

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,

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

²³⁶The 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

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.abcnyc.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.

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

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.

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. Coastal 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 CPC²⁷⁹). 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

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

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

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

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](http://atlanticyardsreport.blogspot.com/2006/11/hpd-foils-foil-after-four-months-wont.html), 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: Analyzing 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.

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,

³⁰⁸ Salkin, *supra* note 9, at 15 ("CBAs are often criticized as creating development barriers that encourage developers to simply find other, less costly, locations."); *see 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

. . . 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

³¹⁹ On the enforceability of agreements between developers and local governments more generally, see 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_noforprofits\(W\).pdf](http://archive.citylaw.org/coib/AO/arch%202008/AO2008_6_official_fundraising_for%20nonaffiliated_noforprofits(W).pdf).

CBA's 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.

CBA's 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. CBA's 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 CBA's in the land use approval process. Should the City nevertheless decide to allow consideration of CBA's, it should do so only after putting in place safeguards that will limit the dangers they pose, as discussed above.

The advent of CBA's 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.