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## Legal and Policy Issues Related to Community Benefits Agreements

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## ESSAYS

### LEGAL AND POLICY ISSUES RELATED TO COMMUNITY BENEFITS AGREEMENTS

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#### I. INTRODUCTION: WHAT ARE COMMUNITY BENEFITS AGREEMENTS AND WHY DO COMMUNITIES ENTER INTO THEM?

Community benefits agreements (CBAs) between developers and community representatives have become widespread nationwide, and such agreements have increasingly come to be viewed as part of the regular cost of major projects such as housing, commercial development, sports stadiums, transportation projects, power plants, and landfills.<sup>1</sup> Typically, CBAs are agreements between a project developer and nonprofit community groups and/or local governments, and provide for financial grants, local hiring, affordable housing, and/or other amenities to the community hosting the project, in exchange for a tacit or explicit commitment to support the project.<sup>2</sup>

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1. See generally Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Development Agreements*, 17 J. Affordable Hous. & Cmty. Dev. L. 113, 115, 119, 124-25, 130 (2008) (surveying recent CBAs nationwide).

2. See Julian Gross et al., *Community Benefits Agreements: Making Development Projects Accountable*, Good Jobs First and the California Partnership for Working Families, 1, 10-11 (May 2005), [http://www.goodjobsfirst.org/pdf/cba2005\\_final.pdf](http://www.goodjobsfirst.org/pdf/cba2005_final.pdf); *Community Benefits Agreements: The Power, Practice, and Promise of a Responsible Redevelopment Tool*, Annie E. Casey Found., 1, 10-11 (2007), [http://www.aecf.org/upload/PublicationFiles/AECF\\_CBA.pdf](http://www.aecf.org/upload/PublicationFiles/AECF_CBA.pdf) [hereinafter *Annie E. Casey Found.*].

Entering into CBAs can provide certainty to a developer that its project can be constructed on time, and to a host community that the new development will be consistent with the neighborhood's needs. In particular, CBAs allow communities to negotiate with developers and to offer input with respect to specific concerns without forcing communities to legally challenge a project—which can involve substantial legal fees with no community benefit especially if the challenge addresses a procedural aspect of the reviews and approvals for the project.<sup>3</sup> The *quid pro quo* is that the developer can advance a project without the risk of delay from litigation (which could severely impact the project's financing) and can receive positive publicity as a good neighbor. Public support for a project can also help the developer in securing public subsidies and obtaining prompt and favorable action on discretionary government approvals.<sup>4</sup> Additionally, the community receives amenities that it would not otherwise obtain because of local budgetary constraints.<sup>5</sup> As one commentator succinctly noted, “the nationwide interest in CBAs demonstrates a substantial level of public dissatisfaction with existing processes.”<sup>6</sup> Nonetheless, as discussed below, not everyone supports CBAs, which can be viewed as improper payments, particularly where CBAs are not authorized or required by any statute or regulation.

Part II of this essay provides an overview of various types of CBAs and includes examples from throughout the United States. Part III addresses policy issues that should be considered to ensure that a CBA is credible and enforceable, and potential legal issues raised by CBAs.

## II. WHERE AND FOR WHICH PROJECTS HAVE CBAs BEEN DEVELOPED AND IMPLEMENTED?

Today, developers routinely provide CBAs to a community where a new industrial use or new large development is proposed to be sited. For the community, CBAs ensure socially responsible development in its neighborhoods. CBAs can act as “safeguards to

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3. See *infra* text accompanying note 6.

4. Gross, *supra* note 2, at 10.

5. See *id.* at 4.

6. Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. Affordable Hous. & Cmty. Dev. L. 35, 37 (2008).

ensure that affected residents share in the benefits of major developments” and “allow community groups to have a voice in shaping a project, to press for community benefits that are tailored to their particular needs, and to enforce developer’s promises.”<sup>7</sup> As a result, since 2001, the use of CBAs has become customary throughout the country in connection with major development projects, and CBAs have come to be viewed as part of the regular cost of doing business.<sup>8</sup>

CBAs could be a tool to address the mitigation of significant adverse environmental impacts from a proposed project, and thus could be included as part of an environmental impact statement or permit (i.e., regulator could impose a condition that the developer create a public park to address open space concerns from a new large development). In most cases, however, CBAs address non-environmental issues, such as living wage requirements for workers employed on the project, a “first source” hiring system to target job opportunities from the project to area residents, space for a neighborhood childcare center, construction of parks and recreational facilities, money to local schools, or the construction of affordable housing.<sup>9</sup>

CBAs routinely garner support from a local host community for the siting of new industrial uses that serve a wider public good.<sup>10</sup> For instance, new landfills, waste water treatment plants, transit centers, and power plants are public necessities that serve an entire region but must be sited in a host community. No one wants to live next to a landfill, waste water treatment plant, power plant, or airport, but communities depend on the services provided by such infrastructure. Thus, a portion of our costs in purchasing electricity, disposing of our waste, or traveling through large transit centers is a payment to the host community. The host community will then appropriate such funds for local improvements, such as funding for a new or expanded local school, park, community center, or job training center. Once

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7. Gross, *supra* note 2, at 3.

8. See Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. Times, June 14, 2006, at C6.

9. See Gross, *supra* note 2, at 10.

10. See discussion *infra* Part II; See generally Salkin & Levine, *supra* note 1; Gross, *supra* note 2.

such infrastructure is built, it will remain in the host community for twenty or more years.<sup>11</sup> The following are some specific examples.

### *A. Energy Projects*

In 2001, Calpine Corporation/Bechtel Enterprises Holdings, Inc. and the City of San Jose agreed to a package in which Metcalf Energy Center would provide, among other things, contracts to local businesses, \$5 million for parks and open space acquisition in the Santa Teresa/South San Jose area, \$1 million in matching funds to the City's fund for energy conservation, and \$500,000 to the City of San Jose's "Healthy Neighborhoods Venture Fund" in exchange for the City's support and providing of municipal services for the construction of the 600 MW power plant.<sup>12</sup>

In 2007, as part of the re-licensing of its Niagara Power Project in Niagara County, New York with the Federal Energy Regulatory Commission (FERC), the New York Power Authority (NYPA) entered into multiple agreements with the local community in order to obtain local community support for the continuation of the plant's operation for another 50 years.<sup>13</sup> Specifically, NYPA entered into a CBA with Niagara County, the City of Niagara Falls, the Towns of Lewiston and Niagara, and the school districts for the City of Niagara Falls, Lewiston-Porter, Niagara-Wheatfield, and the Tuscarora Nation.<sup>14</sup> Among other projects, NYPA agreed to establish a host community fund for capital projects and infrastructure for economic development and public health and safety, with an initial payment of \$8 million followed by \$5 million annually over the 50-year period of the renewed FERC license, and provide a \$9.5 million capital fund, and a \$1 million landscape development fund to Niagara University.<sup>15</sup>

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11. See discussion *infra* Part II.

12. Press Release, City of San Jose, Mayor Gonzales and Calpine Bechtel Reach Agreement (June 13, 2001) [http://www.sjmayor.org/press\\_room/530calpine.html](http://www.sjmayor.org/press_room/530calpine.html).

13. See FERC, FERC Project No. 2216-066, *Final Environmental Impact Statement for Hydropower Relicensing, Niagara Project*, 1 (2006), <http://www.ferc.gov/industries/hydropower/enviro/eis/2006/12-29-06.asp> [hereinafter *FERC*]; New York State, Niagara Power Project: Relicensing, <http://niagara.nypa.gov/> (last visited Sept. 28, 2010).

14. FERC, *supra* note 13, at 145-47.

15. *Id.* at 145, 147.

### B. Transportation Projects

In December 2004, a broad coalition of community-based organizations and labor unions entered into a CBA with the City of Los Angeles in connection with the Los Angeles World Airports (LAWA) \$11 billion modernization plan.<sup>16</sup> The City of Los Angeles funded a CBA package valued at half a billion dollars that included: (1) \$15 million in job training funds for airport and aviation-related jobs; (2) a local hiring program to give priority for jobs at LAX to local residents and low-income special needs individuals; (3) funds for soundproofing affected schools and residences; (4) funds for studying the health impacts of airport operations on surrounding communities; and (5) increased opportunities for local, minority, and women-owned businesses in the modernization of LAX.<sup>17</sup>

### C. Urban Redevelopment

CBAs are also routinely provided by developers to local community groups in connection with large new developments of mixed commercial and residential uses that cover numerous acres and which might involve eminent domain proceedings to acquire specific parcels and/or changes to the local zoning map.<sup>18</sup> These new large developments have the potential to displace poorer residents, cause overcrowding in local schools and create traffic congestion.<sup>19</sup> Some of these impacts can be mitigated through the environmental review and permitting processes if agencies impose conditions on the developer (such as adding a new road or limiting the number of spaces in the parking garage).<sup>20</sup> Nevertheless, even if the

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16. Amy Levine, *LAX Airport CBA*, Cmty. Benefits Agreements Blog, (Jan. 28, 2008, 9:36 PM), <http://communitybenefits.blogspot.com/2008/01/lax-airport-expansion-cba-demonstrates.html>

17. Press Release, LAX Coalition for Economic, Environmental, & Educational Justice, Highlights of the LAX Community Benefits Agreement (Dec. 24, 2004), [http://www.edf.org/documents/4174\\_LAX\\_CBA\\_Summary.pdf](http://www.edf.org/documents/4174_LAX_CBA_Summary.pdf)

18. See discussion *infra* note 22 and accompanying text; See generally Community Benefits Agreement on the Atlantic Yards Development 1-2 (June 27, 2005), available at <http://www.buildbrooklyn.org/pr/cba.pdf>.

19. See Salkin & Levine, *supra* note 1, at 132 n.20.

20. See N.Y. City Bar Ass'n, The Role of Community Benefit Agreements in N.Y. City's Land Use Process 46 (March 8, 2010), available at <http://www.nyplanning.org/TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>.

environmental review and permitting results in adequate mitigation, many residents may still oppose changes, may be skeptical of projections of economic benefits, or may not want to see the character of the community altered by stadiums or high rise buildings. For this reason, developers need to meet with the local community and understand community needs in order to garner the respect and ultimate support for what may be a significant change to the character of a community.

One recent example of a CBA in New York that includes some of the typical terms of CBAs for urban redevelopment projects is the Atlantic Yards CBA. This CBA is also a more traditional CBA in that it was negotiated among a private developer and local community groups. The Atlantic Yards CBA involves the development of a new basketball arena as well as new commercial and residential uses.<sup>21</sup> The Atlantic Yards CBA between Forest City Ratner, the developer, and eight community groups includes: (1) assurance of middle-income and affordable housing; (2) environmental assurances; (3) educational initiatives; (4) jobs for minorities and women; (5) pre- and post-construction job training; (6) a commitment to develop community facilities such as childcare, youth and senior centers; and (7) community access to utilize the arena for local events such as religious congregations and high school and college graduations at “reasonable rents.”<sup>22</sup> The Atlantic Yards CBA also illustrates the limits of such agreements, because it has not prevented litigation by local opponents challenging various aspects of the project.<sup>23</sup>

Other local CBAs may be more targeted to the economic impacts of a project. An example of such a CBA, the Bronx Terminal Market development project, consists of the construction of a million square foot retail space in the Bronx.<sup>24</sup> Approval for the project includes an approximately \$5 million CBA which provides, in part, that: (1) no Wal-Mart or Wal-Mart subsidiary would be permitted to have space in the shopping center; (2) the developer would pay \$3 million to a

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21. Community Benefits Agreement on the Atlantic Yards Development 1-2 (June 27, 2005), available at <http://www.buildbrooklyn.org/pr/cba.pdf>.

22. *Id.*

23. See, e.g., *Goldstein v. Pataki*, 516 F.3d 50, 64-65 (2d Cir. 2008).

24. David Lombino, *Shopping Center in Bronx Approved; Benefit Agreement Bans Wal-Mart*, *New York Sun*, Feb. 2, 2006, at 4, available at <http://www.nysun.com/article/26932>.

job-referral program that aims to help employ local Bronx residents; (3) the developer would set aside 18,000 square feet of retail space for local small businesses; and (4) the developer would pay half the membership dues for 2,000 local families if a store that charges a membership fee opens in the shopping center.<sup>25</sup>

### III. POLICY ISSUES RELATED TO COMMUNITY BENEFIT AGREEMENTS

A number of factors should be considered to ensure that a CBA actually resolves controversy over a project, and is not a wholly illusory settlement that serves as a fig leaf merely used to obtain government approvals of an unpopular project.

#### *A. Are CBAs Unfair To Developers?*

Overall, CBAs can represent a “win-win” situation for a developer and the local community. Nevertheless, there are many individuals who are critical of CBAs and are concerned that CBAs could evolve from a voluntary tool of developers to a mandatory requirement imposed on all projects.<sup>26</sup>

Generally, agencies and zoning boards must adhere to the statutory criteria set forth in zoning ordinances or other regulations when evaluating requests for permits and approvals for a project. These agencies and boards are not permitted to impose additional requirements that are unrelated to the impacts of the project or the criteria established by law in granting approvals if not voluntarily agreed upon by the developer.<sup>27</sup> However, abuse can occur if government officials impose a CBA as part of their approval of a project. A good example of such abuse occurred recently when the New York City Council voted to disapprove a land use action for a proposed development by Related Companies (Related) of the Kingsbridge Armory in the Bronx because Related would not agree

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25. *Id.*; *CBA: Carrion's Benefit Agreement*, The Neighborhood Retail Alliance Blog (Feb. 6, 2006, 10:31 EST), <http://momandpopnyc.blogspot.com/2006/02/cba-carrions-benefit-agreement.html>; See generally Salkin, *supra* note 1, at 115-130 (providing examples of numerous CBAs around the country).

26. See, e.g., Pristin, *supra* note 8, at C6 (addressing concerns with CBAs).

27. See, e.g., N.Y. Town Law § 274-b(4) (McKinney 2004) (“The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit.”) (emphasis added).



to negotiate a CBA that would require retail tenants to pay a living wage to all employees.<sup>28</sup> This example of abuse fosters the views held by those who do not support CBAs.<sup>29</sup> To address this issue, the Land Use Committee of the New York City Bar Association recommended that New York City “announce that it will not consider CBAs in making its determinations in the land use process, will give no ‘credit’ to developers for benefits they have provided through CBAs, and will play no role in encouraging, monitoring or enforcing such agreements.”<sup>30</sup> It is important to note that the New York City Bar Association report found that agreements between developers and community groups that are reached independent of land use processes are still acceptable.<sup>31</sup> In fact, it is questionable whether government actions to impose a CBA unrelated to environmental or land use impacts could withstand a legal challenge because agencies and zoning boards are required to adhere to statutory criteria set forth in zoning ordinances and other regulations when evaluating land use and zoning applications.<sup>32</sup> The New York City Bar Association also believes such agency action to impose CBAs on a developer could run afoul of the U.S. Supreme Court’s decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, which require that exactions have a substantial nexus to impacts of the development.<sup>33</sup>

Critics of CBAs also suggest that there could be the perception that the approval process is artificially slowed down when a developer does not propose a CBA.<sup>34</sup> Given this criticism, it is questionable whether this is really a concern of developers or a disingenuous objection by opponents of CBAs. Generally, developers are interested in being viewed as good neighbors and are interested in working with a community, especially if it will reduce the risk of litigation that could halt or delay their project.<sup>35</sup>

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28. See Sam Dolnick, *Voting 451, Council Rejects \$310 Million Plan for Mall at Bronx Armory*, N.Y. Times, Dec. 15, 2009, at A38.

29. See, e.g., *supra* note 26 and accompanying text.

30. N.Y. City Bar Ass’n, *The Role of Community Benefit Agreements in N.Y. City’s Land Use Process* 46 (2010), available at <http://www.nyplanning.org/TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>.

31. *Cf. id.*

32. See discussion *infra* Part IV.

33. N.Y. City Bar Ass’n, *supra* note 30, at 36.

34. See discussion *supra* Part I.

35. *Id.*

These concerns can be addressed by the judicious use of CBAs. Community activists and supporters of CBAs need to be cognizant of the proper role of CBAs. In other words, CBAs have a proper role when dealing with new industrial uses that serve a regional public good and with “large” new developments. This does not mean that every local zoning approval for a new development, new apartment complex or new business should involve a CBA. One commentator has suggested that the impetus can come from a need for significant tax subsidies, zoning approvals, or infrastructure development.<sup>36</sup> The critics’ concern that CBAs will become an expectation of every new project need not be an issue as long as the public and local officials continue to view CBAs as the cost of doing business for large industrial uses that are public necessities and large new developments; the types of projects that have involved CBAs as discussed above.

### *B. Are CBAs Fair To The Community?*

Initially, one could question whether it is fair that communities need to bargain with private actors for community resources that governments arguably have an obligation to provide, such as affordable housing, parks, and adequate funding for schools.

Another concern is deciding who should be the appropriate community group that is involved in negotiating the CBA. Ideally, a broad and representative group of parties with longstanding roots in the community that are affected by the new use should be involved in negotiations. These parties may include community organizations, religious leaders, labor groups, environmental groups, and small business owners.<sup>37</sup> Many communities have various non-profit organizations and community boards to address local issues.<sup>38</sup> The groups should not be selected by the developer or project proponents.<sup>39</sup>

Another question is whether the groups that negotiated the CBA should benefit or should determine which groups should benefit. Another challenge is how to ensure that the groups that benefit fairly

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36. See David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 Urb. Law. 657, 659 (2007).

37. See, e.g., Annie E. Casey Found., *supra* note 2, at 14.

38. See, e.g., *id.*

39. Gross, *supra* note 6, at 41.

represent the community.<sup>40</sup> Opportunistic new groups may be created when a new project is rumored in anticipation of participating in a payout of benefits. Such groups are especially problematic because their participation does not necessarily represent the community or ensure buy-in by the community for the project. One potential remedy is transparency in the negotiation process, by incorporating measures such as a prohibition against funding being directed to groups that participated in the negotiations.<sup>41</sup> Community funds should also go to the public and not a particular nonprofit. If funds are used to build parks, expand public schools, build community centers and new libraries, as well as new apprenticeship programs, and involve a public agency as the conduit for the funds, CBAs can ensure that not just the individual non-profits benefit, but also the local community as a whole.

Concerns have also been raised about CBAs that involve government actors rather than community groups. One of the many objections to the much criticized Yankee Stadium CBA, for example, is that it did not involve any community groups, but was negotiated solely by elected officials.<sup>42</sup> Individual elected officials might not have the capacity to represent New York City, or even the New York City Council, so it is not clear how New York City's Corporation Counsel could enforce the agreement; nor is it clear who would have the wherewithal to enforce the agreement if the council members that signed it are not re-elected. Perhaps unsurprisingly, implementation of this CBA has been plagued by years of delays.<sup>43</sup>

### *C. Are CBAs Unfair To Taxpayers?*

When government agencies are involved in projects, either as the developer, the major customer, or a near-partner of the developer, there can be a concern that public funds, either in the form of taxes or rates, are being directed to one locality through a community benefits package. A similar situation arises when the support garnered through a community benefits package is the rationale for considerable taxpayer subsidies, tax breaks to developers, or the use

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40. Annie E. Casey Found., *supra* note 2, at 18.

41. See Marcello, *supra* note 36, at 665-66.

42. See Salkin & Lavine, *supra* note 1, at 123.

43. Timothy Williams, *Bronx Still Seeks Benefits From Deal With Yankees*, N.Y. Times, at B1, B7 (Jan. 7, 2008).

of eminent domain powers to assemble the property necessary for a project.

#### *D. Ensuring A Fair Negotiating Process*

Another concern is whether the community parties have sufficient expertise to negotiate with developers for the CBA. If they do not, the community groups can be provided with training (perhaps by attorneys working *pro bono*) to develop the skills to advocate for themselves in this process.<sup>44</sup> The community parties should also be assisted by counsel. Involving parties with the expertise to bargain effectively will help to ensure that the process is transparent and fair, which is critical if the resulting CBA is to actually result in an agreement with widespread public support that provides a resolution of potential conflicts between the community and project developers.

#### *E. Enforceability*

Another chief concern for community parties is the enforceability of any CBA, which is key to ensuring that the promised benefits actually materialize. The first issue is against whom the CBA is enforceable. If there are community hiring and procurement requirements for the project, the CBA should be crafted to ensure that those requirements are enforceable against the developer's subcontractors and tenants who may be doing most of the procurement and hiring.<sup>45</sup>

Another question is who has standing to enforce the CBA. Organizations that are parties or are identified as third-party beneficiaries in the CBA typically have the right to enforce the agreement,<sup>46</sup> and therefore it is important to ensure that at least one party with the resources and likely inclination to enforce the CBA has the right to do so. Finally, while the CBA should contemplate potential project changes due to budget constraints or changing economic condition, the CBA should also include specific deadlines

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44. Annie E. Casey Found., *supra* note 2, at 22.

45. *See* Gross, *supra* note 2, at 69, 71-72.

46. *See generally* Orna S. Paglin, Criteria for Recognition of Third Party Beneficiaries' Rights, 24 New Eng. L. Rev. 63, 69-70 (1989). As with any contract, the signatories can enforce the contract; however, the parties can also decide to limit which terms can be enforced by governmental versus non-governmental signatories.

for the developer to comply with its commitments (i.e., incorporating a specific date by which a new park would be constructed after the development of new residential/commercial buildings are completed).<sup>47</sup> This ensures that a CBA is not an illusory or aspirational agreement that allows a developer to claim public support during the approval process without signing on to any firm obligations. Furthermore, whether benefits are bargained for through CBAs or developed through incentive programs codified in local law, enforcement and monitoring mechanisms must still exist once a development is built to ensure that the local community actually receives the promised benefits.<sup>48</sup>

#### IV. LEGAL ISSUES

Perhaps surprisingly, there is a dearth of law on the legality of CBAs. The fact that there is little litigation on CBAs suggests that CBAs are supported by communities and are having a positive effect in resolving conflicts between developers and community groups.

In the absence of statutes or regulations specifically authorizing CBAs and with the lack of case law, the question will arise as to whether a particular CBA is lawful. Essentially, the questions are: (1) is it permissible for developers to bargain for discretionary approvals or relief from local land use laws?; And (2) is it permissible for local governments to demand concessions from developers that are not set forth in local law? The doctrines discussed below might help in answering these questions:

##### *A. Development Agreements*

Some have analogized CBAs to development agreements, and contend that CBAs can be entered into by municipalities only in those states that also allow development agreements.<sup>49</sup> However, development agreements address a slightly different concern than CBAs. Development agreements involve bargaining for amenities from a developer, but the *quid pro quo* from the local government is a commitment to freeze the zoning requirements applicable to the

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47. See Gross, *supra* note 2, at 70; See generally Williams, *supra* note 44.

48. See Gross, *supra* note 2, at 69.

49. Salkin & Lavine, *supra* note 1, at 115.

project for a set period of time.<sup>50</sup> Therefore, development agreements essentially bind future legislatures to a project. CBAs do not force a government to approve a project, and certainly do not purport to bind future legislatures, so there should not be a presumption that because development agreements are prohibited by state law, CBAs should be as well.

### *B. Incentive Zoning*

Based on the legislative and judicial approval of incentive zoning, there is a strong argument that bargaining for development is not *per se* against public policy.

New York State law authorizes local governments to establish systems to grant relief from density, area, height, open space, use or other zoning requirements for developers who opt to provide specific amenities such as open space, day care, low income housing, or cash in lieu of such amenities.<sup>51</sup> Like CBAs, incentive zoning allows developers to fund amenities that might be too costly for municipalities to provide, and allows municipalities to opt for denser development that provides property tax benefits.

Special incentive districts have been upheld by the New York State Court of Appeals. For example, in *Asian Americans for Equality v. Koch*, the Court of Appeals upheld the Special Manhattan Bridge District, which granted a bonus of additional square footage in exchange for community facilities, low income housing, or rehabilitation of existing housing.<sup>52</sup> In this case, the court also rejected challenges alleging violations of the equal protection clause, exclusionary zoning, and piecemeal zoning.<sup>53</sup>

Nevertheless, courts have identified some limits to incentive zoning. For example, in *Municipal Art Society of New York v. City of New York*, a court invalidated a \$57 million unrestricted payment – not targeted to any specific amenity – to be an impermissible component of a bonus zoning arrangement for the New York

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50. See *City of W. Hollywood v. Beverly Towers, Inc.*, 805 P.2d 329, 334 n.6, 335 (Cal. 1991).

51. See N.Y. Town Law § 261-b (McKinney 2004); see also N.Y. Village Law § 7-703 (McKinney 1996); N.Y. General City Law § 81-d (McKinney 2003).

52. 527 N.E.2d 265, 268, 373 (N.Y. 1988).

53. *Id.* at 266, 268-69, 271-72.

Coliseum site.<sup>54</sup> The \$35 to \$40 million in subway improvements for the Columbus Circle station, however, were not found to be problematic.<sup>55</sup>

One could argue that any zoning relief that is not specifically authorized by a formal system established pursuant to the authorization in statutes such as Town Law section 261-b, and instead bargained for on a case-by-case basis, should be suspect. Nevertheless, in *DePaolo v. Town of Ithaca*, the Appellate Division, Third Department, approved a bargain that was not authorized by a generally applicable system of incentives – a grant by Cornell University to the Town of Ithaca of a 99-year license to use property adjacent to Cayuga Lake as a public park, conditioned upon the amendment of the local zoning ordinance to accommodate a new lake-source cooling system for the university.<sup>56</sup> It should nevertheless be noted that if a local government were to *require* such access, the *demand* would be subject to substantive due process constitutional limits requiring nexus and proportionality between an exaction and the projected impacts of a development.<sup>57</sup>

### *C. Conditional Zoning And Contract Zoning*

There are several well-established land use doctrines that deal with concerns about individual property owners seeking to opt out of generally applicable zoning districts. Two of those that are potentially analogous to some of the concerns raised in connection with CBAs are contract zoning and conditional zoning.

Because CBAs involve contracts and zoning, “contract zoning” may appear to be a doctrine that should be applicable. However, in most cases, it is not. Contract zoning is prohibited.<sup>58</sup> It occurs when a municipality promises in advance to grant zoning relief in exchange for a benefit.<sup>59</sup> However, unless there is a contract purporting to bind a local legislature in advance to vote in a specific way, there is no

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54. 137 Misc.2d 832, 833 (Sup. Ct. N.Y. County 1987).

55. *Id.* at 832.

56. 258 A.D.2d 68, 70-72 (N.Y. App. Div. 1999).

57. *See Dolan v. City of Tigard*, 512 U.S. 374, 374-75 (1994); *Nollan v. California Coastal Comm’n*, 483 U.S. 826, 827, 836-37 (1987).

58. *See Church v. Town of Islip*, 168 N.E.2d 680, 683 (N.Y. 1960); *See also Collard v. Inc. Village of Flower Hill*, 421 N.E.2d 818, 821 (N.Y. 1981).

59. *See Collard*, 421 N.E.2d at 821.

contract zoning.<sup>60</sup> A CBA typically involves a developer promising to do certain things if and when certain approvals are granted, but the local government remains free to grant or deny such permits or approvals based on its findings under local laws and regulations. The court in *DePaolo*, described above, dismissed a challenge to the deal on contract zoning grounds for precisely this reason – the Town of Ithaca was not bound by any contract to vote to grant a rezoning.<sup>61</sup>

“Conditional zoning” also might also seem to be a doctrine that could be analogized to CBAs, because CBAs involve conditions on development. Conditional zoning occurs when a zoning decision is conditioned on the execution of a private agreement restricting the use of the rezoned parcel, and it is permissible if the conditions relate to the property at issue and are reasonable.<sup>62</sup> For example, conditions must apply only to the property being rezoned, and not the owner personally.<sup>63</sup> However, this is probably not a doctrine that will be helpful to a CBA opponent. First, the New York State Court of Appeals has held that when the property owner has accepted the conditions, no one else has standing to contest them.<sup>64</sup> In addition, the remedy is often striking the conditions from the permit or variance, and not invalidation of the zoning decision, which is hardly the result that a challenger to a project would want.<sup>65</sup>

## V. CONCLUSION

CBAs have become increasingly widespread over the past decade. Ethical and policy issues and practical concerns such as the need for broad community participation, effective negotiation, binding commitments, and enforcement are raised over and over again in various contexts. CBAs have not been the subject of much litigation, and therefore it can be argued that they serve to reduce conflict. However, the lack of litigation also means that despite increasing use,

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60. *See id.* at 821-22.

61. *See De Paolo*, 258 A.D.2d at 71.

62. *See Church*, 168 N.E.2d at 681, 683; *Collard*, 421 N.E.2d at 821.

63. *St. Onge v. Donovan*, 522 N.E.2d 1019, 1020, 1023 (1988).

64. *See Church*, 168 N.E.2d at 681, 683; *see also* *East End Prop. Co. #’1, LLC v. Town Bd. of Brookhaven*, No. 2007-05041, 2008 N.Y. App. Div. LEXIS 9034, at \*1-3 (N.Y. App. Div. Nov. 25, 2008) (finding that local residences did not have standing to challenge CBA among the Town of Brookhaven, Caithness and Long Island Power Authority).

65. *See St. Onge*, 533 N.E.2d at 1024-25.



CBAs probably will continue to have an uncertain legal status, particularly where CBAs are forced on developers to address measures that are unrelated to environmental or land use mitigation.