrain from amending those terms, (3) to enforce those terms against the developer, and/or (4) to provide certain community benefits itself. Coalition consideration provided in such an agreement would be a litigation release, making this a settlement agreement, although additional community support would naturally be seen as a benefit by agency staff, elected officials, and the developer.

Conclusion

The widespread national interest in CBAs and related tools indicate that the issues addressed in this article will be relevant for some time. Misuse of the CBA terminology and concept is a serious danger, because of the real-world consequences involved. Community-based organizations may press for a CBA process because they see it as a tool for addressing inequality and changing the balance of power around development decisions. The New York experience suggests that supporters of controversial projects see a different type of potential in the term and concept: the potential to control and limit community involvement and dampen opposition to controversial projects.

How the CBA concept is used in the future will determine whether the tool itself can truly change the development process for the better, or whether it ends up merely consolidating the power of interests that already exert the bulk of control over the development process: elected officials, their staffers, and the developers themselves. Reserving use of the term CBA for agreements that result from a truly inclusive process and that involve legally enforceable commitments can help this tool continue to be a powerful mechanism for changing the outcomes of urban economic development.

1. See Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, at C6 (“In New York and around the country, it has become standard practice for developers of major projects to negotiate with neighborhood and other groups to forge so-called community benefits agreements....”). See generally JULIAN GROSS ET AL., *GOOD JOBS FIRST & THE CALIFORNIA P’SHIP FOR WORKING FAMILIES, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE* (2005). [hereinafter Gross et al., *Community Benefits Agreements*].

2. Small portions of this article are derived or adapted from portions of GROSS ET AL., *COMMUNITY BENEFITS AGREEMENTS*, *supra* note 1, and from a briefing paper co-authored by Julian Gross and Gavin Kearney and Timothy G. Doyle of New York Lawyers for the Public Interest, December 2007.

3. Each campaign for a legally binding CBA reflects this demand. In the past few years, coalitions of community groups have pushed for CBAs in the following cities: Denver, Colorado; Los Angeles, California; Minneapolis, Minnesota; New Haven, Connecticut; New Orleans, Louisiana; New York, New York; Oakland, California; Orlando, Florida; Pittsburgh, Pennsylvania; St. Paul, Minnesota; San Diego, California; San Jose, California; Santa Rosa, California; Yonkers, New York; and Wilmington, Delaware.

4. See Debra Bechtel's article in this issue; GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS, *supra* note 1, at 23 (sidebar entitled "Legal Issue: the Coalition as a Legal Entity"); David A. Marcello, *Community benefit agreements: new vehicle for investment in America's Neighborhoods*, 39.3 URB. LAW. 657 (2007).

5. See GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS, *supra* note 1, at 71 (sidebar entitled "Legal Issue: Chains of Contracts").

6. See *id.* at ch. 8 ("Monitoring and Enforcement of CBA Commitments").

7. See policy requiring cost-benefit analysis of certain subsidized projects in San Jose, available online at <http://www.sanjoseca.gov/clerk/TaskForce/SRTF/SRTF.asp> (last visited Mar. 21, 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, <http://www.workingeastbay.org/article.php?id=66>.

8. See generally GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS, *supra* note 1 (describing Los Angeles CBAs).

9. As discussed in GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS, *supra* note 1, CBAs promote other values as well, such as transparency of outcomes and efficiency of process. See *id.* at 21-22.

10. See *supra* note 1.

11. The dangers of official designation are apparent from the New York City negotiations described *infra* Part I.C.

12. Pristin, *supra* note 1, at C6. In the article the mayor is quoted as saying, "[e]very 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 community advocacy characterized as "blackmail" in comments posted on <http://www.pittsburghcitypaper.ws/gyrobase/Content?oid=oid%3A33964> (last visited Mar. 18, 2008).

13. For convenience, this article will use the term "redevelopment agency" to mean any local governmental entity that is negotiating terms of a development project with a developer, and that has authority to approve or reject the developer's proposed project. Large, multi-use projects in urban areas—the most likely subject of CBA negotiations—are very frequently overseen by redevelopment agencies, and most states have laws establishing redevelopment agencies or allowing cities to do so. See, *e.g.*, California Health & Safety Code § 33000 *et seq.*; Louisiana Revised Statutes § 33:4625; Colorado Revised Statutes § 31-25-101. However, most or all uses of the term "redevelopment agency" in this article would apply equally to any local government entity meeting the definition set forth above.

14. This article uses "development agreement" as a 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, etcetera. 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.

15. *E.g.*, the Park East Redevelopment Corridor, described *infra* note 18; see also 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.").

16. *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).

17. See, *e.g.*, "impact assessment" policies and CUP requirements for big box stores described *supra* note 7.

18. The multi-project community benefits policy that looks the most like a traditional CBA is the slate of community benefits policies, enacted by resolution, to govern the Park East Redevelopment Corridor in Milwaukee in 2004. These commitments are to be implemented through individual development projects that the redevelopment agency oversees in the designated area. The policy campaign by the Good Jobs and Livable Neighborhoods coalition in Milwaukee led to a commitment from the local redevelopment authority to apply a range of community benefits to all projects going forward in that area. Because of the unusually wide range of benefits set forth in the resolution and the breadth of interests in the campaign, this victory, while taking the form of a government policy, was similar to a "Public CBA" as described *infra*, but covering multiple projects.

19. See, for example, the Columbia University Memorandum of Understanding, discussed in detail *infra* § I.C.3.

20. An example is the unenforceable, unilateral "Community Benefits Agreement" distributed publicly by the City of Pittsburgh and the County of Allegheny on January 3, 2008, during CBA negotiations over a new sports arena. See Rich Lord, *ARENA PLAN LEAVES HILL LEADERS SKEPTICAL*, *PITT. POST-GAZETTE*, Jan. 4, 2008, at A1; Wade Malcolm, *AGREEMENT ON ARENA BENEFITS GOES UP IN FLAMES*, *PITT. POST-GAZETTE*, Jan. 8, 2008, at B1.

21. See, for example, the Columbia University Memorandum of Understanding discussed *infra*.

22. Laudable examples of single-issue agreements include "good neighbor agreements," covering environmental issues; labor peace agreements, facilitating union organizing; and the complex local hiring commitments for construction of the Alameda Corridor project in Los Angeles in the late 1990s. Less laudable would be a scenario in which a developer provides a sum of money to a single, local nonprofit in order to generate support for the project, and that support partially counterbalances opposition that is more broad-based and less self-interested. Avoidance of the latter dynamic has led many CBA coalitions to pointedly

refrain from requesting funds for any coalition member organizations, instead concentrating demands on policies or programs directly benefiting community members, such as living wage requirements and environmental mitigations.

23. See, for example, the “Community Benefits Agreement” for the Hunters’ Point Shipyard, entered into in 2005 between San Francisco’s redevelopment agency and Lennar/BVHP, a limited liability corporation affiliated with Lennar Corporation, a nationwide housing developer. The agreement is available online at http://www.hunterspointcommunity.com/docs/pdfs/DDA_Close_Community_Benefits_Agreement.pdf (last visited Mar. 18, 2008). This agreement is simply an attachment to the Disposition and Development Agreement executed by the same parties, and by its terms the community benefits commitments therein are enforceable only by the redevelopment agency and its successors. See *id.* § 16.5 (“Successors and Assigns/No Third-party Beneficiary”).

24. See Patrick Arden, *Mall Plan Approved*, METRO N.Y., Feb. 2, 2006, available at www.momandpopnyc.com/articles/terminalmarket/MallPlanApproved_Metro,2.2.06.pdf; Winnie Hu, *Developer Will Compensate Merchants Evicted From Bronx Market*, N.Y. TIMES, Feb. 2, 2006, at B6.

25. See Arden, *supra* note 24, <http://www.momandpopnyc.com/articles/terminalmarket/index.htm>; Hu, *supra* note 24, at B6; see also Charles V. Bagli & Robin Shulman, *Transforming Bronx Terminal Market, but at a Steep Price*, N.Y. TIMES, Oct. 24, 2005 at B1.

26. Arden, *supra* note 24, <http://www.momandpopnyc.com/articles/terminalmarket/index.htm>.

27. <http://www.bronxgateway.com/community/> (last visited Mar. 14, 2008).

28. The final, executed agreement is available at http://www.bronxgateway.com/documents/copy_of_community_benefits_agreement/Signed_CBA_2_1_06.pdf [hereinafter Bronx Terminal Market agreement] (last visited Mar. 14, 2008).

29. See Arden, *supra* note 24, <http://www.momandpopnyc.com/articles/terminalmarket/index.htm>.

30. See The Neighborhood Retail Alliance: CBA: Carrion’s Benefit Agreement, <http://momandpopnyc.blogspot.com/2006/02/cba-carrions-benefit-agreement.html> (last visited Mar. 14, 2008).

31. See Bronx Terminal Market agreement, *supra* note 28, ¶¶ VI.B.1.c., VI.B.3.a.

32. See *id.* ¶ VI.B.3.g.

33. See *id.* ¶ VIII.2.

34. See, e.g., *id.* ¶ IV.B (“Transparency”) (“The parties may develop reasonable provisions for the conduct of periodic public open meetings.”); ¶ VI.B.3.i (“Union Hiring Provisions”) (“[T]he Developer will encourage and use commercially reasonable efforts to participate with local unions and community based organization [sic] and educational institutions for the implementation of training and apprenticeship programs.”); ¶ VI.D.2.b (“Small Business Development . . . Post-Construction Services”) (“All things being equal as to both cost and quality with regard to performance on this particular development, the Developer shall seek as a goal to award no less than 35% of the total dollar value of post-construction purchasing and service contracts to Bronx-based professional firms (including contracts awarded to Affiliates of Developers).”); ¶ X (“Environment”) (“The Developer will work with the Coalition to request frequent monitoring” of particulate emissions. . . “The Developer with the assistance of the Coalition will delineate how all tenants and users on the entire

development site can reduce their waste....” “To the extent feasible... the Developer will plant trees on local streets....”).

35. See *id.* ¶¶ III.F.3.ii, III.G, III.H.

36. The Ballpark Village CBA, signed in San Diego in 2005, is available at <http://www.communitybenefits.org/downloads/Ballpark%20Village%20CBA.pdf> (last visited Mar. 26, 2008).

37. See, e.g., Ballpark Village CBA, ¶ 9.5.4.1; LAX CBA, available at <http://www.communitybenefits.org/article.php?id=565> (last visited Mar. 14, 2008); Cooperation Agreement, ¶ IV.A.4.

38. See, e.g., Marlton Square CBA, available at <http://www.communitybenefits.org/article.php?id=569> (last visited Mar. 14, 2008); Tenant & Contractor Attachment, ¶ VI.H; Ballpark Village CBA, ¶ 9.7.

39. See Timothy Williams, *Approvals Clear Way for Yankees to Build*, N.Y. TIMES, July 22, 2006, at B2.

40. See Charles V. Bagli & Timothy Williams, *A Bronx Cheer*, N.Y. TIMES, Jan. 7, 2006, at B1; Andrew Simbalist, *Fair Ball*, N.Y. TIMES, Jan. 22, 2006, § 14, at 11.

41. The author has been unable to obtain an executed copy of the CBA, or any indication that it has been publicly distributed; a call to the borough president (one of the document's signers) went unreturned. The following analysis is based on an unsigned version available online at http://www.goodjobsny.org/Yankees_deal.htm [hereinafter Yankee Stadium agreement] (last visited Mar. 14, 2008).

42. See Joyce Purnick, *The House That Hope Built*, N.Y. TIMES, Apr. 6, 2006, at B1; Williams, *supra* note 39, at B2.

43. See Yankee Stadium agreement, *supra* note 41, § IX.

44. See, e.g., *Goncalves v. Regent International Hotels, Ltd.*, 447 N.E.2d 693, 700 (N.Y. 1983) (contract void for lack of valid consideration).

45. See Purnick, *supra* note 42, at B1.

46. See Timothy Williams, *Yankee Stadium Is Going Up, But Bronx Still Seeks Benefits*, N.Y. TIMES, Jan. 7, 2008, at B1.

47. See Timothy Williams & Ray Rivera, *\$7 Billion Columbia Expansion Gets Green Light*, N.Y. TIMES, Dec. 20, 2007, at A1.

48. See *id.*

49. See *id.* In the article, Deputy Mayor Daniel L. Doctoroff is quoted as saying, “The university’s expansion is critical...” *Id.*

50. The bylaws of the WHLDC contemplate, but do not require, negotiation of a CBA. See West Harlem Local Development Corporation Bylaws, art. I, § 8(c).

51. See Columbia University News and Events, <http://www.columbia.edu/cu/gca/news/ULURP/index.html> (last visited Mar. 14, 2008) [hereinafter www.columbia.edu].

52. See Williams & Rivera, *supra* note 47, at A1.

53. See N.Y. Nonprofit Corp. Law § 701(a) (“[A] corporation shall be managed by its board of directors.”).

54. See West Harlem Local Development Corporation Bylaws “Qualifications for Director,” art. II, § 2. The bylaws specify that the board “shall consist of twenty-eight (28) Directors, except in the event of any vacancies,” and allow the board to act with as few as fifteen directors in office. *Id.* art. II, § 1.

55. See *id.* art. II, § 9.

56. At any time that there were two or more vacancies on the board (i.e., fewer than twenty-seven directors in office), the nine elected-official representatives (if all seated) would be able to block any CBA approval, due to the two-thirds

approval requirement described above. As of March 18, 2008, the WHLDC website lists only twenty board members, and this list appears to be outdated. See http://www.westharlemldc.org/Board_Members.html (last visited Mar. 18, 2008). It is not clear from the organization's posted meeting minutes (which run only through January 2007) whether the board ever reached its full slate of twenty-eight members. See http://www.westharlemldc.org/Board_Minutes.html (last visited Mar. 18, 2008.) Determining how many elected-official and other board seats were filled at different times in the life of the WHLDC is outside the scope of this article; the strong and structurally-ordained influence of elected officials on WHLDC actions is present regardless.

57. See www.columbia.edu, *supra* note 51.

58. See Daniel Amzallag, *Columbia, LDC Settle on \$150 Million for Benefits Agreement*, COLUM. SPECTATOR, Dec. 19, 2007, <http://www.columbiaspectator.com/node/28608>.

59. In addition, the MOU contains no commitments on the part of the LDC, so likely suffers from a failure of consideration—making it unenforceable even with regard to the general negotiation intentions it contains. See, e.g., *Goncalves v. Regent International Hotels, Ltd.*, 447 N.E.2d 693, 700 (N.Y. 1983) (contract void for lack of valid consideration).

60. See Amzallag, *supra* note 58, <http://www.columbiaspectator.com/node/28608>.

61. Indeed, one New York City Councilmember, after approval of the project, critiqued the WHLDC as “mak[ing] a mockery of community input.” Tony Avella, *How City Government Failed the People*, COLUM. SPECTATOR, Feb. 7, 2008, <http://www.columbiaspectator.com/node/29105>.

62. Details on the Los Angeles and San Diego CBAs can be found online at <http://www.communitybenefits.org/article.php?list=type&type=46> (last visited Mar. 14, 2008) and in GROSS ET AL., *COMMUNITY BENEFITS AGREEMENTS*, *supra* note 1. Information on the controversial Atlantic Yards CBA is widely available on the web, including a wikipedia page of disputed neutrality, http://en.wikipedia.org/wiki/Atlantic_Yards_public_opinion (last visited Mar. 14, 2008).

63. See 29 U.S.C. § 1144(a) (2000).

64. See, e.g., *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986).

65. See FRESC, <http://www.fresc.org/article.php?id=59> (last visited Mar. 14, 2008).

66. See Connecticut Center for a New Economy, <http://www.ctneweconomy.org/CORD.html> (last visited Mar. 14, 2008).

67. Information on the Oak-to-Ninth CBA is available at <http://www.urbanstrategies.org/programs/econopp/oaktoninth.html> (last visited Mar. 14, 2008).

68. See, e.g., Katia Hetter, *Old Emporium offices vanish*, S.F. CHRON., Sept. 2, 2004, at B1 (describing developer demolition of historic structures despite preservation commitments in development agreement).

69. See, e.g., California Code of Civil Procedure § 1085 (establishing cause of action for writ of mandamus with regard to official action); *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1149 (Cal. 1994) (“What is required to obtain writ relief is a showing by a petitioner of ‘(1) A clear, present and usually ministerial duty on the part of the respondent...; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty...’”) (quoting *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 25 Cal. Rptr. 798, 805 (Ct. App. 1962)).

70. See a discussion of the CIM CBA in GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS, *supra* note 1, and online at <http://www.communitybenefits.org/article.php?id=568> (last visited Mar. 14, 2008).

71. See California Health & Safety Code § 33334.6(e)(7) (requiring that certain affordability covenants run with the land and be made enforceable by “the community” (as defined elsewhere), by residents of covered units, by applicants for those units, and by certain other parties).

72. The typical employment severance agreement is a familiar example of a settlement (or release) of claims prior to filing of litigation.

73. See City and Agency resolutions described at http://www.oaklandauditor.com/reports/forestcity_uptown.pdf (last visited Mar. 14, 2008).

74. See Agency resolution set forth at <http://clerkwebsvr1.oaklandnet.com/attachments/14144.pdf> (last visited Mar. 14, 2008). The Oak to Ninth project was eventually the subject of litigation over the validity of a referendum petition filed with regard to the project; as well as litigation over the project’s environmental analysis. See Christopher Heredia, *Oak-to-Ninth project foes win ruling*, S.F. CHRON., Nov. 23, 2007, at B4; Chip Johnson, *No end in sight for war over Oakland’s Oak to 9th project*, S.F. CHRON., May 25, 2007, at B1.

75. The coalition that negotiated the Uptown agreement advocated solely on affordable housing issues, so the agreement therefore would not fit the definition of a CBA set forth in this article. The Oak to Ninth coalition advocated on jobs and environmental issues as well, influencing the content of the development agreement, negotiating a direct agreement with the developer on construction job training and local hiring, and influencing decisions of state environmental agencies. This range of commitments taken together constitutes a CBA, as it reflects a wide range of interests and an inclusive process, and all resulting commitments are legally enforceable.

76. See Uptown Cooperation Agreement, § III.

77. See Oak-to-Ninth Cooperation Agreement, § II.

78. See Uptown Cooperation Agreement, § IV; Oak-to-Ninth Cooperation Agreement, § III.

79. After describing terms of the development agreement, or “LDDA,” the agreement provides as follows:

Terms of LDDA. The Agency shall not approve any amendment to the LDDA that: (1) reduces the affordability levels or the number of affordable housing units in the Uptown Project, or changes the proportion of three-bedroom units in the Uptown Project, subject to the Agency’s right to subordinate its affordability restrictions to facilitate financing; (2) increases the Financial Assistance Amount as described in Section II.A hereof, or (3) conflicts with or affects any provision of Section III of this Agreement, without the prior written consent of the Coalition.

80. The agreement states: “The Agency shall not allow commercial development on Parcel G that would make infeasible the Parcel G Affordable Housing Projects described in this Agreement.”

81. However, note that the developer of the Oak to Ninth project has been negotiating an enforceable agreement with several community-based organizations on separate issues: construction job training and local hiring.

82. Details on the LAX CBA are available in GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS, *supra* note 1, and online at <http://www.communitybenefits.org/article.php?id=565> (last visited Mar. 14, 2008).