Journal of Law and Policy

Volume 26 | Issue 1 Article 5

1-1-2017

Legislatively Mandating A CBA Is Not The Way: A Case Study Of Detroit's Proposed Community Benefits Ordinance And Its Constitutionality Under The Takings Clause Of The Fifth Amendment

Colyn Eppes

LEGISLATIVELY MANDATING A CBA IS NOT THE WAY: A CASE STUDY OF DETROIT'S PROPOSED COMMUNITY BENEFITS ORDINANCE AND ITS CONSTITUTIONALITY UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

Colyn Eppes[*]

Community Benefit Agreements, or CBAs, have quickly become a useful tool to ensure that the benefits reaped from large-scale urban development projects are shared among all stakeholders, particularly the community in which the development takes place. In exchange for the local community's support, which is critical to the developer to progress through the permit application process efficiently, the developer contractually agrees to provide a slate of benefits to the affected community. CBAs have been lauded for their ability to require developers to promote affordable housing, first-source hiring programs, and other targeted benefits which the host community contracted for. However, one of the biggest critiques of CBAs has been that they may violate the Takings Clause of the Fifth Amendment if the local government becomes too involved in the negotiating process of a CBA. During Detroit's 2016 Elections, grassroots activists, along with local council members, proposed an ordinance which would have mandated a CBA as part of all major development projects undertaken in the City.

Ultimately, the ordinance did not receive the necessary votes to become part of Detroit's charter. However, had the ordinance been approved and implemented, those implementing the

---

[*] J.D. Candidate, Brooklyn Law School, 2018. I would like to express my gratitude to Professor De Barbieri for his advice and expertise. I would also like to thank the members of the *Journal of Law and Policy* for all of their suggestions and contributions while editing this Note. Finally, I would like to thank my friends, family, and my girlfriend Leah for their unwavering support.

ordinance would have either: 1) been constrained by the scope of the Takings Clause, which would severely limit the types of benefits that could be bargained for in a CBA; or 2) risked violating the Fifth Amendment. This Note argues that while legislatively requiring CBAs may increase their number, the CBAs created under this type of ordinance would not facilitate equitable development, as they would be constrained by the Takings Clause. Rather, this Note suggests that a better alternative to legislatively mandated CBAs would be legislation that provides local communities with better tools to negotiate CBAs, without local government involvement in the negotiation process. Accordingly, affected communities would have more bargaining power with developers and be free from the constraints of the Fifth Amendment in the benefits they could broker. As a result, municipalities as a whole would be better equipped to ensure that the effects of real estate development would be equitable to all those who would be affected by it.

INTRODUCTION

One of the greatest challenges facing municipalities today is how to encourage robust economic development while ensuring that the area surrounding the proposed development does not succumb to the effects of gentrification.[1] Community benefits agreements ("CBAs") have been utilized in cities across America in an attempt to mitigate the impact that rapid land development can have on local communities, such as the displacement of long-time residents and businesses.[2] CBAs are private contractual agreements between large-scale real estate developers and coalitions of community organizations, who collectively represent the interests of the community where the development project will take place.[3] A CBA is formed when community based

[1] Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 37–38 (2008).

[2] *Id.*; *see also* Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities*, 37 CARDOZO L. REV. 1773, 1777 (2016).

[3] Gross, *supra* note 1, at 37.

organizations agree to support a developer's project in exchange for a slate of benefits to the host community.[4] Support from the community minimizes opposition to the project, which aids the developer during the permit process and throughout the development of the land.[5]

Typically, CBAs stipulate that the developer: (1) provide certain amounts of affordable housing to low-income residents, (2) use a specified percentage of local contracting firms for all construction work, and (3) reserve a certain amount of jobs created for residents of the host community. These targeted benefits aim to minimize the impact that low-income residents experience as a corollary to large-scale municipal development, which typically includes residential and commercial rent increases, forced residential relocation, and labor competition with non-community residents with respect to jobs created by the project.[6] If community-based organizations representing a host community are well informed as to the likely impact that a proposed development will have, and negotiate a CBA accordingly, gentrification may no longer be be considered tangentially to real estate development.

While many commentators laud over the benefits that CBAs can provide, this equitable development tool also has its detractors.[7] Those who argue against CBAs cite to issues including enforceability,[8] inclusiveness,[9] and whether CBAs actually

---

[4] Whatever benefits a developer promises to provide will invariably depend on the specific needs where the development is to take place. Nevertheless, most CBAs focus on providing affordable housing, various job training opportunities, and local preferencing for construction contracts and other employment opportunities stemming from the development. *See* De Barbieri, *supra* note 2, at 1781–84.

[5] *Id.* at 1785.

[6] *Id.* at 1782.

[7] *See generally id.* at 1788–91 (explaining the many perceived drawbacks of CBAs, including the possible manipulation of community based organizations, the overrepresentation of already established community organizations, and the potential use of CBAs for political corruption).

[8] There is heated debate among legal scholars whether CBAs are legally enforceable. *See id.* at 1787. The main issue regarding CBA enforceability centers around whether the impacted community's promise to support (or not to oppose) a proposed development during the approval process constitutes sufficient consideration to create a legally binding contract. *Id.* at 1810.

promote equitable development.[10] However, the most heavily disputed issue regarding CBAs may be whether they violate the Takings Clause of the Fifth Amendment.[11] The Supreme Court held in the landmark cases of *Nollan v. California Coastal Commission*[12] and *Dolan v. City of Tigard*[13] that certain government conditions, or exactions,[14] on the right to develop land violate the Takings Clause.[15] These two holdings together constitute the *Nollan-Dolan* tests[16] for exactions.[17] Although private CBAs usually involve little to no government intervention, when the government becomes part of the negotiation process, or worse yet, a party to a CBA, its involvement risks triggering the *Nollan-Dolan* tests.[18]

On Election Day 2016, after long and heated debate,[19] the City of Detroit voted down a grassroots proposal for a municipal

---

[9] One risk that CBAs pose is that the affected community negotiating a CBA may not be a true representation of the community it purports to include. When this situation occurs, the benefits promised in the CBA will not be fully realized by the entire community impacted by the project development. *See* Gross*, supra* note 1, at 37.

[10] De Barbieri, *supra* note 2, at 1788.

[11] U.S. CONST. amend. V.; Michael L. Nadler, Note, *The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem*, 43 URB. LAW. 587, 588 (2011).

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

[13] Dolan v. City of Tigard, 512 U.S. 374, 394–95 (1994).

[14] Exactions are concessions that a land-owner must furnish to either an adjudicative or legislative body in exchange for a permit for land development. *See* Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation On The Exactions Theme?*, 77 U. CHI. L. REV. 5, 13 (2010) [hereinafter Been, *Community Benefits Agreements*].

[15] *See Nollan*, 483 U.S. at 841–42; *see generally Dolan*, 512 U.S. at 374 (expanding upon the test set forth in *Nollan*, by requiring that the conditions set by the local government be roughly proportionate to the impact of the development).

[16] *See generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *Takings and Exactions, in* FEDERAL LAND USE LAW & LITIGATION § 1:10., (2016 ed.).

[17] *Id.*

[18] Nadler, *supra* note 11, at 625.

[19] *See Detroiters Deserve Better Than Either Benefits Proposal*, DETROIT FREE PRESS (Oct. 13, 2016), http://www.freep.com/story/opinion/editorials/2016/10/13/detroiters-deserve-better-than-either-benefits-proposal/91996984/.

ordinance that would *require* developers who are seeking public subsidies for development projects of a certain size or projected impact to enter into a private CBA with the affected community.[20] If the ordinance had passed, it would have been the first municipal ordinance on record that would have required a private CBA as a condition *for receiving public subsidie*s.[21] Municipalities are free to condition the distribution of public subsidies in any way they see appropriate, and thus the ordinance would have been constitutional.[22] However, had the ordinance mandated the implementation of a CBA as a condition for development projects

---

[20] *See READ! The Current Draft CBA Ordinance,* EQUITABLE DETROIT COALITION, http://www.equitabledetroit.org/read-the-current-draft-cba-ordinance/ (last visited Oct. 23, 2017) [hereinafter *READ!*]. In fact, there were two ordinances that were voted on in the Detroit's November election, both dealing with community benefits. *See* Christine Ferretti, *Union Leaders Speak Out Against Detroit's Proposal A*, DETROIT NEWS (Oct. 11, 2016), http://www.detroitnews.com/story/news/local/detroit-city/2016/10/11/union-leaders-speak-detroits-proposal/91900540/. The other ordinance, termed "Proposal B", was proposed by the election commission of Detroit and would mandate a community benefits provision be included for developers seeking public subsidies from the City of Detroit for their development projects of a certain size. *See Read the 'Enhanced' Ordinance—Proposal B on the November Ballot*, DETROIT PEOPLE'S PLATFORM (Aug. 19, 2016), http://detroitpeoplesplatform.org/2016/08/read-the-enhanced-ordinance-proposal-b-on-the-november-ballot/ [hereinafter *'Enhanced' Ordinance*]. However, because only "Proposal A" would mandate a private CBA as a condition for certain developers seeking public subsidies, it is the focus of this Note. *See id.*; *READ!*, *supra* note 20. The majority of Detroiters ultimately opted for "Proposal B," which became part of the Detroit City Charter on November 29, 2016. DETROIT, MI., ORDINANCE 35-16 (Nov. 29, 2016); *see* Kirk Pinho, *Milder Community Benefits Ordinance Passes in Detroit*, CRAIN'S (Nov. 9, 2016), http://www.crainsdetroit.com/article/20161109/NEWS/161109838/milder-community-benefits-ordinance-passes-in-detroit.

[21] *See READ!, supra* note 20; *see also The Test Just Began for the Community Benefits Movement*, NEXT CITY, https://nextcity.org/features/view/detroit-test-began-community-benefit-agreements-movement (last visited Oct. 23, 2017).

[22] ASS'N OF THE BAR OF THE CITY OF N.Y., LAND USE COMM., N.Y.C. BAR, THE ROLE OF COMMUNITY BENEFITS AGREEMENTS IN NEW YORK CITY'S LAND USE PROCESS, 28 (2010), http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf [hereinafter N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS].

seeking *land-use approval*,[23] rather than receiving public subsidies, questions concerning the constitutionality of the ordinance under the Takings Clause would have been triggered.[24] The distinction between the conditioning of subsidies versus the conditioning of land-use approval is likely the reason why the proposed ordinance was drafted with respect to only the conditioning of public subsidies for development.[25] However, in order to provide guidance to municipalities on the constitutional implications of community benefits ordinances, this Note assumes that the ordinance was created with respect to *land-use* approval, not the provision of public subsidies.[26]

This Note argues that while Detroit's Community Benefit Ordinance might have survived a facial takings challenge, the proposed legislation, if enacted, would have still been subject to as-applied challenges. To avoid costly litigation that would likely halt development projects and increase costs to developers and municipalities,[27] Detroit and other cities should not adopt ordinances that mandate a private CBA as a condition for development approval.[28] Such ordinances will not fulfill the goals of minimizing the adverse effects of development projects and promoting equitable economic development. Municipalities looking to provide relief to community members that will be negatively affected by proposed economic development have other avenues they can pursue, which do not have constitutional implications and are more desirable.[29] One such example is a

---

[23] *See READ!*, *supra* note 20.

[24] *See* Thomas Keefe, *Determination Whether Exaction for Property Development Constitutes Compensable Taking*, 8 A.L.R. 7TH ART. 7 (2016).

[25] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 28, 34.

[26] *See READ!*, *supra* note 20.

[27] *See* De Barbieri, *supra* note 2, at 1791.

[28] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 10.

[29] *See* Brent Denzin & Erin Elizabeth Hupp, BIG-BOX ORDINANCE TOOL-KIT, MIDWEST ENVTL. ADVOCATES, http://midwestadvocates.org/assets/resources/citizenguides/Big-Box_Ordinance_Tool-Kit.pdf (last updated Jul. 11, 2006); *see also Policy & Tools: Community Impact Reports*, PARTNERSHIP FOR WORKING FAMILIES, http://www.forworkingfamilies.org/resources/policy-tools-

Community Impact Report Ordinance, which would allow community-based organizations to become more informed as to the totality of impacts that a development project could have on a host community. With more accurate information at their disposal, community-based organizations would be in a better place to negotiate with developers, thereby reducing the need to have elected officials become part of the negotiation process, and possibly trigger the *Nollan-Dolan* tests.

Part I of this Note discusses the various stakeholders in private CBAs and how these parties can benefit from community benefits agreements. Part II provides an overview of the Takings Clause, with a focus on regulatory takings, the Supreme Court's holdings in *Nollan* and *Dolan*, and some of the issues left unresolved by these decisions. Part III analyzes the relevant portions of the Detroit Community Benefits Ordinance ("CBO")[30] that may be considered exactions under the current jurisprudence, and evaluates whether the CBO, as is, would survive a Takings Clause challenge. Finally, Part IV explores why CBOs are an inefficient land-use tool, and provides analysis as to why a Community Impact Report Ordinance is a better legislative alternative in promoting sustainable economic development in metropolitan areas.

I. THE APPEAL OF CBAS

The majority of community benefits agreements that have been signed or negotiated focused primarily on large-scale urban development projects.[31] CBAs have become increasingly popular in large-scale development projects due to "their inherent appeal to

---

community-impact-reports#effect; N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 10, 37–38.

[30] *See READ!*, *supra* note 20. This ordinance mandates a community benefits provision as a condition for developers seeking public subsidies from the City of Detroit for their development projects.

[31] *See* Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 296–301 (2008) [hereinafter Salkin & Lavine, *Understanding Community Benefits Agreements*].

the stakeholders in urban development."[32] The three main stakeholders, all of whom stand to benefit from a CBA, include the developer, the community affected by the proposed development, and the local government.[33] However, as discussed *infra*, when the local government becomes too involved in CBA negotiations, either legislatively or adjudicatively, constitutional implications are raised and CBAs begin to lose their appeal.

A. The Developer

The developer, whose responsibilities include funding, constructing, and managing the development project,[34] has two primary goals when entering into a community benefits agreement.[35] First, and arguably most important, a developer who enters into a CBA may gain the support of the community.[36] Such support is crucial in obtaining "regulatory approvals and financial support from the government in a timely fashion."[37] Without community support, the land-use process can be extremely costly, cumbersome, and time-consuming for developers.[38] For example, if the community where a proposed development would occur fiercely opposes the project, they will put pressure on their local elected officials to vote down the project when the city planning commission makes its final determination on permit approval. Fearing backlash from their constituents and the implication that they might have acted to further their personal career, elected officials are much less likely to vote for an unpopular development project. Therefore, developers, who want their projects to be timely and efficient, find that garnering community support can be

---

[32] Nadler, *supra* note 11, at 589.

[33] *See id.* 589–92.

[34] *Id.* at 589.

[35] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 35.

[36] Been, *Community Benefits Agreements*, *supra* note 14, at 18.

[37] *Id.*

[38] *Id.*

immeasurably beneficial in progressing through the land-use process in a smooth, speedy, and cost-efficient manner.[39]

Second, CBAs can lower transaction costs for developers.[40] One way CBAs achieve this is by improving the likelihood that developers will be able to attract lenders and investors to fund the development project.[41] The community's support is crucial in this regard, as "CBAs bring added certainty of securing project approval that benefits developers when they approach investors and lenders in capital markets and protects the developers' investment."[42] Additionally, developers may be able to pass off some of the costs of providing community benefits to the end-users of the development.[43] For example, a developer may promise to give the affected community living-wage jobs for any development that results in new commercial tenants.[44] However, it is likely that the commercial tenants, and not the developer, would be responsible for providing living-wages.[45]

Finally, some developers may prefer negotiating with community members, who may lack negotiation experience, rather than elected officials who might drive a tougher bargain.[46] By directly negotiating with the affected community, developers feel that they can come away from the negotiation with both fewer promised benefits and less costly benefits.[47] Yet, as will be

---

[39] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 2, 35.

[40] Been, *Community Benefits Agreements*, *supra* note 14, at 18.

[41] De Barbieri, *supra* note 2, at 1781

[42] *Id.*

[43] Naved Sheikh, Note, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL'Y 223, 242.

[44] *See* BENJAMIN S. BEACH, ET AL., DELIVERING COMMUNITY BENEFITS THROUGH ECONOMIC DEVELOPMENT: A GUIDE FOR ELECTED AND APPOINTED OFFICIALS (2014), http://www.forworkingfamilies.org/sites/pwf/files/publications/1114%20PWF%20CBA%20Handout_web.pdf.

[45] *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 540 (1991) [hereinafter Been, *"Exit" as a Constraint on Land Use Exactions*].

[46] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22.

[47] *See id.*

discussed, because Detroit's CBO would have required a CBA for major development projects, developers could have lost many of the benefits that would have incentivized them to enter into a CBA, with the result that developers would have been detracted from undertaking projects in the Detroit area.

B. The Host Community

For the affected community, the obvious appeal of community benefit agreements is the various benefits that accompany the development project.[48] The most commonly-included benefits in CBAs are "first-source hiring requirements that provide jobs to members of the local community, living-wage requirements for those jobs, efforts to mitigate environmental damage (either pre-existing the development or caused by it), and the development of affordable housing and various kinds of community facilities."[49] Moreover, CBAs allow affected communities to become more involved in land-use processes in which they normally may not be included.[50] The average land-use process "focuses on traditional land use concerns, such as height and bulk of a project, and accordingly does not always ensure that those most affected by the development have a voice in shaping all the ways in which the development could affect or benefit the community."[51] In this way, a CBA can be an instrument for the affected community to voice their ideas and grievances on how a proposed development will affect them and how the developer can mitigate these effects with promised benefits, making the land-use process more inclusive.[52]

---

[48] *See* Salkin & Lavine, *Understanding Community Benefits Agreements, supra* note 31, at 296–300.

[49] Nadler, *supra* note 11, at 590.

[50] *See* Steven P. Frank, Note, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefits Agreements*, 42 IND. L. REV. 227, 246–47 (2009).

[51] *See* Been, *Community Benefits Agreements, supra* note 14, at 17.

[52] *See* E. BAY ALL. FOR A SUSTAINABLE ECON., BUILDING A BETTER AREA: COMMUNITY BENEFIT TOOLS AND CASE STUDIES TO ACHIEVE RESPONSIBLE DEVELOPMENT 19–30 (2008), http://workingeastbay.org/wp-content/uploads/2014/05/BABBA_report.pdf.

Lastly, CBAs allow community groups to negotiate benefits that may be outside the local government's authority to negotiate because of the *Nollan-Dolan* tests.[53] For example, many CBAs address issues related to minority, female, and local hiring, all of which may fall outside the scope of the *Nollan-Dolan* tests.[54] As will be discussed in Part III, while private CBAs may escape the constraints of the *Nollan-Dolan* tests, the benefits that could have resulted from implementation of the Detroit CBO would have been severely constrained due to the level of government involvement.[55]

C. The Local Government

Finally, CBAs offer potential benefits to municipal governments and local politicians.[56] First, as discussed earlier, community benefits agreements allow municipalities to bypass the constitutional constraints placed on development projects.[57] This benefits government officials in two ways: 1) they help promote equitable economic development within their city;[58] and 2) they provide direct benefits to their individual constituents.[59]

Next, elected officials can use CBAs as a protective shield against both their constituents and developers.[60] For instance, local government officials "may see CBAs as a way to deflect the ire of developers to the community when the developers believe they are being asked to contribute too many, or inappropriate, benefits in exchange for permission to develop."[61] Likewise, when community members complain about the lack of community

---

[53] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 34.

[54] Been, *Community Benefits Agreements*, *supra* note 14, at 18.

[55] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 34; *READ!*, *supra* note 20.

[56] Been, *Community Benefits Agreements*, *supra* note 14, at 20.

[57] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 36; *see generally* Nadler, *supra* note 11, at 591 (suggesting that politicians use CBA as a way to avert conditions).

[58] *See* Nadler, *supra* note 11, at 591.

[59] Been, *Community Benefits Agreements*, *supra* note 14, at 20.

[60] *Id.*

[61] *Id.*

benefits resulting from a development, or that the promised benefits are not coming to fruition, city officials can point to the developer and CBA as the source of such problems, effectively wiping their hands clean of the issue.[62] Lastly, CBAs help redirect infrastructural costs that a municipality usually incurs onto the developer, by stipulating that the developer is to provide affordable housing, local hiring programs, community facilities, and absorb environmental impact costs.[63]

II. THE TAKINGS CLAUSE & THE *NOLLAN-DOLAN* TESTS

A. The Takings Clause and Regulatory Takings Overview

The Takings Clause establishes the federal government's eminent domain power.[64] The clause has been incorporated into the Fourteenth Amendment and is thus also applicable against the states.[65] The Takings Clause holds: "Nor shall private property be taken for public use, without just compensation."[66] This brief yet powerful clause illuminates our constitutional framers' belief that property rights are, in many ways, a constitutional liberty equal to that of other fundamental rights protected by our Constitution.[67] This right, however, is qualified, and must be balanced against the government's police power to serve public interests.[68] This power includes both the state's power to take land for public use, and to regulate property owner's land use in order to further legitimate state interests.[69] With respect to the latter, courts debated for decades on where to draw the line between regulations that are a legitimate use of government power and regulations which are not.

---

[62] Nadler, *supra* note 11, at 592.

[63] *Id.* at 591–92.

[64] CALVIN R. MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 601 (4th ed. 2013).

[65] *Id.*

[66] U.S. CONST. amend. V.

[67] MASSEY, *supra* note 64, at 601.

[68] Daniel J. Curtin, Jr. et al., *Nollan/Dolan: The Emerging Wing in Regulatory Takings Analysis*, 28 URB. LAW 789, 790 (1996).

[69] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

After decades of using an *ad hoc* basis for regulatory takings analysis, the Supreme Court created a multi-factor test for determining when government regulations are so excessive that they in effect, constitute a taking.[70] In *Penn Central Transportation Co. v. City of New York*, the Court applied this rational to New York City's Landmarks Preservation Law ("LPL").[71] The LPL empowered the City to preserve certain structures as historical landmarks because of their "historic, cultural, or architectural significance" in order to further the "widely shared belief" that these structures enhance the public's quality of life.[72] The LPL was eventually applied to Grand Central Terminal, and the owners, Penn Central Transportation Co. ("Penn Central"), brought suit, arguing a taking had occurred when their permit to lease the airspace above Grand Central Terminal was denied because of the LPL.[73] Penn Central argued that application of the LPL constituted a taking for which just compensation was required, because it was prohibited from using the available air space that it owned and thus impaired its "investment-backed" expectations[74] to lease that airspace as a source of future income.[75]

Justice Brennan, writing for the majority, held that when determining if state regulation constitutes a taking of private property for public use, courts should consider the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the nature of the government action involved.[76] Applying this standard, the Court concluded that the economic impact of the LPL was minimal with respect to the total

---

[70] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–29 (1978); *Pa. Coal Co.*, 260 U.S. at 414–16.

[71] *Penn Cent. Transp. Co*., 438 U.S. at 107.

[72] *Id*. at 108–09; N.Y. General Municipal Law § 96-a (McKinney 1968).

[73] *See Penn Cent. Transp. Co*., 438 U.S. at 115, 117.

[74] "A state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Id.* at 127. Penn Central entered into a 50-year lease which provided in its terms for the construction of an office building above Grand Central Terminal. *See id.* at 116.

[75] *See id*. at 115–20.

[76] *Id.* at 124.

amount of revenue Penn Central earned and did not constitute a "total diminution" of the value of its property, but rather simply prohibited Grand Central from leasing its airspace. Moreover, to the extent that the regulation interfered with "reasonable investment-backed expectations," the Court held that Penn Central did not have the option to lease the airspace because the LPL predated their leasing negotiations, and therefore, Penn Central did not have investment-backed expectations.[77] Finally, the Court concluded that because the nature of the government involvement was regulatory, and not physical, the government was entitled to the Court's deference.[78] The Court's disposition reiterated Justice's Holmes holding in *Pennsylvania Coal Co. v. Mahon*,[79] that the "[t]he general rule [is] that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[80]

B. Nollan *and the "Essential Nexus" Test*

In *Nollan v. California Coastal Commission*, the Court applied its regulatory takings analysis to exactions.[81] Exactions occur when a local government conditions approval of a development project on a property owner or developer providing certain amenities in exchange for the right to develop.[82] James and Marilyn Nollan submitted an application to the California Coastal Commission[83] to demolish their run-down beachfront bungalow and replace it with a

---

[77] *See id.*

[78] *See id.*

[79] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (noting where a mining company, Pennsylvania Coal, was permitted to continue its operations because the statute preventing such activity was deemed an overregulation of the property and therefore considered a taking).

[80] *See id.* at 415.

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

[82] W. Andrew Gowder, Jr. & Bryan W. Wenter, *Recent Developments in Exactions and Impact Fees*, 41 URB. LAW. 513, 514 (2009).

[83] Before individuals engage in a development project in California, they are required by state law to obtain a permit from the California Coastal Commission. *See Nollan***,** 483 U.S. at 828.

larger, multi-story residence.[84] The Commission conditioned the approval of the development permit on the Nollans' providing a public access easement across a portion of their property.[85] The Nollans filed suit, arguing the condition constituted a taking for which compensation was required.[86] The Commission argued that conditioning approval of the application was not a taking because it furthered legitimate state purposes by: 1) providing the public with a viewing point of the beach in order to thwart the "psychological barrier" which some members of the public may experience when development obstructs shorefront views; and 2) relieving possible increases in pedestrian traffic that the development would cause.[87]

Justice Scalia, writing for the Court, began his analysis by noting that had the Commission forced the public access easement on the Nollans, it would have undoubtedly constituted a taking.[88] Consequently, the Court had to scrutinize whether conditioning the Nollans' right to develop their land on their furnishing of a public access easement constituted a regulatory taking, requiring just compensation to be paid for the public access easement.[89] The Court began this analysis by balancing the state's interests against the Nollans' interests, noting that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[90] However, the Court qualified this refusal power, holding that a refusal to deny a permit must serve the same governmental interests as the conditions for imposing the exaction.[91] Therefore, the Court held an "essential nexus" must exist between the condition imposed and the government's legitimate state interest, warning local governments that if the concessions they condition permit approval upon do not address the impacts of the development, the "building restriction is

---

[84] *Id.*

[85] *Id.* at 829.

[86] *See id.*

[87] *Id.* at 835.

[88] *Id.* at 831.

[89] *Id.*

[90] *Id.* at 836.

[91] *Id.*

not a valid regulation of land use but 'an out-and-out plan of extortion.'"[92]

The court concluded that a nexus was not present in the case at bar because the impact of the Nollans' project, an obstruction of the ocean view, bore no relation to the condition of the application approval, physical access to the beach.[93] In creating the "essential nexus" test, the Court was particularly concerned with the risk of leveraging, which occurs when a state uses its regulatory power in conditioning land-use as a way to avoid providing compensation, rather than furthering a legitimate state purpose.[94] As Justice Scalia notes,

> [T]he . . . belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast . . . may well be . . . a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization . . . California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this "public purpose," . . . but if it wants an easement across the Nollans' property, it must pay for it.[95]

Such reasoning is consistent with Taking Clause analysis regarding redistribution of wealth: that individual persons should not be singled out to bear the burden of remedying problems of which they are an incidental cause without compensation.[96] Instead, such costs should be borne by the public as a whole.[97]

One of the most alluring aspects of private CBAs is their ability to bypass the constitutional restraints imposed by the *Nollan-Dolan* tests. When the government is not involved in the negotiating process of a CBA, the risk of the government extorting developers is minimized, and the purposes of the Takings Clause

---

[92] *Id.* at 837–40.

[93] *Id.* at 838–41.

[94] *Id.* at 840.

[95] *Id.* at 841–42.

[96] *Id.* at 836–37.

[97] *Id.* at 837.

are not offended. Moreover, by bypassing the constitutional restraints imposed by the *Nollan-Dolan* tests, the benefits in a private CBA could provide a more meaningful, informed, and individualized assessment as to what benefits would be most beneficial to the community in minimizing the impacts of the development, even if such benefits would violate the *Nollan-Dolan* tests. However, because Detroit's CBO would have made the city a party to every CBA falling under the ordinance, the benefits that the host community could have bargained for would have been severely hindered.

C. Dolan and the "Rough Proportionality Test"

In *Dolan v. City of Tigard*, the Court was tasked with expanding upon the "essential nexus" test created by *Nollan*.[98] Florence Dolan submitted an application with the City of Tigard for a permit to redevelop her plumbing and electrical store.[99] Her proposed development would double the size of her store, add an additional structure onto her property, and increase the amount of impervious surfaces on her property.[100] The City Planning Commission granted her permit application on two conditions: 1) that Dolan dedicate roughly 10 percent of her property that ran parallel to a creek and floodplain as a *public* greenway; and 2) that she dedicate an additional strip of land as a pedestrian/bicycle walkway.[101] The Commission stated that the conditions attached to the permit approval furthered legitimate state interests of mitigating the possibility of increased flooding issues resulting from the additional amount of impervious land that would accompany the proposed development, and that the pathway dedication would help alleviate traffic congestion resulting from additional employees and customers.[102]

---

[98] Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (citing *Nollan*, 483 U.S. at 837).

[99] *Dolan*, 512 U.S. at 379.

[100] *Id.*

[101] *Id.* at 379–80.

[102] *Id.* at 381–82.

The Court began its analysis by scrutinizing whether the City's conditions on permit approval passed the "essential nexus" test.[103] Chief Justice Rehnquist, writing for the majority, stated, "[u]ndoubtedly the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld."[104] The City of Tigard had fulfilled its burden to under the "essential nexus" test with respect to the pedestrian bike path.[105] Justice Rehnquist, however, qualified this holding, stating that while the City had met its burden in this regard, a more specific determination was required, something the Court was not forced to decide in *Nollan*.[106] In addition to the "essential nexus test," the Court held there must be a "rough proportionality" between the impact of the development and the concessions the city requires when approving a development permit.[107] The Court noted that this type of quantitative analysis does not require a local government to create a formulaic solution to suffice the rough proportionality test, but rather that the local government have evidentiary proof that the concessions sought are related "both in nature and extent to the impact of the proposed development."[108]

Applying the "rough proportionality" standard, the Court held that the city had not met its burden; there was no reasonable relationship between the increased flooding risks that would result from the proposed development and the requirement that Dolan deed over part of her land as a *public* greenway versus mandating a *private* greenway in which Dolan would be prohibited from developing.[109] Moreover, the City of Tigard failed to make an individualized determination on how much traffic would increase from the development or how much traffic congestion would be alleviated from the dedication of a pedestrian/bicycle pathway.[110] The Court's holding reinforced the principle that the purpose of the

---

[103] *Id.* at 386.
[104] *Id.* at 377, 387.
[105] *Id.* at 387–88.
[106] *Id.* at 386.
[107] *Id.* at 388, 391.
[108] *Id.* at 38.
[109] *Id.* at 391–95.
[110] *Id.* at 395–96.

Takings Clause is to prevent government leveraging and redistribution of wealth.[111]

D. The Takings Clause Standard

Taken together, the *Nollan* and *Dolan* cases establish the test for determining whether the concessions sought by the government in exchange for a development permit effect a taking.[112] First, a court analyzes whether a taking has occurred, by asking whether the government outright demanded the concession, or conditioned it on the right to develop.[113] Second, under the "essential nexus" test, a court must determine whether the government has a legitimate public interest in requiring the concession in exchange for the right to develop.[114] Finally, under the "rough proportionality" test, the court must refine its analysis under the "essential nexus" test and determine whether the cost the developer incurs in providing the concession is roughly proportional to the overall social costs of the development.[115] It is also important to note that the Court in *Dolan* held that the burden of proof with respect to these tests lies with the government, and not the challenger of the exaction.[116]

E. Unresolved Issues from Nollan *and* Dolan

While the Supreme Court provided a standard of review to determine whether an exaction constitutes a taking, courts still grapple with the scope of exactions analysis under *Nollan* and

---

[111] *Id.* at 384; *see also* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 13–15 (2000) (discussing the reasoning behind the *Nollan-Dolan* decisions).

[112] BLAESSER & WEINSTEIN, *supra* note 16, at 26.

[113] *See id.* at 22.

[114] *Id.* at 21.

[115] *Id.*

[116] J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373, 381 (2002).

Dolan.[117] First, courts struggled to address whether the tests applied to physical exactions, such as a dedication of land or easement, or whether monetary exactions, such as impact or in-lieu fees, also fell under the umbrella of *Nollan-Dolan*.[118] The Court answered this question in *Koontz v. St. Johns River Water Management Dist*., holding that *Nollan* and *Dolan* applied to both monetary and physical exactions.[119] In *Koontz*, the court determined that because monetary exactions posed the same risks of government leveraging and redistribution of wealth, barring them was consistent with the purposes of Takings Clause.[120] It is plausible that monetary exactions may even increase the risk of government leveraging and redistribution of wealth, since money is highly liquid, and, conversely, land dedication is a time-consuming endeavor.[121]

The second issue that has divided courts is whether the *Nollan-Dolan* tests should be applied to legislative exactions in addition to adjudicative exactions.[122] While the *Nollan* court was silent on whether there is a distinction between the two, the court in *Dolan* emphasized it was dealing with an adjudicative exaction.[123] Many lower courts applying the *Nollan-Dolan* tests have argued that the dicta in *Dolan* distinguishing between legislative and adjudicative exactions is determinative that the tests should only apply in the adjudicative context.[124] Proponents of this view also further contend that legislative actions, which affect a broad class of

---

[117] *See generally* Keefe, *supra* note 24 (describing various outcomes courts have arrived at under *Nollan* and *Dolan*).

[118] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that the government may not constitutionally request a dedication of land or easement); *see also* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (holding that a government's monetary exactions fall under the realm of *Nollan-Dolan*).

[119] *See Koontz*, 133 S. Ct. 2586; *see also* Keefe, *supra* note 24, at 3–4.

[120] *Koontz*, 133 S. Ct. at 2595.

[121] *See* Nadler, *supra* note 11, at 599–601.

[122] Keefe, *supra* note 24.

[123] *Dolan*, 512 U.S. at 385.

[124] *See* Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 250, 256–57 (2000).

individuals and situations, reduce the risk of leveraging, and therefore courts should give deference to the legislature.[125]

However, the more persuasive argument is that lower courts applying the *Nollan-Dolan* tests need not make a distinction between which government body is imposing the exaction.[126] First, exactions analysis usually occurs in the context where the local government is the actor and the responsibilities of the various branches of local government frequently overlap:

> Local governments do not exhibit, nor must they follow, strict notions of separation of powers requiring independent legislative, executive, and judicial branches with distinct roles. In the local government context, a neat separation does not exist. Instead, local government bodies combine legislative, administrative, and judicial functions. Legislative bodies perform various administrative functions, and administrative bodies exhibit legislative qualities.[127]

Due to this substantial overlap, courts applying the *Nollan-Dolan* tests should focus on what the exaction requires from the landowner, rather than make a distinction between which governmental body requires the exaction.[128] This argument is supported by the fact that if the Supreme Court had believed there should be a distinction between the two, it would have made it explicit, rather than using dicta language in *Dolan*.[129] Moreover, Supreme Court Justices Thomas and O'Connor argue that the legislative/adjudicative divide "appears to be a distinction without a constitutional difference."[130] Thus, courts should not concern themselves with which body of government requires the exaction, but rather, the analysis should only focus on the purpose of the Takings Clause: preventing leveraging and redistribution of

---

[125] *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1993) (en banc).

[126] Reznik, *supra* note 124, at 260.

[127] *Id.*

[128] Nadler, *supra* note 11, at 603.

[129] *See id.*; Dolan v. City of Tigard, 512 U.S. 374, 387 (1994).

[130] Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1118 (1995); Nadler, *supra* note 11, at 603.

wealth.[131] While the CBO is void of any adjudicative determinations that the government is not involved in the negotiating process of a specific CBA created under the Ordinance,[132] by legislatively mandating that developers must enter into CBAs, local communities would have become de facto actors for the city of Detroit by carrying out the ordinance, which would have frustrated the intent of the Takings Clause.

III. THE DETROIT CBO & WHETHER IT WOULD HAVE SURVIVED A TAKINGS CLAUSE CHALLENGE

A. The Detroit CBO

If Detroit's grassroots proposal had been adopted, certain portions of the statute would have become relevant for the purpose of Takings Clause analysis.[133] The CBO created three types of development projects that would have been required to provide community benefits in exchange for the right to develop.[134] First, any development project "expected to incur the investment of [$15 million] or more" would be a "Tier 1 Development Project," and the CBO would have required any project falling under this umbrella to enter into CBA with nonprofit organizations, residents and local businesses, collectively encompassing the Host Community.[135] Any development project that would have been expected to incur an investment of less than $15,000,000 but more than $3,000,000 would be a "Tier 2 Development Project."[136] The CBO encouraged, but did not require, a community benefits agreement.[137] However, under the terms of the CBO, if a developer opted not to enter into a CBA, the ordinance would have required the developer to supply a first-source hiring program in its place, and such program would have become part of the final

---

131 *See Dolan*, 512 U.S. at 387.

132 *See READ!*, *supra* note 20, at 4.

133 The current draft of the proposed ordinance can be found here. *See id.*

134 *See id.*

135 *Id.* at 3–4.

136 *Id.* at 4.

137 *Id.*

development agreement between the developer and the City of Detroit.[138] Lastly, under the terms of the CBO, if the City's Planning Commission (CPC) determined in the course of reviewing an application for a developmental permit that, due to the nature of the development and the host community, such development was likely to generate "disproportionately high and adverse human health or environmental impacts, including social, esthetic, economic, physical, chemical, or biological impacts, in the Host Community," the CPC reserved the right to characterize such development as a "High Impact Development Project."[139] For projects falling under this category, City Council would have had the right to apply the same rules to Tier 1 Development Projects.[140]

The Detroit ordinance defined several types of benefits that could be included in a CBA, including targeted employment opportunities, job training, low- and moderate-income housing, quality of life or environmental mitigations, neighborhood infrastructure, and amenities.[141] As will be discussed below, any benefits included in the CBA under the Detroit ordinance could have been considered exactions because they were concessions the developer had to give up in exchange *for the right to develop their property*.[142] Therefore, the ordinance could have faced two types of constitutional challenges under the Takings Clause: facial challenges and as-applied challenges.[143]

B. Facial Takings Challenge

Because there is relatively little guidance from the Supreme Court surrounding the subject of legislative exactions, challengers of regulatory legislation have struggled to formulate takings claims.[144] While several lawsuits have challenged the facial validity of legislative exactions using the *Nollan-Dolan* takings

---

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Keefe, *supra* note 24.

[143] *See id.*

[144] *See id.* (reporting on the various development surrounding the case law regarding exactions, including legislative exactions).

analysis,[145] the jurisprudence with respect to facial takings claims seems to suggest that courts focus their analysis more on traditional regulatory takings standards set forth in *Penn Central Transportation Co. v. City of New York*,[146] and have not applied the *Nollan-Dolan* tests for facial challenges.[147]

1. Washington

In *Garneau v. City of Seattle*,[148] several landlords challenged the Tenant Relocation Assistance Ordinance ("TRAO"),[149] which, *inter alia*, required landlords to "pay cash relocation assistance to low-income tenants they intend[ed] to displace by redeveloping their property."[150] Plaintiffs asserted that the ordinance failed the *Nollan-Dolan* tests because it lacked an essential nexus between them having to pay cash relocation assistance to tenants and the consequences of the proposed development project.[151] Furthermore, they argued that even if the development of their property forced some tenants to relocate because of rising rental prices, there were several other scenarios where tenants voluntarily

---

[145] *See* Garneau v. City of Seattle, 147 F.3d 802 (9th Cir. 1998); California Bldg. Industry Ass'n, v. City of San Jose, Calif., 351 P.3d 974 (Cal. 2015); Kamaole Pointe Dev. LP v. County of Maui, 573 F. Supp. 2d 1354 (D. Haw. 2008); Wisconsin Builders Ass'n v. Wisconsin Dept. of Transp., 702 N.W.2d 433 (Ct. App. 2005).

[146] *See* Penn Cent. Transp. Co. V. City of New York, 438 U.S. 104 (1978).

[147] *See Garneau*, 147 F.3d at 806 ("Plaintiffs argue that the [*Nollan* and *Dolan*] cases provide the appropriate standard for reviewing the TRAO. . .[i]nstead, we find the more traditional regulatory takings analysis. . .applicable."); *see also California Bldg. Industry Ass'n*, 351 P.3d at 991 (emphasizing that the *Nollan* and *Dolan* tests are not triggered "so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property. . ."); *Kamaole Pointe Dev. LP*, 573 F. Supp. 2d at 1370 (determining that the Court was not empowered to expand the *Nollan* and *Dolan* tests to what amounts to a facial takings claim).

[148] *Garneau*, 147 F.3d 802.

[149] The TRAO required landlords to, among other things, provide a cash subsidy for any tenants who were forced to relocate residences as a result of the landlord increasing rent prices due to redevelopment. *See Garneau*, 147 F.3d at 804.

[150] *Id.*

[151] *Id.* at 806.

choose to relocate.[152] Therefore, requiring landlords to provide cash for relocation assistance every time a tenant relocated lacked an "essential nexus" because the development only forced some, but not all, tenants to relocate.[153]

However, the Ninth Circuit found the *Nolan-Dollan* tests were an inappropriate standard of review.[154] The court held "[p]laintiffs argue that the [*Nollan* and *Dolan*] cases provide the appropriate standard for reviewing the TRAO . . . [i]nstead, we find the more traditional regulatory analysis . . . applicable."[155] When explaining why they found the *Nollan-Dolan* tests inappropriate, the court indicated that when a claimant asserts a facial takings challenge, a court must analyze whether the mere enactment of a piece of legislation constitutes a taking, and should not concern itself with hypothetical situations in which exactions could violate the Takings Clause.[156] The court suggested that an example of a successful facial takings claim occurred in *Lucas v. South Carolina Coastal Council,* where "government regulation prohibited all beneficial use of Lucas' beach front, for which he had paid $975,000 . . . [and] [t]he court found that mere enactment of this use restriction rendered [the] Lucas' property valueless."[157]

Applying more traditional regulatory analysis, the court looked to "[the nature of the government action] . . . the economic impact of the regulation on the claimant [and] . . . the extent to which the regulation has interfered with distinct investment-backed expectations."[158] However, the court also created a distinct standard of review for courts to use when analyzing a facial takings claim.[159] First, the court held they should only inquire as to the "general scope and dominant features . . . leaving other [specific] provisions to be dealt with as cases arise directly

---

[152] *See id.* at 806–810.

[153] *See id.*

[154] *See id*. at 806.

[155] *Id*.

[156] *Id.* at 811.

[157] *Id.*

[158] *Id.* at 107 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)) (internal citations omitted).

[159] *See Garneau*, 147 F.3d at 806–08.

involving them."[160] The court further noted that contrary to as-applied takings challenges, in a facial challenge the ordinance is given legislative deference and thus "[p]laintiffs bear the burden of proving their facial takings claim at trial."[161] The court acknowledged that plaintiffs "face an uphill battle since it is difficult to demonstrate that mere enactment of a piece of legislation deprived the owner of economically viable use of his property."[162]

Using this facial takings analysis, the court concluded that the TRAO was not a categorical taking in that the government did not physically intrude an owner's property rights,[163] nor did it deny them all economically viable use of their property.[164] Prevailing on the facial takings claim would have required the plaintiffs to demonstrate that the TRAO's enactment caused a diminished value of their property.[165] Ultimately, the court determined that the plaintiffs did not meet their burden in proving that the enactment of the TRAO made it economically unfeasible to successfully manage their buildings because plaintiffs phrased their argument as an as-applied challenge, and therefore, their evidence relating to economic impact was specific to the plaintiffs themselves, and not impacts on landlords as a whole.[166]

2. Hawaii

In *Kamaole Pointe Development LP v. City of Maui*, the United States District Court for the District of Hawaii mirrored the Ninth

---

[160] *Id.* at 807 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926)).

[161] *Garneau*, 147 F.3d at 807.

[162] *Id.*; Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).

[163] *Garneau*, 147 F.3d at 807. *See generally* Lorreto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a physical invasion of property constitutes a *per se* taking).

[164] *Garneau*, 147 F.3d at 807. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a government regulation that completely erases any economic value in an owner's property constitutes a *per se* taking).

[165] *Garneau*, 147 F.3d at 807–08.

[166] *See id.*

Circuit's analysis in *Garneau* when it examined a facial challenge of an ordinance requiring developers to set aside a percentage of affordable housing units as part of the overall development project.[167] The City contended that the ordinance furthered the purpose of combatting "the critical shortage of affordable housing, making home acquisition by the majority of the [islands inhabitants] extremely difficult."[168] Developers looking to build five or more residential units on their property were required to enter into an agreement with the Maui County Department of Housing and Human Concerns to receive land use approval from the City.[169] The Ordinance required that "[w]hen fifty percent of the dwelling units . . . are offered for sale of $600,000 or more, fifty percent of the total number of units and/or lots shall be sold or rented to residents within the income-qualified groups established by this ordinance."[170] The court found that when mounting a facial takings challenge the "formulation explicitly recognized by the Ninth Circuit as viable for facial takings claims—i.e., a Lucas-style attack—is now the only means available for mounting such a challenge."[171] Therefore, the court concluded that because plaintiffs failed to produce any evidence of an "improper purpose," the ordinance was facially valid.[172]

3. California

Similarly, in *California Building Industry Association v. City of San Jose*, plaintiff developers sought to invalidate a San Jose inclusionary housing ordinance using *Nollan-Dolan* takings analysis.[173] The ordinance required all development projects creating twenty or more new, modified, or residential units to make at least 15 percent of the units available at an affordable housing

---

[167] Kamaole Pointe Dev. LP v. County of Maui, 573 F. Supp. 2d 1354, 1367–1370 (D. Haw. 2008).

[168] *Id*. at 1357.

[169] *Id*.

[170] *Id*.

[171] *Id*. at 1370.

[172] *Id*. at 1371, 1384.

[173] Cal. Bldg. Industr. Ass'n v. City of San Jose, 351 P.3d 974, 978, 988 (Cal. 2015).

price.[174] The plaintiffs argued that this requirement constituted a required dedication of property and triggered the *Nollan-Dolan* tests.[175] The California Supreme Court, however, found that this requirement was not an exaction, but rather a price control limiting the price "for which the developer may offer some of its units for sale."[176] Therefore, the court reasoned that the only way the plaintiffs could prevail on a facial takings claim would be to use the standards set forth in *Penn Central* and show that the economic impact of the regulation was confiscatory.[177] Applying that analysis, the court held that the plaintiffs failed to prove the inclusionary housing ordinance's requirement dedicating 15 percent of apartment units at an affordable housing rate would have a confiscatory effect on developers in San Jose.[178]

4. Wisconsin

Outside of the Ninth Circuit, facial challenges of legislative exactions using the *Nollan-Dolan* tests have also been struck down.[179] In *Wisconsin Builders Ass'n v. Wisconsin Dept. of Transp.*,[180] the Wisconsin Court of Appeals examined a facial takings claim with respect to setback restrictions promulgated under Wisconsin state law.[181] Mounting their facial challenge, the plaintiffs attempted to analogize setback restrictions required by the law to the easements required in *Nollan* and *Dolan*.[182] Specifically, the plaintiffs argued that "the setback restrictions amount to a taking of an easement development all along affected state highways and, therefore, under [*Nollan*] there must be a

---

[174] *Id.* at 978, 981–82.

[175] *Id.* at 988–90; *see* Ahva Aflatooni, *San Jose Shows the Way: Inclusionary Housing Ordinance Survives Facial Challenge*, 26 No. 6 Miller & Starr, Real Estate Newsalert NL 1 (2016).

[176] *See Cal. Bldg. Indust. Ass'n*, 351 P.3d at 991–93.

[177] *Id.* at 991, 993.

[178] *See id.* at 993.

[179] Wis. Builders Ass'n v. Wis. Dept. of Transp., 702 N.W.2d 433 (Ct. App. 2005).

[180] *Id.*

[181] *Id.* at 436.

[182] *Id.* at 445–47.

nexus [and proportionality] to a state public purpose."[183] Similar to the Ninth Circuit, the court found that "the rough proportionality standard of Dolan . . . does not, by its very terms, appear to apply to the facial challenge to a regulation, where there are no facts regarding any individual landowner. Wisconsin Builders [plaintiffs] does not present an argument that resolves this incompatibility."[184] In striking down the plaintiff's challenge, the court concluded that the *Nollan-Dolan* standard did not apply to a "facial challenge to the setback restrictions."[185]

5. The Detroit Ordinance

Assuming a Michigan court would have applied a similar analysis to a takings challenge of the Detroit ordinance if it had gone into effect,[186] it is likely that any such challenge would have failed. Utilizing traditional regulatory takings analysis, a court would likely look to the nature of the government action involved, the economic impact of the Detroit ordinance on developers, and the extent to which the ordinance interfered with the developer's reasonable investment-backed expectations.[187] Further, the court would need to analyze the "general scope" and "dominant features" of the Detroit ordinance to determine whether "mere enactment" of the ordinance constituted a taking.[188]

A developer challenging the facial validity of the ordinance might have argued that the Detroit ordinance, in some instances, involved government invasion of property, as one of the possible

---

[183] *Id*. at 445.

[184] *Id*. at 448.

[185] *Id*.

[186] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–130 (1978) (holding that courts applying regulatory takings analysis should 1) analyze whether a taking has occurred if the government had simply demanded the concession; 2) determine whether the government has a legitimate public interest in requiring the concession in exchange for the right to develop (the "essential nexus" test); and 3) the court must refine its analysis under the "essential nexus" test and determine whether the cost the developer incurs in providing the concession is roughly proportional to the overall social costs of the development (the "rough proportionality test)).

[187] *See id.*

[188] *See* Garneau v. City of Seattle, 147 F.3d 802, 807 (9th Cir. 1998).

community benefits that may be included in a CBA under the ordinance would be neighborhood infrastructure and amenities, such as parks, playgrounds, and community centers.[189] However, a court analyzing this contention would have likely countered that such an argument would only be proper in an as-applied challenge.[190] Therefore, a court would likely hold that, on the face of the ordinance, there is no physical invasion of property.[191] Consequently, a challenger would have been relegated to prove that the mere enactment of the ordinance would have the effect of making development projects economically unviable for developers.[192] It is possible that a developer challenging the ordinance could have asserted some adverse economic impact with respect to its enactment.[193] However, overcoming the evidentiary burden of proving that the impact of the ordinance would result in profitless development projects[194] seems infeasible. As noted in *Garneau*, plaintiffs face an enormous burden when trying to invalidate the facial validity of legislation due to judicial deference.[195] For those reasons, it is unlikely that a developer

---

[189] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (holding that California Coastal Commission's requirement of a public access easement across the landowner's property constituted a physical invasion of property); *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (holding that Tigard's city planning commission's requirement that the landowner deed over a portion of her property for a development permit constituted a physical invasion of property).

[190] *See Garneau*, 147 F.3d at 811.

[191] *See, e.g.*, *id.* at 812–15 (indicating that unless the challenger can successfully prove that a legislative enactment will render a class of landowner's property valueless, the challenger is not likely to prevail on a facial takings claim).

[192] *See Penn Cent. Transp. Co.*, 438 U.S. at 123–130.

[193] Because the Detroit ordinance requires a CBA for certain development projects, it is feasible that a CBA could include costs for the developer, such as environmental impact mitigation, that are normally borne by the local government. Therefore, requiring the developer to bear these costs will naturally reduce the profit margin by they would have enjoyed by the difference of such costs. Been, *supra* note 14, at 10–20.

[194] *See* sources cited and accompanying text, *supra* note 191.

[195] *See Garneau*, 147 F.3d at 807–08.

would have been able to mount a successful facial takings challenge against the proposed ordinance.

C. As Applied Takings Challenge

While the Detroit CBO would have likely passed muster under facial takings analysis,[196] the CBO would have likely faced as-applied challenges, thus triggering the *Nollan-Dolan* tests.[197] Because there is no case-law on record with respect to the constitutionality of CBAs,[198] and because as-applied challenges are extremely fact-sensitive, it is more prudent to compare provisions in active CBAs with similar provisions in the Detroit CBO to determine whether the CBO would have been invalidated under an as applied challenge.

1. The Los Angeles Staples Center CBA

The first CBA was created in 2001 as part of the $4.2 billion dollar Los Angeles Staples Center development, home of the NBA's L.A. Lakers.[199] This massive development project included a 7,000-seat theater, an entertainment plaza, 250,000-square-foot expansion of the Los Angeles convention center, a 45-story hotel, housing complexes, and retail businesses.[200] In an effort to garner community support in the development approval process, the developers approached the Figueroa Corridor Coalition for Economic Justice ("FCCEJ"), a coalition of twenty-nine community groups and five labor unions in the surrounding area,

---

[196] *See, e.g.*, Cal. Bldg. Indus. Ass'n. v. City of San Jose, 351 P.3d 974, 993–94 (Cal. 2016) (holding that in order to mount a successful facial takings challenge, the regulations must be "confiscatory" in its economic impact on a designated class of landowners).

[197] *See* Aflatooni, *supra* note 174, at 552.

[198] De Barbieri, *supra* note 2, at 1790–91 (indicating that CBAs are private agreements and may not fall under application of *Nollan-Dolan* tests).

[199] Lee Romney, *Community, Developers Agree on Staples Plan: The Proposed Entertainment and Sports District Could Become a Model for Urban Partnerships*, L.A. TIMES (May 31, 2001), http://articles.latimes.com/2001/may/31/news/mn-4715.

[200] *Id.*

to negotiate a CBA.[201] After five months of negotiations, the developer agreed to provide a set of community benefits in exchange for FCCEJ's support during the approval and development stages.[202] For the purposes of this analysis, the most comparable benefits of the Staples Center CBA include: 1) funding an assessment of community park and recreation needs (and committing one million dollars to meet those needs); 2) adopting a "first source" hiring program, giving preference to certain target groups, including low-income individuals from the poorest census tracts throughout the city; and 3) constructing 100 to 160 affordable housing units, representing approximately 20 percent of the total number of units created by this project.[203]

Under the proposed CBO, if a developer had wished to build a new stadium for the Detroit Pistons, like the project to create the L.A. Staples Center, the cost of undertaking such a project would have indisputably qualified as a "Tier 1 Development Project" under Detroit's failed ordinance, thus requiring a CBA.[204] Further, had the provisions stated above in the Staples Center CBA been included in this CBA, the *Nollan-Dolan* tests would have been triggered.[205] Consequently, should a development project become too cost prohibitive from the developer's perspective, likely due in part due to the various community benefits it is obliged to supply,

---

[201] *See id*; JULIAN GROSS ET AL., GOOD JOBS FIRST, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE at 29–32 (2005), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf.

[202] *See* GROSS ET AL., *supra* note 201.

[203] *LA Sports and Entertainment District CBA*, PARTNERSHIP FOR WORKING FAMILIES, at A-2, A-9, A-16, http://www.forworkingfamilies.org/sites/pwf/files/resources/CBALosAngelesSportsAndEntertainmentDistrictProject.pdf (last visited Oct. 23, 2017).

[204] Two ordinances related to community benefits were voted on in Detroit's November 2016 election. DETROIT, MICH., CITY CODE, COMMUNITY DEVELOPMENT ch. 14, art. xii (EQUITABLE DETROIT COALITION, The current draft CBA Ordinance, sec. 14-12-1 - 14-12-7); *see* Ferretti, *supra* note 20.

[205] DETROIT, MICH., CITY CODE, COMMUNITY DEVELOPMENT ch. 14, art. xii (EQUITABLE DETROIT COALITION, The current draft CBA Ordinance, sec. 14-12-1 - 14-12-7); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1986).

a developer may have been able to assert a successful as-applied takings challenge under the Detroit CBO.[206]

Applying the case law discussed above, it is apparent how constrained CBAs under the Detroit ordinance would have been in terms of the scope of benefits that could have been included. Similar to the California Coastal Commission in *Nollan*, Detroit would have had the burden of proving that the development of the stadium had an "essential nexus" in conditioning permit approval on the creation of local parks and facilities.[207] In order to prove an essential nexus, Detroit would have needed evidence that the proposed development displaced community parks and recreational facilities.[208] Further, under *Dolan*, Detroit would have had to prove that cost of funding the assessment and providing money to meet the needs the assessment shows were "roughly proportional" to the impact the development had on community recreational needs.[209] The City of Detroit might have been able to assert these impacts, however, it would still have been their burden to prove. [210]

In regards to a first source hiring program, the CBA might have passed the "essential nexus" test if Detroit could have proved that the impact of the development would displace existing jobs in the surrounding area.[211] However, had the CBA provided that the developer would hire citizens "from the lowest income census tracts across the city," the CBA would likely have failed the essential nexus test because the development would not have displaces jobs from the lowest census tracts across the city, but only where the proposed development took place.[212] Finally, any minimum affordable housing requirements for residential development would have also forced the City to prove an

---

[206] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 36–37.

[207] Nollan, 483 U.S. at 837 (1986). *See* Nadler, *supra* note 11, at 589.

[208] *See* Nadler, *supra* note 11, at 589, 604, 605; *Nollan*, 483 U.S. at 838.

[209] *See* Nadler, *supra* note 11, at 589, 604–05; Dolan v. City of Tigard, 512 U.S. 374, 398 (1994).

[210] *See* Nadler, *supra* note 11, at 589, 604–05; Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998).

[211] *See Nollan,* 483 U.S. at 838; Nadler, *supra* note 11, at 589, 604–05.

[212] *Nollan,* 483 U.S. at 838; *see* Nadler, *supra* note 11, at 589, 604–05; Romney, *supra* note 199.

"essential nexus" and "rough proportionality" by showing that the development would displace that amount of residents who had lived at affordable housing rates.[213]

2. The Atlantic Yards CBA

The Atlantic Yards development project in Brooklyn, New York included a CBA.[214] The estimated $2.5 billion project boasted a 19,000-seat arena for the Brooklyn Nets, along with a parking garage, a hotel, residential housing, and commercial office and retail space.[215] Developer Forest City Ratner ("FCR"), eight community coalition groups, and several elected officials signed a CBA,[216] the terms of which, *inter alia*, included: 1) a "good faith effort" to employ 35 percent minority and 10 percent women construction workers throughout the development; 2) [Developer] FCR will seek to award 20 percent of the construction contracts to qualified minority owned firms and 10 percent to qualified women owned firms; 3) FCR promises 50 percent of the residential units will go to low LMI income families; and 4) FCR seeks to provide a senior citizens center, parks, open arenas and arena related programs.[217]

Had the Atlantic Yards community benefits been included in the Piston Stadium CBA, Detroit would have faced similar as-applied takings challenges. With respect to the first two benefits, the Detroit CBO was silent on whether the host community could negotiate with developer to include community benefits

---

[213] *See Nollan*, 483 U.S. at 838; *Dolan*, 512 U.S. at 398; Nadler, *supra* note 11, at 589, 604–05.

[214] Amy Lavine, *Atlantic Yards CBA*, COMMUNITY BENEFITS BLOGSPOT (Jan. 29, 2008), http://communitybenefits.blogspot.com/2008/01/atlantic-yards-cba.html.

[215] Charles V. Bagli, *Deal is Signed for Nets Arena in Brooklyn*, N.Y. TIMES (Mar. 4 2005), http://www.nytimes.com/2005/03/04/nyregion/deal-is-signed-for-nets-arena-in-brooklyn.html.

[216] Lavine, *supra* note 213.

[217] *See* COMMUNITY BENEFITS AGREEMENT 13, 18, 22, 26 (June 27, 2005), http://www.beegreennow.org/images/Community%20Benefits%20Agreement.pdf.

specifically targeted at minorities and women.[218] However, when listing the possible benefits that could be included into a CBA, the Ordinance indicated that the list was "non-exclusive."[219] Since many past CBAs included provisions geared toward promoting women and minority involvement in the development process,[220] the Ordinance's silence in terms of outlining impermissible benefits, makes it likely that benefits targeted at women and minorities would have been permitted under the CBO. Nevertheless, Detroit would have been hard-pressed to prove that there was an "essential nexus" between the impact of the development and the requirement to hire a certain percentage of minority and female construction workers, as well as to award a certain percentage of construction contract to these constituencies, and would likely be held invalid under an as-applied takings challenge.[221] With respect to the affordable housing percentage, Detroit would have again been forced to show an "essential nexus" and "rough proportionality" between the impact of the development and the minimum requirement of affordable housing.[222] Such a high percentage of minimum affordable housing would have almost certainly been held invalid under the "rough proportionality" test.[223] Finally, with respect to the dedication of amenities, each amenity would have had to pass both *Nollan* and *Dolan* tests. Provisions such as senior citizens' centers would likely have been deemed suspect under *Nollan-Dolan* analysis.[224]

---

[218] *See READ!*, *supra* note 20.

[219] *See id.*

[220] *See* N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 34.

[221] *See id.*

[222] *See id*. at 36–37.

[223] *See id*.

[224] This report indicates that concessions relating to gender and minority hiring programs are more likely to violate the Takings Clause. Therefore, an argument could be made that a senior citizen center should be included in those categories as well, because unless a development project requires the destruction of a senior citizen center, any concession requiring the construction of such a center would fail the "essential nexus" test. *See id.* at 34.

IV. RECOMMENDATIONS

A. Why CBOs are Inefficient Land Use Tools

The City of Detroit should be lauded for its effort to utilize CBAs as a tool in promoting equitable development for its residents. CBAs have enormous potential to mitigate the adverse effects that development can have on historically impoverished areas. However, community benefits ordinances are an inefficient means of promoting equitable development because they detract from many of the positive aspects of CBAs.[225]

1. CBOs Will Deter Development if Enacted by Municipalities

The increasing popularity of CBAs is partially driven by the fact that all stakeholders stand to benefit from their implementation in a development project.[226] However, under the Detroit ordinance, incentives that attract developers into signing private CBAs would have disappeared. First, developers would have lost one of their biggest incentives in entering a CBA, which is gaining the support of the affected community.[227] Normally, gaining the community's support is one of the best ways for a developer to move through the land use approval process in a timely manner,[228] and a CBA can be an ideal vehicle to accomplish that.[229] However, because the CBO mandated a CBA be implemented as part of all major developments,[230] gaining community support would have been expressly required, rather than encouraged.[231] An adverse ancillary effect of this requirement on developers would be that it would become more difficult for them to attract investors to fund the

---

[225] *See* Been, *Community Benefits Agreements*, *supra* note 14, at 18 (discussing the various benefits stakeholders can realize through CBAs).

[226] *See id.* at 15–20.

[227] N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 35.

[228] *See* Been, *supra* note 14, at 18.

[229] *Id.*

[230] *See READ!*, *supra* note 20.

[231] *Id.*

project, since developers could no longer rely on community support to ensure project approval, thereby taking away a very valuable bargaining chip that developers had relied on in the past to attract investors.[232]

As discussed developers entering into a private CBA may feel that they can control the table at negotiation proceedings because the affected community may not be as experienced negotiators as elected officials.[233] While the ordinance would have required the City to abstain from actually negotiating CBAs,[234] Detroit's City Council would still have an effect on the negotiating process. This is due to the fact that all CBAs would have been incorporated into a final development agreement between the city and a developer,[235] and if the City's Planning Commission ("CPC") had felt that a given CBA was "inadequate" in the community benefits provided, they might have tried to use other land use tools to fill gaps in the CBA. For instance, the CPC would have been able to threaten to reduce or eliminate tax abatements or subsidies that it had originally offered. Alternatively, the CPC could have imposed other impact fees or other exactions to address any areas it considered the CBA scanty. Taken together, the effects of the ordinance on developers could have been to deter them from attempting to build large-scale projects in Detroit.[236] As a result, major development projects that could produce countless jobs,[237] create residences for persons of all income levels,[238] and aesthetically improve areas in Detroit could have become more infrequent.

---

[232] De Barbieri, *supra* note 2, at 1781.

[233] N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 39.

[234] *See READ!*, *supra* note 20.

[235] *Id.*

[236] *See* Pinho, *supra* note 20.

[237] Romney, *supra* note 199 (detailing how many jobs could be created as a result of the Staples Center Development).

[238] *See id.*

2. Increased Likelihood of Litigation Negatively Affects All Stakeholders Under the CBO

As discussed, had the CBO passed, it is probable that Detroit would have prevailed in a facial takings challenge; however, the lawsuit nevertheless would have cost the City valuable time, money, and municipal resources.[239] Moreover, as discussed, several scenarios make it plausible that developers would have initiated as-applied challenges, thus creating constant litigation surrounding the ordinance.[240] For instance, a developer could have considered trying to invalidate a CBA if they believed it had given too many concessions, especially if the developer thought the concessions were outside the scope of the *Nollan-Dolan* tests and the cost of litigation outweighed the cost of providing the benefits.[241]

Additionally, due to variable changes that occur with most development projects,[242] under the Detroit ordinance, a developer might have felt unable to provide promised community benefits and might have backed out of them. Consequently, the host community or the city might have attempted to enforce the benefits in court.[243] However, if the community benefits sought had been outside *Nollan-Dolan*, the developer would have had a legitimate defense and a much stronger case to invalidate those provisions of the CBA.[244] Moreover, as there is still debate over whether CBAs are enforceable contracts,[245] it is likely that the developer would have had a significant advantage in any litigation stemming from CBAs implemented under the ordinance.

Cumulatively, the risks posed by constant litigation over the Detroit ordinance would have adversely affected various

---

[239] Garneau v. City of Seattle, 147 F.3d 802, 807 (9th Cir. 1998); *see* De Barbieri, *supra* note 2, at 1782.

[240] N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, 36–37.

[241] *See id.*

[242] De Barbieri, *supra* note 2, at 1780 (discussing several delays the developer Forest City Ratner experienced in the Atlantic Yards project).

[243] *READ!, supra* note 20.

[244] *See* Dolan v. City of Tigard, 512 U.S. 374, 387 (1994).

[245] De Barbieri, *supra* note 2, at 1782.

stakeholders in development projects.[246] Developers would have faced project delays, increased litigation costs, and community backlash, which could have had the consequential effect of investors backing out of projects.[247] Furthermore, the City would have continued to waste valuable resources defending any and all litigation surrounding the ordinance, which in it of itself could have brought officials under fire from constituents.[248] Finally, any benefits the host community would have realized from the development could have been delayed, reduced, eliminated, or any combination thereof.[249] Taken together, CBOs eliminate many of the benefits that private CBAs offer and create too many additional risks,making this land-use tool ineffective in promoting equitable development.[250]

B. Another Avenue Municipalities May Take to Legislatively Facilitate Equitable Development: Community Impact Reports

Municipalities looking to facilitate equitable development through legislation have better land-use tools at their disposal than CBOs. One land-use tool that local governments should pursue is a Community Impact Report ("CIR").[251] A CIR is a brief report prepared by the developer that "allows developers, policy-makers and community members to consider the economic and social impacts of major developments."[252] A CIR is supplementary to an environmental impact report ("EIR"), which has become a common requirement of most development projects, and focuses mainly on assessing the traffic, pollution, and other environmental

---

[246] *See id*. at 1813.

[247] *See id*.

[248] *See id*.

[249] *See id*. at 1813–16.

[250] Nadler, *supra* note 11, at 590–91.

[251] *Policy & Tools: Community Impact Reports*, PARTNERSHIP FOR WORKING FAMILIES, *supra* note 29.

[252] GROWTH WITH JUSTICE COAL., THE CASE FOR THE COMMUNITY IMPACT REPORT 2 (2003), http://www.sustainlv.org/wp-content/uploads/Community-Impact-Report.pdf.

effects of a development project.[253] Conversely, CIRs focus on fiscal, employment, affordable housing, neighborhood needs, and smart growth assessments in order to provide an overall picture of the socio-economic impacts of a proposed development project.[254]

Similar to a CBA, CIRs benefit the various stakeholders in development projects.[255] With respect to the affected community, CIRs would likely help provide access to better information on how development projects will affect issues that they care about most, such as jobs and housing.[256] Consequentially, community members will be able to "play a more active and constructive role in development."[257] For developers, CIRs allow them to highlight both the benefits their project will bring to the host community as well as address any adverse impacts early in the development process.[258] Finally, if elected officials gain access to the projected impacts of a project before development starts, "policy-makers will be better able to shape the project" and help prioritize how the local government should mitigate the impacts of a project.[259] For example, elected officials could use the information in CIRs to determine what types of exactions would mitigate the impacts of a project in a way that would both promote equitable development and pass the *Nollan-Dolan* tests. As a result, public policy would be furthered by promoting equitable development and minimizing the risks of government leveraging and redistribution of wealth.[260]

CIR legislation also has the potential to become an effective tool for facilitating the negotiation of private CBAs. Since the developer and the affected community would have access to the probable impacts of a project before development actually takes place,[261] they could frame CBA negotiations based on the results

---

[253] CAL. DEP'T OF TRANSP., ENVTL. IMPACT REPORT (EIR) (June 21, 2016), http://www.dot.ca.gov/ser/vol1/sec5/ch36eir/chap36.htm#def.

[254] *Policy & Tools: Community Impact Reports*, PARTNERSHIP FOR WORKING FAMILIES, *supra* note 29.

[255] *Id.*

[256] GROWTH WITH JUSTICE COAL., *supra* note 251, at 6.

[257] *Id.*

[258] *Id.* at 7.

[259] *Id.* at 6.

[260] *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

[261] GROWTH WITH JUSTICE COAL., *supra* note 251, at 6–7, 13.

of the CIR. Moreover, when disagreements occur among community members on what benefits should be negotiated, a CIR could become a tool that facilitates compromise.[262]

There are instances where community-based organizations representing the host community have come to a standstill on what community benefits should be included in a CBA.[263] For example, during the initial negotiations for the Atlantic Yards CBA, over thirty community-based organizations were involved in the discussions.[264] However, disagreements with the developer and among the other community-based organizations led to less than ten organizations signing the Atlantic Yards CBA.[265] This circumstance provided legal scholars who assert that CBAs may fail in being truly representative of the host community, with further ammunition.[266] However, had the community-based organizations surrounding the Atlantic Yards CBA been able to rely on a CIR, these organizations would have been better suited to compromise because the projected impacts of the development would have been clearly in front of them, instead of arguing amongst themselves what the likely effects of the project would have been.[267] Thus, CIRs may enable affected communities to better come together and determine which benefits, as a whole, should be negotiated for, reducing the risk of representativeness posed by CBAs.

While the enactment of CBOs may appear to promote CBAs and equitable development, their actual effect would be to curtail the permissible array of benefits that could be included in a CBA by only allowing benefits that conform to the narrow strictures of the *Nolan-Dolan* tests. Conversely, while legislatively mandating

---

[262] *See id.* at 8–9 (concerning a case study where residents were outraged that a long time institution was being overhauled, resulting in riots).

[263] De Barbieri, *supra* note 2, at 1798–99.

[264] *See* Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL'Y 157, 199 n. 177 (2009).

[265] N.Y.C. BAR, ROLE OF COMMUNITY BENEFITS AGREEMENTS, *supra* note 22, at 8.

[266] De Barbieri, *supra* note 2, at 1784.

[267] *See Policy & Tools: Community Impact Reports*, PARTNERSHIP FOR WORKING FAMILIES, *supra* note 29.

CIRs would not in and of itself lead to the creation of CBAs, CIRs would facilitate more private CBAs, which would result in more individualized and impactful benefits. Not only would the resulting private CBAs be free from the constraints of *Nollan* and *Dolan*, but CIRs can supply the various stakeholders in a development project with better information regarding how a proposed development would impact a community on a socio-economic level, earlier in the development process.[268] Accordingly, each stakeholder becomes in a better decision to make practical decisions when weighing the various costs and benefits in deciding what benefits should be bargained for in a CBA that will both: 1) mitigate the impacts of the development; and 2) identify and facilitate ways to make development projects more inclusive to the residential and commercial residents where the development takes place.

CONCLUSION

The advent of CBAs has shown community groups, local governments, and developers that through negotiation and compromise, achieving equitable development is both plausible and mutually beneficial. However, the Detroit CBO affirmatively demonstrates that attempting to mandate CBAs through the legislative process does not further the goal of mutually beneficial equitable development, but, rather, has the opposite effect.[269] If the Detroit CBO had gone into effect, developers would have likely lost the benefits they once realized when negotiating private CBAs, and the litigation risks associated with CBOs would have resulted in more project delays and fewer community benefits. However, through instruments such as CIRs, municipalities can facilitate the spread of CBAs without legislatively mandating them, making equitable development a reality rather than a rarity.

---

[268] *Id.*

[269] *See* De Barbieri, *supra* note 2, at 1791–93.