THE ROLE OF COMMUNITY BENEFIT AGREEMENTS IN NEW YORK CITY'S LAND USE PROCESS*

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Introduction

A community benefits agreement (CBA) results from negotiations between a developer proposing a particular land use and a coalition of community organizations that claims to represent the individuals and groups affected by the proposed development[1] In a typical CBA, community members agree to support the developer's proposed project, or at least promise not to oppose the project or to invoke procedural devices or legal challenges that might delay or derail the project. In return, the developer agrees to provide to the community such benefits as assurances of local jobs, affordable housing and environmental improvements.[2]

CBAs are a relatively recent phenomenon across the United States, although they grow out of a long history of negotiations among developers, land use authorities and public officials, and the affected community and various stakeholder groups (such as environmental groups or organized labor) over development proposals that require governmental approval.[3] The first major CBA, the Los Angeles Staples agreement, was signed in 2001. Since then, scores of CBAs have been negotiated across the country.[4] In New York City, developers and community groups began to use CBAs in the last few years. Because most CBAs are relatively new, there is scant evidence, either empirical or

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* The Association of the Bar of the City of New York's Land Use Committee established a Subcommittee to review and write a report with respect to Community Benefits Agreements in New York City. The Subcommittee responsible for drafting this report consisted of Vicki Been, Boxer Family Professor of Law, NYU School of Law; Ross Moskowitz; Wesley O'Brien; and Ethel Sheffer AICP. All members of the subcommittee participated in their individual capacities; their affiliations are listed only for identification purposes and none purported to participate in the deliberations as representatives of their institutions. Laura Wolf Powers served on the subcommittee early in its deliberations, but moved from the City and was not able to participate in final discussions. Professor Been would like to thank Matthew Jacobs, NYU '10, Michael Nadler, NYU '11 and Carolyn Nagy NYU '10 for their superb research assistance in the preparation of the report, and Bethany O'Neill for her tireless administrative support through many drafts.

[1] Julian Gross, with Greg LeRoy and Madeline Janis-Aparicio, GOOD JOBS FIRST, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9 (2005), *available at* http://www.goodjobsfirst.org/pdf/cba2005final.pdf.

[2] *Id.* at 10.

[3] Vicki Been, *Compensated Siting Proposals: Is it Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787, 794–95 (1994);William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Process*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 7, 9 (2007/2008).

[4] Harold Meyerson, *No Justice, No Job Growth: How Los Angeles is Making Big-Time Developers Create Decent Jobs*, AM. PROSPECT, Nov. 5, 2006, at 39.

anecdotal, to evaluate whether CBAs are a net benefit to the parties who enter into these agreements. Similarly, little is known about the impact CBAs have on those individuals or community groups that are in the neighborhood of the development, but were not parties to the agreements. Nor is it yet clear what effect CBAs will have on the land use process or the City's development climate more generally.

Given the rising popularity of CBAs, and the growing controversy over their use, however, it is important to evaluate the benefits and drawbacks of these agreements in light of both the experience of parties who have entered into CBAs and more theoretical concerns about the impact that CBAs may have on the processes of land use regulation and real estate development. Those theoretical concerns are grounded in a long history of efforts by communities, developers, and local governments to find flexible ways to address neighbors' concerns about development proposals. Conditional rezonings, development agreements, negotiated exactions, conditional negative declarations in environmental impact review, and compensated siting agreements between industries needing to develop locally undesirable land uses (LULUs) and host communities have been used for decades.[5] The debates about, and experiences under, such progenitors of CBAs offer important insights into the possible advantages and disadvantages of CBAs.

Part I of this report summarizes the structure, history, and political and legal context of CBAs. Part II briefly reviews the history of New York City's debates over deal-making in land use controversies over the past few decades. Part III evaluates the benefits and drawbacks various stakeholders perceive CBAs to offer or threaten. Part IV surveys some of the thorny legal and policy questions presented by CBAs. Part V concludes with recommendations to the City.

I. Overview of Community Benefit Agreements

A. What Are CBAs?

CBAs generally are private agreements that detail the benefits a developer will provide in order to secure the cooperation, or at least forbearance, of community organizations regarding the developer's application for permission to develop a particular project. Community opposition to a proposed development obviously may influence whether regulatory bodies will approve the project. Community opposition also may affect whether government agencies are willing to help fund the project. A developer's ability to secure community acceptance of the project through a CBA accordingly may significantly affect the chances that the project will make it through various regulatory and funding hurdles.

The benefits developers offer through a CBA vary with the particular development and community. Common promises include commitments to use local residents or businesses for the labor and material needed for the project; assurances that a certain number or percentage of housing units will be affordable to low- or moderate-income workers; agreements to pay living wages (or other benefits) to workers employed on the project; stipulations that the development be designed and constructed in an environmentally friendly fashion; and promises to correct existing environmental

[5] *See* Been, *supra* note 3.

problems. In return, coalitions of community groups promise the cooperation or forbearance necessary to allow the developer to get through the government approval processes as expeditiously as possible.

In some cases, the developer initiates discussion about a CBA; in others, community groups approach the developer. At times, regulatory authorities or elected officials have suggested that the parties negotiate a CBA. In a few recent cases in New York City, local government officials have participated in the negotiations[6] or signed the agreement as witnesses.[7]

The final agreement is usually a private agreement between the developer and a coalition of community groups or individual groups. In some cases, though, local governments incorporate the agreement (or its terms) into their own development agreements with the property owner.[8]

B. The Rise and Spread of CBAs

While CBAs have roots in other land use tools, as described in Section I(D), the modern CBA movement began in California. The first CBA involved the $4.2 billion Los Angeles Sports and Entertainment District development, which abuts the Staples Center, home of the NBA's Los Angeles Lakers.[9] The Staples CBA was negotiated by a consortium of developers that had already constructed the Staples Center itself and the Figueroa Corridor Coalition for Economic Justice (FCCEJ), a local coalition of 29 community groups and five labor unions.[10]

The development as proposed included an entertainment plaza, a 7,000-seat theater, a 250,000-square-foot expansion of the Los Angeles convention center, retail businesses, a housing complex and a 45-story hotel,[11] supported by at least $150 million in public subsidies as well as the use of eminent domain.[12] In an effort to get the project approved before the mayor and several city council members who supported the project reached the end of their term-limited administration, the developers reached out to the

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[6] *See, e.g.*, Columbia University CBA negotiations, discussed *infra* Part I(C)(1).

[7] *See, e.g.*, Atlantic Yards CBA, *infra* note 52 (Mayor Michael Bloomberg signing as "witness"); *see also* New York Yankees CBA, *infra* note 111 (Bronx Borough President Adolfo Carrion and three City Council members signing as "witnesses").

[8] *See, e.g.*, Staples CBA, discussed *infra* Part I(B).

[9] Negotiations in 1998 regarding the Hollywood and Highland Center (which hosts the annual Academy Awards in its Kodak Theater) also might qualify as a CBA, However, because those negotiations involved a City Council member, the agreement may be more appropriately characterized as an exaction. *See* Patricia Salkin, Understanding Community Benefit Agreements: Opportunies and Traps for Developers, Municipalities and Community Organizations *in* LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 1407, 1412 (ALI-ABA 2007). In any event, the Staples agreement is widely considered to be the first CBA. *See* Patricia Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice And Other Considerations For Developers, Municipalities And Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 301 n..26 (2008).

[10] Lee Romney, *Community, Developers Agree on Staples Plan: The Proposed Entertainment and Sports District Could Become a Model for Urban Partnerships*, L.A. TIMES, May 31, 2001, at A1.

[11] *Id*.

[12] Gross, *supra* note 1, at 14.

L.A. County Federation of Labor, which joined forces with FCCEJ to negotiate the CBA.[13] The City encouraged the negotiations, but did not participate directly.[14]

After just five months of negotiations,[15] FCCEJ agreed to support the rezonings and public subsidies needed for the project, and the developers agreed to:

- fund an assessment of community park and recreation needs, and commit $1 million toward meeting those needs;
- make "reasonable efforts" to maintain 70% of the 5,500 permanent jobs generated by the project as living wage jobs;
- adopt a "first source" hiring program, giving preference to certain target groups, including individuals whose home or place of employment was displaced by the development; low-income individuals living within three miles of the development; and low-income individuals from the poorest census tracts throughout the city;
- construct 100 to 160 affordable housing units, representing approximately 20% of the total number of units created by the project;
- provide $650,000 in interest-free loans to non-profit housing developers for the creation of additional affordable housing;
- provide funding of up to $25,000 per year for five years toward the cost of implementing a residential permit parking program in the neighborhoods surrounding the development;
- establish an Advisory Committee to monitor the implementation of the agreement and to enforce its terms.[16]

The City of Los Angeles and the Los Angeles Community Redevelopment Agency both approved the CBA, and the agreement was integrated into a development agreement between the developer and the Redevelopment Agency, making it enforceable by both the City and the community groups.[17]

In addition to being the first major CBA, the Staples expansion agreement is significant for several reasons. First, only two years earlier, a less well-organized collection of the same community groups had been unable to win many of the concessions they sought from the same developers in connection with the original Staples Center stadium development.[18] The developers did promise living wages and union hiring for some of the jobs created by the development, but controversy ensued about whether the developer tried to back out of those promises.[19] The experience with the Staples expansion CBA therefore may have convinced CBA proponents that better

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[13] Ho, *supra* note 3, at 20–21.
[14] *Id*. at 21.
[15] *Id*.
[16] LA SPORTS AND ENTERTAINMENT DISTRICT AGREEMENT, COMMUNITY BENEFITS PROGRAM, 2–11, *available at* http://www.saje.net/atf/cf/%7B493B2790-DD4E-4ED0-8F4E-C78E8F3A7561%7D/communitybenefits.pdf.
[17] Greg LeRoy &, Anna Purinton, NEIGHBORHOOD FUNDERS GROUP, COMMUNITY BENEFITS AGREEMENTS: ENSURING THAT URBAN REDEVELOPMENT BENEFITS EVERYONE 8 (2005), *available at* www.nfg.org/publications/community_benefits_agreements.pdf.
[18] Romney, *supra* note 10.
[19] Ho, *supra* note 3, at 20.

organization results in increased leverage. Second, because the Staples agreement has a longer history than any other major CBA, the parties' performance under the agreement has been fairly well documented.[20] According to one FCCEJ organizer, the developers have implemented the CBA "to the letter and beyond."[21] To date, the developers have delivered many of the promised benefits: the residential parking program is in operation; local residents voted to allocate the parks funding to a community recreation center and improvements to an existing park; and seed money for zero-interest loans has been disbursed to two non-profit affordable housing developers for the development of approximately sixty units.[22] Third, the perceived success of the Staples expansion agreement led to subsequent CBAs in Los Angeles, including the SunQuest Industrial Park CBA,[23] NoHo Commons CBA,[24] Marlton Square CBA,[25] and the CBA for the Los Angeles International Airport's $11 billion modernization plan.[26] The economic downturn makes it difficult to assess whether CBAs have or will become a permanent fixture in LA's urban development process, but at the very least, they regularly are on the agenda in public discussions about major projects involving public subsidies.[27]

CBAs quickly spread across California[28] Elsewhere in the country, community groups in Atlanta,[29] Chicago,[30] Denver,[31] Milwaukee,[32] Minneapolis/St. Paul,[33]

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[20] *See, e.g.*, LeRoy & Purinton, *supra* note 17, at 6–9.
[21] Gross, *supra* note 1, at 29.
[22] *Id.* at 30.
[23] SUNQUEST INDUSTRIAL PARK PROJECT COMMUNITY BENEFITS PLAN, *available at* http://www.communitybenefits.org/downloads/Sunquest%20Industrial%20Park%20Project.pdf.
[24] NORTH HOLLYWOOD MIXED-USE REDEVELOPMENT PROJECT COMMUNITY BENEFITS PROGRAM, *available at* http://amy.m.lavine.googlepages.com/NoHo20CBA.pdf.
[25] MARLTON SQUARE REDEVELOPMENT PROJECT DEVELOPER COMMUNITY BENEFITS PROGRAM, *available at* http://www.communitybenefits.org/downloads/cba_marltonsquare.pdf.
[26] LAX MASTER PLAN PROGRAM COMMUNITY BENEFITS AGREEMENT, *available at* http://communitybenefits.org/downloads/LAX%20Community%20Benefits%20Agreement.pdf. For discussions of the LAX CBA, see Salkin, *supra* note 9, at 1412; Salkin & Lavine, *supra* note 9, at 304– 06.
[27] Gross, *supra* note 1, at 32.
[28] In San Diego, for example, 27 housing, labor, community, environmental, and religious groups formed ACCORD (A Community Coalition for Responsible Development) and entered into a CBA in 2005 with the developer of the new stadium for the San Diego Padres, PETCO Park. BALLPARK VILLAGE PROJECT COMMUNITY BENEFITS AGREEMENT, *available at* http://www.onlinecpi.org/downloads/BPV%20CBA%20text.pdf; *see also* Salkin, *supra* note 9, at 1412. A coalition entered into a CBA for the CIM project in San Jose in 2003. The Partnership for Working Families: CIM Project CBA, http://www.communitybenefits.org/article.php?id=1476.
[29] Amy Lavine, *Atlanta Beltline community benefits*, CMTY. BENEFITS AGREEMENT BLOG, May 19, 2008, http://communitybenefits.blogspot.com/2008/05/atlanta-beltline-community-benefits.html.
[30] A CBA was negotiated in Chicago, contingent on the city being selected as the host for the 2016 Olympic Games. The Chicago negotiations were nullified when Rio de Janeiro was chosen to host the Olympics. *See* Amy Lavine, *Community Benefits for the maybe-Chicago Olympics*, CMTY. BENEFITS AGREEMENT BLOG, Mar. 26, 2009, http://communitybenefits.blogspot.com/2009/03/community-benefits-for-maybe-2016.html; Amy Lavine, *Chicago Lost its Olympic Bid… so there won't be a Chicago Olympics CBA*, CMTY. BENEFITS AGREEMENT BLOG, Oct. 2, 2009, http://communitybenefits.blogspot.com/2009/10/chicago-lost-its-olympic-bid-so-there.html.
[31] *See* Ho, *supra* note 3, at 21–23.
[32] *See* Ann K. Pikus , *Wanted: Affordable Housing in Wisconsin*, 2007 WIS. L. REV. 201, 217-18; *see also* Brenda Parker, THIS LAND IS OUR LAND: THE BATTLE FOR A COMMUNITY BENEFITS AGREEMENT IN MILWAUKEE 1 (2005), *available at* http:// www.laborstudies.wayne.edu/power/downloads/Parkeast.pdf.
[33] *See* Ho, *supra* note 3, at 23–24.

Miami,[34] New Haven,[35] New Orleans,[36] Seattle,[37] and Washington D.C.[38] also have begun to negotiate CBAs.[39] Most are tied to real estate development, and the community groups' ability to insist on a CBA is based on their power to slow down or block required land use approvals. Some CBAs, however, are tied instead to subsidies, franchises or contracts that the industry party wants to win from the government, so the community groups' leverage lies in their influence over those processes.[40]

C. CBAs in New York City:

As detailed in Section I(D) below, New York City has used a variety of agreements over the years to mitigate the impacts of land use decisions arising out of rezoning actions, discretionary variance approvals and decisions to provide tax incentives or subsidies to developers. Controversy over Donald Trump's Riverside South project in the early 1990s, for example, resulted in the developer's promise to the City to provide various mitigations to impacts identified in the land use process. Those mitigations were set forth in a restrictive declaration, and included commitments to provide affordable housing and open space and to pay $10 million towards improvements to two subway stations[41]

While CBAs certainly have much in common with agreements the City has reached with developers in the past, which were primarily reflected in restrictive declarations (see Part II, below), CBAs typically (but not always) are private agreements not directly involving elected officials or government agencies. The private agreement most often cited as the "first" CBA in New York involved Forest City Ratner's proposed Atlantic Yards development. There are at least four current developments that involved

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[34] Oscar Pedro Musibay, *Miami commissioners OK museum leases at Bicentennial Park*, S. FLA. BUS. J., Dec. 19, 2008.

[35] Amy Lavine, *Yale-New Haven CBA*, CMTY. BENEFITS AGREEMENT BLOG, Jan. 30, 2008, http://communitybenefits.blogspot.com/2008/01/yale-new-haven-cba.html.

[36] Jaime Guillet, *Historic Lincoln Beach needs city OK for new era*, NEW ORLEANS CITY BUS., Jan. 15, 2008.

[37] A CBA was successfully negotiated in Seattle, but the development project was canceled due to deteriorating economic conditions. *See* Stuart Eskenazi, *Coalition talks reach deal on Goodwill site*, SEATTLE TIMES, Sept. 2, 2008; Emily Heffter, *$300M project at Seattle Goodwill site cancelled*, SEATTLE TIMES, Apr. 24, 2009.

[38] Amy Lavine, *Washington D.C. Shaw District CBA*, CMTY. BENEFITS AGREEMENT BLOG, Jan. 30, 2008, http://communitybenefits.blogspot.com/2008/01/washington-dc-shaw-district-cba.html.

[39] The best source of information about CBAs currently in force or being negotiated is the excellent blog maintained by Amy Lavine, a staff attorney at the Government Law Center of Albany Law School, http://communitybenefits.blogspot.com/.

[40] For example, in Minneapolis, the winner of the bid to develop a city-wide wireless Internet service negotiated a CBA with the Digital Inclusion Coalition that commits the developer to contribute to a Digital Inclusion Fund to promote affordable Internet access, low-cost hardware, local content and training. DIGITAL INCLUSION COALITION, RECOMMENDATIONS FOR THE WIRELESS MINNEAPOLIS COMMUNITY BENEFITS AGREEMENT (2006), *available at* http://www.digitalaccess.org/pdf/CBA_Two-Sided_6-27.pdf.

[41] For a history of the Riverside South negotiations, see Coalition Against Lincoln West v. City of New York, 86 N.Y.2d 123 (1995). For continued controversy over the import of the negotiations between the developer and community groups, see also Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61 (N.Y. App. Div., 2008); Julia Vitullo-Martin, *The West Side Rethinks Donald Trump's Riverside South*, MANHATTAN INST. CTR. FOR RETHINKING DEV. NEWSLETTER, Jan. 2004, *available at* http://www.manhattan-institute.org/email/crd_newsletter01-04.html.

CBAs.[42] Several others have involved negotiations or agreements that had some of the characteristics of CBAs.

1. CBAs currently in force:

Atlantic Yards:

In December, 2003, Forest City Ratner (FCR) announced plans to construct a 19,000-seat arena for the NBA's New Jersey Nets, along with housing, office and retail space, a hotel, and a parking garage, in Atlantic Yards in downtown Brooklyn. The 22-acre development would occupy the space that had been used as open-air rail yards for the Long Island Rail Road, controlled by the Metropolitan Transit Authority (MTA). The proposed project would be the largest development in the City outside of Manhattan in a quarter century.[43]

Not surprisingly for a development of such size, the FCR proposal generated immediate skepticism and controversy. FCR embarked on a campaign to win support for the project, and as part of that campaign, raised the idea of a community benefit agreement. In July 2004, FCR convened a meeting of community groups, including the New York chapter of the Association of Community Organizations for Reform Now (ACORN), Brooklyn United for Innovative Local Development (BUILD), the Downtown Brooklyn Oversight and Advisory Committee (DBOAC), as well as members of Community Boards 2, 6 and 8.[44] Those groups began meeting regularly with FCR.[45] Other groups that had come out against the arena, such as Develop Don't Destroy Brooklyn and Prospect Heights Action Coalition, did not participate in the discussions,[46] although there is disagreement about whether they were excluded, or refused to participate. As community activists learned about the negotiations underway, considerable controversy over the process erupted.[47]

While negotiations over the CBA were proceeding, FCR also was negotiating with the City and State about the governmental processes that would be used to review the proposal. New York State's Urban Development Corporation (UDC) Law[48] gives the Empire State Development Corporation (ESDC) the power to override local zoning and

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[42] Some CBA proponents have disavowed the New York City CBAs, arguing that both those agreements and the processes that produced them are problematic. For a critique of the New York City CBAs, see Julian Gross, *Community Benefits Agreements: Definitions, Value, ,and Legal Enforceability*, 17 J. AFFORDABLE HOUS., & CMTY. DEV. L. 35 (2007/2008).

[43] Charles V. Bagli, *Deal is Signed for Nets Arena in Brooklyn*, N.Y. TIMES, Mar. 4, 2005, at A1.

[44] Members of the community boards who negotiated with FCR were criticized for taking part in these negotiations by their colleagues for granting FCR's negotiations an appearance of greater legitimacy. *See* Hugh Son, *Owner Neglecting Nets, Say Critics*, N.Y. DAILY NEWS, Nov. 29, 2004, at 1.

[45] Pratt Inst. Ctr. for Cmty. & Econ. Dev., SLAM DUNK OR AIRBALL? A PRELIMINARY PLANNING ANALYSIS OF THE BROOKLYN ATLANTIC YARDS PROJECT 14 (2005), *available at* http://dddb.net/documents/whitepapers/PICCED/bay-report.pdf.

[46] *Id.* at 16.

[47] *Id.* at 54. *See also* Nicholas Confessore, *To Build Arena in Brooklyn, Developer First Builds Bridges*, N.Y. TIMES, Oct. 14, 2005 at A1; Norman Oder, *CBs say Ratner "Overstates our Participation" in Community Benefits Agreement*, May 4, 2006, ATL. YARDS REP., *available at* http://atlanticyardsreport.blogspot.com/2006/05/cbs-say-ratner-overstates-our.html .

[48] N.Y. UNCONSOL. LAW § 6266 (McKinney 2008).

other laws and processes under certain circumstances.[49] On March 3, 2005, the City and the ESDC signed a Memorandum of Understanding (MOU) with FCR that recognized the ESDC's power to override the City's Uniform Land Use Review Procedure (ULURP).[50] The effect of the ESDC's assertion of jurisdiction was to eliminate the legal role that Community Board 6, the Brooklyn Borough President, the City Planning Commission (CPC) and the City Council otherwise would have had in deliberations over the project. Under the City's usual ULURP procedures, the community board would hold a hearing on the project, then would recommend approval or disapproval of the project to the Borough President, who in turn, could hold a hearing on the project before recommending approval or disapproval to the CPC. The CPC would be required to hold a hearing. If the CPC approved the project, the City Council would then hold a hearing before voting on the project. [51]

Although the ESDC's authority over the development foreclosed any official role for the community boards, and obviated the requirement for public hearings by the community boards in the review of the proposal, FCR continued to negotiate the community benefit agreement. On June 27, 2005, with Mayor Bloomberg as an official "witness," Bruce Ratner and eight community-based organizations signed the CBA.[52]

The benefits promised by the CBA are divided into eight categories, corresponding with the missions of the eight signatories. First, the CBA addresses workforce and labor issues, with the developer promising to "use good faith efforts to meet the overall goal during construction of the arena and the Project of employing, or causing to be employed, not less than 35% Minority and 10% women construction workers . . ."[53] To meet that goal, the CBA described, in broad terms, initiatives regarding job training, referral, and hiring, but was vague about funding for the initiatives.[54]

Second, the CBA addresses contracting practices: "Developers will seek to award not less than twenty (20%) percent of the total construction contract dollars of each Development Phase to qualified Minority owned firms and not less than ten (10%) percent of the total construction contract dollars for each Development Phase to qualified women owned firms."[55] In addition, the CBA commits the developer to "seek to initially

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[49] *See* Floyd v. N.Y. State Urban Dev. Corp., 300 N.E.2d 704 (N.Y. 1973).

[50] See Press Release, State of N.Y. Executive Chamber, Governor Pataki And Mayor Bloomberg Announce Memorandum Of Understanding For Atlantic Yards Project In Brooklyn (Mar. 4, 2005), *available at* http://www.nylovesbiz.com/press/press_display.asp?id=556.

[51] For a full description of the process that would normally apply, see RULES OF THE CITY OF NEW YORK, tit. 62, § 2; The Uniform Land Use Review Procedure (ULURP), N.Y.C. DEP'T CITY PLAN., http://www.nyc.gov/html/dcp/html/lucproc/ulrpo.shtml.

[52] ATLANTIC YARDS COMMUNITY BENEFIT AGREEMENT, *available at* http://www.buildbrooklyn.org/pr/cba.pdf. The following eight community-based organizations signed the Atlantic Yards CBA: All-Faith Council of Brooklyn (AFCB); Association of Community Organizations for Reform Now (ACORN); Brooklyn United for Innovative Local Development (BUILD); Downtown Brooklyn Neighborhood Alliance (DBNA); Downtown Brooklyn Educational Consortium (DBEC); First Atlantic Terminal Housing Committee (FATHC); New York State Association of Minority Contractors (NYSAMC); and Public Housing Communities (PHC).

[53] *Id*. at 13.

[54] For example, as to the job training initiatives, "[t]he Developers and BUILD will seek and secure adequate public and/or private funding for this initiative." *Id*. at 14.

[55] *Id.* at 14.

lease not less than fifteen (15%) percent of the gross retail leasing space . . . to qualified community based businesses . . ..”[56]

Third, FCR promises to “make 50% of the residential units built at the Project affordable to low- and moderate-income families . . .” pursuant to a separate Memorandum of Understanding with ACORN.[57] That MOU specifies that the parties will work together “to secure necessary modifications to existing affordable housing programs,” of various government agencies, to allow FCR to develop the affordable housing.[58] The MOU lays out three scenarios that specify different mixes of housing aimed at various income groups.[59] If it turns out that it is not possible to provide affordable housing under the lowest income target mix scenario once further information is available about the costs of developing the affordable housing, the government subsidies available for that development, and the profits realized from the sale of market rate units, the CBA specifies that the parties will step down to higher income mixes.[60] Neither the CBA nor the MOU specifies what level of government subsidies are necessary to trigger the developer’s commitment, or what would happen if the “necessary modifications” to allow the units to qualify for affordable housing subsidies are not secured.

Fourth, the CBA turns to amenities to be provided to the neighboring community. “The Project Developer seek[s] to create a vibrant community . . . by providing needed community benefits which will include, but not be limited to . . . a community health center, a senior citizens center, parks and open spaces and Arena related programs.”[61] The developer commits to provide approximately six acres of “open space” in the project, including walkways, lawns, fountains, plazas, terraces that will be open to the public without charge.[62] In addition, the developer “will designate one (1) box and four (4) seats within the lower bowl, and fifty (50) seats in the upper bowl, for community use with priority given to seniors and youths throughout the year.”[63] The developer will make the Arena available “at a reasonable” rate to community groups at least 10 times per year,[64] provide a “meditation room” inside the Arena for community use,[65] and establish a foundation “to fund sports programs in disadvantaged communities . . . support non-profit community organizations, and to help fund . . . special initiatives to work with the prison population . . ..”[66]

The fifth section of the CBA commits the developer to mitigate various environmental harms caused by the development. The developer is required to “establish a Committee on Environmental Assurance to address short and long term environmental issues” and report periodically to the Coalition on mitigation measures.[67]

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[56] *Id.* at 19.
[57] *Id.* at 22; MEMORANDUM OF UNDERSTANDING BETWEEN ATLANTIC YARDS DEVELOPMENT COMPANY, LLC AND ACORN (ACORN MOU), *available at* http://www.nolandgrab.org/docs/HousingMOU.pdf.
[58] MEMORANDUM OF UNDERSTANDING, *supra* note 57, at 1.
[59] *Id.* at 4–5.
[60] ATLANTIC YARDS COMMUNITY BENEFITS AGREEMENT, *supra* note 52, at 23.
[61] *Id.* at 26.
[62] *Id.* at 30.
[63] *Id.* at 31.
[64] *Id.* at 31.
[65] *Id.* at 31.
[66] *Id.* at 33.
[67] *Id.* at 34.

The sixth section of the CBA establishes a "Good Neighbor Program" aimed at providing benefits for public housing residents by funding capital improvements for libraries, recreational facilities, music rooms, developing community programming, and creating school scholarship and mentorship programs. As part of the Good Neighbor Program, the developer also will sponsor job fairs and establish a job readiness and referral center.[68]

Seventh, the CBA sets forth several educational initiatives. The developer will work with community organizations to improve educational services, "including the development of four (4) schools that will be located in the Surrounding Community."[69] Additionally, the developer will create a children's health initiative, a "Youth Enterprise Program" aimed at "developing retail space to be operated in part by students," an after school program "to unite non-custodial fathers with their children," and a program to find job placements for "hard to employ youths."[70]

Finally, the CBA requires the developer to fund the appointment of an "independent compliance monitor" to oversee the implementation of the agreement and investigate any complaints about its implementation.[71]

The Empire State Development Corporation approved the project in August, 2006,[72] and on December 20, 2006, the Public Authorities Control Board (PACB) — consisting of Governor George Pataki, House State Assembly Speaker Sheldon Silver, and Senate Majority Leader Joseph Bruno — voted unanimously to approve the Atlantic Yards project. The project's ground-breaking occurred in early 2007,[73] with many minority-owned firms being hired for the development, pursuant to the CBA.[74] As a result of the economic downturn of 2008, however, Forest City Ratner announced plans to delay construction of the residential buildings at Atlantic Yards, prompting fears that they, and the affordable housing units they were to contain, will never be built.[75]

Signatories to the Atlantic Yards CBA laud it as a great achievement. According to Bertha Lewis, Executive Director of the New York ACORN:[76] "This agreement is about the fundamentals of life: a decent job, a place to live and a neighborhood that is inviting to people of all backgrounds and classes."[77] Opponents of the Atlantic Yards CBA, however, decry the CBA as a tool FCR used to divide opponents, co-opt local politicians and community leaders, and manufacture the appearance that there is more support for the project than actually exists.[78] The claims of both supporters and opponents are discussed more fully in Part III.

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[68] *Id.* at 35–36.
[69] *Id.* at 38.
[70] *Id.* at 39.
[71] *Id.* at 9–10, 40.
[72] Chris Smith, *Mr. Ratner's Neighborhood: Manipulative Developers, Shrill Protesters, and a Sixteen-Tower Glass-and-Steel Monster Marching Inexorably Forward*, N.Y, MAG., Aug. 14, 2006, at 24.
[73] Rich Calder, *B'klyn Arena Tip-Off – Breaks Ground Today*, N.Y. POST, Feb. 20, 2007, at 21.
[74] Rich Calder, *Ratner Readies Wrecking Ball*, N.Y. POST, Mar. 2, 2007, at 4.
[75] Michael Daly, *Vows Fade, So Do Housing Hopes*, N.Y. DAILY NEWS, Mar. 23, 2008, at 15.
[76] Ms. Lewis agreed to support Atlantic Yards in the MOU, *supra* note 57.
[77] *See* Press Release, N.Y.C. Dep't of Hous., Pres. & Dev., Mayor Michael R. Bloomberg, Bruce Ratner and Civic Leaders Sign Community Benefits Agreement (June 27, 2005), *available at* http://nyc.gov/html/hpd/html/pr2005/mayors-release248-05-pr.shtml.
[78] *See, e.g.*, Ho, *supra* note 3, at 24–25; Salkin & Lavine, *supra* n. 9, at 313–14.

Harlem Park:

In September of 2004, the City Council approved a rezoning for the development of "Harlem Park," a massive complex containing office space, residences, and a Marriott Hotel as principal corporate tenant. The hotel was to have been the first built in Harlem since Hotel Teresa closed its doors in 1966, and at a height of 550 feet, "Harlem Park" would become be the tallest building in upper Manhattan.[79]

Before obtaining zoning approval, developer Michael Caridi signed an agreement with Community Board 11 giving Harlem residents "first shot at an estimated 948 hotel and 1,482 construction jobs."[80] The CBA set goals at 50% minority employment in hourly positions, and 35% employment for both women and minorities in management. The hotel also agreed to award 25% of its contracts to minority and women owned firms and to attempt to employ local residents in at least one of every four jobs.[81] Although ground was broken on construction of the hotel amidst great fanfare in February, 2005, development stalled the following year.[82] After the Marriott development fell through, Vornado Realty announced plans to build an office building on the site,[83] which would house the headquarters of Major League Baseball.[84] In attempting to secure a rezoning of the property in order to allow for the office building, Vornado reached an agreement with Community Board 11 in Harlem that Vornado would provide funding for maintenance and capital improvements to Harlem parks, streetscape improvements, and a community hiring program, in addition to agreeing to hiring targets for local community members.[85] Vornado cancelled its plan to construct in office building in December 2008, however, citing the deteriorating economy.[86]

The Gateway Center at the Bronx Terminal Market:

In February 2006, the City Council approved the redevelopment of the Bronx Terminal Market into the Gateway Center, a retail complex projected to cost $495 million to develop.[87] Staunch resistance to the proposal from unions and other critics led then Bronx Borough President Adolfo Carrión and the City Council's Bronx Delegation to create a CBA "Task Force - Coalition" consisting of community development corporations and other local stakeholders.[88]

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[79] Mark Berkey-Gerard, *Hotels in New York*, GOTHAM GAZETTE, Feb. 21, 2005, http://www.gothamgazette.com/article/20050221/200/1329.

[80] Bennett Baumer, *Sidebar: How Marriot Made Harlem Happy*, *CITY LIMITS*, May/June 2005, http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3183.

[81] Jamal Watson, *Future of Harlem Marriott Appears to be in the Past*, N.Y. SUN, Feb. 15, 2006, at 2.

[82] *Id.*

[83] Jenna M. McKnight, *Harlem Gets an Office Tower*, BUS. WEEK, July 18, 2007, *available at* http://www.businessweek.com/innovate/content/jul2007/id20070718_420102.htm.

[84] Kirsten Danis, *Baseball HQ is a Tall Order*, N.Y. DAILY NEWS, Mar. 8, 2008, at 11.

[85] Eliot Brown, *In Gaining Approval for Harlem Tower, Vornado Gave Concessions*, N.Y. OBSERVER, Mar. 12, 2008, http://www.observer.com/2008/gaining-approval-harlem-tower-vornado-gave-concessions.

[86] Eliot Brown, *Vornado Exec: 125th Street MLB Project 'Shut Down'*, N.Y. OBSERVER, Dec. 10, 2008, http://www.observer.com/2008/real-estate/vornado-exec-125th-street-mlb-project-shut-down#.

[87] For early reviews of the project, see Tom Angotti, *Bronx Terminal Market and the Subverting of the Land Use Review Process*, GOTHAM GAZETTE, Dec. 13, 2005, http://www.gothamgazette.com/article/landuse/20051213/12/1680; Charles V. Bagli & Robin Shulman, *Transforming Bronx Terminal Market, But at a Steep Price*, N.Y. TIMES, Oct. 24, 2005, at B1.

[88] Press Release, Office of the Mayor of N.Y., Mayor Michael R. Bloomberg Applauds City Council on Approving Gateway Center at Bronx Terminal Market (Feb. 1, 2006) *available at*

The CBA, which was finalized just before the City Council vote on the proposed rezoning,[89] commits the developer, the Related Companies, to spend $3 million to fund job training and referral efforts to help Bronx residents secure jobs in the construction of the development, as well as in the enterprises of tenants of the development.[90] The developer also promised to help promote living wage jobs within the development.[91] The CBA requires the developer to reserve space that local small businesses could rent in the development, and prohibits the developer from renting space to Walmart or its subsidiaries.[92] The developer agreed to build the market according to standards that would make the building eligible for LEED Silver certification.[93] The developer promised to require any warehouse club to which it rented space to accept food stamps and Women, Infants, and Children vouchers.[94] The developer accepted various design and lighting suggestions made by the community groups,[95] agreed to provide space, at below-market rent, for a child care facility, and committed to provide space for a community board office.[96] Finally, the CBA requires the developer to establish a $75,000 fund that the community can use for legal fees to enforce the agreement.[97]

At the time, Mayor Bloomberg praised the CBA for the Gateway Center as a "sweeping [agreement] that will go a long way toward meeting the community's needs."[98] Some members of the Task Force, however, have complained that the Task Force was given no legal assistance or guidance and too little time to be effective, and that final negotiations were conducted by the Borough President and the Bronx City Council delegation, not by the members of the Task Force.[99] Only three members -- Hostos Community College, the New Bronx Chamber of Commerce and Mount Hope Housing Company – signed the agreement. Reportedly, at least seven other members of the Task Force refused to sign because of concern about both the negotiating process and the substance of the agreement.[100]

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http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2006a%2Fpr036-06.html&cc=unused1978&rc=1194&ndi=1.

[89] Albor Ruiz, *Deal Eases Nabe Fears on BX. Mall*, N.Y. DAILY NEWS, Feb. 2, 2006, at 5.

[90] GATEWAY CENTER AT BRONX TERMINAL MARKET COMMUNITY BENEFITS AGREEMENT, *available at* http://www.bronxgateway.com/documents/copy_of_community_benefits_agreement/Signed_CBA_2_1_06.pdf.

[91] *Id*. at 29–30.

[92] *Id*. at 34–35.

[93] *Id*. at 31.

[94] *Id*. at 34.

[95] *Id*. at 30–33.

[96] *Id*. at 35–36.

[97] *Id*. at 9.

[98] Press Release, *supra* note 88.

[99] Heather Haddon, *Terminal Market Deal Criticized*, NORWOOD NEWS, Feb. 23, 2006, *available at* http://www.bronxmall.com/norwoodnews/past/022306/news/N60223page1.html. *See also* Amy Lavine, *Tthe Gateway Center at Bronx Terminal Market CBA*, CMTY. BENEFITS AGREEMENT BLOG, Aug. 14, 2009, http://communitybenefits.blogspot.com/2009/08/gateway-center-at-bronx-terminal-market.html.

[100] *Id*. *See also* Patrick Arden, *Community Groups Say They Were Left Out of Market Benefit Pact*, METRO N.Y., Feb. 7, 2006; Neighborhood Retail Alliance, *CBA: Carrion's Benefit Agreement*, Feb. 6, 2006, http://momandpopnyc.blogspot.com/2006/02/cba-carrions-benefit-agreement.html.

The first store at the Gateway Center, a Home Depot, opened in April, 2009, at which point over 90 percent of the retail space had been leased.[101] The official opening occurred in September, 2009. Several aspects of the CBA already have been implemented, such as a lottery to provide discounted membership at the Gateway Center's BJ's Wholesale Club to community members,[102] and the first installments of funding for the Bronx Community College's PROJECT H.I.R.E., a program designed to provide both job training and job-search training.[103] There has been some controversy, however, surrounding alleged mishandling of funds provided to the Bronx Overall Economic Development Corporation, pursuant to the CBA.[104]

Yankee Stadium:

In 2004, the New York Yankees proposed to construct a new stadium across the street from their current stadium.[105] A community group called "Save Our Parks" formed in opposition to the plan, largely on the grounds that construction would require paving large sections of Macombs Dam Park and Mullaly Park and razing hundreds of oak trees. In addition, critics feared that the stadium would cause increased traffic and pollution in surrounding neighborhoods.[106] Groups like Good Jobs New York also voiced opposition to the public subsidies that would be used for the proposed stadium.[107]

On November 22, 2005, the local community board, CB4, voted to recommend that the proposal be rejected.[108] Then-Bronx Borough President Adolfo Carrión nevertheless recommended that the plan be approved,[109] and on February 22, 2006, the City Planning Commission unanimously approved the plan, which called for the Yankees to fund most of the construction costs and the City to pay for infrastructure improvements.[110]

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[101] Press Release, of the Mayor of N.Y., Mayor Bloomberg Joins the Home Depot and Related Companies to Open First Store in $500 Million Gateway Center at Bronx Terminal Market and Welcome First 200 Employees (Apr. 23, 2009), *available at* http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2009a%2Fpr181-09.html&cc=unused1978&rc=1194&ndi=1.

[102] Mike Jaccarino, *BJ's Comes Through on Cards Deal*, N.Y. DAILY NEWS, Aug. 7, 2009, at 55.

[103] Press Release, Bronx Community College, BCC PROJECT H.I.R.E. Receives $175,000 for Gateway Mall Building Trades Program (May 21, 2007), *available at* http://www1.cuny.edu/forum/?p=1465.

[104] *See* Bill Egbert, *BX. Boro Prez Seeks Probe of Mall Funds*, N.Y. DAILY NEWS, July 15, 2009, at 47; Bill Egbert, *Gateway to Missing Funds: Borough Prez OK's Mall's Benefits-Agreement Report Despite $1.6M Shortfall*, N.Y. DAILY NEWS, Sept. 1, 2009, *available at* http://www.nydailynews.com/ny_local/bronx/2009/09/01/2009-09-01_gateway_to_missing_funds_borough_prez_oks_malls_benefitsagreement_report_despite.html.

[105] Mike Lupica, *Yankees Finally See Light on New Stadium*, N.Y. DAILY NEWS, Aug. 1, 2004, at 66.

[106] *See, e.g.*, Save Our Parks, *Arguments Against the Expansion of Yankee Stadium*, Aug. 30, 2006, http://saveourparks.blogspot.com/2006/08/arguments-against-expansion-of-yankee.html.

[107] *See Bettina* DAMIANI & DAN STEINBERG, GOOD JOBS N.Y., LOOT, LOOT, LOOT FOR THE HOME TEAM: HOW THE PROPOSAL TO SUBSIDIZE A NEW YANKEE STADIUM WOULD LEAVE RESIDENTS AND TAXPAYERS BEHIND (2006), *available at* http://www.goodjobsny.org/lootfinal3.pdf.

[108] Bill Sanderson, *BX. Board Sends Stadium Plan to Showers*, N.Y. POST, Nov. 23, 2005, at 8.

[109] Bill Sandserson, *No Stoppin' Stadium*, N.Y. POST, Nov. 24, 2005, at 7.

[110] *NY1: Plan for New Yankee Stadium Clears Major Hurdle*, (NY1 News television broadcast Feb. 22, 2006), *available at* http://www.ny1.com/Default.aspx?SecID=1000&ArID=57280.

In the weeks preceding the final City Council vote on April 5, 2006, the Yankees entered into a CBA with Bronx officials, including Carrión and Council Member Maria Baez.[111] The agreement commits the Yankees to contribute $800,000 each year for 40 years to underwrite programs for Bronx community groups.[112] In addition, the Yankees agreed to donate $100,000 in equipment and 15,000 tickets every year to needy Bronx groups.[113] The CBA also reserves 25% of stadium construction jobs for Bronx businesses, with 50% of that total reserved for businesses owned by women or minorities.[114]

On April 5, 2006, the City Council authorized construction of the stadium despite continued opposition from parks advocates and some residents in the surrounding community.[115] Ten days later, a Supreme Court judge refused to grant a temporary restraining order that would have blocked construction,[116] and a subsequent federal suit was dismissed in November, 2006.[117] A groundbreaking ceremony was held for the new stadium on August 16, 2006, 11 days after the City Council vote.[118]

In early 2008, the New York Times reported that 17 months after the agreement was concluded, Bronx community groups had not received any funding from the Yankees.[119] Moreover, the "construction advisory committee" provided for in the CBA to monitor compliance with the agreement had not been created.[120] According to the NY Daily News, the Yankees declined to provide specific employment figures to respond to those charges, but maintained that community groups would receive all the money promised under the CBA, including back payments for the first 17 months.[121] Grants to local little league teams were disbursed in April, 2008,[122] while other community groups began to receive funding in July, 2008.[123] In April, 2009, a lawsuit was filed against the Yankee Stadium Benefits Fund, a non-profit created to oversee the distribution of funds

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[111] Participation and Labor Force Mitigation and Community Benefits Program Related to the Construction of the New Yankee Stadium, *available at* http://www.reconstructionwatch.net/Yankees_deal.htm.

[112] David Saltonstall, *50M On Deck for Bronx if Stadium OKd*, N.Y. DAILY NEWS, March 22, 2006, at 19. *See also* Timothy Williams, *Bronx Board is Shuffled After Rejecting New Stadium*, N.Y. TIMES, June 19, 2006, at B1.

[113] Saltonstall, *supra* note 112.

[114] *Id.*

[115] Winnie Hu, *Yankees Win 44-3 and 45-2 as Council Approves Stadium*, N.Y. TIMES, Apr. 6, 2006, at B1.

[116] Bill Hutchinson, *Bx. Parks Group Bats Zero in Fight Against Yankees*, N.Y. DAILY NEWS, Aug. 11, 2006, at 39.

[117] *New Yankee Stadium Lawsuit Dismissed*, FOX NEWS, Nov. 16, 2006, http://origin.foxnews.com/wires/2006Nov16/0,4670,BBANewYankeeStadium,00.html.

[118] *NY1: Groundbreaking Ceremony for New Yankee Stadium Marks Beginning of New Era* (NY1 News television broadcast Aug. 16, 2006), *available at* http://www.ny1.com/Default.aspx?SecID=1000&ArID=61843.

[119] Timothy Williams, *Yankee Stadium is Going Up, but Bronx Still Seeks Benefits*, N.Y. TIMES, Jan. 7, 2008, at B1.

[120] Juan Gonzalez, *Bronx Pols, Yankees Prez in a Smackdown*, N.Y. DAILY NEWS, Feb. 15, 2008, at 34.

[121] *Id.*

[122] Bill Egbert, *Little League reaps a windfall from New Yankee Stadium Foundation*, N.Y. DAILY NEWS, May 6, 2008, *available at* http://www.nydailynews.com/ny_local/bronx/2008/05/06/2008-05-06_little_league_reaps_a_windfall_from_new_.html.

[123] Bill Egbert, *A Leg Up from the Yanks: Fund Created by Team Gives 261G in Grants to 15 Groups*, N.Y. DAILY NEWS, July 30, 2008, at 28.

to community groups, accusing the organization of mismanaging the money, among other charges.[124]

Continued controversy over the CBA has been fueled by dissatisfaction with the pace of opening parks to replace those lost to the stadium[125] and reports that the cost to the City of replacing the lost parks already has expanded to almost twice what was estimated.[126] The new Yankee Stadium opened in March, 2009.[127]

Mets Stadium:

On June 12, 2005, Mayor Bloomberg and team owners announced that the New York Mets planned to build a new stadium on a parking lot at Shea Stadium.[128] The City Council was scheduled to review the Mets' stadium financing plan on April 5, 2006, but Council member Hiram Monserrate, whose district includes Shea, persuaded the Council to delay review of the Mets' plan until the team agreed to provide benefits to the local community. Specifically, Councilman Monserrate, joined by Council members John Liu, Tony Avella and Leroy Comrie (who represent neighboring Flushing, Bayside and St. Albans/Jamaica respectively) urged the Mets owners to sign a CBA that resembled the one forged by the Yankees.[129]

The prospect of community groups seeking a Yankee-like benefits deal from the Mets piqued Mayor Michael R. Bloomberg's anger at the news conference. "Every development project in this city is not just going to be a horn of plenty for everybody that wants to grab something," he said. New development, he said, should not be a rush to "line up to get some ransom."[130] Other critics of a CBA for the Mets pointed to the differences between the Yankee and Mets stadiums. While the Mets are moving from one side of a parking lot to the other, the Yankees are building on 22 acres of established parkland ringed by residential buildings.[131]

The Mets nevertheless set about to address the Council's concerns. Reportedly, they reached agreement with several Queens City Council members, though it is not clear who else from the community at large was involved, and whether a formal agreement was ever drafted or executed. No written summary of the discussions has been made public, but reportedly the Mets agreed to earmark at least 25% of annual future expenditures for public service and charitable programs to Queens-based programs and groups (which apparently would amount to about $500,000 per year based on past expenditures). The Mets reportedly also agreed to ask contractors and subcontractors to

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[124] Fernanda Santos, *Lawyer Who Was Hired by Yankees Sues the Team's Bronx Community Charity*, N.Y. TIMES, Apr. 1, 2009, at A28.

[125] *See, e.g.*, GEOFFREY CROFT & LUKAS HERBERT, NYC PARK ADVOCATES, BROKEN PROMISES: THE CITY'S REPLACEMENT PARK SCHEME FOR THE NEW YANKEE STADIUM (2008), *available at* http://brk.nycparkadvocates.org/BrokenPromises.pdf. *See also* Patrick Arden, *Locals Unsold on Park: Bloomberg's first 'redevelopment park' far from Yankee Stadium*, METRO N.Y., Apr. 21, 2008. *available at* http://saveourparks.blogspot.com/2008/04/locals-unsold-on-park-bloombergs-first.html.

[126] Timothy Williams, *Time and Cost Are Mounting For New Parks*, N.Y. TIMES, May 25, 2008, at A27.

[127] Harvey Araton, *Grand Stage for Yanks, but at a Cost*, N. Y. TIMES, Apr. 2, 2009, at F2.

[128] Richard Sandomir, *A New Ballgame*, N.Y. TIMES, June 13, 2005, at D1.

[129] Patrick Arden, *Queens Councilmen Seek Sweet Deal with the Mets*, METRO N.Y., Apr. 20, 2006, *available at* http://saveourparks.blogspot.com/2006/04/queens-councilmen-seek-sweet-deal-with.html.

[130] Richard Sandomir, *Wilpon is Walking Again Through Ebbets Rotunda*, N.Y. TIMES, April 6, 2006, at D5.

[131] *Id.*

steer 25% of their construction jobs and contracts to Queens residents and firms, and another 25% to minority and female residents and firms citywide[132] On April 26, 2006, the New York City Council approved — by a vote of 48 to 1 — the financing plan that remained the stadium's final obstacle.[133] The stadium opened in the spring of 2009.[134]

Columbia University:

The area of West Harlem just north of Columbia University's existing Morningside Heights campus has been the subject of controversy for over 40 years. Columbia's land use plans over the last few decades have sparked considerable community opposition.[135] Against that backdrop, Manhattan's Community Board 9 (CB9) began in 1991 to prepare a community plan for the area, pursuant to Section 197-a of the City Charter.[136] CB9 presented a draft plan, entitled *Sharing Diversity through Community Action*, to the City Planning Commission in December 1998. The CPC subsequently returned the plan to CB9 for reconsideration.[137]

In 2000, CB9 worked with West Harlem Environmental Action (WE ACT) to draft a community-based plan for the Manhattanville Piers called *Harlem on the River*.[138] In 2002, New York City's Economic Development Corporation (EDC) built on that plan by proposing the *West Harlem Master Plan*, calling for a cohesive plan for the economic development of West Harlem, and recommending such changes as the development of waterfront amenities, transportation improvements, and rezoning to encourage economic development.[139] In early 2003, CB9 approved a resolution supporting many of the waterfront design elements of that Master Plan, and began working again to revise their own 197-a plan to reflect new conditions.[140] Then in early 2004, DCP and EDC began a

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[132] Frank Lombardi, *Mets Deal Amazin' For Boro: Council OKs Stadium Plan Full of Hits*, N.Y. DAILY NEWS, Apr. 27, 2006, at 1.

[133] *NY1: City Council Approves Stadium Financing Plans for Mets, Yankees* (NY1 News television broadcast Apr. 26, 2006), *available at* http://ny1.com/1-all-boroughs-news-content/top_stories/?SecID=1000&ArID=58923.

[134] Joshua Robinson, *First Impressions of Citi Field*, N.Y. TIMES, Mar. 29, 2009, http://bats.blogs.nytimes.com/2009/03/29/first-impressions-of-citi-field/?scp=6&sq=citi%20field%20opening&st=cse.

[135] Sheila Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2008 (2007).

[136] N.Y.C. CHARTER, ch. 8, § 197-a ("Plans for the development, growth, and improvement of the city and of its boroughs and community districts may be proposed by (1) the mayor, (2) the city planning commission, (3) the department of city planning, (4) a borough president with respect to land located within his or her borough, (5) a borough board with respect to land located within its borough, or (6) a community board with respect to land located within its community district. A community board…that proposes any such plan shall submit the plan together with a written recommendation to the city planning commission for determinations pursuant to subdivision b of this section. Any such submission may be made…only after…[holding] a public hearing on the plan.").

[137] COMMUNITY BOARD 9 MANHATTAN 197-A PLAN: HAMILTON HEIGHTS, MANHATTANVILLE, MORNINGSIDE HEIGHTS 5 (2007), *available at* http://legacy.prattcenter.net/pubs/CB9/CB9M_Final_24-Sep-07.pdf [hereinafter CB9 197-a Plan].

[138] *Id*. at 6.

[139] N.Y.C. DEP'T CITY PLAN., MANHATTANVILLE: FINAL ENVIRONMENTAL IMPACT STATEMENT EXECUTIVE SUMMARY S-7, *available at* http://www.nyc.gov/html/dcp/pdf/env_review/manhattanville/00.pdf.

[140] CB9 197-a Plan, *supra* note 137, at 6.

125th Street "River-to-River" study, and the Department of Transportation initiated a Harlem/Morningside Heights Transportation Study.[141]

As CB9 worked with the Pratt Institute Center for Community and Economic Development to update and refine its 197-a plan,[142] Columbia University began purchasing properties in the area,[143] and hired the Renzo Piano Building Workshop and Skidmore Owings and Merrill to design an extension of Columbia's Morningside Heights campus.[144] In 2003, Columbia announced its plans in broad form, established a 40-member "community advisory council" and began sponsoring town hall meetings to solicit comments about its plans to expand.[145] In April, 2004, it shared its preliminary designs with CB9,[146] and on several occasions announced its openness to negotiating a CBA.[147] Columbia repeatedly expressed a willingness to "go to great lengths"--short of not expanding--to avoid conflicts with the community.[148] Columbia appointed Maxine Griffith as Executive Vice President for Government and Community Affairs. Griffith previously had served on the City Planning Commission under Mayor Dinkins and had worked extensively in Harlem as a senior fellow for the Regional Plan Association.[149]

In August, 2004, the community advisory council issued a report calling for Columbia to enter into a CBA guaranteeing affordable housing, open space, environmental sensitivity, and local hiring.[150] The community advisory council then disbanded, and despite Columbia's statement that it was prepared to negotiate, and the advisory council's call for a CBA, negotiations did not begin. Some attribute the inaction to disarray by the various stakeholders in the community:

> The impacted communities, their organizations, and their leaders were fragmented across lines of race, nationality, class, geography, personal and

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[141] *Id.* at 7.

[142] *See* The Campaign for Community Based Planning, Community-Based Plan of the Month: Sharing Diversity Through Community Action – Manhattan CB9 197-a Plan (Apr. 29, 2009), *available at* http://communitybasedplanning.wordpress.com/2009/04/29/community-based-plan-of-the-month-sharing-diversity-through-community-action-manhattan-cb9-197-a-plan/.

[143] Denny Lee, *On the Heights, A Chill Wind Begins to Blow*, N.Y. TIMES, Sept. 14, 2003, at 14.1; Charles V. Bagli, *Columbia, in a Growth Spurt, Is Buying a Swath of Harlem*, N.Y. TIMES, July 20, 2003, at A1.

[144] Karen W. Arenson, *Columbia Hires Architects and Planners to Help Design Long-Term Expansion*, N.Y. TIMES, Feb. 15, 2003, at B3.

[145] Charles V. Bagli, *Columbia Buys Sites and Assures Neighbors*, N.Y. TIMES, April 21, 2004, at B8; David Gonzalez, *CITYWIDE; In Columbia Growth Plan, Ghosts of '68*, N.Y. Times, Aug. 24, 2004, at B1; Bagli, *supra* note 143.

[146] Bagli, *supra* note 145.

[147] *See, e.g.*, Daphne Eviatar, *Dispute; The Manhattanville Project*, N.Y. TIMES MAG., May 21, 2006, at 32; Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, at C6.

[148] Foster & Glick, *supra* note 135, at 2008.

[149] *Id.* at 2009; *see also* Press Release, Columbia University, Maxine Griffith Named Vice President for Government and Community Affairs (July 13, 2005), *available at* http://www.columbia.edu/cu/news/05/07/maxineGriffith.html.

[150] Christine Lagorio, *Expand and Contract*, CITY LIMITS (May 31, 2004), http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=1527; Jamal Watson, *Columbia University real estate expansion report released; Calls for creation of low income housing*, AMSTERDAM NEWS, Aug. 18, 2004, at 1; Gail Robinson, *New York as College Town*, GOTHAM GAZETTE, Sept. 27, 2004, http://www.gothamgazette.com/article/issueoftheweek/20040927/200/1129.

> institutional interest, and political ideology. Different community interests and groups sought to form coalitions to consolidate their power in order to influence the ultimate deal between Columbia and the City, and between themselves and Columbia. . . . An array of elected officials and business and property owners also attempted to intervene in sporadic efforts to advance their own diverse interests.[151]

Other commentators attributed the inaction to Columbia's failure to take "community participation seriously."[152]

In August 2005, CB9 submitted its 197-a plan to the CPC.[153] In the fall of 2005, Columbia applied to the CPC to rezone an approximately 35-acre area in West Harlem and create the Special Manhattanville Mixed-Use Zoning District. The proposed rezoning would allow Columbia's Academic Mixed-Use plan on approximately 17 acres, and commercial and residential development in the remaining portion. The application triggered environmental review and ULURP. The CPC, facing both Columbia's proposal and CB9's alternative 197-a plans, reportedly told both Columbia and CB9 to "enter into a dialogue about the plans, make good faith efforts to identify common ground and achieve consensus wherever possible."[154]

Despite similar urgings to "reach a consensus" from West Harlem's City Council Member Robert Jackson, negotiations still did not get underway.[155] Some community groups, such as WE ACT, sought to convince the CPC to incorporate appropriate protections and benefits for the community into the rezoning itself.[156] Meanwhile, the formal land use review processes continued -- a public hearing on the draft scope of work with respect to the environmental impact statement (EIS) was held on November 15, 2005, with over 70 opponents speaking out about the project.[157]

At the same time, Columbia also sought approval from the Empire State Development Corporation to use eminent domain to acquire the properties whose owners had refused to sell. The threat that eminent domain might be used ignited considerable opposition, and complicated discussions about a community benefit agreement, because some in the community refused to negotiate until Columbia promised not to use eminent domain, a promise Columbia apparently was unwilling to make.[158] The Empire State

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[151] Foster & Glick, *supra* note 135, at 2026.
[152] Tom Angotti, *Zoning Versus Planning in Manhattanville*, GOTHAM GAZETTE, June 23, 2006, www.gothamgazette.com/article/landuse/20060623/12/1892.
[153] N.Y. City Planning Commission, IN THE MATTER OF a plan concerning Community District 9 in Manhattan, submitted by Community Board 9, for consideration under the rules for the processing of plans pursuant to Section 197-a of the New York City Charter. The proposed plan for adoption is called "Community Board 9 Manhattan 197-a Plan: Hamilton Heights, Manhattanville, Morningside Heights", Nov. 26, 2007, *available at* http://www.nyc.gov/html/dcp/pdf/cpc/060047.pdf.
[154] Letter from Amanda Burden, Chair of the New York City Planning Commission,to Mr. Jordi Reyes-Montblanc, Chair, Manhattan Community Board 9, October 17, 2005.
[155] Foster & Glick, *supra* note 135 at 2029.
[156] *Id.* at 2039.
[157] Erin Durkin, *CU Expansion Foes Go on the Record*, COLUMBIA SPECTATOR, Nov 16, 2005, *available at* http://www.columbiaspectator.com/2005/11/16/cu-expansion-foes-go-record.
[158] Foster & Glick, *supra* note 135, at 2042–48.

Development Corporation approved the use of eminent domain in December, 2008, though litigation contesting the decision is ongoing.[159]

In the spring of 2006 the West Harlem Local Development Corporation (WHLDC) was formed to negotiate a CBA with Columbia.[160] Originally, the WHLDC's Board of Directors included representatives of CB9, as well as other community organizations, local businesses, tenants' associations, local public housing, representatives, commercial and residential property owners, and faith-based organizations.[161] A few months later, in the summer of 2006, the WHLDC Board of Directors expanded to include nine local elected officials, including the Manhattan Borough President, City Council members, State Assembly members, State Senate members and Congressman Charlie Rangel. The then-current Chair of CB9, who also had chaired CB9's 197-a Plan Committee, Patricia Jones, was elected president of the WHLDC.[162]

It was reported that the New York City Economic Development Corporation (EDC) "provide[d] $350,000 and a professional mediator, John Bickerman, to facilitate negotiations."[163] In early 2007, the WHLDC and Columbia "exchanged letters that indicated interest in addressing the same basic issues: housing, education, health, jobs, environment, etc., though not in the same manner or scope."[164] From that point on, negotiations ensued throughout the year.

DCP certified both Columbia's and CB9's plans on June 18, 2007.[165] After certification, the first step in the ULURP process is consideration by the local community board, which has sixty days to hold a public hearing and vote on the project. On July 9, 2007, CB9 approved its own 197-a plan then scheduled a public hearing on Columbia's proposal for August 15, 2007. The hearing was extremely contentious, lasting more than five hours, with even former Mayor (but current Columbia professor) David Dinkins being heckled for his support of the project. CB9's land-use committee then voted to

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[159] Jose Martinez, *Columbia Expansion Foes Fight City's Push to Take Land*, N.Y. DAILY NEWS, Jan. 22, 2009, at 27; Maggie Astor, *Two Landowners, Two Lawsuits Fight Eminent Domain in M'ville*, COLUMBIA SPECTATOR, Jan. 22, 2009, *available at* http://www.columbiaspectator.com/2009/01/22/two-landowners-two-lawsuits-fight-eminent-domain-mville.

[160] Timothy Williams, *Land Dispute Pits Columbia vs. Residents in West Harlem*, N.Y. TIMES, Nov. 20, 2006, at B1; Raymond Carlson, *Negotiations Force Columbia to Increase Bid*, YALE DAILY NEWS, Jan. 15, 2008, *available at http://www.yaledailynews.com/news/city-news/2008/01/15/negotiations-force-columbia-to-increase-bid/*. For a discussion of the issues involved in incorporating an entity to negotiate a CBA, see Debra Bechtel, *Forming Entities to Negotiate Community Benefits Agreements*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L 145 (2007/2008).

[161] Erin Durkin, *Community-Benefits Agreement Talks on Horizon*, COLUMBIA SPECTATOR, June 20, 2006, *available at* http://media.www.columbiaspectator.com/2006/06/20/community-benefits-agreement-talks-horizon.

[162] Matthew Schuerman, *Mr. Bollinger's Battle*, N.Y. OBSERVER, Feb. 18, 2007, at 48.

[163] Jimmy Vielkind, *How to Mediate Manhattanville: A New Negotiating Partner is Born*, CITY LIMITS, Dec. 4, 2006, http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3223.

[164] Foster & Glick, *supra* note 135, at 2052.

[165] N.Y. City Planning Commission, IN THE MATTER OF an application submitted by Columbia University pursuant to Section 201 of the New York City Charter, for an amendment of the Zoning Resolution of the City of New York, concerning Article X, Chapter 4 (Special Manhattanville Mixed Use District), establishing a special district in Borough of Manhattan, Community District 9, and modifying related regulations, N 070496 ZRM, Nov. 26, 2007, at 29, *available at* http://www.nyc.gov/html/dcp/pdf/cpc/070496.pdf.

oppose Columbia's plan unless ten conditions were met, including the construction of low-income housing.[166] The full Board subsequently voted 32-2 (with one abstention) against the proposal, but listed conditions that if met would cause it to support the proposal.[167] The various conditions included taking the threat of eminent domain off the table, building (or paying for) affordable housing, and withdrawing a proposal for a seven-story underground structure.[168]

In mid-September, Manhattan Borough President Scott Stringer announced that he would not support Columbia's proposal unless it was modified in various ways.[169] He proposed a rezoning of the areas of West Harlem surrounding Columbia's proposed expansion that basically tracked CB9's 197-a plan. Just days later, however, Stringer announced that he would support Columbia's proposals because Columbia had agreed to establish a $20 million fund to build affordable housing in the neighborhood, to contribute an additional $11.25 million for local parks and playgrounds, to use environmentally friendly construction and design, and to create a community resource center to give local residents: 1) information about the construction plans; 2) assistance in applying for jobs created by the expansion; and 3) assistance in applying for the affordable housing Columbia would finance.[170]

Councilmember Robert Jackson of Harlem, praised the agreement, saying "I am pleased that Columbia has basically put forward this particular step to say, 'we are willing to sit down and negotiate with anyone who is willing to do that.'"[171] Councilman Jackson and Borough President Stringer also argued that the agreement reflected only the beginning of the benefits that Columbia would provide for the community and that the dollar amount would increase with further negotiations.[172] Others, however, complained that Columbia's negotiations with Stringer and with the WHLDC had shut out significant interests in the community.[173]

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[166] Id. at 30-32; see also Sewell Chan, *Panel Rejects Columbia's Expansion Plan*, N.Y.TIMES, Aug. 16, 2007, http://cityroom.blogs.nytimes.com/2007/08/16/panel-rejects-columbias-expansion-plan/.

[167] N.Y. City Planning Commission, *supra* note 165; see also Matthew Schuerman, *Harlem Tells Columbia "No" (and Whispers "Negotiate")*, N.Y. OBSERVER, Aug. 21, 2007, http://www.observer.com/2007/harlem-tells-columbia-no-and-whispers-negotiate?observer_most_read_tabs_tab=0.

[168] Erin Durkin, *Stringer's Office Calls for Changes to M'Ville Expansion Plan*, COLUMBIA SPECTATOR, Sept. 17, 2007, *available at* http://www.columbiaspectator.com/2007/09/17/stringer-s-office-calls-changes-m-ville-expansion-plan.

[169] *Id.*

[170] Press Release, Office of the Manhattan Borough President, BP Stringer Announces Agreement with Columbia University to Protect and Enhance West Harlem Community as Part of Columbia Expansion Proposal (Sept. 26, 2007), *available at* http://neighbors.columbia.edu/pages/manplanning/pdf-files/Stringer%20AnncPrposl%20SP.pdf.

[171] Colin Moynihan, *Columbia Announces Deal on Its 17-Acre Expansion Plan*, N.Y. TIMES, Sept. 27, 2007. at B3.

[172] Matthew Schuerman, *Is Columbia Expansion a Done Deal?*, N.Y. OBSERVER, Oct. 2, 2007, http://www.observer.com/2007/columbia-expansion-done-deal.

[173] Eliot Brown, *Butts on Columbia Expansion: Politicians 'Polluted' Negotiations on Community Benefits*, N.Y. OBSERVER, Dec. 5, 2007, http://www.observer.com/2007/rev-butts-community-organizers-offer-tough-reviews-cbas-columbia.

On November 26, 2007, the CPC voted to approve Columbia's proposal, with a few modifications, and over one "no" vote and one abstention.[174] Negotiations between Columbia and the WHLDC continued. Over the next few weeks three members of the WHLDC resigned, either to protest Columbia's refusal to take the use of eminent domain against commercial properties off the table or to protest Columbia's use of level 3 bio-tech labs.[175] On the eve of the City Council's vote, the New York Observer reported:

> The agreement, according to sources familiar with the negotiations, is all set except for one crucial element: the numbers were left blank. . . [176]

But by the morning of December 19, 2007, Columbia announced it had reached an agreement with the WHLDC. The agreement, documented in a memorandum of understanding, rather than an actual CBA, envisioned that Columbia would provide $150 million in community benefits, including a new public school for CB9, $20 million worth of in-kind benefits, a $24 million housing fund and $76 million for a "benefits fund" which would be managed by a committee of WHLDC representatives, elected officials and Columbia representatives.[177]

Following the announcement of the agreement, the City Council approved Columbia's proposal.[178] The WHLDC and Columbia continued to negotiate over the terms of the CBA while Columbia sought approval of its expansion from the State Public Authorities Control Board. That Board granted approval in May 2009.[179]

The CBA was signed in May, 2009.[180] The CBA provides more detail about how the $76 million benefits fund agreed to in the MOU would be used: those funds would be disbursed annually over sixteen years[181] to pay for improvements to public housing in the area;[182] fund a resource center for the community;[183] fund an assessment of public

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[174] N.Y. City Planning Commission, *supra* note 165, at 42-118; Matthew Schuerman, *'Bollinger Dollars,' 'Personal Vindictive' at Columbia Vote*, N.Y. OBSERVER, Nov. 26, 2007, http://www.observer.com/2007/opponents-heckle-commissioners-surprise-columbia-vote.

[175] Anna Michaud, *City Council Approves Columbia Expansion*, CRAIN'S N.Y. BUS., Dec. 19, 2007, *available at* http://www.crainsnewyork.com/apps/pbcs.dll/article?AID=/20071219/FREE/121035688/1058/newsletter01#.

[176] Matthew Schuerman, *Harlem Asks Columbia for $247 M*, N.Y. OBSERVER, Dec. 18, 2007, http://www.observer.com/2007/harlem-asks-columbia-247m; *see also* Carlson, *supra* note 160.

[177] Press Release, Columbia University, Columbia, Local Development Corporation Reach Long-term Collaboration Agreement on Enhanced Education, Health Care, Jobs, Affordable Housing and Other Civic Programs (Dec. 19, 2007), *available at* http://news.columbia.edu/pressroom/1111; Timothy Williams & Ray Rivera, *$7 Billion Columbia Expansion Gets Green Light*, N.Y. TIMES, Dec. 20, 2007, at A1.

[178] Williams & Rivera, supra note 177.

[179] Maggie Astor & Betsy Morais, *State Grants Final Approval for Columbia's Expansion into Manhattanville*, COLUMBIA SPECTATOR, May 20, 2009, *available at* http://www.columbiaspectator.com/2009/05/20/state-grants-final-approval-columbias-expansion-manhattanville.

[180] COMMUNITY BENEFITS AGREEMENT BETWEEN COLUMBIA UNIVERSITY AND WEST HARLEM LOCAL DEVELOPMENT CORPORATION, *available at* http://www.scribd.com/doc/15380853/Community-Benefits-Agreement.

[181] *Id*. at 9.

[182] *Id*. at 10.

[183] *Id*. at 17.

transportation, pedestrian and parking needs in the community;[184] pay for an assessment of community health needs;[185] and support a clinic that would provide legal services and housing advocacy for the local community (such as assisting local tenants in eviction proceedings).[186] In addition to that fund, and the in-kind services[187] and demonstration school[188] provided for in the MOU, the CBA commits Columbia to pay a living wage to all employees on the expanded campus,[189] to hire local residents,[190] to give contracts to minority and women-owned businesses,[191] to fund summer internships for local children,[192] undertake a number of environmental improvements,[193] and provide space for a day care facility.[194]

While officials from the City's executive branch were not formally involved in the Columbia CBA negotiations, they did play a variety of roles. The Mayor's office suggested that Wachtel & Masyr, LLP, a firm with considerable experience with CBAs, serve, pro bono, as counsel to the WHLDC.[195] The EDC provided funds for the WHLDC to operate, as well as a professional mediator to facilitate negotiations.[196] The Office of the Corporation Counsel provided legal advice to elected officials who were represented on the WHLDC regarding the appropriate role of elected officials in the WHLDC.

Construction on the Manhattanville expansion began in September, 2009.[197]

2. Projects in Which CBAs Recently Were Under Discussion

Kingsbridge Armory

In 2008, the Related Companies was chosen by the city to develop the Kingsbridge Armory, a 575,000 square-foot, city-owned "Romanesque-style fortress" in the Bronx that has been vacant for well-over a decade, into a mall with retail space, restaurants, and a multi-screen movie theater.[198] The Kingsbridge Armory Redevelopment Alliance (KARA), a coalition of community groups, unions, and local elected officials, demanded that the Related Companies negotiate a CBA.[199]

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[184] *Id*. at 35.
[185] *Id*. at 39.
[186] *Id*. at 17.
[187] *Id*. at 11–12.
[188] *Id*. at 14.
[189] *Id*. at 18.
[190] *Id*. at 18–21.
[191] *Id*. at 18–21.
[192] *Id*. at 27.
[193] *Id*. at 32–35.
[194] *Id*. at 38.
[195] *Lawyer's Allegiance*, CRAIN'S INSIDER, Feb. 13, 2007, *available at* http://www.crainsnewyork.com/assets/pdf/CN12520212.PDF.
[196] Vielkind, *supra* note 163.
[197] Maggie Astor, *Manhattanville Construction Starts*, COLUMBIA SPECTATOR, Sept. 10, 2009, *available at* http://www.columbiaspectator.com/2009/09/10/manhattanville-construction-starts.
[198] Terry Pristin, *Bronx Groups Demand a Voice in a Landmark's Revival*, N.Y. TIMES, June 25, 2008, at C6.
[199] Bill Egbert, *Coalition Waging Battle with Armory Developer for Kingsbridge Benefits*, N.Y. DAILY NEWS, Apr. 25, 2008, at 72.

Some city officials, including Mayor Bloomberg and Seth Pinsky, president of the city's Economic Development Corporation, have opposed that demand.[200] Pinsky argued that the existing land use process "gives ample opportunity for the community's voice to be heard" and asserted that community members were consulted prior to the City's issuance of a Request for Proposals from developers, which took many of the community's requests into account.[201] He maintained that ULURP "is the proper place for a community benefits agreement," where it can be "addressed through a legally sanctioned process."[202] In March, 2009, the Industrial Development Agency, overseen by Mr. Pinsky, approved tax-exempt financing for the Kingsbridge Armory development, over the objections of Comptroller Bill Thompson and Manhattan Borough President Scott Stringer, who wanted to postpone the vote until a CBA had been negotiated.[203]

In August, 2009, Bronx Borough President Ruben Diaz and members of KARA released a proposed CBA that included: living wages for all employees of retail tenants; local hiring and sourcing requirements for subcontractors; efforts to mitigate increased traffic; low-cost space for local non-profits in the mall; green building requirements for the development; money for local economic development initiatives; and a ban on supermarkets and big-box food stores.[204] Related has yet to comment publicly on the proposed draft, but its lawyer has previously stated that a living wage requirement would be a "deal-killer."[205]

The affected community board voted to recommend approval of the project contingent upon the developer agreeing upon a CBA.[206] On September 4, 2009, Borough President Diaz recommended disapproval of the project because no CBA had been agreed to.[207] On October 19, 2009, the City Planning Commission voted in favor of the project,[208] with CPC Chair Amanda Burden declaring that "the issue of a Community

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[200] Terry Pristin, *Proposed Supermarket Divides Bronx Community*, N.Y. TIMES, Sept. 30, 2009, at B6; Daniel Beekman, *Bloomberg Sits Down with CNG*, YOURNABE.COM, Aug. 27, 2009, http://www.yournabe.com/articles/2009/08/27/bronx/doc4a96911003b49524387239.txt; see also, Sam Dolnick, Planners Accept Proposal for Mall at Bronx Armory, N.Y. TIMES, Oct. 20, 2009, at A28.

[201] Beekman, *supra* note 200.

[202] Ivonne Salazar, *An In-Depth Look Inside the IDA Armory Meeting*, BRONX NEWS NETWORK, Mar. 11, 2009, http://www.bronxnewsnetwork.org/2009/03/in-depth-look-inside-ida-armory-meeting.html.

[203] *Id.*

[204] Bill Egbert, *Living Wage May Kill BX Plan*, N.Y. DAILY NEWS, Aug. 27, 2009, at 53. According to at least one report, Community Board 7 and local elected officials also were involved in the drafting of the proposed CBA. *See* Amy Lavine, *Some New York City News*, CMTY. BENEFITS AGREEMENT BLOG, Aug. 25, 2009, http://communitybenefits.blogspot.com/2009/08/some-new-york-city-news.html.

[205] Egbert, *supra* note 204.

[206] N.Y. City Planning Commission**,** IN THE MATTER OF an application submitted by Related Retail Armory, LLC and the Economic Development Corporation pursuant to Sections 197-c and 201 of the New York City Charter for an amendment of the Zoning Map, Section No. 3c: changing from an R6 district to a C4-4 District property bounded by West 195th Street, Jerome Avenue, West Kingsbridge Road, and Reservoir Avenue, as shown in a diagram (for illustrative purposes only) dated May 18, 2009, Community District 7, Borough of the Bronx, Oct. 19, 2009, at 10, *available at* http://www.nyc.gov/html/dcp/pdf/cpc/090437.pdf.

[207] Id., at 11-13; see also Press Release, Office of the Bronx Borough President, Borough President Diaz Issues Negative Recommendation on Kingsbridge Armory Project (Sept. 4, 2009), *available at* http://bronxboropres.nyc.gov/en/gv/press/pressReleases/2009/2009-09-04.pdf; *see also* Hilary Potkewitz, *Big Bronx Armory Project Draws Key "No" Vote*, CRAIN'S N.Y. BUS., Sept. 4, 2009, *available at* http://www.crainsnewyork.com/article/20090904/FREE/909049987.

[208] N.Y. City Planning Commission, *supra* note 206, at 22.

Benefit Agreement including commitment to living wages should not weigh in [the CPC's] consideration of the merits" of a proposal.[209] As of this writing, the matter is pending before the City Council.[210]

The Kingsbridge Armory proposal has ignited a storm of controversy over CBAs. Alair Townsend editorialized in Crains New York Business that CBAs amount to "virtual extortion" and "zoning for sale."[211] Candidates for the City Comptroller position argued over CBAs in their first public debate: Melinda Katz expressed concern that CBAs may not be enforceable,and argued that the City should develop a standardized method for reviewing such agreements; David Weprin said he would use the Comptroller's audit powers to hold parties to their CBA commitments; John Liu (who won the contest for Comptroller) promised to "intensively" review the Yankee Stadium CBA; and David Yassky asserted that he would pursue fewer large scale developments and would use the city's economic development programs to provide amenities such as parks and schools.[212] Mayor Bloomberg is reported to be opposed to a CBA for the Kingsbridge development.[213] On December 14, 2009, the City Council disapproved the Kingsbridge Armory Project by a vote of 45 to 1.[214]

D. CBAs in Context: The Role of Negotiated Mitigation and Amenities in Land Use Regulation

The drafters of the first zoning ordinances and the standard state zoning enabling act believed that once enacted, the zoning ordinance would resolve most issues, and exceptions to the zoning would be rare. That has not proved to be the case, for many reasons.[215] Planners and zoners are not omniscient, of course, and cannot write zoning ordinances that anticipate a fast-paced real estate market that must adapt to new technology, including cell phones or new consumer fads such as the coffee bar craze. In addition, buyers want more variety than the cookie-cutter development that rigid zoning tends to produce, and developers want more flexibility to address special characteristics

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[209] Jordan Moss, *City Planning vote Was 8 to 4 in Favor of Armory Plan; Council has Final Say*, BRONX NEWS NETWORK, Oct. 19, 2009, http://www.bronxnewsnetwork.org/2009/10/city-planning-vote-was-8-to-4-in-favor.html; see also N.Y. City Planning Commission, *supra* note 206, at 20 ("The community benefits agreement, living wage, and hiring practice issues are beyond the purview of the Commission. However, the Commission encourages continued discussion amongst the interested parties to help resolve these concerns.").

[210] See Bill Egbert, Armory's last stand: Final public con-fab over development plan; then Council vote, N.Y. DAILY NEWS, Nov. 17, 2009.

[211] Alair Townsend, *Community Deals Sell NY Down the River*, CRAINS N.Y. BUS., Sept. 14, 2009, *available at* http://www.crainsnewyork.com/article/20090913/SUB/309139992.

[212] *Lavine*, *supra* note 205.

[213] See, e.g., Frank Lombardi, Wages stall mall: Mayor Bloomberg nixes armory project's pay mandate, N.Y. DAILY NEWS, Nov. 18, 2009, at 46.

[214] Sewell Chan, Council Spurns Plan to Turn Kingsbridge Armory into Mall, N.Y. Times, City Room, Dec. 15, 2009, http://cityroom.blogs.nytimes.com/2009/12/15/council-spurns-plan-to-turn-kingsbridge-armory-into-mall/.

[215] *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987); Lee Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000).

of the land than rigid end-state zoning allows. Regulators (and their constituents) want flexibility to adapt to evolving information about how land development affects services and infrastructure, water quality, air quality, and wildlife habitat in neighboring areas, and a range of other interests that are typically considered as part of an environmental impact review process. Further, land use regulators often see their role as mediating conflicts among the various stakeholders who have legitimate interests in the use of the land, and that role requires flexibility.[216]

Accordingly, while much development in New York City is "as-of-right", zoning is no longer limited to prescriptive rules about land use, but also includes more flexible set of standards, which allow the specifics of the requirements imposed on each proposed development to vary with the threatened impacts of the project and the concerns of the various interest groups affected by the proposal. That flexibility creates dangers, however, that the negotiations surrounding land use development may be unfair to the developer or to those affected by the development, or that the negotiations may stand in the way of a development that would increase the overall social welfare by producing more benefits than costs.

The courts and state legislatures first responded to the advent of "negotiated" zoning with dismay.[217] Early decisions struck down "contract" zoning, for example, when the local government conditioned rezonings on so many particulars that the arrangement resembled a contract.[218] But courts eventually realized that negotiation over the details of the land use proposal and its impacts on the surrounding community is an entrenched feature of the land use regulation scheme and shifted from rejecting the practice to instead minimizing the possibility that the negotiations would be unfair. While tolerating negotiations meant to address burdens the development would impose on the local community, courts draw lines about what are proper "quid pro quo[s]."[219]

Perhaps the best example of the courts' approach is their treatment of exactions and impact fees. Exactions are conditions that a local government imposes on a developer in return for the local government agreeing to allow a land use that it otherwise could prohibit.[220] Exactions are a means of ensuring that developers, rather than taxpayers, bear the costs and risks of development, use publicly funded resources efficiently, and mitigate any harmful consequences of development.[221] Typically, the condition is that the developer supply, or fund, a public facility or amenity. For example,

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[216] Rose, *supra* note 215, at 894–900, 908–10.

[217] *See, e.g.*, Midtown Props., Inc. v. Madison Twp., 172 A.2d 40, 44 (N.J. Super. Ct. Law Div. 1961), *aff'd*, 189 A.2d 226 (N.J. Super Ct. App. Div. 1963) (contract zoning allows the "zoning power . . . [to be] prostituted for the special benefit" of the developer); City of Knoxville v. Ambrister, 263 S.W.2d 528, 530 (Tenn. 1953) (contract zoning destroys "that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society"). For more recent expressions of such concerns, see Snyder v. Bd. of County Comm'rs, 595 So.2d 65 (Fla. Dist. Ct. App. 1991), *quashed*, 627 So.2d 469 (Fla. 1993) ("local governments frequently use governmental authority to make a rezoning decision as leverage in order to negotiate, impose, coerce and compel concessions and conditions on the developer.").

[218] Wegner, *supra* note 215, at 983–86; Bruce R. Bailey, Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L. REV. 897 (1965).

[219] See, e.g., Nunziato v. Planning Bd. of Borough of Edgewater, 541 A.2d 1105 (N.J. Super. Ct. App. Div. 1988).

[220] Vicki Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478–83 (1991).

[221] *Id.*

exactions may include impact fees to defray the cost of roads or congestion management needed because of the traffic generated by the development, or may require land or easement dedications for the property needed to provide schools or parks for the development.[222]

Initially, courts were suspicious of local governments' authority to impose exactions and of the danger that the governments were simply "rent-seeking," or attempting to extract some of the developer's profits in exchange for the government's approval.[223] Eventually, however, the courts' approach became one of managing the dangers of negotiations over exactions. To ensure that governments were not simply "extorting" developers, the Supreme Court imposed a "nexus" requirement: the benefit the government seeks to exact from a developer must have an "essential nexus" to the legitimate state interest that the government would have invoked to justify rejecting the proposed development.[224] Further, the amount of the benefit the government seeks has to be roughly proportional to the impact that the particular development would impose.[225] Within those strictures (as well as others imposed by state law), however, governments are allowed to impose exactions upon developers to offset the environmental and land use impacts that the proposed development will have on the local community.

Similarly, the New York courts have recognized that local governments can impose conditions upon developers through the environmental impact review process. In New York, a negative declaration is a finding by the relevant government entity that a proposed development or project would have no significant effect on the environment and therefore a full environmental impact review is not necessary. Agencies may issue "conditional negative declarations" when they conclude that the developer can adopt measures to mitigate any harmful environmental impacts the proposed development might cause.[226] Indeed, developers try to avoid the need for a complete EIS by including measures in their projects designed to keep the project's impacts below the threshold that would trigger full review.[227] Further, agencies confronted with a final EIS that identifies environmental harm that will result from the development may approve the development conditioned upon various measures to mitigate the harms.[228]

Community benefit agreements must be seen against the backdrop of the doctrines the courts (and legislatures) have adopted to cabin negotiations over the

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[222] *Id.*

[223] *See, e.g.*, Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect, 22 Ill. 2d 375 (1961) (finding that an ordinance requiring a land-owner to dedicate part of his property for the construction of a school in exchange for receiving a permit to construct residential units was "an unreasonable condition" and "purports to take private property for public use without compensation."); Gulest Assocs. v. Town of Newburgh, 25 Misc.2d 1004 (N.Y. Sup. Ct. 1960), *aff'd*, 15 A.D.2d 815 (1962) (holding an ordinance requiring that a land-owner pay for a park, playground or other recreational space to be built before the town granted permission to build on his property "permits the taking of property without due process of law and amounts to denial of equal protection of the laws and violates the provisions of the Fifth Amendment of the United States Constitution . . . and must therefore be declared illegal, null and void.").

[224] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[225] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[226] N.Y. ENVTL. CONSERV. LAW § 8-0109 (Consol. 2009) (setting out the procedure for "Preparation of environmental impact statements").

[227] *See generally* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002).

[228] *See, e.g.*, Town of Henrietta v. Dep't of Envtl. Conservation, 430 N.Y.S.2d 440 (App. Div. 1980).

approval of proposed land development. Although the doctrines may not apply directly to CBAs (depending upon how involved land use regulators are in the CBAs), they help to illuminate some of the dangers CBAs pose.[229]

E. CBAs Contrasted with Restrictive Declarations:

The NYC Zoning Handbook describes restrictive declarations as:

> A restrictive declaration is a covenant running with the land which binds the present and future owners of the property. As a condition of certain special permits, the City Planning Commission may require an applicant to sign and record a restrictive declaration that places specified conditions on the future use and development of the property.[230]

Restrictive declarations are different from the CBAs discussed in this report in several important ways. Restrictive declarations are not negotiated between the developer and community groups. Although restrictive declarations may contain provisions that the public or community groups identified as necessary during the land use and environmental review processes, restrictive declarations are drafted by the developer in consultation with the Department of City Planning. Restrictive declarations are not contracts signed with community community groups, but rather are signed only by the developer and recorded as encumbrances against the property. Because they are not contracts, restrictive declarations require no consideration. Restrictive declarations are monitored and enforced by the City and the City is the sole enforcer of these restrictive declarations; community members may not bring private enforcement actions, unless the restrictive declaration provides a private right of action that the courts will recognize.

Finally, but perhaps most importantly, restrictive declarations do not include any community benefits that are unrelated to the impacts of a project. Rather, restrictive declarations certain provisions to guarantee the implementation of administrative conditions of the land use approval or to mitigate or avoid project impacts that are identified during the environmental impact review process. Because restrictive declarations are executed as part of the land use regulatory process, they are subject to the requirements of due process, equal protection and the Fifth Amendment's takings clause, including the nexus and proportionality requirements of *Nollan/Dolan*.

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[229] CBAs also should be viewed against the doctrines limiting the reach of neighborhood consent provisions in zoning ordinances. Such provisions require developers to secure the consent of some percentage of neighboring property owners before they can develop the property. The requirements have met with considerable skepticism, and the United States Supreme Court's limited jurisprudence on neighbors' consent provisions suggests that they are unconstitutional if neighbors are able to exercise unbridled discretion, at least if the proposed use is not a noxious one. *See* Eubank v. City of Richmond, 226 U.S. 137 (1912); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); *see also* A. Dan Tarlock, *An Economic Analysis of Direct Voter Participation in Zoning Change*, 1 UCLA J. ENVTL. L. & POL'Y 31 (1980).

[230] N.Y.C. DEP'T OF CITY PLAN., ZONING HANDBOOK 110 (2006).

F. CBAs in the Land Use Regulatory Process versus CBAs in the City's Economic Development Practices:

The City's Economic Development Corporation often provides various incentives for developers to encourage projects the City believes will benefit the City. Recently, the EDC has required or encouraged developers receiving such subsidies to enter CBAs with the host community. CBAs negotiated as a condition for the receipt of government subsidies raise very different issues from the CBAs discussed in this report, which are negotiated as part of the process of land use review. When the City chooses to provide subsidies to developers, it is free to condition those subsidies in any way it thinks appropriate (subject to general prohibitions on discrimination, corruption, and so on). Developers who object to the conditions imposed are free to decline to be involved in the project. Those who do seek subsidies from the public must take the bitter with the sweet; if they do not like the conditions, they should simply forego the subsidies (or seek to convince the government that it cannot accomplish its economic development goals if it conditions the subsidies).

When conditions are imposed as part of the land use regulatory scheme, however, the courts have limited the discretion of land use officials in order to prevent local governments, voters, and special interest groups from using their leverage over a property owner who needs regulatory approval to develop the property to "extort" concessions from the developer.[231] Regulatory authorities may use their power to solicit concessions from the developer only to address legitimate concerns of the land use process.[232]

In this report, we are focused only on CBAs negotiated as part of (or in an attempt to influence) the land use regulatory process. We take no position on the wisdom of using CBAs as part of the process of awarding economic development subsidies, although we do address the interplay between the land use and economic development processes in our recommendations.

II. A Brief History of NYC's Treatment of Negotiations with Developers over Amenities:

Although CBAs are a fairly recent phenomenon in New York, the City and its neighborhoods have long grappled with the wisdom of negotiations among developers, neighborhoods, and the City about "amenities," or benefits the developer provides to the neighborhoods the development affects. The City's Zoning Resolution has long incorporated the concept of "incentive" or "bonus" zoning, whereby the Resolution gives

[231] *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (referring a requirement that an owner provide an easement across part of his property as a condition of granting a permit to build a house as "an out-and-out plan of extortion"); Garneau v. City of Seattle, 147 F.3d 802, 810 (9th Cir. 1996) ("If the government's purpose are not connected [to legitimate land use interests], then the government's demand for the exaction is not a legitimate exercise of its police power, but 'an out-and-out plan of extortion'"); Commercial Builders of N. Cal. v. Sacramento, 941 F.2d 872, 876 (9th Cir. 1991) (Beezer, J., dissenting) ("a state can leverage its police power to the point where a regulation of land use becomes an 'out-and-out plan of extortion'").

[232] *See supra* text accompanying notes 224-225.

a developer greater density, or waives certain height or setback restrictions, if the developer agrees to provide or pay for public improvements, such as plazas, parks, transit improvements and sometimes, low income housing.[233] Further, the City Planning Commission and the Board of Estimate often used special permits in the 1970s and 1980s to allow private development that was not as-of-right, but which the City believed could improve urban design and provide private funds to pay for public improvements. These individual discretionary actions were seen as a way of allowing better, more flexible site planning and projects than could occur under the standard provisions of the Zoning Resolution, while securing needed and useful improvements and amenities for the public.

In 1975, New York State passed the State Environmental Quality Review Act (SEQRA), which requires developers of projects to analyze the environmental impacts of their projects and if that analysis reveals that the project may have a significant impact on the environment, to prepare an environmental impact statement (EIS).[234] Under SEQRA, if a discretionary zoning action, such as a change in zoning or a special permit, may have a significant impact on the environment, an EIS must examine the effects the development may have on the environment (both positive and adverse), including effects on air or water quality, traffic, transportation municipal services, historic resources, socioeconomic makeup of a neighborhood, urban design, or neighborhood character, among others. The EIS also must identify the mitigations that a developer could take to reduce or, if possible, eliminate any significant adverse environmental impacts set forth in the EIS.[235] Environmental impact review, and the measures required to mitigate significant adverse environmental impacts, accordingly became an integral part of a City's discretionary approval of a project in the late 1970s and remain a critical part of the land use review process today.

The increasing use of mitigation measures in the environmental impact review process, as well as the spread of bonus zoning and the provision of public facilities or other benefits to meet social or community needs by applicants for discretionary approvals such as special permits, began to provoke considerable public debate in the late 1970s and early 1980s. Critics focused on the appropriateness and legality of the various forms of quid pro quos in the land use regulatory context, the amount and enforceability of the developers' commitments, and the nexus between the mitigation measures that were requested and the project's impacts Some complained that land use decisions were being made only through deal-making, in which amenities or funds to pay for amenities were the coin of trade.

Most of the early incentive zoning, as well as the negotiated discretionary approvals, involved Manhattan projects. Manhattan community representatives and public interest groups expressed the view that these actions were "zoning for sale", and that the amenities required of, or offered by, the developers were not adequate compensation to the community for the increased bulk of projects. Further,

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[233] *See, e.g.*, N.Y.C. ZONING RESOLUTION art. 2, ch. 3, § 23-90 (bonus for inclusionary housing); art. 2, ch. 4, § 24-13 (bonuses for "Deep Front and Wide Side Yards" in residential districts); art. 2, ch. 4, § 24-14 (bonus for "Public Plaza[s]" in residential districts); art 2., ch. 4, § 24-15 (bonus for "Arcades" in residential districts), *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml.

[234] State Environmental Quality Review Act (SEQRA), ch. 612, 1975 N.Y. Laws 895 (1975) (codified as amended at N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (Consol. 2009)).

[235] N.Y. ENVTL. CONSERV. LAW § 8-0109 (Consol. 2009).

representatives from the other four boroughs reacted with resentment and envy, arguing that the developers' contributions should be applied to city-wide needs.

The 1982 approval of Lincoln West (later called Riverside South) especially generated controversy. The EIS for the project identified major impacts on transportation which required mitigation. As part of the mitigation, the developer was required to donate funds for the improvement of the 72nd and 66th Street subway stations, and to pay $7,000,000 to create a freight forwarding facility in the Bronx. But the developer also was required to build a 21 acre park, which was to be owned by the NYC Parks Department. In addition, in response to complaints from the local community board (CB7) that the market rate development project would cause secondary displacement, the City Planning Commission required the developer to make at least 12% of the units affordable to low income families. [236]

Against this background of public and governmental concern about the practice of negotiating amenities in exchange for zoning approvals, on April 22, 1983, Mayor Edward I. Koch appointed a commission, chaired by Mitchell Sviridoff and comprised of fourteen members drawn from the development, legal, neighborhood, and civic communities.[237] In establishing the commission, Mayor Koch noted: "It is now a common procedure for developers planning projects that need approval by the Department of City Planning and the Board of Estimate to offer to build additional facilities or to provide funds to make other improvements in the community. While these commitments offer valuable benefits to some areas of the city, the time has come to step back and ask whether the process serves the best interests of all our citizens, and whether it should be made subject to clear ground rules."[238]

The Sviridoff Commission recommended against the use of "unrelated amenities" in the land use process, finding that they are "an ill advised method of raising revenues "to shore up other sectors of city life." The Commission reminded the City that "the primary purpose of the City's Zoning Resolution is to encourage and support thoughtful use of land—and not to generate income for the City." To the extent that the City wanted to encourage developers to provide certain amenities, the Commission recommended that the City emphasize as-of-right zoning, which could include bonus provisions "which clearly delineate what the developer is expected to provide as a trade-off in open space and other public amenities." The Sviridoff Commission also recommended the use of "mandated planning features" which would require as-of-right developments to include public improvements as part of their project." These mandated features could include tree planting, subway entrances, street furniture and the like. "Once stated, these features tell a developer exactly what is expected, and are thus a predictable element of development in the City." The Sviridoff Commission recognized, however, that the City Planning Commission and the Board of Estimate would need some discretion about specific projects and that as-of-right zoning may not be suitable in every instance. Further, although decrying the use of zoning for "redistribution" purposes, it

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[236]The Lincoln West project collapsed in 1984, but these requirements, as well as additional measures concerning the funding of some community facilities, were incorporated into the restrictive declarations for the successor project, Riverside South, which was approved in 1993. *See supra* note 41.

[237] William G. Blair, Development Trust Fund Proposed, N.Y.TIMES, June 17, 1984; Alan S. Oser, Debate Sharpens on City's use of Incentives in Zoning, N.Y.TIMES, Oct. 2, 1983, at 86.

[238] Mayor Edward Koch, Press Release, April 22, 1983.

did recommend that some sort of developer tax be imposed to create a Development Trust Fund for the purposes of low income housing and other social needs. But the Commission lamented the fact that negotiated zoning "has become the norm rather than the exception" and recommended that the City adopt a clearer system of as of right zoning bonuses and mandated planning features.

Apparently in response to the Sviridoff Commission, the Board of Estimate proposed guidelines regarding developer amenities in the land use approval process.[239] The Board specifically addressed the issue of negotiations between the developer and community groups (the precursors to today's CBAs), noting that "in an effort to engender local support for their project, some applicants enter into agreements with local organizations to provide funds for neighborhood improvements or public services. The Board is concerned that such agreements . . . may . . . distort[] the land use review process." Accordingly, the Board's draft guidelines proposed that the City:

- Prohibit community boards from "concluding agreements for developer-funded amenities or participating in negotiations regarding the granting of things of value to third parties";
- Require developers to disclose all contributions or promises to provide things of value they had made regarding the proposed development;
- Refuse to enforce third party agreements; and
- Refuse to take such agreements into account in its own assessment of amenities required to address needs created by project.[240]

In, June, 1988, Mayor Koch asked The Association of the Bar of the City of New York to review those guidelines.[241]

The Bar's Special Committee on the Role of Amenities in the Land Use Process, chaired by Sheldon H. Elsen, was composed of six land use experts who were active members of the Bar Association.[242] The Committee held four days of public hearings, and after an additional four months of study, issued a report recommending that amenities should be a part of the land use process only if they were confined to needs that are "directly arising from the project"— i.e., only if there was a nexus between the identified project impacts and the mitigation requested or required.[243] The Report addressed the various arguments for the practice of negotiating for "unrelated" amenities in the land use approval process by concluding that however "worthy or needed" such an amenity may be, their "most basic flaw" is that they are "not levied in an even handed and neutral way" and thus "offend our ideals of distributive justice."[244] Unrelated amenities distort the budgeting and planning process, as well as public priorities, the Committee found, and create the risk of eroding or corrupting the decision making process.[245]

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[239] The guidelines are reprinted in The Special Committee on the Role of Amenities in the Land Use Process, The Role of Amenities in the Land Use Process, 43 The Record of the Association of the Bar of the City of New York 1, 44-45 (1988), *available at* http://www.abcny.org/pdf/report/RoleofAmenitiesintheLandUseProcess.pdf.

[240] Id.

[241] Id. at 1.

[242] Id. at 5-6.

[243] Id. at 6-7, 10-11, 30-32.

[244] Id. at 13.

[245] Id. at 13-16.

The Committee took the position that in reviewing land use applications, community boards could "negotiat[e] with the developer over amenities which the board might recommend, subject, however, to the important substantive limitation that such amenities must be related to the project's identified impacts, and that negotiations must be similarly limited."[246] The Committee recommended that community boards be given an "earlier and meaningful" role in the environmental review process, within the scoping process.[247] The Committee noted that the land use review and environmental review processes were not coordinated and "synchronized" and made a number of recommendations that would remedy that defect (many of which have become part of the land use review process today).[248] But the Special Committee's bottom line was emphatic: "the process of requiring developers to build or provide amenities unrelated to needs created by their project should be stopped, in large part because of the bad effects which such practices have on government."[249]

III. What Do Communities, Developers and Local Governments Find Attractive about CBAs?

A. Communities

1. CBAs may give neighborhoods a more meaningful role in the development process than the opportunities ULURP provides for public participation.

Those who champion CBAs on behalf of local communities articulate several justifications for the agreements. First, they argue that the City's normal land use procedures often fail to ensure that the concerns of the neighborhood most affected by the proposed development are considered and adequately addressed.[250] They argue that the representatives of the neighborhood -- the community board, the borough president, and City Council members -- are not effective in advocating for the community. They assert that community boards are given few resources and little training to evaluate development proposals.[251] They note that members serve at the pleasure of borough

[246] Id. at 17.
[247] Id. at 20-26.
[248] Id. at 21.
[249] Id. at 44.
[250] More generally, communities in many cities have turned the CBAs out of frustration with the lack of meaningful opportunities for communities to participate in the planning and design of federal urban renewal projects, community economic development programs, and land use decisions more generally. *See, e.g.*, Ho, *supra* note 3, at 11–19.
[251] *See, e.g.*, Derek Alger, *Issue of the Week: Community-Based Planning*, GOTHAM GAZETTE, Mar. 25, 2002, http://www.gothamgazette.com/iotw/communityboards/; Robin Shulman, *Report Finds Disparity in City Aid to Community Boards*, N.Y. TIMES, June 20, 2005, at B2; Frank Lombardi, *Back of Bloomy! Rally at City Hall Rips Community Board Cuts*, N.Y. DAILY NEWS, June 10, 2009, at 29; Helen Rosenthal, *Cutting Back on Democracy*, GOTHAM GAZETTE, Mar. 16, 2009, http://www.gothamgazette.com/article/fea/20090316/202/2854.

presidents, who sometimes are said to replace members because of the members' views.[252]

The community boards' recommendations are advisory only, and may be ignored by the borough presidents, City Planning Commission, City Council and Mayor.[253] Elected officials may, of course, disregard a community board's recommendations for appropriate reasons, such as the City's need for a particular development. But community members also may fear that their elected officials may disregard the community's concerns for reasons the community may find more troubling, such as the role developers' contributions may play in financing political campaigns.[254]

One of the tools designed to give neighborhoods more power in the land use process -- community based plans sanctioned by §197a of the City's charter -- is widely seen as having very limited impact.[255] Communities that have not yet drafted a 197-a plan complain that such plans are extremely costly and difficult to craft, and many communities, especially in lower income neighborhoods, lack the resources to engage in the planning process.[256] Although Section 197-a requires the DCP to "[p]rovide community boards with such staff assistance and other professional and technical assistance as may be necessary to permit such boards to perform their planning duties and responsibilities under this chapter,"[257] critics claim that such assistance is in fact rarely given.[258] Critics argue that the few planners staffed by the DCP to work with communities focus mainly on reviewing the plans, rather than helping communities develop the plans.[259]

Some communities that already have drafted 197-a plans believe they are ignored.[260] The City Planning Commission officially interprets community plans as nonbinding guidance, which minimizes 197-a's effectiveness at providing meaningful public participation to communities.[261]

Relative to ULURP, or 197-a plans, therefore, CBAs are seen as a more direct and powerful way for the community to have a role in shaping their neighborhood's development.

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[252] Lincoln Anderson, *Stringer Wants Reform, New Blood on Community Boards*, DOWNTOWN EXPRESS, Feb. 22, 2006, *available at* http://www.downtownexpress.com/de_146/stringerwantsreform.html.

[253] *See* N.Y.C. CHARTER, ch. 70, § 2800(d) (setting out the duties and authority of community boards); see also Community Board Assistance Unit of the Mayor's Office, Handbook for Community Board Members (2009), *available at* http://www.nyc.gov/html/cau/downloads/pdf/handbook_2009.pdf.

[254] Gross, *supra* note 1, at 4.

[255] Under Section 197-a of the city charter, community boards are authorized to sponsor plans for the "development, growth, and improvement of the city, its boroughs and communities." . N.Y.C. CHARTER, ch. 8, § 197-a(a).

[256] MUN. ART SOC'Y, THE STATE OF 197-A PLANNING IN NEW YORK CITY (1998), *available at* http://mas.org/presscenter/publications/the-state-of-197-a-planning.

[257] N.Y.C. CHARTER, ch. 8, § 191(5).

[258] Thomas Angotti, *New York City's "197-a" Community Planning Experience: Power to the People or Less Work for Planners?*, 12 PLAN., PRAC. & RES. 59 (1997).

[259] MUN. ART SOC'Y, *supra* note 256, at 2.

[260] Betsy Morais, *Residents, Avella Question 197-a and 197-c Revision Process*, COLUMBIA SPECTATOR, Jan. 22, 2008, *available at* http://www.columbiaspectator.com/2008/01/22/residents-avella-question-197-and-197-c-revision-process.

[261] Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL'Y 135, 142 (2002).

2. CBAs give neighborhoods a role in the development process when the City's typical land use processes are preempted.

Communities complain that they have even less input into the land use approval process when the City's ULURP is pre-empted because the project involves the state or federal government or special authorities such as the Metropolitan Transit Authority, or falls within the jurisdiction of the Empire State Development Corporation (ESDC). Several of the projects in which CBAs have been negotiated have involved the ESDC, and have been approved outside ULURP.[262] The Atlantic Yards development, for example, did not have to go through ULURP because it was within the jurisdiction of the ESDC. ESDC's procedures did not provide a formal role for the community board, and community groups found opportunities for participation unsatisfying.[263] Indeed, community groups complained bitterly that the public hearings focused only on a dense and technical environmental impact statement and provided little meaningful opportunity for community members to have an impact on the project.[264] Proponents of the Atlantic Yards CBA said it was needed in part to address that gap. More generally, CBA advocates argue that CBAs especially are necessary to ensure that the community's needs are voiced and addressed when the City's typical land use processes do not apply.[265]

3. CBAs give neighborhoods an opportunity to address issues, such as wage rates or employment practices, that the City may not have the authority to address in the normal land use process.

Advocates of CBAs believe that CBAs give the residents affected by a development a say regarding all the ways in which a proposal may change the local community, without regard to whether those impacts are related to land use or environmental impacts.[266] The normal land use process, because of its focus on traditional land use concerns such as the height and bulk of a project, does not always ensure that those most affected by the development have a voice in shaping all the ways in which the development could affect or benefit the community.[267] CBAs allow neighborhoods to negotiate their own mitigation and benefits without having to worry about the *Nollan/Dolan* nexus and proportionality requirements, which might apply if the City were involved in the negotiations.

Many CBAs, including the Atlantic Yards, Columbia and Bronx Terminal Market CBAs, for example, address the percentage of the development's construction jobs that will be reserved for minority, women, or local workers.[268] Such a requirement might not pass muster under *Nollan/Dolan*, but proponents of CBAs argue that as private agreements, CBAs are unlikely to trigger with the *Nollan/Dolan* nexus or proportionality

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[262] Lance Freeman, *Atlantic Yards and the Perils of Community Benefit Agreements*, PLANETIZEN, May 7, 2007, http://www.planetizen.com/node/24335.
[263] Memorandum from the N.Y. Pub. Int. Res. Group, ULURP Should Apply to the Atlantic Yards Project (June 18, 2004), *available at* http://www.developdontdestroy.org/public/nypirg_ULURP.pdf .
[264] *Urban Renewal: Up in Arms about the Yards*, ECONOMIST, Sept. 23, 2006, at 89.
[265] Angotti, *supra* note 87.
[266] *See* Gross, *supra* note 1, at 5-6.
[267] *Id.*
[268] *See supra* notes 52, 90, 180.

requirements. As discussed below in Part IV(D), however, to the extent that CBAs are required by or incorporated into the land use approval processes, they may implicate *Nollan/Dolan*, so this "advantage" of CBAs may be illusory.

4. CBAs allow neighborhoods to control the distribution of at least some of the benefits of the development.

The normal land use process does not necessarily ensure that those most affected by a development proposal will receive an equitable share of the benefits of the development. In many cases, one of the direct benefits of a development is the creation of new jobs. The land use approval process may take into account benefits such as jobs that a development will bring to a community in weighing whether to allow the development. But the land use process generally does not address which community, or group within the community, should get those benefits.[269] Proponents of CBAs believe that they can help give community groups "a united voice"[270] that can help them secure promises that jobs (and other benefits) will be offered first to the residents of the neighborhoods in which the development is being built.[271]

B. Developers

1. CBAs may garner community support for the project and therefore increase the chances that the project will be approved.

A developer's success in obtaining regulatory approvals and financial support from the government in a timely fashion is influenced, of course, by community support for the project.[272] Some developers therefore have accepted and even embraced the use of CBAs because they may secure some measure of community support for, or at least reduce opposition to, the development.[273] Even if the developer believes the project will be approved without a CBA, by gaining support, or reducing opposition, for the project in the community, a CBA may reduce the risk of rejection or save the developer time in the approval process.

2. CBAs may be a more cost effective way of sharing some of the benefits of the development than other means used in public approvals processes.

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[269] *See* Gross, *supra* note 1, at 5–6.
[270] Ho, *supra* note 3, at 9.
[271] *See* Madeline Janis & Brad Lander, *Background on Community Benefits Agreements: The Process, the Projects, and the Prospects for the Future*, in Community Benefits Agreements: The Power, Practice, and Promise of a Responsible Development Tool, *available at* http://www.aecf.org/upload/PublicationFiles/AECF_CBA.pdf (CBAs allow "[c]oalitions of community groups, labor unions and advocates [to demand] more accountable economic development: living wage policies, linking workforce development and first-source hiring to new jobs facilitated by public action, . . . and new 'green-collar- job creation to capture the benefits of more sustainable development.").
[272] Ho, *supra* note 3, at 9.
[273] *Id.*

Developers also may embrace CBAs because they understand that they will be asked to contribute benefits somewhere in the public process and believe that negotiating a CBA with community groups will result in lower costs than negotiating with elected or appointed officials. Or they may believe that promises made through CBAs are less likely to be strictly enforced (in terms of the quality of amenities constructed or offered, for example) than if elected or appointed officials were to require the benefits at issue. Or, developers may believe that they will get greater public relations benefits from CBAs than from any benefits that they provide during a public process.

3. CBAs may provide more certainty that a project will not be challenged in court.

Even after a project has received the requisite regulatory approvals, a developer might still have to consider the likelihood that a dissatisfied community group(s) may sue to challenge the approvals. Developers (and their lenders) are unlikely to expend any significant dollars until the applicable statute of limitations has expired. A CBA will reduce the chances of a lawsuit being filed; the more inclusive the CBA is, the more certainty a developer will have that a project will proceed on a timely basis.

C. City Officials and Local Politicians

1. CBAs may allow municipalities to bypass legal constraints on land use regulation imposed by statute and judicial precedent.

As noted above, the Supreme Court's decisions in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* preclude municipalities from imposing exactions on proposed projects unless those exactions have a substantial nexus to impacts of the developments that would otherwise justify rejection of the development proposal, and unless the exaction is roughly proportional in amount to those impacts.[274] The restrictions established by *Nollan* and *Dolan*, however, only constrain actions taken by the government. Thus, community groups may be able to convince a developer that the agreement is not constrained by *Nollan* and *Dolan* and secure concessions unrelated to the development's land use impacts. To the extent that local government officials are unhappy about their inability to address local concerns because of the strictures of *Nollan/Dollan* and other legal constraints, those officials may wish to see CBAs fill the void. As noted above, however, and discussed more fully in Part IV(D) below, if CBAs are required by or incorporated into the land use approval processes, they in fact may implicate *Nollan/Dolan*

2. CBAs may allow elected and appointed officials to distance themselves from politically unpopular community demands or from politically unpopular developments.

City officials may see CBAs as a way to deflect the ire of developers from elected or appointed officials to the community when the developers believe they are being asked to contribute too many, or inappropriate, benefits in exchange for permission to develop.

[274] Nollan v. Cal. Costal Comm'n, 483 U.S. 825 (1987); Dolan v City of Tigard, 512 U.S. 374 (1994).

Both because the City may wish to appear welcoming to development in order to maintain the City's growth and because of the role that developers' campaign contributions may play in local politics, land use officials may wish to avoid being seen as overly demanding. By tacitly allowing community groups to bargain with the developer through CBAs that are outside of the land use process, municipalities are able to address community needs while blaming the demands upon the developers on forces outside the land use approval process.

CBAs negotiated outside of the land use process also provide cover for local officials who vote to approve a development that is unpopular with their constituents. By citing the CBA, local officials are able to point to the benefits the community will receive and therefore justify the officials' support for the development.

3. CBAs may allow borough presidents and city council members to secure more for their own constituents than the public approval processes might allow.

Politicians in whose district a proposed development falls may believe their constituents should get more of the benefits of the proposed development than others in the City, because those constituents are likely to bear more of the impacts. As discussed above, CBAs may confer benefits better tailored to the local community's needs than concessions the developer makes in the public approval process, because CBAs may not be constrained by the law applicable to the public processes, and because the public approval process involves many other constituencies that must be satisfied.[275] Local politicians accordingly may see the CBA process as a way for them to "deliver" benefits specific to their communities that is easier for them to use than ULURP or other processes.[276]

IV. The Legal and Policy Issues Posed by CBAs

Many participants in the land use process have expressed concern about the unregulated nature of the CBA negotiations process. Because CBAs are a recent phenomenon, the concerns summarized in this section are not based on empirical studies of the agreements or their implementation, but instead are based on observations about CBAs currently in operation, and on the history of negotiations over land use approvals among city officials, developers and members of the community described in Part II.

A. Will "Community" Groups Involved in CBAs Represent the Community?

One of the most common criticisms leveled at CBAs is that the agreements may not represent the wishes of the majority of the community. Under ULURP, community boards, borough presidents, the CPC, the City Council and the Mayor all are involved in the decision whether to grant or deny development approval.[277] The borough president, city council members and the mayor are elected every four years. Members of

[275] GROSS, *supra* note 1, at 10.
[276] *Id.* at 32.
[277] For information on ULURP, see *supra* note 51.

community boards and the CPC are appointed by elected officials (the borough presidents and members of the City Council appoint community board members,[278] and the Mayor, borough presidents and Public Advocate appoint the members of the CPC[279]). Thus, the actions of all those involved in ULURP are subject to the political process: communities affected by development can express support for, or opposition to, the land use decisions made by elected officials and their appointees at the ballot box, and those officials and appointees are accountable to the electorate.

On the other hand, in some cases, the people who negotiate the CBAs are neither elected nor appointed by the community or its elected representatives.[280] In those instances, some community members fear that they have no way of holding these groups accountable for the negotiations. Negotiators who are not well organized, who are weak negotiators, or who do not represent the community's interests can dominate the negotiations unchecked. Further, the lack of accountability may allow developers to choose to work with or appease some groups and ignore others.

CBA negotiations are not subject to requirements and procedures designed to ensure access to the policymaking process for all affected constituencies. For example, ULURP specifically provides for public hearings.[281] ULURP contains rules that govern the notice that must be provided to the affected communities informing them of these hearings.[282] CBAs, on the other hand, may be negotiated privately,[283] and the parties to the CBA may not give other affected interests either notice or an opportunity to be heard about the terms of the CBA.[284] None of the CBAs in the City have been put to a vote of the community as a whole, and some of the CBAs negotiated were not made publicly available until recently.

The Atlantic Yards CBA is illustrative of the problem. Only eight community organizations signed the Atlantic Yards CBA, while more than fifty community groups aligned in opposition.[285] Many interested observers have expressed concern that the signatory groups are not representative of the impacted constituencies. Lance Freeman, an Associate Professor of Urban Planning at Columbia University, for example, criticized the Atlantic Yards CBA on the grounds that "there is no mechanism to insure that the 'community' in a CBA is representative of the community."[286]

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[278] N.Y.C. CHARTER § 2800(a)(1); half of the borough presidents' appointees must be nominees of the council members elected from council districts that include the community district.

[279] *Id*. at § 192(a).

[280] *See* Gross, *supra* note 1, at 11 ("CBAs are negotiated between leaders of community groups and the developer," but noting that government agencies and staff may play a role in negotiations, especially "[i]n unusual circumstances, [when] a government entity may in fact be the 'developer' of a project . . . [and therefore] be central to the negotiations and a party to the CBA.").

[281] N.Y.C. RULES, tit. 62, §2-06(a).

[282] N.Y.C. RULES, tit. 62, §2-02(a)(2).

[283] If they are kept in the files of government agencies as part of the review process, they may be subject to the state's Freedom of Information Law. *See* N.Y. PUB. OFF. LAW art. 6; Washington Post Co. v New York State Ins. Dep't, 463 N.E.2d 604, 606 (NY 1984), (holding that under the plain text of the state's Freedom of Information Law, the term 'public records' includes any "information kept, held, filed, produced . . . by, with or for an agency").

[284] Some, perhaps most, of the community groups negotiating CBAs, however, have tried to maintain transparency regarding their negotiation process and the substance of those negotiations.

[285] *See supra* note 52.

[286] Freeman, *supra* note 262; *see also* Bettina Damiani, Project Director, Good Jobs N.Y., Comments at the Public Hearing of the New York City Council Committee on Economic Development on the proposed

The problem of representativeness is compounded by the potential for conflicts of interest. The cooperation of at least one community group that signed the Atlantic Yards CBA, BUILD, followed closely behind Forest City Ratner's financial contribution to the organization. Indeed, BUILD was not incorporated until days before it announced its support for the development.[287] Shortly after the CBA was signed, Forest City Ratner gave BUILD $100,000, provided space and overhead for a BUILD office in the vicinity of Atlantic Yards, and donated computer equipment and furniture to the group.[288] Forest City Ratner has since given BUILD additional funds and has provided funds for other signatories.[289]

Some of the groups negotiating CBAs in New York City have taken care to involve the community, protect against conflicts of interest, and insure an inclusive bargaining process. But there are no safeguards in place other than those the groups impose upon themselves: no mechanism for ensuring that those who claim to speak for the community actually do so; no guaranteed forum through which the community can express its views about the substance of the CBA or the wisdom of entering into a CBA; and no formal means by which the community can hold negotiators accountable for the success or failure of a CBA. These gaps give rise to a perception that developers might use CBAs as part of a divide and conquer strategy to "buy" off a few community activists in order to create the impression of broader community support than actually exists.[290]

B. Will Those Who Negotiate for the Community Drive an Appropriate Bargain?

Even if those at the bargaining table do indeed speak for the community, there is no guarantee that they will secure a good bargain.[291] Representatives of the community may be hampered by inexperience in negotiating with developers who have made a life's work out of hard bargaining. Community representatives may lack the resources to ascertain what would be the best terms for the community. The fact that the terms of some of the CBAs negotiated recently in New York City were not made available to the public in a timely fashion makes it more difficult for the bargainers to assess what is an appropriate agreement.[292] Further, negotiators likely are members of community groups who stand to benefit from the terms of the CBA (even if not from direct contributions

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Brooklyn Atlantic Yards project (May 26, 2005) (*available at* http://www.goodjobsny.org/testimony_bay_5_05.htm).

[287] Matthew Schuerman, *Ratner Sends Gehry to Drawing Boards*, N.Y. OBSERVER, Dec. 5, 2002, at 13.

[288] Confessore, *supra* note 47.

[289] Matthew Schuerman, *Out of the Woods*?, N.Y. OBSERVER, Oct. 19, 2005, *available at* http://www.observer.com/node/33929. *See also* Matthew Schuermann, *Ratner's Gift*, N.Y. OBSERVER, June 9, 2006, *available at* http://neptune.observer.com/node/34828?page=all.

[290] *See* Amy Lavine, *Atlantic Yards CBA*, CMTY. BENEFITS AGREEMENT BLOG, Jan. 29, 2008, http://communitybenefits.blogspot.com/2008/01/atlantic-yards-cba.html; Kenneth Fisher, *Complex Policy Choices in Managing Growth*, N.Y.L.J. , Jan. 16, 2007, at S8; Freeman, *supra*¸note 262.

[291] Damiani, *supra* note 286; for evidence of how communities fared in similar negotiations over undesirable land uses, see Been, *supra* note 3, at 800–823.

[292] *See* Been, *supra* note 3, at 825–826 (discussing how confidentiality agreements over compensated siting agreements hampered communities bargaining over such agreements).

from the developer, as discussed above), and therefore may have conflicts of interest in assessing what the community should ask for.[293]

The benefits obtained also are not always easy to value. The Atlantic Yard negotiations, for example, required the valuation of such benefits as job training and ''special initiatives to work with the prison population." Valuations of such benefits (not to mention the comparison of the value of the benefits to the costs the development might impose on the community) are notoriously problematic and controversial.

C. Will Negotiations over a CBA Result in Neighborhood by Neighborhood Solutions to Problems That Would Better Be Addressed on a Citywide Basis, or Otherwise Harm the Interests of the City As a Whole?

The terms of a CBA very well may affect the terms of negotiations between the developer and elected or appointed officials in the public approval process, depending upon how the timing of the CBA negotiations relates to the ULURP process. The community negotiating the CBA may capture benefits that would have gone instead to the broader community if CBAs were not allowed. Or the community may bargain for one type of benefit, and thereby reduce the ability of elected officials in the public approval process to get a different kind of benefit that would have been more appropriate for the City as a whole.

Further, while the benefits incorporated into CBAs may address important needs, such as affordable housing, critics contend that these issues should be confronted citywide, rather than on a neighborhood-by-neighborhood basis.[294] A citywide approach would be more likely to channel resources into the neighborhoods that need them most, which may not be the neighborhoods that happen to be getting development.[295] Indeed, it may often be the case that the neighborhoods in which developments are proposed are among the least needy of the City's communities.

A citywide approach to the City's needs is likely to be more comprehensive, better planned, and better integrated with the City's other initiatives. To take one example, the terms of some of the CBAs in the City have involved promises to provide benefits that would draw upon public funding. The Atlantic Yards CBA, for example, promises to provide affordable housing but envisions that the housing will draw upon various public subsidy programs.[296] Those public subsidies are limited resources and the provision of affordable housing of a particular type and in a particular neighborhood

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[293] *See* Damiani, *supra* note 286, (arguing that "Community residents who have not been part of the negotiation, but have expressed concerns about educational facilities, open space, and traffic, have not had a way to include these concerns in the negotiation process. . . . [W]ithout broad, cross-cutting organizing, such 'CBAs' can become a mechanism for dividing the community rather than uniting it.").

[294] *See, e.g.*, Oder, *supra* note 47 (quoting chairpeople of three community boards complaining that they were shut out of the negotiation process for the Atlantic Yards CBA).

[295] *See* Damiani, *supra* note 286.

[296] *See* ATLANTIC YARDS COMMUNITY BENEFITS AGREEMENT, *supra* note 52, at § VI(B)((2)(b) (relying on "governmental contributions for site development and affordable housing subsidies"); *Id.* at Annex A ("the ACORN/ATLANTIC YARDS 50/50 Program will utilize existing Housing Development Corporation (HDC) bond programs and Department of Housing Preservation and Development (HPD) programs, with necessary modifications. The program may also utilize existing Housing Finance Agency (HFA), Affordable Housing Corporation (AHC) or Housing and Urban Development (HUD) programs, with necessary modifications.").

pursuant to a CBA may distort the City's priorities for spending those resources. The subsidies might go much further if used for other developments, but the City would be hard-put to refuse to subsidize affordable housing promised in a particular CBA and thereby risk having to take "blame" for the development's failure to provide community benefits.[297]

Diversion of benefits from the City as a whole to the host neighborhood also may result in greater inequality among the City's neighborhoods. Many neighborhoods within the City will not be zoned for major development or will not have the infrastructure or underused land required for such development. Those communities may share in any benefits of development that are obtained in the public approval process. If CBAs divert benefits from the City as a whole, however, those neighborhoods may see little of the benefits from the City's growth.

D. Will CBAs Considered in the Land Use Process Trigger Nollan/Dolan *and Other Legal Limits on Exactions – Are They Legal?*

As discussed above, the Supreme Court's decision in *Nollan* and *Dolan* imposed nexus and proportionality requirements on local governments' demands for exactions in the land use approval process, at least where those exactions are negotiated on a case-by-case basis.[298] The state courts have imposed additional restrictions on the use of exactions.[299] While we know of no instance in which the courts have been confronted with a claim that CBAs trigger those same restrictions, such a claim would have at least a reasonable basis in the law in some circumstances. If the "leverage" community groups have to convince developers to enter into negotiations stems from from an explicit or implicit requirement that the landowner enter into a CBA before seeking government approval of the land use proposal, the courts may view the negotiations as posing no less (and perhaps more) risk of "extortion," to use the *Nollan* court's term,[300] than the local government's processes at issue in that case.[301] Government officials sometimes have

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[297] It is telling that those charged with administering the City's affordable housing programs, such as the Department of Housing, Preservation and Development, have been silent about the City's willingness to provide the subsidies the Atlantic Yards CBA anticipated would enable the developer to provide the affordable housing "promised" in the agreement. Press Release, supra note 77; see also Norman Oder, HPD foils FOIL (after four months) won't reveal affordable housing subsidies, Nov. 29, 2006, http://atlanticyardsreport.blogspot.com/2006/11/hpd-foils-foil-after-four-months-wont.html.

[298] For a discussion of whether, and how, *Nollan* and *Dolan* apply to takings challenges brought against development impact fees, see Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyziing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 37 (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1456371.

[299] Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 762–63 (2007). *See also* Andrea B. Pace, Note, *Utah Leads the Way in Regulating Land Use Exactions through Statute but Still Has Room to Improve*, 21 BYU J. PUB. L. 209, 221–25 (2007).

[300] 483 US at 837 (referring to a requirement that an owner provide an easement across part of his property as a condition of granting a permit to build a house as "an out-and-out plan of extortion").

[301] While the CBAs entered into in New York City thus far have involved major developments requiring rezonings or other significant land use changes requiring approval by the City Council, the growing popularity of CBAs poses a risk that community groups might begin asking for CBAs when developers need administrative approvals such as variances. Those cases are especially likely to trigger *Nollan*/*Dolan* requirements. *See* Dolan, 512 U.S., at 391 n.8.

suggested the need for the agreements,[302] and indeed even have been involved in the negotiations.[303] Further, the agreements often have been reached and announced at the eleventh hour before crucial government votes on the land use proposals.[304] Courts therefore may find sufficient government involvement in the negotiations themselves to trigger the legal restrictions that apply to the government. To the extent that there are formal or informal "requirements" that developers enter into CBAs prior to seeking government approval of their land use plans, the courts' prohibitions on neighborhood consent requirements also may be applicable.[305] Finally, to the extent that elected officials suggest that they will not consider proposals unless the developer has entered into a CBA, as some are reported to do, courts may find that the City Council has exceeded its authority.

The purpose of this report is not to answer those questions definitively. The questions are sufficiently well grounded, however, to raise considerable concern about the legality of CBAs, both as they have evolved thus far in the City and as the City's stance on CBAs is debated.

E. Will CBAs, Even if "Legal," Compromise Sound Planning and Land Use Regulation?

In *Nollan*, the Supreme Court cautioned that the use of land use exactions could paradoxically lead to under-enforcement of the jurisdiction's land use regulations.[306] The Court suggested that a municipality that enacts strict regulations but waives those regulations in exchange for the benefits secured by exactions might achieve fewer of its genuine land use objectives than if it enacted a less strict but non-waivable regime.[307] In similar fashion, in municipalities that become dependent on the benefits conveyed by CBAs, both the local government and community groups may lose sight of larger, long-term land use objectives and "sell" development approval too cheaply, leaving the community insufficiently protected from the harms that urban developments may impose.

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[302] *See, e.g.*, Egbert, *supra* note 204.

[303] *See, e.g.*, Alex Kratz, *Diaz Stalls on Amory [sic] Project, Waits for Response on Draft Benefits Agreement from Developer*, BRONX NEWS NETWORK, Aug. 21, 2009, http://www.bronxnewsnetwork.org/2009/08/diaz-stalls-on-amory-project-waits-for.html.

[304] *See, e.g.*, Stringer, *supra* note 170 (Manhattan Borough President announcing both his support for Columbia University's expansion and simultaneously announcing an agreement made with Columbia University President Lee Bollinger); Press Release, *supra* note 177 (announcement that Columbia University had reached an agreement with the West Harlem Local Development Corporation, made on the morning of the City Council's vote to approve Columbia's expansion plans).

[305] *See, e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912) (an ordinance allowing two-thirds of the property-owners on a street to regulate how other owners could use their property on that street, without any standards or government oversight, violated the Equal Protection and Due Process Clauses); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) (an ordinance restricting the erection of billboards, but providing for an exception if one-half of the neighboring property-owners choose to lift the restriction, is constitutional because the restriction was imposed by the government rather than the neighbors); Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (an ordinance requiring the consent of neighboring property-owners before a building permit would be issued violated the Due Process Clause by delegating authority over permits from the government to local landowners).

[306] Nollan v. Cal. Coastal Comm'n., 483 U.S. 825 (1987).

[307] *Id.* at 837 n.5.

Indeed, critics assert that the City's indulgence of CBAs has allowed developments that otherwise might not have been approved, at least without significant modification.

F. Will CBAs Chill Appropriate Development?

In some instances, a community's insistence that the developer enter into a CBA to provide benefits to the community may deter development that the community or the City as a whole actually might prefer to have.[308] Negotiators must exercise judgment about how hard to push for benefits, and such judgments require negotiating experience, information about competitor cities, analysis of market trends, and other forms of expertise that community groups bargaining over a CBA may not have.

G. Will CBAs Be Difficult to Enforce Legally, or Will They Contain Terms That Would Be Time-Consuming and Costly to Monitor, or That Are Too Vague to Be Enforced?

Monitoring and enforcing promises made to communities pose significant challenges for those communities.[309] In some cases, CBAs are phrased in aspirational terms that make it hard to determine exactly what is being promised. In the Atlantic Yards CBA, for example, the developer's commitments often are phrased in terms of "the developers agree to work … towards the construction of a high school," or the developers "will seek to …" and the developers "intend to" do various things, but do not actually commit the developers to do those things.[310] Other provisions defer specifics,

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[308] Salkin, *supra* note 9, at 15 ("CBAs are often criticized as creating development barriers that encourage develoipers to simply find other, less costly, locations."); s*ee also* Townsend, *supra* note 210 (deriding demands for a Kingsbridge Armory CBA as "virtual extortion" that might derail a project predicted to create over 1,000 jobs in an area with high unemployment rates).

[309] Salkin and Lavine, *supra* note 9; Gross, *supra* note 1, at 69-72.

[310] ATLANTIC YARDS COMMUNITY BENEFITS AGREEMENT, *supra* note 52, at 13 ("The Developers will use good faith efforts to meet the overall goal . . ."); 13 ("The Developers and BUILD shall make every effort to . . ."); 14 ("Developers intend to negotiate with . . . "); 15 ("The Project Developer and BUILD will work to seek and secure public and/or private funding . . ."); 16 ("Developers . . . will work . . . to the extent feasible, to have [Minority and women] employees . . . "); 16 ("Developers agree to work . . . towards the creation of a High School . . . to be located preferably within the Neighboring Community, and if not, then within the Surrounding Community and, if not, then elsewhere within the Community somewhere within Brooklyn. The creation of such a High School will be subject to public and/or private funding."); 17 ("Developers will seek to award . . ."); 18 ("Developers will seek to award . . ."); 19 ("The process for identifying and awarding contracts shall be included in the Project Implementation Plan, to be created pursuant to Section III, Part G hereof. . . If after Developers provide reasonable opportunity for adequate input . . . Developers determine it is not feasible to directly award all of the work specified in this section V to M/WBEs, the Developers shall seek to establish 'associate relationships' between the prime consultants and M/WBEs."); 19 ("Developer will seek to initially lease . . ."); 20 ("The selection of the firms shall be determined by the Developers, at their discretion, but in collaboration with [specified groups]."); 20 ("The initiative will seek to make available to the selected M/WBEs the following assistance . . ."); 20 ("Developers . . . will attempt to put together a consortium of lenders. . . .[and] to attempt to obtain other sources of available credit or guarantees,"); 25 ("Developer intends to provide for ten (10%) percent of rental units at the Project to be available to senior citizens."); 33 ("Developer shall begin to work to establish or cause to be established a not for profit foundation,"); 33 ("The Developer shall work . . . to create an educational and informational gallery, at a location to be agreed upon . . . Developers shall work .

noting, for example, that FCR will provide space for a community health center "at rent and terms to be agreed upon."[311] Further, some promises are subject to liquidated damages clauses – the developer can "buy-out" its obligation to provide an pre-apprentice training program, for example, by making a one-time payment of $500,000 to the community coalition.

Some CBAs do not include terms such as the timeframe for commitments to be fulfilled; who will monitor performance; how and when information on performance will be made available, and what will happen if the commitment is not fulfilled. [312] In other instances, community groups may have lacked the legal expertise to negotiate usable enforcement provisions.[313] Even when monitoring and enforcement terms are included in CBAs, tracking benefits more complex than one-time financial payments, such as living wage and local hiring requirements, present practical administrative challenges.[314] Finally, because there oftentimes remains mutual skepticism between community groups and developers, monitoring may be especially costly.[315] Community groups may be reluctant to rely on a developer's reports, for example, and attempt to verify figures independently.[316] Such independent analysis could be burdensome for a number of reasons, including the fact that the relevant information may be contained in a developer's private records of wages and hiring decisions.[317]

Finally, while CBAs may meet the legal requirements for contracts, the remedies for breach of the contract are unclear.[318] There are no federal or state cases yet squarely

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. . to seek and obtain public and/or private funding to support this gallery and on-going exhibits."); 34 ("To the extent feasible, the Arena Developer shall permit . . ."); 34 ("Developers will work . . . to establish a Committee on Environmental Assurances . . ."); 34 ("If requested by the Environmental Assurances Committee, the Developers shall work . . . to seek and secure public and/or private funding to pay the reasonable expenses . . ."); 35 ("As will be further described in the Project Implementation Plan, the Developers shall consult with FATHC to determine appropriate mitigation measures . . ."); 36 ("Developer will work with PHC to establish a 'Good Neighbor Program', as further described in the forthcoming Project implementation plan, to . . .perform[] services, or provid[e] funds, at its discretion, . . .Developer and PHC shall work together to seek and/or obtain public and/or private funding for this program."); 37 ("Developer and PHC intend to work with the NYC Department of Small Business Services . . ."); 37 ("Developer will work . . . to seek and secure public and/or private funding . . . PHC and the Project Developer may work together to create a separate non-profit organization.."); 38 ("Developer will work with the DBEC in the creation of educational services . . . subject to the approval of appropriate governmental authorities."); 39 ("Developer will work with DBEC in the creation of a child health initiative . . ."); 39 ("Developer will work with DBEC to develop a Youth Enterprise Program . . ."); 39 ("Developer will work with DBEC to develop an after school program . . ."); 40 ("Developer will work with DBEC to develop a formal relationship with a university research center and a foundation to create a research unit . . ."); 40 ("Developers will work . . . to target hard to employ young people . . . for employment training opportunities at the Project."); 40 ("Developers will use good faith efforts to meet the overall goal . . . be seeking to employ persistently unemployed young people."); 40 ("Developer will work . . . to develop a long term implementation plan . . ."); 41 ("Developers shall . . . dedicate such resources as it seems reasonably necessary to fulfill its obligations hereunder.").

[311] *Id*. at 27.

[312] Gross, *supra* note 1, at 69–72.

[313] *Id.* at 23.

[314] *Id.* at 70–71.

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] Erik Engquist, *Developers' Deal-making Escalates: Community benefit agreements become costly as Bloomberg endorses concept*, CRAIN'S N.Y. BUS,, Mar, 27, 2006, at 1.

addressing legal issues involving the enforcement of CBAs, or the appropriate remedies for a breach.[319]

In a small percentage of cases, CBAs are folded into a development agreement, and in these instances local governments assume monitoring and enforcement responsibilities.[320] Usually, however, community groups are on their own to ensure that the promises contained in the agreement are kept.[321]

V. Recommendations

The resolution of these thorny issues is a difficult challenge for the City. On the one hand, the dangers CBA pose to communities and to the City are serious, and in many quarters, there is considerable dissatisfaction and unease with the CBAs that have been negotiated in the City thus far. On the other hand, the rise of CBAs across the country and in New York City reflects the belief of many communities that current land use processes fail to adequately consider or protect their interests. As noted earlier, the commissions and committees that have been called upon to address similar issues in the past have recommended that communities be involved in the review of development proposals much earlier in the process – before environmental impact review is completed, for example. We agree with our predecessors that (like negotiations over amenities) CBAs are a symptom of a deeper problem with the land use process.

Our first recommendation, therefore, is that the Deputy Mayor for Economic Development, working with such agencies as the Department of City Planning, the City's Department of Environmental Protection, and the Department of Housing Preservation and Development (along with Borough Presidents and the relevant City Council committees) use the lull in development activity caused by the economic downturn to reconsider how the land use approval process and the environmental review process could be refined to provide neighborhoods with a more meaningful and satisfying role in the approval process. The City should work with organizations with extensive experience in the land use field, such as the Bar Association's Land Use and Zoning, Housing, and Environmental committees, as well as non-profit research or advocacy groups such as the Citizens Housing and Planning Committee, the Furman Center for Real Estate and Urban Policy, the Manhattan Institute's Center for Rethinking Development, the Municipal Art Society, the NY Metro Chapter of the American Planning Association, the Pratt Center for Community Development, and the Regional Plan Association. The current economic climate provides an opportunity for improving the land use regulatory scheme that the City should not miss.

Many of the members of this subcommittee would prefer to avoid the use of CBAs, because of the dangers articulated in Part IV. But some members fear that CBAs cannot be banned, either legally or practically, and worry that if the City were to adopt a ban on CBAs, developers would then strike agreements with community groups with

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[319] On the enforceability of agreements between developers and local goverenments more generally, s*ee* Nolan M. Kennedy, Jr. Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825, 836–37 (1972).

[320] Gross, *supra* note 1, at 10.

[321] *Id.* at 70–71.

even less transparency and accountability than has been the case in the CBAs negotiated thus far.

We are unanimous, however, in the belief that the City must establish a policy regarding the use of CBAs. The City's ad hoc approach is sending mixed signals to both developers and communities. During the boom years before 2007, the heated market encouraged developers to negotiate CBAs with communities in order to gain support for ambitious projects. At the same time, concerns that CBAs are tantamount to "zoning for sale" and may run afoul of the *Nollan/Dolan* "essential nexus" test led City officials to be wary of appearing to approve or be involved in the agreements. The fact that the real estate market is now in a slump only heightens that wariness. The result is considerable confusion about how the City's land use processes will treat CBAs. The City must take a stand and put an end to the confusion.

It is our recommendation that the 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 the agreements. To the extent that the City wishes to consider CBAs outside of the land use process, such as in its decisions to grant subsidies or contracts to developers pursuant to its economic development program, it should set forth clear standards that a CBA must meet in order to be considered.

A. The City Should Refuse to Consider CBAs in the Land Use Approval Process

Any public official making a land use decision should ground his or her decision in the land use impacts and implications of a project, as well as the environmental issues identified in the environmental review process. CBAs which contain provisions unrelated to land use planning and impacts considered in the environmental review process are not an appropriate basis for the official's decision and therefore should not be made a condition, either explicitly or behind the scenes, for governmental approval.

The Committee therefore recommends that the City announce that consideration of CBAs in the land use process is inappropriate, and that community boards, the Borough Presidents, the Department of City Planning, the City Planning Commission, City Council members and the Mayor are prohibited from suggesting that developers seeking land use approvals enter into CBAs, and from considering the existence of a CBA or the specific terms of a CBA in deciding whether to approve a developer's request for a map or text amendment, special permit, variance, or other discretionary land use approval. Further, in no instance should any of those official participants in the land use review process serve as administrators or direct beneficiaries of a CBA commitment.

It should be noted that a prohibition on City involvement would not and could not prohibit agreements between developers and community groups that are truly reached independently of the land use process. Rather, such a prohibition would be intended to avoid inappropriate City involvement in these agreements. The City should therefore also announce to developers that in assessing a proposed project's impacts in the environmental review process, it will not take into account any terms of a CBA other than those that directly mitigate impacts revealed in the environmental impact review. However, to the extent that provisions of a CBA address land use and environmental

impacts identified during ULURP and SEQRA, and a developer agrees to incorporate these into a Restrictive Declaration, the project approvals may include such conditions.

To ensure that the existence or terms of CBAs are not considered inappropriately, the City should require developers seeking any map or text amendment, special permit, variance, or other discretionary land use approval to report, at each stage of the land use review process, any agreements negotiated with individuals or community groups, and to make public the terms of those agreements before the final public hearing on the proposal.

Because elected officials have an important role with respect to development projects in their communities, they may wish to have some involvement in a CBA process. However, any such involvement should be consistent with the above and, in order to protect against the appearance of impropriety, should be further governed by guidance from the New York City Conflicts of Interest Board, Corporation Counsel, and General Counsel to the City Council.[322]

B. If the City Chooses to Consider CBAs in Its Decisions to Grant Subsidies or Contracts Pursuant to Its Economic Development Programs, It Should Establish Clear Standards for Such CBAs

The City may choose to employ CBAs in deciding whether to grant subsidies, sell or lease City property or provide other support to projects as part of its economic development program, because economic development processes are not subject to many of the constitutional constraints applicable to the land use process. However, because economic development projects often will involve land use approvals, the use of CBAs in connection with subsidies must be carefully circumscribed to avoid affecting the land use process. The affected City agencies should consider whether the purposes of a CBA can be achieved through other means, such as more direct integration of community benefits into the Request for Proposal, subsidy agreement, land disposition agreement or contract. If the City decides, however, to require a CBA as a condition for granting subsidies or for entering into land disposition agreements with developers through the economic development process, it should make clear that the CBA will be considered only as part of the subsidy decision, not as a component of the land use approvals which may be associated with the project. In these instances, the City must set forth standards that

[322] Officials' participation in negotiations over CBAs may trigger Conflict of Interest Board Advisory Opinion 2008-06, for example. That opinion allows elected officials and agency heads (and their designees) to use City time and resources to solicit or encourage private contributions to not-for-profit organizations only if 1) the official determines that the not-for-profit's work supports the mission of his or her City office or agency; 2) the solicitations include a statement that a decision whether or not to give will not result in official favor or disfavor; 3) the official does not target for solicitations any person or firm with a matter pending or about to be pending before their City office or agency; 4) the official is not soliciting on behalf of any organization with which they are associated or that would benefit a person or firm with whom or which they are associated; and 5) the official file twice each year a public report with the Conflicts of Interest Board disclosing the identity of each not-for-profit organization for which the office or agency sought private contributions in the prior six months. N.Y.C. CONFLICT OF INT. BD., ADVISORY OPINION 2008-06, *available at* http://archive.citylaw.org/coib/AO/arch%202008/AO2008_6_official_fundraising_for%20nonaffiliated_notforprofits(W).pdf.

CBAs must meet in order to satisfy the requirements of the economic development agreement or land disposition agreement. Such standards should address concerns addressed in Part IV of this report regarding transparency, representativeness, accountability and enforceability, and should seek to ensure that citywide interests are not compromised by the CBA.

CBAs are the latest in a series of tools that local governments and community groups have used to try to ensure that development pays its way, mitigates the harms it causes, and provides benefits to the communities it burdens. The goal is appropriate, but the history of such tools shows that negotiations between developers on the one hand, and either land use officials or community groups on the other, may lead to real or perceived conflicts of interest, compromise land use approval processes, and foster rent-seeking. CBAs accordingly must be carefully circumscribed. They may be appropriate conditions to impose upon developers in return for economic development subsidies, but we urge the City to clearly and firmly reject any consideration of CBAs in the land use approval process. Should the City nevertheless decide to allow consideration of CBAs, it should do so only after putting in place safeguards that will limit the dangers they pose, as discussed above.

The advent of CBAs can be seen as an important signal that neighborhoods do not believe that current land use processes are adequately protecting their interests. We urge the City to take the opportunity provided by the economic downturn to thoughtfully consider that dissatisfaction and to refine the City's land use approval processes to ensure a more effective and satisfying role for community input early in the approval process.