

**LEGAL CONSTRAINTS ON NEIGHBORS' USE OF COMMUNITY BENEFITS
AGREEMENTS IN NEW YORK CITY**

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Abstract:

A Community Benefits Agreement (CBA) is an agreement between a real estate developer and a local community in which the developer agrees to mitigate the impacts of a real estate development in exchange for the community's forbearance from protesting the development project. This thesis focuses on land use CBAs, a subset of CBAs, which are entered into in exchange for a community's agreement to forbear from protesting the developer's land use application to the local government. Land use CBAs disrupt the traditional community - local government - developer dynamic by transforming the adversarial relationship between the developer and the community into one of mutual agreement. CBAs provide communities with additional leverage in the land use decision-making process. The thesis aims to provide CBA practitioners with a roadmap for understanding the legal issues inherent in CBAs, and strategies for negotiating a valid and enforceable CBA.

This thesis utilizes legal and planning scholarship, case law, interviews with CBA experts and news articles to reach its findings. While courts have not yet ruled on the constitutionality or enforceability of CBAs, as CBAs become more prevalent, legal challenges may soon arise. These challenges will likely focus on the level of local government involvement and whether the local government engaged in impermissible regulatory takings, and therefore, communities should recognize the legal risk presented by including local government in the process. Communities should pursue one of two CBA negotiation strategies: (1) a direct negotiation with the developer, without local government assistance, thereby enabling a wider range of benefits, or (2) a negotiation with the developer with the local government's assistance, thereby limiting the scope of the range of benefits.

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I. Introduction

a. Legal constraints on Community Benefits Agreements

This thesis will explore the legal constraints on the public's ability to advocate for its interests through New York City's land use approval process. Land use and real estate development in the United States are governed by three distinct stakeholders: (i) the real estate developer, (ii) the local government and (iii) the neighbors, the self-interested subset of the general public that is situated geographically closest to the proposed development or rezoning. For ease of reference, this third party is referred to throughout as the neighbors or the community.¹

This thesis analyzes the legal constraints to the community's ability to gain more leverage in the land use decision-making process by entering into a Community Benefits Agreement (a CBA) with a developer. A CBA is a side agreement between the developer and the community which operates as a legal tool under contract law to mitigate the impacts of a development for a community from a developer seeking land use approvals or government subsidies and minimize the related resistance for the developer.

This thesis distinguishes between two different types of Community Benefits Agreements: the "land use CBA" and the "economic development CBA". A developer

¹ Robert C. Ellickson, Vicki L. Been and Christopher Serkin, *Land Use Controls: Cases and Materials*. (Aspen, 2005), 73.

generally enters into a “land use CBA” in exchange for a community’s agreement to forbear from protesting the developer’s land use application. Land use CBAs arose within a context where the developer and the community assume adversarial roles advocating for or against a change to the land use status quo, and the local government serves as a regulatory body and the final arbiter. This tripartite stakeholder dynamic, and particularly the judicially defined role of the local government as a regulatory body, is symptomatic of the courts’ sensitivity to zoning initiatives that could constitute regulatory takings violating the Fifth Amendment of the United States Constitution. The land use CBA disrupts this tripartite stakeholder dynamic by transforming the adversarial relationship between the developer and the community into one of mutual agreement, and thereby disrupting the checks and balance of the formal land use decision-making process.

In addition to land use CBAs, a developer could enter into an “economic development CBA”. Developers enter into economic development CBAs in order to receive subsidies or improve its development proposal in response to a Request for Proposals (or sometimes, as a condition of its development proposal). The economic development CBA increases the developer’s chances of obtaining government subsidies for a development project or being selected as the developer for a project. In the economic development CBA context, the relationship between the three stakeholders is quite different, particularly the role of the local government. The local government, instead of acting in as a regulatory body serving as neutral arbiter (as it does in the land use context), is now a market participant, offering subsidies, tax credits, or other incentives to the developer in exchange for a development

which addresses certain policy or legal goals. The local government is not constrained by the Fifth Amendment when entering into subsidy or disposition agreements.

This thesis analyzes land use CBAs (as opposed to economic development CBAs) as a mechanism for empowering the community to participate with greater agency in the land use approval process than current land use decision making processes allow. Land use CBAs, as private agreements operating outside of the regulations of the land-use decision making process, enable the parties to prevent or resolve the conflict using a contract-based legal tool.

Using case law, scholarly articles, and interviews with practitioners, I researched the legal constraints of CBAs as a contemporary negotiating tool for the public to access benefits from a developer seeking land use approvals from a local government. I limited the scope of the thesis to land use CBAs because of their impact on the tripartite stakeholder dynamic and the legal difficulties of structuring benefit agreements between these distinct parties. The thesis concludes with strategic recommendations for neighbors pursuing a CBA with a developer seeking land use approvals.

My intent is to provide community organizations and CBA practitioners with a working understanding of how to structure the CBA negotiating process so that the resulting CBA is legally enforceable and provides for appropriate benefits. In order to negotiate, implement and enforce a CBA, a community organization must know: (i) how to distinguish a land use CBA from an economic development CBA, (ii) the nuances differentiating public and private agreements, (iii) how to evade or

succeed against a *Nollan/Dolan* legal challenge threatening the enforceability of the CBA, (iv) the State Action Doctrine, (v) basic tenets of contract law and (vi) why CBAs are attractive in NYC.

b. Land use law in the United States

Land use law in the United States is a mechanism for mediating between property developers seeking to change the status quo, the local governmental body with jurisdiction over land use approvals, and the community of local residents and businesses concerned about their property.² While these three stakeholders do not hold equal power in the land use approval process, they keep each other in check.³ The developer-local government-neighbor dynamic, which I call the “tripartite stakeholder dynamic”, informs and is informed by the land use decision-making process and land use law.

Zoning, the regulatory structure that controls land use, has guided the tripartite stakeholder dynamic since the Supreme Court upheld the legality of the use of zoning in *Euclid v. Ambler* in 1926.⁴ However, since *Euclid*, local governments have evolved from acting purely as an administrator to actively partnering with

² See Ellickson, Been and Serkin, *Land Use Controls*, 73. “A typical land use dispute is a drama featuring three main sets of players: (1) The developer (who usually owns the land or holds an option to purchase the land) ...(2) The neighbors of the land in dispute (or others situated farther away but still threatened by the negative consequences of the proposed activity) are the developer’s first and main line of opposition...(3) The general-purpose local government in which the land is located is in the principal institution for reconciling the competing interests of the developer and the neighbors.”

³ The politics of rezoning and the developer-local government-neighbor power dynamic is the discussion of many land use and political theorists’ work. See Ellickson, Been and Serkin, *Land Use Controls*, 302-309. Some contend that Neighbors are powerful because they elect the local government, others contend the developers are powerful because of the capital they bring to the community, others contend that the local government controls the dynamic. Identifying the sources of power is outside of the scope of this thesis. Instead this thesis is focusing on Community benefits agreements as an open, legal device that may or may not shift the balance of this dynamic.

⁴ *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 [U.S. 365](#) (1926)

developers.⁵ While the court in *Euclid* upheld a local government's right to administer land use regulations, such as zoning, courts have pushed back on a local government's use of zoning power to actively shape individual development projects due to the Fifth Amendment's Takings Clause.⁶ The courts are wary of zoning agreements or approvals that appear too contract-like. Contract zoning, initially struck down by the courts, occurs when "the local government conditioned rezoning on so many particulars that the arrangement resembled a contract".⁷ In light of these judicial constraints, local governments and communities have pursued other means for obtaining benefits from real estate developers seeking land use approvals.

In New York City, the tripartite stakeholder dynamic is formally regulated by the Uniform Land Use Review Procedure (ULURP) process.⁸ The dynamic also plays out in informal processes such as meetings and negotiations between the developer and the local government and/or the community outside of the regulated ULURP hearings. According to the Department of City Planning's website

[t]he Charter's intent in requiring ULURP was to establish a standardized procedure whereby applications affecting the land use of the city would be publicly reviewed... Key participants in the ULURP process are now the Department of City Planning (DCP) and the City Planning Commission (CPC),

⁵ See Ellickson, Been and Serkin, *Land Use Controls*.

⁶ The Takings Clause of the Fifth Amendment prevents the government from seizing private property without just compensation.

⁷ Vicki Been, "Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?," *Furman Center for Real Estate and Urban Policy Working Paper, 2010*, 5.

⁸ See New York City Department of City Planning website, "The Uniform Land Use Review Procedure", <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> (Accessed February 2013). For ULURP Rules see New York City Department of City Planning website – ULURP Rules <http://www.nyc.gov/html/dcp/html/luproc/ulrule.shtml> (Accessed March 2013)

Community Boards, the Borough Presidents, the Borough Boards, the City Council and the Mayor.⁹

The land use approval process formally begins when a real estate developer submits an application to New York City (the local government) for approval.¹⁰ The developer then participates in a series of public hearings and approvals. The Community Board, an appointed quasi-governmental board plays, an “important advisory role... Applications for a change in or variance from the zoning resolution must come before the board for review, and the board's position is considered in the final determination.”¹¹ The Community Board theoretically represents the interests of the neighbors and may approve or disapprove of the proposed project before elected officials determine whether to grant the final approvals. ULURP provides community stakeholders with an outlet to express their opinions about a project but gives the community little to no dispositive power. ULURP entrenches the imbalance of power between the developer, local government and neighbors. The developer has the power to initiate and persuade. The neighbors also have the power to persuade but cannot veto anything the developer requests. The local government has the authority to grant the developer’s requests but only limited authority to demand certain benefits in return for the general public or the neighbors. In addition to ULURP, land use negotiations in New York unfold in a variety of legal

⁹ NYC DCP website, “The Uniform Land Use Review Procedure”; <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> (Accessed March 2013)

¹⁰ NYC DCP website, “The Uniform Land Use Review Procedure”; <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> (Accessed March 2013). The ULURP process informally begins whenever the developer begins to discuss the proposed project with local government officials and community stakeholders. These informal discussions are precursors to and can occur simultaneously with negotiations for the CBA.

¹¹ See New York City Mayor’s Community Affairs Unit website, “About Community Boards” <http://www.nyc.gov/html/cau/html/cb/about.shtml> (Accessed March 2013)

transactions and documents including development agreements, restrictive declarations and CBAs.

c. CBAs, a new zoning-related legal tool, shifts the imbalance in the dynamic

Community Benefits Agreements are one of the newest forms for capturing benefits for neighbors that are otherwise unattainable through the formal land use process. Agreements between developers and the community or local government to compensate for the impacts of the development are not new or unique. However “CBAs in their current form arose within a specific contemporary context.”¹² Benefits agreements are sometimes formalized in development agreements or restrictive declarations. A development agreement is an agreement between the developer and the local government memorializing the land use and zoning regulations in effect at the time and any impacts the developer is agreeing to mitigate. A restrictive declaration is a covenant running with the land that prohibits the developer and future owners from using the land for a prohibited use. These contracts provide a local government with the limited opportunity to contract for impact mitigation. According to the City Bar Report, CBAs are the result 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 developer proposals that require governmental approval.”¹³

¹² Laura Wolf-Powers, "Community Benefits Agreements and Local Government: A Review of Recent Evidence" *Journal of the American Planning Association* (2010) Vol. 76, No.2, 2 (finding that CBAs are the result of a strong urban real estate market interested in redevelopment and infill.)

¹³ Association of the Bar of the City of New York Land Use Committee, *The Role of Community Benefits Agreements in New York City's Land Use Process*, March 2010, 1.

Over the past decade, CBAs have become a popular tool in New York City for circumventing City Charter processes to mediate between community and developer interests.¹⁴ CBAs are symptomatic of the City's unresponsive land use approval system and the community's deep dissatisfaction with its role in the planning process. According to the New York City Charter Revision Commission "CBA supporters argue that the normal land use process does not allow for enough input by community members, and that CBAs provide a better forum for citizens to procure what they need from developers, resulting in a strengthening of the local economy and improvement of the neighborhood."¹⁵ CBAs enable the community to demand and receive benefits that are otherwise unattainable through ULURP and thereby shift the power in the tripartite stakeholder dynamic.

d. Public and private CBAs raise different legal issues

CBAs are unregulated contracts in an otherwise highly regulated area of municipal law, and therefore raise certain constitutional legal issues. CBAs are either public or private agreements. A private CBA is a contract between the developer and the community. CBAs are generally private agreements.¹⁶ A public CBA is a CBA in which the local government is involved. The City Bar Report found

¹⁴ For example - On May 18th 2009 Columbia University and the West Harlem Local Development Corporation ("WHLDC") entered into the West Harlem Community Benefit Agreement ("WHCBA"). Columbia University, as developer, provided \$150 million in cash and in-kind benefits for the West Harlem community in exchange for the community's support of their proposed Manhattanville campus expansion. "West Harlem Community Benefits Agreement", May 18, 2009 <http://www.columbia.edu/cu/gca/news/COmmunityBenefitsAgreement/index.html> (accessed March 2013)

¹⁵ See New York City Charter Revision Commission, Final Report of the 2010 New York City Charter Revision Commission, August 23, 2010, 104. (accessed March 2013)

¹⁶ NYCBA, *Report*, 2. "CBAs are generally private agreements that detail the benefits a developer will provide in order to secure the cooperation, at least forbearance, of community organizations regarding the developer's application for permission to develop a particular project."

that in some instances “local governments incorporate the agreement (or its terms) into their own development agreements with the property owner.”¹⁷

As a public agreement, a CBA is governed not only by contract law (which governs private agreements) but also by applicable federal, state and local laws that regulate actions of local governments. The most pressing public CBA legal constraint is the Fifth Amendment of the United States Constitution and its analogous provision in the New York State Constitution. The Fifth Amendment protects citizens from the government taking private property without just compensation. There are two types of takings. A physical taking can occur when the government physically takes or invades a private party’s property. A regulatory taking can occur when regulations are so burdensome that they effectively make it impossible for the party to enjoy the property. Courts are wary of local governments engaging in regulatory takings by abusing their authority to grant discretionary land use approvals as a mechanism for exacting cash and other benefits from developers seeking approvals. The Supreme Court since *Nollan v. California Coastal Commission*¹⁸ in 1987 and *Dolan v. Tigard*¹⁹ in 1994 has construed the Takings Clause expansively, finding that a local government’s overly burdensome demands on developers in return for land use approvals is an impermissible regulatory takings.

In a public CBA, *Nollan/Dolan* scrutiny would be triggered if the CBA were structured such that the local government (either directly or indirectly) demanded

¹⁷ NYCBA, *Report*, 3. (referring to the Staples CBA, did not provide a NYC example).

¹⁸ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

¹⁹ *Dolan v. City of Tigard*, 512 [U.S. 374](#) (1994)

benefits in return for granting the land use approvals to the developer. *Nollan/Dolan* scrutiny is not triggered in private CBAs because the Takings Clause does not apply to purely private agreements. The Takings Clause does not apply in purely private CBAs because in such instances the government has not taken a regulatory action that deprives either party of property.

e. Plan of the thesis

Part I of this thesis introduces Community Benefits Agreements and outlines the research agenda to identify the legal constraints of Community Benefits Agreements. Part II, a literature review, assesses the current legal and planning CBA scholarship, finding that there is a divergence between the approach of each discipline to understanding the legal and stakeholder dynamics that structure a CBA. Part III presents the research design and resources used to examine the legal constraints of CBAs. Part IV analyzes the potential legal issues in three New York City CBAs and finds that communities can pursue multiple strategies to negotiate valid CBAs. Part V concludes the thesis with recommendations for community organizations that are negotiating CBAs.

II. Literature Review

Over the past decade, CBAs have become increasingly used in the United States as an additional or alternative negotiation mechanism between community

stakeholders and real estate developers. Since Julian Gross'²⁰ work with the Staples Center CBA in 2001, academics and community organizers have recognized the rise in CBAs and their evolution from other forms of agreements (such as development agreements and restrictive declarations) providing benefits to neighbors or local government to mitigate the impacts of development.²¹

Scholars are also aware that CBAs as a legal form are a recent innovation, and therefore, definitive conclusions or comprehensive empirical studies are not yet available. The New York City Bar Association Report (City Bar Report) found that “[b]ecause most CBAs are relatively new, there is scant evidence, either empirical or anecdotal, to evaluate whether CBAs are a net benefit to the parties who enter into these agreements... Nor is it yet clear what effect CBAs will have on the land use process or the City’s development climate more generally.”²² CBA scholarship has focused on case studies and identifying potential legal issues. Scholars are studying CBAs as they are negotiated and implemented (or fail to be signed) to offer community activists, local governments and developers practical insights in how to structure CBAs.

Even though CBAs are relatively new, it is not too early in their development to assess the legal constraints of such agreements. The City Bar Report and other legal articles have addressed the regulatory and constitutional issues facing CBAs, contextualizing CBAs within “a long history of efforts by communities, developers

²⁰ Julian Gross is the Legal Director of the California Partnership for Working Families. Although he is a lawyer for the purposes of this section I consider him a ‘planning scholar/planner’ because his work is focused on CBA organizing rather than CBA legal analysis and he co-authors articles with non-lawyers.

²¹ See Wolf-Powers, *Evidence*.

²² NYCBA, *Report*, 1-2.

and local governments to find flexible laws to address neighbors' concerns about development proposals."²³ Many articles find that CBAs perpetuate rather than resolve the legal uncertainties of negotiating with developers to mitigate the impacts of development projects. While it is impossible to entirely resolve legal uncertainties before a court issues a conclusive ruling, this thesis hopes to untangle and clarify some parameters of the unresolved legal issues.

a. CBAs suffer from a lack of definition

The first step toward resolving legal uncertainty is properly defining the issue. Scholars have struggled to define the legal issues associated with CBAs because, as Dan Steinberg, a planning scholar focusing on labor involvement in CBAs notes, CBAs suffer from a lack of a formal definition.²⁴ This deficiency rises in part from the relative novelty of CBAs but also because scholars disagree. To some extent, all CBA, planning and legal scholars alike, concur that CBAs are agreements between developers and community representatives for benefits from the developer in return for the community's forbearance from protesting the project. They take different approaches however, to whether CBAs are limited to private agreements, what the community is actually giving to the real estate developer in the CBA, and whether certain actions of a local government constitute involvement in the agreement.

Failing to identify and understand the legal ramifications of these issues puts community activists at risk of entering into CBAs that are legally unsound and

²³ NYCBA, *Report*, 2.

²⁴ Interview with Dan Steinberg on February 21, 2013.

therefore enforceable. The community, even more than the developer, needs to ensure that the CBA is legally enforceable, since the parties to the CBA exchange their consideration at different time intervals. The community forbears from protesting the land use application at the beginning of the land use approval process. The developer, however, most often carries out its end of the bargain at a later date, during the actual construction process, or after construction is completed. Therefore, the developer receives its benefit up front, while the community must rely on the enforceability of the CBA to ensure that the developer meets its obligations at a later date. Scholars (other than Julian Gross) have failed to focus on providing communities with strategic protections from the inherent imbalance in the agreement.

b. CBAs are a catchall for a variety of different kinds of agreements

The disagreement among scholars as to CBAs' definition has led to CBAs to become a catchall for a variety of different agreements that are fundamentally different. As CBAs evolve, the variations between CBAs will become more distinct and possibly develop into different legal forms. Over time a more refined definition of CBAs will also emerge. Until then, Laura Wolf-Powers' 2009 typology demonstrates the range of agreements that scholars consider CBAs. She identified five general categories of CBAs:

[1] Independent agreement between developer and negotiating parties (no formal government role); [2] Independent agreement exists between developer and negotiating parties (provisions also included in development and disposition agreement with redevelopment agency); [3] No independent agreement exists between negotiating parties and developer (but provisions included in development and disposition agreement with redevelopment agency); [4] Agreement exists between public or quasi-public agency or authority and negotiating parties (agency

or authority acting as developer); [5] Local legislation dictates benefits requirements²⁵

This thesis considers only the first two types of agreements described above as CBAs. Wolf-Powers' third type of agreement is not a CBA because in order to distinguish a CBA from other types of benefit agreements, a CBA must be an independent agreement between the developer and the community.²⁶ When the local government acts as the developer, as described in Wolf-Powers' fourth type of agreement, the tripartite stakeholder dynamic is fundamentally disrupted, and therefore, this type of agreement does not belong in the same analysis as a CBA between a private actor²⁷ developer and a community. When the benefits are dictated by legislation, as described in Wolf-Powers' fifth type of agreement, then the agreement cannot be considered voluntary. The benefits resulting from legislation are not the product of a community negotiating for benefits otherwise unattainable. As defined earlier, CBAs are agreements between developers and communities for benefits that the developer would not otherwise provide. If communities are not party to the agreement (either as signatories or negotiating parties) the agreement should not be called a community benefit agreement.

Wolf-Powers' typology focuses on the parties to the agreement without analyzing why the agreement was made. This thesis categorizes CBAs differently.

Instead of categorizing them by the nature of local government's role, I posit that the

²⁵ Wolf-Powers, *Evidence*, 4.

²⁶ A CBA can also become incorporated into a local government's agreements and still be considered a CBA as long as it also exists as an independent agreement between the developer and the community.

²⁷ I am using the term private actor developer because public institutions can be private actor developers even though they are public organizations but a governmental organization can never truly be a private actor.

fundamental defining characteristic is the CBA's subject matter. CBAs, as categorized by their subject matter, fall into two categories: (i) economic development and (ii) land use. Identifying the subject matter of the CBA is a critical first step in analyzing the CBA and developing a strategy for negotiations, because the legal constraints of contracting for a land use approval are different than the constraints of contracting for an economic development project. However as Wolf-Powers has stated²⁸, it can be quite difficult to distinguish between the two types. To complicate matters further, the larger the redevelopment project the greater the likelihood it will require both land use approvals and economic development incentive packages from the local government resulting in a hybrid land use/economic development project.

Once the subject matter is defined then the categorization should be further refined by the level of the local government's involvement in drafting, negotiating, signing and/or enforcing the CBA. Wolf-Powers' heuristic delineating between formal or informal government involvement fails to capture the nuances that a court would focus on when determining if local government were involved. Properly identifying the extent of local government's involvement becomes critically important for land use CBAs and for CBAs signed for deals that are hybrid land use and economic development. Local government has greater legal leeway to become involved in economic development CBAs than in land use CBAs. If the subject matter of a CBA in a hybrid land use and economic development deal is unclear and the local government acting on that uncertainty becomes involved to an extent

²⁸ Wolf-Powers, *Evidence*, 3.

permissible for an economic development CBA but impermissible for a land use CBA, it runs the risk of engaging in a regulatory taking that violates the Taking Clause.

c. Planners and lawyers analyze CBAs from different perspectives

Planning and legal scholars diverge on how they perceive the power dynamics between CBA stakeholders. These two disciplines understand the role that local government and neighbors play in land use differently. Lawyers view the role of local government as that of an impartial arbiter refereeing competing land use interests. Planners view local government as an active participant in shaping land use and distributing benefits and impacts of development.²⁹ Lawyers view neighbors as a self-interested subset of the general public who will use their vote and political capital to preserve the status quo and the value of their property. Planners view neighbors as the subset of the general public most impacted by the project. The divergence between planners and lawyers in perceiving the roles and values of the local government and the neighbors leads to fundamentally different outlooks on the validity and usefulness of CBAs.

Planning scholars assume that the local government and neighbors are (or should be) pursuing similar goals.³⁰ They present local government in the role of

²⁹ See Julian Gross, with Greg LeRoy and Madeline Janis-Aparicio, "Good Jobs First, Community benefits agreements: Making Development Projects Accountable" 2005, 5. <http://www.goodjobsfirst.org/pdf/cba2005final.pdf>. ("As local governments grapple with their responsibility to shape development and land use patterns, a new movement has emerged to challenge conventional thinking and offer a broader vision.")

³⁰ Wolf-Powers, *Evidence*.

'facilitator'³¹ whereas legal analysts view local government as 'regulators'. Planners view CBAs as empowering neighbors to participate more actively in the negotiation for the benefits that the local government had historically sought for them. Wolf-Powers argues that "the parties to a CBA are not simply the groups seeking benefits and the developers from whom the benefits are being sought, but also the local public sector aiming to negotiate the best redevelopment deal for the locality."³² Planning scholars tend to focus on how to make developers accountable for the impacts of their projects.³³ The planning approach pits local government and neighbors against developers. Planners do not perceive local government and neighbors as distinct stakeholders. When planners conflate these two roles in their CBA research and subsequent community organizing guides, communities are at risk of becoming misinformed about unnecessarily triggering legal constraints that are otherwise avoidable by community organizations capable of conducting their own negotiations.

In contrast, legal scholars tend to adhere more strictly to the conventional land use law model of the tripartite stakeholder dynamic.³⁴ Adherence to this model enables them to cast neighbors as continuing their historical role of negotiating on behalf of their subset of the general public's interest. Vicki Been, an NYU land use

³¹ See Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 2005, 4. ("Unfortunately, public-private partnerships at the local level are being driven for the most part by the private sector...Local governments, eager to expand their tax based and presented with little meaningful information about the costs and benefits of their choices, often see their role as being limited to facilitating the visions and plans of developers - rather than facilitating a public vision and plan developed with the input of a wide range of stakeholders.")

³² Wolf-Powers, *Evidence*, 2.

³³ See Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 2005.

³⁴ See Michael Nadler, "The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem." *Urban Lawyer* 43, 587, 588. ("In development projects, there are at least three interested parties: the developer...the municipal government...and the local community.") for references to the developer- local government-neighbor model.

law professor, like other legal scholars, views the neighbors as the prime movers, describing CBAs as “the latest in a long line of tools neighbors have used to protect their neighborhood from the burdens of development.”³⁵ This approach presents CBAs as an alternative avenue to channel the conflict between the developer and the neighbors, necessary because of local government’s failure to effectively mediate their interests. It does not necessarily blame government for this failure but rather assumes that courts have constrained government to such an extent that government lacks the flexibility to respond effectively.³⁶

In contrast to planners’ conflating the interest of the neighbors and local government, legal scholars run the opposite risk of viewing the interests of neighbors and local government as wholly distinct. In reality, the local government derives its authority from neighbors and neighbors derive their authority from the local government.³⁷ For example, in New York City, the borough president, an elected local official, appoints the members of the Community Board. The Community Board officially represents the neighbors in ULURP. Legal scholars’ misperception of the neighbors as an autonomous and powerful entity wholly distinct from local government overestimates the neighbors’ capacity to negotiate, implement and enforce a CBA without local government’s assistance. Legal scholars’ insistence that communities are capable of advocating for CBAs separately from local government is a narrative fiction possibly created to evade some of the

³⁵ Been, *Exactions*, 1.

³⁶ See Been, *Exactions*, 5.

³⁷ In the tripartite stakeholder dynamic developers tend to be defined as outsiders with limited voting rights or representation in local government. Neighbors on the other hand are local residents who vote for the local government. The local government in turn legislates the neighbors’ involvement in land use.

more difficult legal constraints on CBAs created when local government becomes involved.

d. Planning scholars conflate land use and economic development CBAs

CBA activists have already begun to put together guides for assisting community organizations to advocate and negotiate for CBAs.³⁸ However these guides tend to gloss over the legally crucial distinction between land use CBAs and economic development CBAs. While this distinction may be irrelevant in many projects, because a large project will usually need both land use approvals and subsidies, failing to make this distinction may lead community activists to believe they have more leverage than they do or link their benefits to the wrong impacts. In conflating these types of CBAs and failing to clearly demonstrate to community activists that public and private CBAs have different legal limitations, CBA scholar activists risk facilitating community organizing around unachievable or unenforceable benefits. For example, Gross, LeRoy and Janis-Aparicio explain that “community groups promise to support the proposed project before government bodies that provide the necessary permits and subsidies.”³⁹ They later “strongly recommend that a CBA be incorporated into *any* [emphasis added] development agreement for a project, so that the CBA becomes enforceable by the government entity that is subsidizing the development.”⁴⁰ On a close reading it is clear that their recommendation is limited to projects with government subsidies. However,

³⁸ See Gross, LeRoy and Janis-Aparicio, *Good Jobs First*.

³⁹ Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 9.

⁴⁰ Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 10. (This section is titled “How Does a CBA Relate to a Development Agreement”).

appreciating that limitation requires the ability to distinguish between permits and subsidies. The distinction especially in large-scale redevelopment projects can be murky. Planning scholars often conflate a community's source of bargaining power.

e. Legal scholars are too focused on Takings Clause constraints

Nadler identified whether CBAs violate the Takings Clause as “one of the most pressing and commonly cited” issues regarding CBAs.⁴¹ As part of their Takings Clause analysis, CBAs scholars debate whether *Nollan/Dolan*'s two-prong test would apply.⁴² Legal commentators focus on *Nollan/Dolan* because it is the most relevant, pressing and current Regulatory Takings case law. Nadler, like other legal scholars, agrees that if local government becomes “sufficiently involved in the CBA negotiation process, *Nollan* and *Dolan* should apply. In practice, this would lead to the invalidation of many promised community benefits contained in existing CBAs.”⁴³ While much of the legal analysis of CBAs has focused on *Nollan/Dolan*, legal scholars should also begin considering legitimate contract law issues raised by CBAs, such as consideration and standing.

The singular focus on *Nollan/Dolan* can obscure the reality that CBAs are not exactions. 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. Exactions are a means of ensuring that developers, rather than taxpayers, bear the costs and risks of development...and mitigate any harmful

⁴¹ See Nadler, *Constitutionality*, 587.

⁴² Nadler, *Constitutionality*, 587.

⁴³ Nadler, *Constitutionality*, 587.

consequences of development.”⁴⁴ When an exaction violates the Taking Clause, it becomes a regulatory taking. Unlike the exactions discussed in *Nollan* and *Dolan*, CBAs are not a prerequisite for land use approvals. CBAs may become public agreements, but are not necessarily public by definition. Legal scholars often dismiss the analysis of which circumstances and characteristics (short of incorporation into a development agreement between the developer and the local government), would make the local government ‘sufficiently involved’ to warrant *Nollan/Dolan* scrutiny.

Legal scholars often mistakenly assume that that community activists are aware of and concerned about *Nollan/Dolan* constraints. For example, in Been’s discussion of why CBAs are attractive to communities, she stated that “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.”⁴⁵ I have been unable to find any anecdotal evidence that demonstrates that negotiating parties are concerned about whether the courts would consider the benefits to be improper regulatory takings. In fact when I interviewed a former lawyer about her role in negotiating a NYC CBA, she said that *Nollan/Dolan* constraints were not a concern because CBAs are just another iteration of frequently-used side agreements between developers and neighbors. Another lawyer who represents developers in CBA negotiations told me during an informal conversation that he does not know of community organizations that are aware of or feel constrained by *Nollan/Dolan*.

⁴⁴ Been, *Exactions*, 6.

⁴⁵ Been, *Exactions*, 8.

Legal scholars have failed to offer guidelines to community activists and local governments to avoid *Nollan/Dolan* scrutiny when negotiating CBAs. Even though community organizations seem unconcerned about the Taking Clause constraints, legal scholars should provide clear information about the legal practicalities of these agreements because CBAs are ripe for legal challenges by developers disinterested in providing the benefits in this economic downturn or future purchasers of the development disinterested in implementing the developer's promises. As CBAs develop into a more entrenched legal form or as the projects associated with CBAs age, affiliated parties are going to become disenchanted with the CBA negotiation or implementation process and legally challenge the CBAs enforceability.

f. Bridging Legal and Planning Literature

This thesis will bridge the gap between planning's disinterest with distinguishing between public and private agreements (and the associated legal constraints) and land use and economic development CBAs and law's singular focus on the constitutional issues. The thesis reconciles these two strains by arguing that community activists must choose a public, private or hybrid approach to CBA negotiation. The public/private distinction is key to understanding CBAs, but it is also critical to recognize that the public/private distinction is more accurately a continuum, and therefore, the legal constraints vary in subtle ways as the CBAs become more public or more private.

III. Research Design

In order to understand the legal constraints faced by neighbors interested in engaging in CBAs, I researched the legal and planning scholarship on CBAs. CBAs are a new and distinct legal instrument, and therefore, a dearth of empirical and, to some extent, anecdotal evidence exists.⁴⁶ Moreover, the limited scholarship on CBAs and the lack of case law have made it difficult to assess the success of existing CBAs. I therefore focused this thesis on the legal issues surrounding advocating, negotiating and implementing CBAs, instead of compiling best practices for drafting a legally valid CBA.

The evidence I gathered fell into four primary categories: primary research, legal scholarship, planning scholarship and media coverage. The primary research consisted of copies of Community Benefits Agreements I found on the internet and cases I pulled from Lexis Nexis. The legal scholarship included legal journal articles and professional association reports. The planning scholarship included practical guides to CBA organizing and planning journal articles. I also gathered newspaper articles about CBAs and conducted informal and formal interviews with people involved in existing CBAs.

First, I researched the various kinds of CBAs in existence and came to the conclusion that CBAs derived from developers seeking land use approvals have fundamentally different legal issues than CBAs derived from developers receiving subsidies and land dispositions from the local government. I then narrowed my research to the legal issues of land use CBAs because the research showed that economic development CBAs would only raise contract law legal issues whereas

⁴⁶ NYCBA, *Report*.

land use CBAs would raise the same contract law issues but also possible constitutional issues.

I began by contextualizing CBAs within the larger framework of land use decision-making. I researched how the tripartite stakeholder dynamic has evolved to include proto-CBA forms of negotiation and benefit agreements.⁴⁷ It became clear that the legal scholarship and the planning scholarship approached the tripartite stakeholders dynamic differently. I continued researching both planning and legal perspectives on CBAs with the intention of reconciling their approaches.

The planners tended to focus on how to organize the community and ensure certain kinds of benefits. The lawyers were focused on whether CBAs were valid legal agreements and how they fit in with current land use jurisprudence concerned with regulatory takings. I had begun my research distracted by the legal approach. Initially, I wanted this thesis to answer the question of how community organizers could reconcile the *Nollan/Dolan* constraints when negotiating CBAs. As I researched existing CBA processes and spoke with CBA participants⁴⁸ it became clear that CBA ‘practitioners’ were not hamstrung by *Nollan/Dolan* because they were either unaware or indifferent to the case law.

These realizations crystallized the idea that the most useful part of this thesis would be to bridge the legal and planning literature and provide practitioners with distilled, practical analysis of the possible pitfalls associated with different CBA negotiating and implementation strategies. Understanding the practical legal

⁴⁷ Wolf-Powers, *Evidence*.

⁴⁸ Interviews with Dan Steinberg, Michael Nadler, and confidential conversations with land use lawyers negotiating CBAs in New York City.

constraints would allow the communities to use their resources more effectively – negotiate for valid benefits and avoid or succeed in litigation.

With this refined research goal in mind I continued to research the relevant case law. The case law is not entirely on point. As far as I and other researchers have found, CBAs have yet to be challenged in court.⁴⁹ Legal analysis has primarily focused on *Nollan* and *Dolan*, the two Supreme Court cases limiting local government’s ability to demand exactions in return for land use approvals. Since the Supreme Court does not often review zoning or land use issues, these cases are the launching point of legal analysis for innovations in land use and zoning. I included these two seminal cases in my analysis of public and private agreements. I also expanded my research to cases covering neighbor consent provisions and state action doctrine. Neighbor consent provisions, or legislative requirements for neighbor consent of a particular land use, have been largely ignored by CBA scholars. Been discusses them briefly in a few footnotes.⁵⁰ This thesis included it because it could further illuminate why the distinction between public and private agreements is so crucial.

Another understudied CBA legal issue is the State Action Doctrine that provides individuals with constitutional protections from the state but does not extend these protections to actions by one individual to another. The State Action Doctrine is the source for determining that courts will treat private and public CBAs differently. Michael Nadler provided a thorough analysis of State Action Doctrine even though

⁴⁹ Patricia Salkin, “Understanding Community benefits agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations.” (October 29, 2007). Touro College – Jacob D. Fuchsberg Law Center

⁵⁰ See Been, *Exactions*, 1.

others ignored it.⁵¹ Analysis of the State Action Doctrine is crucial for discovering what characteristics a court might focus on when determining whether a CBA is public or private. It is important for CBA practitioners to understand the consequences of involving local government or elected officials.

The results of my interviews bore out what I was beginning to sense from the literature. I interviewed Dan Steinberg, a PhD candidate working on how to make development accountable; Michael Nadler, a lawyer who worked on the New York City Bar Association Report and wrote a law journal article on the constitutional issues of CBAs; and a former lawyer heavily involved in the Columbia CBA. My interviews were open-ended conversation guided by pre-drafted questions. I focused my questions on their understanding of the legal constraints, what they perceived to be community CBA activists' perception of the legal constraints and how the legal constraints factored into negotiations with developers and local government. I also spoke informally to lawyers at City Bar meetings who have or are currently negotiating CBAs in New York City. They did not want to participate in formal interviews because of sensitivity to their clients.

The interviewees, all from different backgrounds and perspectives, felt that, in their experience, community activists were not consciously constrained by *Nollan/Dolan*. Community organizations did not shape or limit their benefit requests based on *Nollan/Dolan's* essential-nexus/roughly-proportionate tests. They were less concerned about how a court might react to the benefits and more focused on

⁵¹ Nadler, *Constitutionality*.

putting an agreement together and figuring out if the local government would enforce it.

IV. Legal Analysis

In 2001, the developers of the Staples Center in Los Angeles and the Figueroa Corridor Coalition for Economic Justice entered into the first CBA, known as the Staples CBA.⁵² The Staples CBA covers a wide range of benefits from living wage and employment provisions to funding for parks and affordable housing.⁵³ In 2005 the developer began to implement the CBA.⁵⁴ The Atlantic Yards CBA, New York City's first CBA was also signed in 2005.⁵⁵ Columbia University entered into a CBA with the West Harlem community in 2009.⁵⁶ Not all CBA negotiations have led to a signed CBA, most notably the Related Companies and the Kingsbridge Armory Redevelopment Alliance failed to sign a CBA in 2006.

The complexity and confusion surrounding the legal constraints of who may participate in CBAs and CBA's role in New York's land use process has impeded CBAs' success in becoming a stabilizing factor in the contested tripartite stakeholder dynamic. If and when CBAs' legal status either as a public and/or private agreement becomes validated, communities and developers can standardize their negotiating procedure in such a way that will relieve some of the pressure from the unstable tripartite stakeholder dynamic.

⁵² NYCBA, *Report*.

⁵³ Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 30-31 and 35.

⁵⁴ Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, p.30.

⁵⁵ NYCBA, *Report*.

⁵⁶ "West Harlem Community Benefits Agreement", (May 18, 2009)

<http://www.columbia.edu/cu/gca/news/COmmunityBenefitsAgreement/index.html> (accessed March 2013)

Gross, an early CBA activist, defines CBAs as “a legally enforceable contract, signed by community groups and by a developer, setting forth a range of community benefits that the developer agrees to provide as part of the development project.”⁵⁷ His definition does not require local government involvement. Generally CBAs are private third-party agreements between the developer and the community, and therefore the local government is not a party to the agreement and has no standing in court to enforce the agreement. However if the local government memorializes the agreements as part of a development agreement or restrictive declaration the local government then gains standing.⁵⁸

The rise of CBAs is premised on the dynamic that the community can and will represent its own interests to negotiate for compensation for the direct impact of the development on their community. The community is a third voice that is not always represented by the local government because these interests may conflict with the local government’s larger view of the development and/or because the local government does not have the authority to capture these benefits for the community. Laura Wolf-Powers believes that “[i]n the ideal case, public sector officials receive input from affected community members during the land use and development review process and proceed to carry the public’s priorities and concerns into negotiations with private developers.”⁵⁹ However this view of the land use dynamic subsumes the community into the greater public sector. That view conflicts with the tri-partite dynamic that the neighbors are a self-interested subset

⁵⁷ Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 9.

⁵⁸ See Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 9-10.

⁵⁹ Wolf-Powers, *Evidence*.

disinterested in conducting the larger scale cost-benefit analysis appropriate of local government. Viewing CBAs as the failure of local government to consider the input of affected community members misses the inherent potential tension between the demands of the community and the demands of the local government on a developer. The community's demands are not demands meant to mitigate the larger impacts of the development but demands to compensate a community for forbearing from using their elevated position as neighbors to delay or derail the development. Since the development impacts neighbors differently than it does the general public the neighbors represent the public's interest on a smaller more self-interested scale than the local government.

In New York City, defining the geographic scale of the impacted community is complicated because the Community Board, Borough President and the City Council each represent different but overlapping affected communities. A project might cross the borders of a few Community Boards or affect a small area of a geographically large Community Board. ULURP maintains the distinct identity of the neighbors as a subset of the general public by providing the affected Community Board with a role in the process. ULURP also enables the general public to participate through public hearings and by lobbying their borough president and local city councilmen. New York City is also unique in its manifestation of the tripartite stakeholder dynamic because in New York real estate developers of large-scale projects tend to be repeat players in a pro-development real estate environment.

Although New York City has not yet included a CBA in one of its development agreements or restrictive declarations with a developer, the Bar Association found that “[i]n a few recent cases in New York City, local government officials have participated in the negotiations or signed the agreement as witnesses.”⁶⁰ Laura Wolf-Powers also found that local government participates more directly in CBAs than acknowledged.⁶¹ When local government officials participate in the negotiations or act as witnesses to agreements not otherwise incorporated into agreements between the local government and the developer, the agreement remains a private agreement but begins to take on public characteristics that may lead courts (and the public) to demand that these agreements are treated as if they are public.

a. CBA Legal Issues

CBAs as unregulated agreements raise several interconnected legal issues. Since courts have not ruled on the legality or enforceability of any CBAs yet, it is difficult to determine exactly which aspects of a CBA will draw the court’s attention. Potential legal issues include: whether the CBA is a valid contract; whether the local government has overstepped its authority in participating in CBA negotiations; whether the local government may condition a land use approval on the signing of a CBA and whether a CBA’s mere existence in consideration for a land use approval has caused the local government to engage in a regulatory taking. It is also difficult

⁶⁰ NYCBA, *Report*, 3

⁶¹ Wolf-Powers, *Evidence*, 2. (“[a]t its simplest, a CBA is a legal contract between a developer and a set of nongovernmental groups whose support the developer considers necessary to obtain key public approvals or subsidies. However, most such arrangements involve local government actors much more directly than this suggests.”)

to predict whether these first CBA cases will be brought by the developer, the community, a successor-in-interest to the developer, a successor community organization, the local government or some other party. A court may not grant all these potential challengers standing.

b. *Nollan/Dolan* constraints

Legal scholars believe that whether CBAs violate the Takings Clause is the most pressing issue facing CBAs.⁶² In determining this, legal scholars turn to *Nollan/Dolan* jurisprudence. The Supreme Court has developed a two-prong test for determining if local government's exactions, or demands on a developer, amount to a regulatory taking. The first prong derived from the ruling in *Nollan* "imposes 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."⁶³ The Supreme Court's ruling in *Dolan* created the second prong – the 'roughly proportional' test. As a result of *Dolan* "the amount of the benefit the government seeks has to be roughly proportional to the impact that the particular development would impose."⁶⁴ Together *Nollan/Dolan* require that exactions imposed on a developer by the local government have an 'essential nexus' to the development and are 'roughly proportionate' to the impacts of the development.

⁶² See Nadler, *Constitutionality*, 587.

⁶³ Been, *Exactions*, 6. (explaining the ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

⁶⁴ Been, *Exactions*, 6. (explaining the ruling in *Dolan v. City of Tigard*, 512 [U.S. 374](#) (1994).

Nollan/Dolan's limitations on exactions belong to a larger set of jurisprudence skeptical of how developers are treated by local government and neighbors. Earlier cases ruled against any zoning approvals that appeared contract-like until the courts began to accept the idea that zoning is not static but rather a structured negotiation between the developer and the local government.⁶⁵ Courts are uncomfortable with local governments that have too much power over developers.

While CBAs as side agreements might not raise the same concerns for courts as exactions required by local government, the courts are also concerned with neighbors controlling developers. One example of neighbors potentially controlling developers is when a municipality's local land use law includes a 'neighbor consent provisions'. These provisions usually call for a threshold of neighbors to consent to the developer's requested land use. While there is little case law on these types of provisions, courts are generally wary of giving neighbors too much authority to control how developers use their property.⁶⁶ Been describes neighbor consent provisions as "hav[ing] met with considerable skepticism, and the Supreme Court's limited jurisprudence on neighbor's 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."⁶⁷

Neighbor consent provisions differ from CBAs, because as a matter of local law, neighbor consent provisions legislatively require that the neighbors consent before the local government will grant an approval. CBAs are not initiated or required by

⁶⁵ See Been, *Exactions*.

⁶⁶ See Been, *Exactions*, 7.

⁶⁷ See Been, *Exactions*, 7.; fn 51 referring to *Seattle Title Trust v Roberge*, 278 US 116, 120-22 (1928) and *Eubank v City of Richmond*, 226 US 137, 140-44 (1912).

legislation. Neighbor consent provisions upend the tripartite stakeholder dynamic by giving neighbors a dispositive vote that they do not possess in many zoning regimes, including ULURP. Courts disfavor these provisions because they have the power to erode developer's property protections. CBAs do not fundamentally restructure the dynamic in the way that the provisions do. CBAs are private voluntary agreements that provide both the developers and community with material benefits. Developers benefit from CBAs because they theoretically make it easier for a developer to gain an approval from the local government because the local government is assured by the existence of the CBA that the neighbors approve (or do not protest) the development. Private CBAs in no way guarantee that the developer will be granted the approval from the local government.

Neighbor consent provisions shift the balance of the dynamic because they procedurally require neighbor consent for developers to gain the sought-after approval. The courts' treatment of neighbor consent provisions provide a useful outer limit to how much power the courts will allow neighbors to gain. However neighbor consent provisions do not have a meaningful impact on structuring a CBA because CBAs are only used where neighbors lack the legislative authority to stop a development. CBAs are used where neighbors can prove to be a delaying and thus costly irritant but cannot stop the development in their own right.

c. State Action Doctrine

Another legal doctrine that has received little attention in CBA scholarship is the State Action Doctrine. The State Action Doctrine provides individuals with constitutional protections from state actions. The State Action Doctrine does not

extend the Bill of Rights protections to private actions by private non-governmental actors. Courts will use the State Action Doctrine to distinguish between the legal status of public and private CBAs. Applying the State Action Doctrine to CBA fact patterns is crucial for discovering what characteristics a court may focus on when determining whether a CBA is public or private.

d. New York City Case Studies

I used the CBAs from Atlantic Yards, Columbia’s Manhattanville expansion and Kingsbridge Armory as case studies for identifying potential legal issues. I chose these three because Atlantic Yards and Columbia’s expansion are two of the biggest projects in New York in recent years. They both required land use approvals. I included the Kingsbridge Armory even though the developer did not develop the project because its media coverage provides clear examples of local government involvement.⁶⁸

It should be noted that the New York City real estate development climate is unique due to the fact that a small group of real estate developers tend to be repeat players and work closely with a pro-development local government. This environment already shifts the traditional conception of the tripartite-stakeholder dynamic. In other municipalities neighbors may have more authority to delay or resist a project. However New York City’s pro-development culture and ULURP’s weak provision of land use authority to neighbors provide neighbors with little bargaining power in the formal land use decision process. This has created a

⁶⁸ As spring 2013 community organizations near the Kingsbridge Armory were working on a new CBA.

demand for an alternative, informal negotiating process between the community and developers to mediate potential conflict.

i. Atlantic Yards

Atlantic Yards is a mixed-use redevelopment in Brooklyn. The project covers former rail yards and a residential area. When completed, the project will include 8 million square feet of development. The Barclays Center, the anchor of the development, opened in September 2012. The development plan also calls for more than 6,000 residential units of which 2,250 are to be affordable.⁶⁹ The project required land use approvals, public subsidies, and the use of eminent domain.⁷⁰ The project, particularly its use of public funds and eminent domain, was highly contentious from the outset.

The Atlantic Yards CBA was signed June 27, 2005 and is between the developer, Forest City Ratner, and a coalition of eight community organizations led by ACORN.⁷¹ The CBA provided four broad types of benefits: job development, affordable housing, small business contracting and community amenities.

The Atlantic Yards CBA, like the other New York City CBAs, exhibits characteristics of all four types of CBAs. It is a hybrid land use and economic development project. The CBA is solely between the developer and community organizations but local government was involved in some of the negotiations. Since

⁶⁹ Develop Don't Destroy Brooklyn website. <http://dddb.net/php/aboutdddb.php> (accessed March 2013) and Eliot Brown, "Housing Pieces Delayed". Wall Street Journal (March 28, 2013). http://online.wsj.com/article/SB10001424052702303674004577432762410420398.html?mod=W_SJ_NY_MIDDLETopStories (accessed March 2013).

⁷⁰ Develop Don't Destroy Brooklyn website. <http://dddb.net/php/aboutdddb.php> (accessed March 2013).

⁷¹ Atlantic Yards CBA, (June 27, 2005) <http://www.scribd.com/doc/31432536/Atlantic-Yards-Community-Benefits-Agreement-CBA> (accessed March 2013).

the Atlantic Yards CBA was not integrated into a development agreement or other similar document with the city or state, the Atlantic Yards CBA does not meet the most basic test for a public CBA.⁷²

Ideally the text of the CBA and any other legal document recording the legal terms of the CBA would define the subject matter of the CBA and the parties involved. The Atlantic Yards CBA is not so clear. According to the Atlantic Yards CBA, Forest City Ratner, was pursuing a project that contains both land use and economic development characteristics. Language hinting at the purpose of the project can be found in the Preamble and Definition sections.⁷³ The CBA defines the “Term” of the CBA as “commenc[ing] on the date hereof and continue until either (i) the Developers abandon their efforts to acquire or lease from the Metropolitan Transportation Authority and to obtain a rezoning of the Project site for large-scale development, or (ii) thirty (30) years from commencement of construction...”⁷⁴ As a hybrid CBA, the Atlantic Yards CBA is constrained by land use law.

The Atlantic Yards CBA, however, attempts to obscure the purpose of the CBA by limiting the consideration provided by the community organizations to their role in administering and implementing the agreed upon benefits.⁷⁵ CBA scholars have noted that courts, in adhering to the Second Restatement of Contracts, generally only conduct a cursory investigation into the adequacy of the consideration.⁷⁶ Courts may not challenge or look past this description of the

⁷² See Salkin, *Understanding*, 8. (“[t]he Atlantic Yards CBA is not incorporated into a development agreement with the city, making enforcement possibly more difficult”).

⁷³ Atlantic Yards CBA, 1-2.

⁷⁴ Atlantic Yards CBA, 5.

⁷⁵ See Atlantic Yards CBA, 6-7. “B. Designation of Implementation Roles”

⁷⁶ Salkin, *Understanding*, 16. See 17A AM. Jur. 2d. Contracts §124.

consideration. If the courts accept this consideration at face value, the CBA appears to be entirely private. This consideration does not implicate land use/regulatory takings jurisprudence or the state action doctrine.

The consideration described in the CBA does not provide the whole picture. The Memorandum of Understanding (MOU), attached in the Appendix to the CBA, between Forest City Ratner and ACORN sheds more light on what the community organizations are truly providing the developer. The MOU contains a list of provisions outlining the developer's and ACORN responsibilities. Two of these provisions define ACORN's responsibilities. According to the MOU, "2. ACORN agrees to assist the Developer in working with governmental authorities (including the Public Parties) in order to secure necessary modifications to existing affordable housing programs, and related rules and regulations [and] 3....ACORN agrees to take reasonable steps to publicly support the Project by, among other things, appearing with the Developer before the Public Parties, community organizations and the media as part of a coordinate effort to realize and advance the Project and the contemplated creation of affordable housing."⁷⁷ Provision number two describes ACORN's responsibility to cooperate with and assist the developer in implementing the agreed to housing program. Provision number three describes ACORN's responsibilities to support the project in front of local governmental bodies including voting ULURP parties. This provision is characteristic of a land use CBA. If this provision had been in the body of the contract rather than the Appendix then the court would be more likely to view this as part of the consideration.

⁷⁷ See Atlantic Yards CBA, Appendix, Exhibit D "Memorandum of Understanding".

ii. Columbia's Manhattanville Expansion

In May 2009, Columbia University and the West Harlem Local Development Corporation (“WHLDC”) signed the “West Harlem Community Benefits Agreement”.⁷⁸ The community was represented by the WHLDC which was made up of local community members, members from the Community Board, and representatives of local elected officials. Since signing the CBA, WHLDC has dissolved and reincorporated as the West Harlem Development Corporation (“WHDC”) successor organization.⁷⁹ Many of the former WHLDC board members are WHDC board members.

Columbia entered into the CBA for several reasons including intense lobbying to do so from local government officials. Columbia needed community support for its ULURP application for rezoning properties in Manhattanville for an extended campus. Moreover, Columbia was contending with Community Board 9, the local community board, which submitted its own competing rezoning 197-a plan.⁸⁰ While efforts were made to reconcile the two plans, the CBA was the best solution for creating buy-in and agreement between the parties.

The CBA was beneficial to both the community and Columbia. Columbia wanted to ensure that there would be no litigation from the community challenging their requested zoning approvals and wanted to obtain local officials’ approval. The community wanted to make sure that many of the benefits generated by the

⁷⁸ West Harlem CBA.

⁷⁹ West Harlem Development Corporation Website. <http://westharlemdc.org/about/> (accessed March 2013)

⁸⁰ NYCBA, *Report*, 18. According to the City Charter, a Community Board may submit its own plan for consideration and implementation by the City. Both plans went through ULURP at roughly the same time.

expansion would remain localized rather than simply accrue to Columbia and the City and the State.

The CBA provides for a Benefits Fund of \$76 million, an Affordable Housing Fund of \$20 million, up to \$4 million in legal services related to housing, \$30 million for a community public school and \$20 million in in-kind benefits.⁸¹ The agreement also provides for technical assistance and guidance from Columbia as well as internships, scholarships and other Columbia-related benefits. The agreement is structured such that any benefit that is provided for by agreements with the City and State are enforced and monitored through those government agreements. Benefits that are extraneous to the City agreements are enforced and monitored through the process set out in the CBA.⁸² The CBA clearly states that the consideration for the CBA is that no litigation “shall be commenced or pending.”⁸³

The CBA represents a conscious effort on the part of the developer and the City to create a two-tiered public and private CBA. Any benefit that the City felt justified in demanding because of the EIS report it could incorporate into its public documents. Any benefit that may be outside of the bounds of the City’s authority and might approach an impermissible taking was not backed by a City-led enforcement mechanism. This effort balances the legal concerns but raises the question of whether courts would respect this distinction or view the entire package as a back-handed attempt at a regulatory taking. Between the City enforcement mechanism, the Mayor and the EDC providing the community with experienced legal

⁸¹ West Harlem CBA, 8.

⁸² West Harlem CBA.

⁸³ West Harlem CBA, 8.

representation,⁸⁴ the local official involvement with negotiating and administering,⁸⁵ and the City Council and the Borough President approving the expansion as a result of the community agreeing to the CBA,⁸⁶ the State Action Doctrine has clearly been triggered. The Court would likely apply *Nollan/Dolan* analysis to this CBA if the developer would raise a regulatory taking challenge. However, practically, it seems unlikely that a public university interested in working with the City in the future would exert such a challenge.

iii. Kingsbridge Armory

In 2006, the City issued an RFP for developers to redevelop the vacant Kingsbridge Armory site in The Bronx.⁸⁷ The Kingsbridge Armory redevelopment is an economic development project. The Related Companies was chosen in 2008 to redevelop the site into a 575,000 square foot mall and was to be granted \$17 million in tax benefits from the City.⁸⁸ The Kingsbridge Armory Redevelopment Alliance (KARA) a coalition of labor, community and church organizations, represented the neighbors in the CBA negotiations. Julian Gross, who had successfully negotiated the Staples Center CBA, advised KARA during its negotiations.⁸⁹ The community began the negotiations with little faith in Related because Related had just completed a

⁸⁴ NYCBA, *Report*, 22.

⁸⁵ Hunter Walker, "City Officials, Others Quibble With Group Administering \$100 Million of Columbia's Cash." *New York Observer* (November 22, 2011). <http://www.observer.com/term/west-harlem-local-development-corporation/> (accessed March 2013).

⁸⁶ See Been, *Exactions*, fn 104.

⁸⁷ Robert Knakal, "Congrats, Kingsbridge Armory Opponents." *New York Observer* (April 15, 2010). <http://observer.com/2010/04/congrats-kingsbridge-armory-opponents/> (accessed March 2013).

⁸⁸ Terry Pristin, "Bronx Groups Demand a Voice in a Landmark's Revival" *New York Times*, (June 25, 2008). <http://www.nytimes.com/2008/06/25/business/25armory.html> (accessed March 2013); Knakal, *Congrats*.

⁸⁹ Bill Egbert, "Negotiations over CBA for Kingsbridge Armory redevelopment" *New York Daily News* (April 28, 2008) <http://www.nydailynews.com/new-york/bronx/negotiations-cba-kingsbridge-armory-redevelopment-article-1.278259#ixzz2PFBXaQW6> (accessed March 2013).

widely criticized Gateway CBA for the Gateway Mall in The Bronx. KARA wanted a CBA that “guaranteed specified wage and hiring standards for workers and tenants. The groups [were] also seeking athletic and recreational space, room for cultural programs and social services and opportunities for local entrepreneurs.”⁹⁰

In order to redevelop the site, the project needed ULURP approval and the City Council to vote in its favor. The City Council voted 45 to 1 against the project because Related would not agree to the CBA calling for living wages for employees of the future tenants of the site.⁹¹

The Kingsbridge Armory CBA, had it been passed, would have triggered the State Action Doctrine because the Bronx Borough President Ruben Diaz “draft[ed] a model CBA with KARA, the local community board and other elected officials.”⁹²

During ULURP, the Community Board voted to approve the project on the condition that the CBA was signed, and Borough President Diaz planned to withhold his approval until a CBA was signed.⁹³ The community and Related could not agree to the terms of the CBA because of the living wage requirement. The City Council ultimately voted against the project with both the community and the developer attributing the vote to the failed CBA.⁹⁴ As the City considers a new developer for the site, the community is working on negotiating a new CBA.⁹⁵

⁹⁰ Pristin, *Bronx Groups*.

⁹¹ Knakal, *Congrats*.

⁹² Nadler, *Constitutionality*, 622.

⁹³ Nadler, *Constitutionality*, 622.

⁹⁴ Nadler, *Constitutionality*, 623.

⁹⁵ David Cruz, “CBA talks for Kingsbridge Armory Bid Underway.” *Bronx Times* (January 31, 2013). http://www.bxtimes.com/stories/2013/5/05_armory_2013_01_31_bx.html (accessed March 2013).

Given the Borough President's and Community Board's involvement with negotiating the CBA, the State Action Doctrine would have been triggered. If the court then applied *Nollan/Dolan* analysis, it is unlikely a living wage requirement imposed on tenants would have withheld an 'essential-nexus' challenge. Although the Kingsbridge Armory would have been an economic development project, since the CBA was being used to control the ULURP process, it took on land use constraints as well. Had the CBA been a requirement in the RFP and directly linked to the tax benefits provided by the City, this analysis would not apply. However the Borough President and the Community Board were not involved in the EDC's RFP nor the IDA's tax benefits and therefore had no authority to hinge the CBA negotiations on more legally sound conditions.

V. Findings Chapter

a. Categorizing CBAs

Many different forms of legal agreements fall within the definition of Community Benefits Agreements. Across the United States communities are entering into CBAs.⁹⁶ These agreements vary by community, reflecting local land use regulations and local community bargaining power. Julian Gross would include any agreement "in which the developer agrees to shape the development in a certain way or to provide specified community benefits."⁹⁷ The developer might be seeking a CBA either to earn a community's support for land use approvals or subsidies.

⁹⁶ See Tulane University's Public Law Center, "The Summary and Index of Community Benefits Agreements." <http://www.law.tulane.edu/plc/> (accessed March 2013).

⁹⁷ Gross, LeRoy and Janis-Aparicio, *Good Jobs First*, 9.

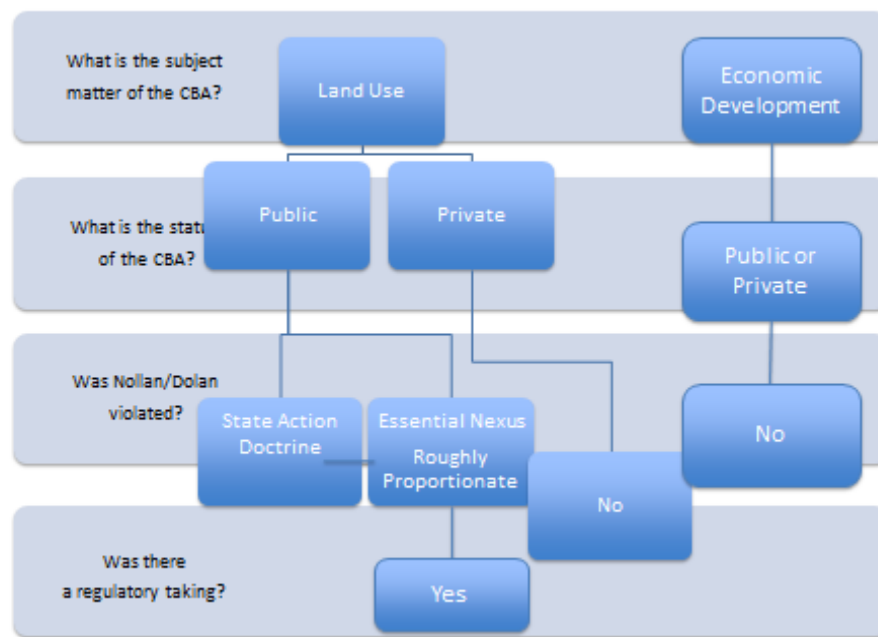
Since land use CBAs and economic development CBAs have different legal constraints, it would be useful for community organizers (local government, the courts and developers) if CBA scholars used different labels to differentiate between these two agreements. When too many different types of agreements are included under the same rubric it makes it more difficult for already resource and capacity limited community organizers to understand the strategic considerations of pursuing the different forms of agreements (land use or economic development CBAs or public or private CBAs).

As a practical matter, determining the subject matter of the CBA should be the threshold question into any inquiry attempting to define a CBA. This 'subject matter' test is the threshold question because it will determine the scope of legal constraints on the negotiating parties and the appropriateness of local government's involvement. For some projects, determining whether the developer is providing benefits for land use approvals or subsidies is clear, making this first line of inquiry a simple categorization task. Other projects will require both land use approvals and economic development subsidies. It may be more difficult to determine what kind of CBA a community entered into for these hybrid projects. In order to make a subject matter determination for a CBA associated with a hybrid project, the community should look to the consideration provided.

After the subject matter determination has been made, the inquiry should proceed to determine the status of the agreement - whether the agreement is public or private. This status determination will further define the legal constraints. The subject matter should be identified first because if a CBA is solely for economic

development project then even if the government required a CBA there is no risk of a court finding a regulatory taking because the local government is not acting in a regulatory capacity when entering into economic development agreements with a developer. Determining subject matter and status will structure the universe of legally valid potential benefits available to the community.

CBA Inquiry Flowchart*:



*For a hybrid project conduct both lines of inquiry and determine the subject matter of the CBA based on the consideration provided by the community.

Unfortunately CBAs rarely adhere neatly to these distinctions. Most CBAs are hybrids, manifesting muddled subject matter and status characteristics. Although a project might require land use approvals and obtain economic development subsidies, the developer may seek the CBA for one or both aspects. Whenever a community provides land use approval consideration for the CBA, even if the community is also benefitting from and supporting the developer’s bid for subsidies,

a court will likely apply land use case law. Even though the court might look to land use cases, a CBA that is also an economic development CBA provides supporters of the CBA and the court with the opportunity to hinge the consideration on the subsidy as a mechanism for avoiding the stricter land use restrictions. Even though the distinctions are nebulous, the categories are useful for strategizing future CBAs and predicting their legal validity.

b. Characteristics of Public and Private CBAs

Legal CBA scholarship has become hyper-focused on assessing the applicability of *Nollan/Dolan* for analyzing the legal validity of CBAs. This focus on *Nollan/Dolan* leaves readers with the inaccurate impression that courts will apply these two cases primarily and perhaps exclusively if a CBA were challenged in court. However, in the interest of judicial economy, courts tend to reach issues in the order of primacy. If a finding on one issue makes another issue moot, a court will not rule on the subsequent issue. In order for the court to reach the issue of a regulatory taking, the court would have to first determine: 1. if the party was injured. 2. the CBA subject matter 3. the status of the CBA and 4. if the local government was involved, the land use approvals were the result of gaining exactions. The court would have to unravel several complex legal issues before even deciding whether *Nollan/Dolan* is applicable to CBAs generally and to a particular CBA.

The legal scholarship has glossed over the fact that *Nollan/Dolan* is only applicable in challenges raised by the developer. In order for a party to have

standing in court it must have experienced the ‘injury-in-fact’.⁹⁸ Only the developer⁹⁹, not the local government nor the neighbors, can claim a regulatory taking injury. Therefore *Nollan/Dolan* is limited to instances where the developer is claiming (or counter-claiming) that the local government either on its own or through the community deprived it of property.

Once the court determines that the party has proper standing to raise this issue, it would likely proceed to determine the subject matter of the CBA. In order to determine the subject matter, the courts will likely turn to the CBA itself. Ideally the subject matter would be stated in the CBA as part of the consideration provided by the community. However as was the case with the Atlantic Yards CBA discussed above, the consideration documented in the CBA does not indicate its true purpose. In the event that the CBA does not sufficiently define the subject matter of the CBA, courts may look to extrinsic evidence such as Memoranda of Understanding between the developer and the community, other documentation between the developer and the community or documentation between either party and the local government.

Once the court has determined that the CBA is a land use CBA, it will then turn to the status of the agreement. The court will begin by inquiring whether the local government was involved in negotiating the CBA. *Nollan/Dolan* analysis is only proper after a court has determined that the developer is granting benefits in return

⁹⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)

⁹⁹ Other parties that could potentially make these claims are parties legally required to provide benefits because of their relationship to the developer. One possible example is if the CBA required the buyer of the project to continue any obligations of the developer. I include these potentially liable parties within the term developer.

for a community's support of land use approvals at the behest of the local government. According to Nadler, before applying the *Nollan/Dolan* tests "courts must first answer a much murkier question: whether or not the conditions imposed fall under the exactions jurisprudence of *Nollan* and *Dolan*...The key to determining whether *Nollan and Dolan* apply to community benefits agreements is deciding whether the negotiation of a CBA can be 'fairly attributed' to the state."¹⁰⁰ Although Nadler summarized the *Nollan/Dolan* jurisprudence before reaching the State Action Doctrine in his article, as a practical matter a community activist should first consider how much the local government has been involved before becoming too entangled in mastering *Nollan/Dolan* analysis. Nadler finds that determining when the State Action Doctrine has been triggered is tricky and uncertain.¹⁰¹

The State Action Doctrine has been expanded to include circumstances where an individual is acting in a 'public function' and when the local government has an 'entanglement' with the private activity.¹⁰² Local government participation in CBAs may constitute an entanglement. Incorporating a CBA into a development agreement to empower the local government to enforce the CBA would "likely constitute state action."¹⁰³ The State Action Doctrine is also triggered if the state's actions compelled a result. The courts have latitude to find that the state was sufficiently involved as to compel an outcome either through coercive power or simply providing aid to a private actor.

¹⁰⁰ Nadler, *Constitutionality*, 605.

¹⁰¹ Nadler, *Constitutionality*, 606.

¹⁰² Nadler, *Constitutionality*, 606.

¹⁰³ Nadler, *Constitutionality*, 607.

Past New York examples may shed light on circumstances that might constitute state compulsion. The Bronx Borough President drafted a CBA for the failed Related-Kingsbridge Armory proposal.¹⁰⁴ During the failed negotiations, the Bronx Borough President was highly involved.¹⁰⁵ The CBA negotiations and the project failed because the developer and the community could not reach an agreement about imposing living wage requirements on future tenants.¹⁰⁶ A court would likely consider this compulsion because the Bronx Borough President is an elected official that participates in ULURP. The only reason it might not trigger State Action Doctrine is that he does not have the authority to make a final ULURP decision.

The City's involvement with the West Harlem CBA is also problematic and would likely implicate the State Action Doctrine. The City, through the New York City Economic Development Corporation provided the community organization with funds to negotiate with Columbia University.¹⁰⁷ This would qualify as tangible aid for a court looking to find state action. The local officials sitting on the West Harlem LDC board could also trigger the State Action Doctrine.¹⁰⁸ Once the State Action Doctrine has been triggered, constitutional protections, including *Nollan/Dolan* tests, apply.

While many past CBAs would likely trigger the State Action Doctrine, CBAs could be structured such that they do not trigger the State Action Doctrine. Local

¹⁰⁴ Bronx Borough President Website Press Release August 26, 2009. <http://bronxboropres.nyc.gov/press/releases/2009-08-26.html> (accessed March 2013).

¹⁰⁵ Nadler, *Constitutionality*, 622.

¹⁰⁶ Knakal, *Congrats*.

¹⁰⁷ NYCBA, *Report*, 22.

¹⁰⁸ West Harlem Local Development Corporation Website.

governments have, in existing CBAs, assumed a more active role than the general definition of CBAs necessitates.¹⁰⁹ Laura Wolf-Powers, in her general assessment of CBAs found that when local government is involved it tends to be the legislative branch.¹¹⁰ This assessment seems to reflect local government involvement in New York City CBAs as well.

Courts apply a different level of deference to local government depending on whether it is acting in legislative or administrative capacity.¹¹¹ Courts initially viewed discretionary zoning decisions as administrative actions and therefore outside of politics.¹¹² However over time the land use approval process has become more legislative in nature and courts no longer see planners and others with zoning authority as outside of politics.¹¹³ Land use challenges are usually fought in state court and rarely reach the Supreme Court but courts may use *Nollan/Dolan* to apply stricter scrutiny to takings challenges than other land use challenges.¹¹⁴

In New York City, ULURP applications have both legislative and administrative characteristics. ULURP is structured such that elected officials (borough presidents and city councilmen) and administrators (members of the City Planning Commission) participate in the decision-making process. Either the City Planning Commission or the City Council will have final authority on an application. For certain applications or when a Borough President files for City Council review

¹⁰⁹ See Wolf-Powers, *Evidence*, 2. (“However, most such arrangements involve local government actors much more directly than this suggests.”).

¹¹⁰ See Wolf-Powers, *Evidence*, 2. (“Because city council members or other local elected officials often prompt or assist in the negotiations or officially sanction the resulting agreements, the legislative branch of local government is generally involved in a CBA.”)

¹¹¹ See Ellickson, Been and Serkin, *Land Use Controls*.

¹¹² See Ellickson, Been and Serkin, *Land Use Controls*.

¹¹³ See Ellickson, Been and Serkin, *Land Use Controls*.

¹¹⁴ See Ellickson, Been and Serkin, *Land Use Controls*, 197.

because the City Planning Commission approves an application that both the Borough President and the Community Board disapprove of, the City Council will make the final decision, as was the case in for Kingsbridge Armory project. Members of the public appointed by the elected Borough President to the Community Board also participate in ULURP.

Incorporating CBAs into ULURP would obviously trigger the State Action Doctrine. Participation by ULURP members in CBA negotiations would likely do so as well. However courts would likely treat different ULURP bodies differently. Since a Community Board does not have a binding vote its members may be able to participate in CBA negotiations without triggering State Action Doctrine. This leeway for the Community Board probably would not extend to the Community Board acting in an official capacity and linking its ULURP recommendation to the CBA. In that circumstance a court may see the facts as similar the conditions placed on Nollan and Dolan for their permits. Courts would likely look more carefully at the actions of the ULURP bodies as it proceeds towards a binding vote.

c. Evading Nollan/Dolan

CBAs can evade *Nollan/Dolan* constraints in a few ways. First *Nollan/Dolan* does not apply to truly private agreements. Court rulings are generally construed narrowly and do not create precedent for issues not at issue in the given case. Applying *Nollan/Dolan* to private agreements between developers and communities would be expanding *Nollan/Dolan* beyond its scope and would have no basis in constitutional law. A CBA would remain private if the agreement was solely between developers and the community without any local government involvement.

As the jurisprudence develops, local government may be able to have some involvement without transforming a private CBA into a public CBA.

Second, some public CBAs may pass *Nollan/Dolan* scrutiny not because the benefits meet the two-prong test but because the CBA circumvents the test altogether. One way to achieve this circumvention is to create a separation between the benefits demanded and the approvals granted by masking a land use CBA as an economic development CBA. Laura Wolf-Powers found that “[i]n many CBAs... the matter at issue is not chiefly a zoning approval, but a public subsidy to a project maintaining a firewall between regulatory action and the benefits provided to advocacy groups.”¹¹⁵ If the CBA is viewed by the court as an agreement in exchange for a subsidy from the local government rather than in exchange for a discretionary land use approval, *Nollan/Dolan* does not apply because private actors do not have Fifth Amendment protections against the government when it is acting as a market participant rather than a regulator.

d. Benefits of Public and Private CBAs

Community representatives advocating for CBAs should begin by asking: Is this CBA in return for a land use approval? If so, do I achieve my goals better if the agreement is public or private? A community may prefer public CBAs even though they have more legal restrictions because a public CBA will also have more legal protections when it comes to implementing and enforcing the CBA. For example, if the public CBA has been incorporated into the development agreement or restrictive declaration then the local government will have recourse to uphold the

¹¹⁵ Wolf-Powers, *Evidence*, 3.

agreement in court. This may serve the community in the long run because the community may not have the capacity or resources to challenge the developer. This also relieves the community of some of the responsibility to monitor the implementation of the CBA.

A community may prefer a private CBA because a community can negotiate for a wider range of benefits that would not pass the essential-nexus/roughly proportionate test. While these CBAs may allow for the community to gain benefits that are most responsive to their needs, private CBAs will not have the protection of local government.

The local political climate may dictate if the CBA will or should be public or private. Local governments may favor CBAs for some land use projects and not others. For example, in New York City, Mayor Bloomberg has wavered on his support of CBAs.¹¹⁶ Support for CBAs may also waver after failed negotiations prevent projects from the Kingsbridge Armory from redeveloping a vacant site in an area in need of tax revenue and jobs. The political climate might become more favorable for CBAs as communities become savvier about the impacts of development and the real estate market for redevelopment sites tightens.

Neighbors have several disadvantages when negotiating CBAs with real estate developers. Neighbors are less organized and have fewer resources than the developer. Neighbors also learn about the development project after the developer has already decided on most of its objectives. Neighbors are in a defensive reactive

¹¹⁶ Pristin, *Bronx Groups*. ("In 2005, the Bloomberg administration publicly applauded a private agreement between housing advocates and Forest City Ratner, the developer of [Atlantic Yards](#) in Brooklyn, but now it no longer supports the concept.")

position when negotiating the CBA. This thesis aims to mitigate some of these disadvantages by informing the neighbors of some of the legal constraints to prevent neighbors from negotiating for indefensible benefits or unenforceable agreements.

VI. Conclusion

a. Recommendations

Public or private, land use or economic development CBAs serve unique purposes for neighbors seeking to mitigate the impacts of development. Each type of CBA has its own merits. Neighbors can maximize their negotiating leverage with developers when they understand the implications of each type of CBA and know how to use each type of CBA to reach an ends. Economic development CBAs have the fewest legal constraints but the neighbors’ role is limited and defined by the local government. Although land use CBAs have greater legal constraints they provide the neighbors with greater agency. Public CBAs shift some of the burden of implementation and enforcement from the neighbors to the local government but impose greater constraints on the available benefits. Private CBAs provide the neighbors with the greatest agency but require the most resources and organizational capacity from the neighbors.

	Public	Private
Land Use	<p>Pros: Local government can assist in negotiation, implementation and enforcement.</p> <p>Cons: State Action Doctrine, regulatory takings, <i>Nollan/Dolan</i>;</p>	<p>Pros: less legal risk of a regulatory taking; greater range of benefits available.</p> <p>Cons: places burden of defending the enforceability of the contract on the neighbors</p>

	more limited range of benefits available	
Economic Development	<p>Pros: Local government can require a developer enter into a CBA as a condition for the incentives.</p> <p>Cons: Local government creates and controls the parameters of the developer-neighbor agreement</p>	<p>Pros: no legal constraints</p> <p>Cons: Neighbors have limited negotiating leverage;</p>

These recommendations are intended to alert neighbors and local government to potential legal issues of public or private CBAs. The aim is to prevent the CBA from failing either in the implementation or enforcement phase. Since CBAs have not been challenged in court my recommendations are intended as general guide for what may become legal issues. CBA practitioners should first and foremost investigate whether there have been any recent developments in CBA case law.

- i. Initiate contact with the developer.

As soon as the neighbors learn of a development project that will require land use approvals (possibly during the first public hearing) and impact the community, the neighbors should contact the developer to begin discussing the project and its impacts. The developer may have initiated contact with the neighbors as part of its effort to garner support for its forthcoming ULURP application. The neighbors should clearly communicate to the developer whether they would like the developer to communicate directly and exclusively with them without any local government involvement or if they would like to include local government in these early conversations.

ii. Classify the type of CBA

Once the community learns about the project, the community should determine the source of their bargaining power. First, the community should assess whether the developer is seeking land use approvals or subsidies (or both), and whether the developer is responding to an RFP. If the developer is seeking subsidies or responding to an RFP the community should identify whether, as part of that process, the local government is empowering the community to participate in the project selection process and in the negotiation of benefits that would mitigate the impacts of the project. If the developer does not need the community's approval for the economic development application or if the developer is only seeking land use approvals then the neighbors need to pursue a more strategic negotiation with the developer. If possible, the neighbors should seek to link the consideration for the CBA to the economic development aspect of the project rather than the land use approvals.

iii. Identify goals prior to negotiation

Neighbors should begin their internal organizing effort by identifying the impacts they are seeking to mitigate. Having identified the impacts and the corollary benefits, neighbors should engage in a superficial *Nollan/Dolan* inquiry. The results of this inquiry will inform the neighbors as to whether they should pursue a public or private CBA. If the benefits are essentially related to the project (i.e. building affordable housing as part of a housing development) and proportionate to the impact of the project (i.e. replacing the affordable units being displaced by this project) then neighbors can pursue a public CBA with local government's assistance

and involvement, and still secure the desired benefits. Neighbors may prefer a public CBA because it shifts some of the resource and capacity burden to the local government.

Even if all of the desired benefits would not trigger *Nollan/Dolan*, neighbors may want to wait on involving local government in case during negotiations, the benefits included would be the kind of benefits to trigger *Nollan/Dolan*. This stage of internal CBA organizing will be highly dependent on recent developments in state and federal case law. At this stage communities should contact CBA practitioners familiar to with the parameters of appropriate benefits.

iv. Take caution when involving the local government

If the desired benefits violate either of the two *Nollan/Dolan* tests, then the neighbors should make every effort to prevent local government from becoming involved in the process and triggering the State Action Doctrine. Even though it is counter-intuitive for the resource constrained community to refuse funds for coordinating the effort from the local government, receiving funds from the local government to hire a lawyer or organizing staff may turn the CBA negotiation into a state action. If the community is concerned about its capacity to organize without local government then it may want to reassess the impacts they are hoping to mitigate. The community organizers should assess whether increasing their organizational capacity is worth reducing the range of impacts they can seek to mitigate. Each CBA will present a unique set of factors that will determine the outcome in this tradeoff.

v. Include a severability clause

When drafting the CBA, the community should be particularly aware of the consideration provided for the benefits. If possible the benefits should be separated into benefits provided by the developer in response to regulatory requirements (for example, an Environmental Impact Statement (EIS) in New York City) and benefits provided by the developer to the community as a result of the consideration provided for the CBA. Separating these benefits through the use of severability clauses or separate legal documents will enable a court to separate the legally offensive benefits from the legally sound benefits, thereby protecting the latter even if the former is found unenforceable.