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Do Community Benefits Agreements Benefit Communities?

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DO COMMUNITY BENEFITS AGREEMENTS BENEFIT COMMUNITIES?

Edward W. De Barbieri[†]

Community Benefits Agreement (CBA) campaigns and public discussions about community benefits are becoming the norm in deciding how large urban projects are built outside of formal public land use approvals. CBAs have revolutionized land use approvals for large, public-private economic development projects: now developers and coalitions representing low-income communities can settle their disputes before formal project approval. As a result, CBAs are now commonplace nationwide.

Legal scholarship, however, has failed to keep up with these important developments. This Article aims to do just that by examining how CBAs, when properly negotiated, lower transaction costs, enhance civic participation, and protect taxpayers. It argues that CBAs achieve all these outcomes well, and more efficiently than existing government processes. Indeed, this Article's central argument is that to the extent that scholars have analyzed CBAs, their analyses have gone astray by either dismissing CBAs as harmful to communities or by focusing on the role of the state in negotiating what really should be a private contract between a coalition of

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community groups and a developer. It is a mistake to give the state's role in CBAs primacy over the community coalition because the inclusion of government in the CBA bargaining process creates a host of constitutional protections for developers—namely that the community benefits must be connected to and proportional with the instant government approval.

This Article places focus back on CBAs as private contracts enforceable by inclusive and representative community coalitions. It presents a case study of a successful CBA negotiated for the development of the Kingsbridge National Ice Center in the Bronx. This Article proposes a framework for assessing the impact of CBAs in economic development—one that recognizes the nuanced role that states and municipalities play in the formation and enforcement of CBAs. The framework focuses on the extent to which CBAs (1) lower transaction costs by effectively resolving disputes among developers and community groups, (2) increase civic participation in public processes, (3) protect taxpayers, and (4) avoid government intervention and constitutional protections for developers. This Article concludes with recommendations for the appropriate, limited role of government in CBA negotiations.

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INTRODUCTION

Today it is commonplace for developers to routinely negotiate and provide economic benefits such as affordable housing, local hiring, and living wages to communities where major developments are located.¹ In practice, large developers bidding on economic development projects deploy lobbyists to negotiate agreements with local opposition groups and to win lucrative rights to build.² Community Benefits Agreements (CBAs) are contracts between developers and a representative coalition of community organizations.³ The coalition exchanges public and political support of a proposed development project for a slate of economic benefits.⁴ CBAs are now the standard practice for developers and community groups to resolve disputes surrounding large developments in many cities and towns across the country.⁵

¹ Christine A. Fazio & Judith Wallace, Essay, *Legal and Policy Issues Related to Community Benefits Agreements*, 21 *FORDHAM ENVTL. L. REV.* 543, 544 (2010). Recently, CBAs have been characterized as a type of "impact transaction"—referring to transactions for the public good, similar to impact litigation that have the potential for effecting large scale social change. Patience A. Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 *IND. L. REV.* 621, 630 (2016).

² Lobbying at the local level is big business. Lobbyists with connections to elected officials, including mayors or city council members, do especially well. The top ten lobbyists in New York City, for example, reported compensation of almost seventy-two million dollars in 2014. One firm that supported Mayor Bill de Blasio's recent mayoral campaign reported earnings of \$8.2 million in 2014 (the year de Blasio was elected), up \$4.6 million from 2013. LOBBYING BUREAU, OFFICE OF THE CITY CLERK, ANNUAL REPORT 13 (2015), <http://www.cityclerk.nyc.gov/downloads/pdf/2014%20annual%20227%20Final%202.pdf>; LOBBYING BUREAU, OFFICE OF THE CITY CLERK, ANNUAL REPORT 16 (2014), <http://www.cityclerk.nyc.gov/downloads/pdf/LobbyingAnnualReport2014.pdf>.

³ *Policy & Tools: Community Benefits Agreements and Policies*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/resources/policy-tools-community-benefits-agreements-and-policies> (last visited July 28, 2015).

⁴ JULIAN GROSS WITH GREG LEROY & MADELINE JANIS-APARICIO, GOOD JOBS FIRST & CAL. P'SHIP FOR WORKING FAMILIES, COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 10–11 (2005), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>.

⁵ Terry Pristin, *In Major Projects, Agreeing Not to Disagree*, N.Y. TIMES, June 14, 2006, at C6. One study highlighted twenty-seven CBAs in place nationwide. Laura Wolf-Powers, *Community Benefits Agreements and Local Government: A Review of Recent Evidence*, 76 J. AM. PLAN. ASS'N 141 (2010) [hereinafter Wolf-Powers, *CBAs and Local Government*]. Another study highlighted CBAs, not just in California and New York City, but also in upstate New York, Atlanta, Pittsburgh, Charleston, Miami, Milwaukee, Seattle, Minneapolis-St. Paul, and Wilmington, as well as internationally in Toronto and Dublin. 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, 318 (2008) [hereinafter Salkin & Lavine, *Understanding Community Benefits Agreements*].

Although some scholars have written about CBAs, the scholarship has not kept up with the rapid increase in implementation of CBAs.⁶ Scholars who do analyze CBAs either dismiss them as harmful to community interests,⁷ or focus their attention on the state's involvement in negotiations and enforcement.⁸ In contrast, this Article shines a spotlight on the *benefits* of CBAs, presenting a framework for how and when they *can* be beneficial, and argues, counter to some, that state involvement is actually undesirable. When done properly, CBAs can and do benefit communities.

Three recent development projects illuminate the wide variety of current arrangements through which developers attempt to distribute community economic benefits:

- In Chicago, community groups are calling for a CBA at the \$600 million Obama Presidential Center,⁹ yet Barack Obama Foundation representatives have not embraced a CBA thus far, arguing that smart and sustainable growth and anchoring public and private investment in the community is already key to the Center's location on the South Side.¹⁰
- In Atlanta in 2013, the City Council approved a community benefits "plan"¹¹—not a binding CBA with a community

⁶ Some have even disputed that CBA use is widespread. See, e.g., Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 642 (2011).

⁷ See, e.g., Fazio & Wallace, *supra* note 1, at 548 (arguing the limitations of CBAs in benefiting communities, citing the example of the Atlantic Yards CBA and how it failed to prevent litigation from community groups challenging various aspects of the project).

⁸ See, e.g., Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 31–35 (2010) (arguing that local government should not consider CBAs in land use approvals, or in the alternative if local government does consider CBAs in land use approvals, any review should ensure that CBA terms have a nexus to land use concerns, are transparent, representative, accountable, address citywide concerns, and are enforceable).

⁹ Dahleen Glanton, *Obama Library Raises Hopes, Fears About Economic Boom on South Side*, CHI. TRIB. (May 11, 2015, 5:01 AM), <http://www.chicagotribune.com/news/ct-obama-library-economics-20150511-story.html#page=1>. In partnership with the University of Chicago, a presidential library and museum is planned on the South Side of Chicago, and additional programs are planned for the campus of Columbia University in New York City, as well as in Honolulu, Hawaii, and in connection with the University of Illinois. Official Announcement, Obama Found., Obama Presidential Center Coming to Chicago (May 12, 2015), <http://www.barackobamafoundation.org/announcements>.

¹⁰ Glanton, *supra* note 9. Often developers claim that their development itself provides economic benefits in the form of tax revenue to the local government, jobs, and the elimination of blight; however, this claim belies the nature of CBAs as being separate and apart from general economic benefits related to development. See GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 3–4.

¹¹ Dion Rabouin, *City Council Unanimously Approves Benefits Plan for Communities Around New Falcons Stadium*, ATLANTA DAILY WORLD (Dec. 3, 2013), <http://atlantadailyworld.com/2013/12/03/city-council-unanimously-approves-benefits-plan-for-communities-around-new-falcons-stadium>; see also *Atlanta Falcons Community-Benefits Plan*,

coalition—seeded with fifteen million dollars from The Arthur M. Blank Family Foundation,¹² and a second fifteen million dollars from the city's economic development authority,¹³ despite calls from community leaders for a CBA¹⁴ surrounding the development of a new Atlanta Falcons stadium.¹⁵

- In Maine, Somerset County Commissioners recently approved a wind farm tax abatement district after the developer agreed to pay an annual per-turbine fee for the next twenty years as part of a “community benefit agreement.”¹⁶ The funds may be spent in any manner directed by commissioners anywhere in the county.¹⁷

In none of these three examples is there an enforceable CBA with community organizations to help guide the distribution of economic benefits. An enforceable CBA, negotiated with an inclusive, representative, and accountable coalition is key to how CBAs benefit communities. In contrast to the examples from Chicago, Atlanta, and Maine, Part II of this Article presents an example of a CBA where a community has a contractual role in distributing benefits negotiated around a significant economic development project.

The Kingsbridge National Ice Center CBA is the first “credible” CBA in New York City,¹⁸ negotiated by the city's first inclusive

SCRIBD., <https://www.scribd.com/doc/188765618/Atlanta-Falcons-Community-Benefits-Plan> (last visited Aug. 10, 2015).

¹² *Westside Neighborhood Prosperity Fund Background*, ARTHUR M. BLANK FAM. FOUND., <http://www.blankfoundation.org/westside-fund-background> (last visited July 29, 2015). Arthur M. Blank is the cofounder of Atlanta-based home improvement retailer The Home Depot. *Arthur Blank, Chairman*, ARTHUR M. BLANK FAM. FOUND., <http://blankfoundation.org/arthur-blank> (last visited July 24, 2015).

¹³ Press Release, Invest Atlanta, Invest Atlanta Announces Application Process for Westside Tax Allocation District Community Improvement Fund (Jan. 13, 2014), <http://investatlanta.com/wp-content/uploads/Invest-Atlanta-Announces-Application-Process-for-Westside-Tax-Allocation-District-Community-Improvement-Fund-FINAL.pdf>.

¹⁴ Equality Atlanta, *Making the Case for Vine City and English Avenue*, YOUTUBE (Nov. 14, 2013), <https://www.youtube.com/watch?v=StSY5HRorPA>.

¹⁵ *Fast Facts: Mercedes-Benz Stadium by the Numbers*, MERCEDES-BENZ STADIUM, <http://mercedesbenzstadium.com/stadium-info/fast-facts> (last visited Mar. 1, 2016).

¹⁶ Community Benefit Agreement Between the County of Somerset, Maine, and Blue Sky West, LLC (Dec. 22, 2014) (on file with author); Rachel Ohm, *Somerset County Approves Wind Farm TIF District*, CENTRALMAINE.COM (Dec. 23, 2014), <http://www.centralmaine.com/2014/12/22/somerset-county-approves-wind-farm-tif-district>. The county approved a tax increment financing, or TIF, district, which would allow both the county to collect a portion of future property tax increases and First Wind to pay less future property taxes. *Id.*

¹⁷ Ohm, *supra* note 16.

¹⁸ Press Release, Josh Epstein, DLA Piper, DLA Piper and Urban Justice Center Congratulate the Kingsbridge Armory Redevelopment Alliance on Their Historic Community Benefits Agreement (Apr. 23, 2013) [hereinafter DLA Piper Press Release], <http://www.dlapiperprobono.com/news/latest-news/2013/kingsbridge-armory-redevelopment-alliance.html>.

grassroots CBA coalition.¹⁹ The case study of the Kingsbridge National Ice Center CBA provides analysis and lessons learned that can be useful in negotiating CBAs around other major developments. The case study illustrates with particularity exactly when and how a CBA can benefit a specific community.

In Part III, this Article proposes a framework for assessing the impact of CBAs on economic development. The framework focuses on the extent to which CBAs (1) lower transaction costs by effectively resolving disputes among developers and community groups, (2) increase civic participation in public processes, (3) protect taxpayers by holding developers to the commitments they make, and (4) avoid government regulation and constitutional protections for developers. Not only are CBAs a welcome addition to local public land use review processes, they are becoming the norm for how developers and communities settle disputes.

I. CBAs EMERGE IN LAND USE LAW

The notion of “citizen participation in public decision-making is a little like eating spinach: no one is against it in principle because it is good for you.”²⁰ The problem of civic participation in the CBA context is how to achieve a community coalition bargaining team that is representative of a variety of community interests. CBA scholarship in support of CBAs highlights the flexibility of CBAs to reach terms that agreements between developers and the government cannot. Scholars who highlight the challenges of CBAs talk about the problem of obtaining an inclusive coalition.

This Part advances the argument that CBAs are the law outside of the law for public land use decision in two ways: First, scholars have looked at CBAs the wrong way. Specifically, agreements that do not involve an inclusive coalition obviously are likely to fail. These agreements should not be called CBAs. Second, it is possible for a community coalition to have an inclusive, representative, and accountable negotiating team. Instances of these types of coalitions exist throughout the literature. In Part II, this Article presents a case study of a precedent setting CBA involving an inclusive community coalition.

¹⁹ Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J.L. & POL’Y 157, 210 (2009) [hereinafter Salkin & Lavine, *Balancing Community Empowerment*].

²⁰ Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. LAW. 827, 829 (2012) (quoting Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASS’N 216 (1969)).

This Part begins with a discussion of CBAs in the legal academic literature. It then describes CBA origins as an outgrowth of community organizing campaigns. Next, it discusses how CBAs are formed and how they work.

Arguments in the literature in support of CBAs are introduced, focusing on the use of CBAs to bring living wage jobs to local workers. Then, arguments in the literature against the use of CBAs are discussed, centering on claims of extortion by community groups, lack of representation of the community groups themselves, and the likelihood for government corruption and insider dealing.

A. *CBAs and Land Use Scholarship*

The first CBAs were negotiated in Los Angeles around fifteen years ago.²¹ They arose out of local hiring and living wage campaigns led by nonprofit community organizing groups.²² CBAs revolutionized land use approvals for economic development projects since, for the first time, developers and coalitions representing low-income communities settled their disputes about specific projects before the projects were approved.²³

Although CBAs are prevalent nationwide,²⁴ the term CBA has expanded to include agreements where local government officials replace the coalition as the negotiating party.²⁵ Although it may seem counterintuitive, the inclusion of government in the CBA bargaining process creates a host of constitutional protections for developers.²⁶ Under the unconstitutional conditions doctrine, these protections limit the scope of what developers can exchange for a public land use approval.²⁷ Perhaps as a result, scholars in the legal academic literature have recently focused on the role of the state in negotiating what really

²¹ GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 14–19; Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 5, at 301–07.

²² Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 5, at 301; Lee Romney, *Community, Developers Agree on Staples Plan*, L.A. TIMES, May 31, 2001, at A1.

²³ For a visual diagram showing the altering of contractual relationships between the developer, various community groups, and government, see GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 12–13.

²⁴ See *supra* note 5.

²⁵ Currently, scholars use the term CBA to refer to both private contracts and contracts involving government. Wolf-Powers, *CBAs and Local Government*, *supra* note 5, at 141.

²⁶ Been, *supra* note 8, at 19 (arguing that CBAs may allow municipalities to bypass constitutional protections that come with government involvement in land use regulation).

²⁷ *Id.* at 13–14.

should be a private contract between a coalition of community groups and a developer.²⁸

The existing literature misses the point about CBAs. The scholarship has not kept up with their rapid development and fails to accurately assess the importance of the CBA movement in influencing economic development. CBAs deserve greater attention because they operate largely outside of what is written in the law of public land use. They should be celebrated, not shunned merely because there are no standardized CBA laws enacted.²⁹ CBAs are emerging as an extra-legal way to facilitate public land use approvals and are altering how developments are negotiated.

If it is true, as scholars have recently observed, that public land use debates are stale,³⁰ perhaps a renewed emphasis on CBAs will freshen up the conversation. By settling disputes prelitigation, properly negotiated CBAs may actually *lower* transaction costs for developers. CBAs bring an added certainty of securing project approval³¹ that benefits developers when they approach investors and lenders in the capital markets and protects the developers' investment. CBAs are effective when (1) the community coalition is inclusive of, representative of, and accountable to a spectrum of community interests; and (2) the government is not a party.³²

Leading scholars have argued that policymakers and economists tend to overestimate the benefits of government regulation.³³ CBA negotiations function as a Coasean bargain between private parties,³⁴ where developers and community groups attempt to arrive at an agreeable value for the development of a particular project. Ronald Coase pointed out that efficient bargains that may occur when transaction costs are low will be prevented when transaction costs are high.³⁵ While the upfront costs of negotiating a CBA are typically high

²⁸ *Id.* at 18–19.

²⁹ The City of Detroit is considering a local ordinance requiring CBAs for projects above a certain size. See *infra* Section I.F. Other examples include the Maine wind farm statute, see discussion *supra* Introduction, the report on Public Benefits Agreements to NYC Comptroller John C. Liu, see discussion *infra* Section I.F, and the Washington, D.C., Planned Unit Development (PUD) law. See discussion *infra* Section I.C.

³⁰ See, e.g., David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013).

³¹ GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 10.

³² Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 39–40 (2008) [hereinafter Gross, *Community Benefits Agreements*].

³³ See, e.g., R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 18 (1960).

³⁴ Laura Wolf-Powers, *Community Benefits Agreements in a Value Capture Context*, in VALUE CAPTURE AND LAND POLICIES 217, 218 (Gregory K. Ingram & Yu-Hung Hong eds., 2012) [hereinafter Wolf-Powers, *Value Capture*].

³⁵ Coase, *supra* note 33, at 15–16.

in terms of organizing and working with lawyers, over time, the costs of a well-settled agreement may be less than the costs of prolonged litigation.

Scholars often cite failed CBAs, or agreements that should not be called CBAs, to support arguments for why CBAs are too costly to negotiate.³⁶ Generally, scholars mistakenly refer to agreements negotiated by noninclusive coalitions as CBAs; rather, they use the term CBA to describe agreements involving only a few groups that do not comprise an inclusive coalition of representative interests.³⁷ This Article argues that CBAs should refer only to a limited category of agreements entered into between a developer and a coalition of community groups concerning a single development because they are truly unique contracts in their ability to achieve terms that rarely occur elsewhere in land use law.³⁸

In addition to lowering transaction costs and bargaining outside government regulation, CBAs have the power to bring more dense development to cities. Density, some argue, is the reason cities are more productive than other areas.³⁹ Yet, as Ryan Avent writes, many cities are losing competitiveness because of a lack of affordable housing and stifling government regulation.⁴⁰ CBAs can help development move forward in a way that encourages the growth of productive urban cores by resolving conflict and facilitating bargains that public processes do not facilitate. CBAs may also have a role to play in managing development in rural areas, such as in parts of Maine and in other locations, as discussed in the Section below.

³⁶ See, e.g., Lance Freeman, *Atlantic Yards and the Perils of Community Benefit Agreements*, PLANETIZEN: BLOG (May 7, 2007, 5:00 AM), <https://www.planetizen.com/node/24335> (criticizing the Atlantic Yards CBA in downtown Brooklyn). However, the Atlantic Yards CBA had no mechanism to ensure the community was represented in the agreement. See *id.*

³⁷ See, e.g., *Policy & Tools: Community Benefits Agreements and Policies*, *supra* note 3 (defining a CBA as a project-specific agreement where a developer and a broad coalition of community groups exchange community contributions for project support). Julian Gross, a leading CBA practitioner and author, argues that only standalone agreements between community groups and developers should be termed CBAs, since they (1) can be enforced by the affected community stakeholders, and (2) are private contracts. Julian Gross, *Commentary on Community Benefits Agreements in a Value Capture Context*, in *VALUE CAPTURE AND LAND POLICY* 229, 230–31 (Gregory K. Ingram & Yu-Hung Hong eds., 2012) [hereinafter Gross, *Commentary*]. Laura Wolf-Powers, a leading CBA scholar, more broadly defines CBAs as “a set of programmatic and material commitments that a private developer has made to win public support from” area residents and other stakeholders. Wolf-Powers, *Value Capture*, *supra* note 34, at 218; Wolf-Powers, *CBAs and Local Government*, *supra* note 5.

³⁸ See Gross, *Commentary*, *supra* note 37, at 229–30.

³⁹ See, e.g., Ryan Avent, Opinion, *One Path to Better Jobs: More Density in Cities*, N.Y. TIMES (Sept. 3, 2011), <http://www.nytimes.com/2011/09/04/opinion/sunday/one-path-to-better-jobs-more-density-in-cities.html?pagewanted=all&r=0>.

⁴⁰ RYAN AVENT, *THE GATED CITY* ch. 1 (2011).

CBAs are not without challenges. Potential downsides range from unenforceability,⁴¹ to trouble organizing the coalition,⁴² to claims of extortion.⁴³ Nevertheless, CBAs continue to have a far-reaching impact on development projects nationally.

B. *Community Organizers Develop CBA Campaigns*

The movement to organize for CBAs is founded in progressive political action. Specifically, CBA campaigns come out of a community organizing tradition that disrupts power and the relations of power in a local community. CBA campaigns through contract law principals are intrinsically connected to community economic development (CED) law.

CED lawyering emerged in the 1990s as the dominant form of poverty alleviation as a market-based response to traditional entitlement programs.⁴⁴ Scott Cummings has argued for a new approach to CED practice that reconnects to its politically activist roots by deploying transactional lawyering in support of strategies such as living wage campaigns, worker ownership drives, and organizing-based jobs initiatives.⁴⁵ CBA campaigns are an example of this alternative CED practice, in that CBAs often include terms regarding living wage, local hiring preferences, and other benefits for low-income workers and tenants.

Coalitions of grassroots activists and lawyers, spurred on by successes in the movement to increase living wages, began using local business subsidies to direct economic benefits to low-income communities.⁴⁶ This led to the Figueroa Corridor Coalition for Economic Justice in Los Angeles winning a community benefits plan

⁴¹ Been, *supra* note 8, at 27–28.

⁴² Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 5, at 320.

⁴³ Pristin, *supra* note 5 (quoting New York City Mayor Michael Bloomberg as saying that development projects will not be an opportunity “for everybody else that wants to grab something”).

⁴⁴ Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 400 (2001). One significant shift in antipoverty programs to CED was the 1999 New Markets Tax Credits initiative, where the Clinton Administration pledged over one billion dollars in tax breaks and loan assistance to businesses in poor areas. *Id.* at 399 n.1. Scholars have observed that this new wave of market-based CED policy has largely failed to alleviate poverty; for instance, market-based CED has mostly facilitated public financing of low-wage, dead-end jobs. *Id.* at 407–08.

⁴⁵ *Id.* at 408–09.

⁴⁶ *Id.* at 479.

surrounding the billion dollar development of the L.A. Live sports and entertainment complex.⁴⁷

As has been discussed in the literature, the first step in a CBA campaign is organizing the coalition.⁴⁸ Additional steps include building support among elected officials, educating the press and the public, and negotiating with developers.⁴⁹ A developer's self-interest in a CBA negotiation stems from a developer's need for public support for a subsidy or particular government approval.⁵⁰

It is key for a CBA coalition to be representative of as many of the varying community interests surrounding the project as possible.⁵¹ Therefore, community organizers need to do what they do best: reach out to community participants.⁵² In certain CBA campaigns where the CBA coalition was not representative of differing views in the community, such as was the case with Atlantic Yards, CBAs are not likely to be accepted or seen as legitimate by the community.⁵³ This Article will return to the issue of effectiveness of civic engagement and its impact on the success or failure of CBAs and CBA campaigns in later Sections.

C. *How CBAs Work*

Community organizing groups, and the members they organize, have limited available mechanisms to influence publically supported economic development projects.⁵⁴ Individuals may testify at land use

⁴⁷ *Id.* at 480.

⁴⁸ See, e.g., Memorandum, David Marcello, Pub. Law Ctr., A "Concentric Circles" Model for Organizing Community Benefit Agreements (Mar. 15, 2007) (on file with author).

⁴⁹ *Id.*

⁵⁰ GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 10.

⁵¹ Gross, *Community Benefits Agreements*, *supra* note 32, at 45; Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 5, at 321.

⁵² Salkin & Lavine, *Understanding Community Benefits Agreements*, *supra* note 5, at 321. Note that in the context of participatory budgeting, a process where citizens vote to award public funds to different capital projects—not too dissimilar in some respects from the spirit of a CBA campaign—a recent report indicated that outreach to nonwhite participants was key to including community members from diverse backgrounds. Linell Ajello, *Participatory Budgeting Swells, and So Do Questions About Impact*, CITY LIMITS (July 2, 2015), http://citylimits.org/2015/07/02/participatory-budgeting-swells-and-so-do-questions-about-impact/?utm_content=bufferbbbf7&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

⁵³ William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Processes*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 7, 28 (2007); Salkin & Lavine, *Understanding Community Benefit Agreements*, *supra* note 5, at 320.

⁵⁴ Gross, *Community Benefits Agreements*, *supra* note 32, at 37–38.

approval hearings,⁵⁵ lobby elected officials,⁵⁶ or in some cases, use litigation strategies to delay or derail project approvals.⁵⁷ These strategies often frustrate the parties involved, and in most cases, limit the ability of local residents to meaningfully influence development in their neighborhoods.⁵⁸ As a result, organizers have formed coalitions of low-income workers, faith communities, and labor unions to negotiate directly with developers to win community economic benefits tied to specific projects, furthering equitable development and social justice ends.⁵⁹

Campaigns to win CBAs on particular projects are part of a strategy community organizers can use by leveraging their base of members to bring developers to the negotiating table.⁶⁰ In most cases, CBAs are negotiated before a project is approved, and the delivery of benefits occurs during and after construction.⁶¹ Community organizing groups, faith congregations, and unions support CBA campaigns because CBAs have the ability to win affordable housing development, living wages for local residents, and dedicated space for community activities.⁶² Critics claim that CBAs are outright extortion by politically connected, unelected, antidevelopment dissidents.⁶³

CBA negotiations typically begin when a local government, or a developer, proposes a particular economic development project. A CBA is formed when the developer makes an agreement with a coalition of community organizations who represent groups of people most immediately affected by the proposed development. The coalition of community groups agree not to oppose the development in exchange for a promise from the developer to provide some form of community benefit, such as a certain amount of affordable housing, for example.⁶⁴ Usually, the CBA is private between the developer and the coalition. Recently, some local governments have taken part in CBAs.⁶⁵ Though,

⁵⁵ *Id.* at 38.

⁵⁶ See Telephone Interview with Alice McIntosh, *infra* note 134.

⁵⁷ Been, *supra* note 8, at 19.

⁵⁸ *Id.* at 15–16.

⁵⁹ See discussion *supra* Section I.B.

⁶⁰ See discussion *infra* Section II.A.1.

⁶¹ See discussion *infra* Section II.A.3.

⁶² See, e.g., SUSTAINABLE PORT CHESTER ALL., COMMUNITY BENEFITS AGREEMENT BACKGROUND PACKET (2016), http://portchesteralliance.org/wp-content/uploads/2015/08/CBA-Background-Packet_Sust-PC-Alliance_Compressed.pdf.

⁶³ See discussion *infra* Section I.E.1.

⁶⁴ GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 9–10.

⁶⁵ CBAs involving local governments have been characterized as “public CBAs.” Gross, *Community Benefits Agreements*, *supra* note 32, at 45. Although, Julian Gross points out in a more recent writing that including “public CBAs” in the CBA definition is overly broad and that it confuses the unique aspects of a CBA, namely, that it is private and enforceable by

as mentioned above, agreements involving government officials make community coalitions less relevant in negotiating and enforcing CBA terms. Therefore, this Article will define CBAs only as agreements between community coalitions and developers.

The definitional issue is central to forming the argument advanced in this Article, namely, that CBAs between community coalitions and developers are important because they give local residents key rights in enforcing meaningful benefits of public development projects. It is important for policymakers to realize that only CBAs involving community coalitions should be given any weight in deciding whether to approve or deny a particular project. The role of government officials in negotiating benefits surrounding development is materially different than the role of community groups. Specifically, conditions set by government actors must have “nexus” and “rough proportionality” to the requested approval.⁶⁶ CBAs negotiated by community groups do not have these same restrictions. Nevertheless, community groups can negotiate CBAs alongside government negotiators for separate terms that are complimentary in a final project approval.

The types of benefits agreed upon in CBAs may also often be implemented through planned unit developments (PUDs), or development agreements.⁶⁷ PUDs are parcels of land that can be developed by a single landowner in a manner that does not directly correspond to lot size, bulk, density, lot coverage, type of use, required open space, or other typical zoning mandates.⁶⁸ Development agreements, which take different forms in various jurisdictions, can contain a series of community benefits commitments. Such commitments may also be incorporated into government or agency resolutions, or into permits issued as part of land use approval processes.⁶⁹

community groups against a developer. Gross, *Commentary, supra* note 37, at 229–30. A 2010 report to New York City Comptroller John C. Liu coined the term “public benefit agreement” or “PBA.” TASK FORCE ON PUB. BENEFIT AGREEMENTS, CITY OF N.Y., RECOMMENDATIONS (2010), <http://landuselaw.wustl.edu/Articles/Community%20Benefits%20Agreements%20Task-Force-Report-Final.pdf>. Use of the term PBA has not yet become commonplace.

⁶⁶ See discussion *infra* Section III.D.2.

⁶⁷ Several cities, such as Washington, D.C., already have a PUD ordinance in effect, which allows developers to create mixed-use communities based upon an officially approved plan. See Planned Unit Development Procedures, D.C. Mun. Regs. tit. 11, § 24 (2015); Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 587 n.64 (2013). The PUD approval process encourages negotiation between local governments and developers. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 271 (3d ed. 2013).

⁶⁸ JUERGENSMEYER & ROBERTS, *supra* note 67, at 261–62.

⁶⁹ Gross, *Community Benefits Agreements, supra* note 32, at 47.

D. Arguments for CBAs

CBAs inject, through progressive political action, the ability for citizens to engage in negotiations about the land use decisions that affect them. Public approval processes for major economic development projects typically exclude low income and other vulnerable communities.⁷⁰ However, community economic benefits commitments are meaningless unless legally enforceable by the individuals and groups that the benefits are intended to reach. Without enforcement, private developers receive project approval, and typically, significant taxpayer funded subsidies or subsidized land, without ongoing commitments to provide the benefits they promised.

CBAs have the potential to enhance the project approval process for public land use. Community groups tend to like CBAs because community groups have a greater role in shaping the development process. The public impacts of CBA campaigns can be profound with respect to increased minimum wages, affordable housing, open spaces, and other community benefits.

1. Living Wages for Local Workers

As community organizing campaigns across the country seek to increase local minimum wages, CBAs are an important tool in enacting higher living wages. As mentioned above, CBA campaigns developed as an outgrowth of movements to increase living wages. In some instances, CBA campaigns have led to municipality-wide living wage laws.⁷¹ A

⁷⁰ Been, *supra* note 8, at 16–17 (discussing complaints by community groups that they have less opportunity for input when the local government approval process is preempted by county, state, federal, or special authority approval).

⁷¹ One result of the 2009 Kingsbridge Armory CBA campaign was that the New York City Council passed the Fair Wages for New Yorkers Act, which requires developers of certain projects receiving at least one million dollars in financial assistance for economic development to pay employees a living wage tied to the consumer price index. N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 6, § 6-134 (2015). Although the Act passed the Council on April 30, 2012, it was vetoed by then Mayor Michael Bloomberg, whose veto was overridden by the Council on June 28, 2012. See *File No. Int. 0251-2010*, N.Y.C. COUNCIL, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=664291&GUID=A83A5A5B-9589-4589-AAD7-5B2C6884610F> (last visited July 24, 2015); see also *City Renews Efforts to Redevelop Kingsbridge Armory*, CITYLAND (Feb. 15, 2012), <http://www.citylandnyc.org/city-renews-efforts-to-redevelop-kingsbridge-armory>. Mayor Bloomberg sued the Council claiming the law, which required developers and their tenants to pay employees ten dollars per hour plus \$1.50 per hour in a “health benefits supplement,” would hinder job creation and industry growth. Nick Gardner, *NYC Mayor Says ‘Living Wage Law’ Is Preempted and Invalid (N.Y.Sup.Ct.)*, WESTLAW LAB. & EMP. DAILY BRIEFING, Dec. 18, 2013, 2013 WL 6645414. Mayor Bill de Blasio,

core principle of most CBA campaigns is a desire that jobs (with living wages), as well as other benefits, be offered to residents in neighborhoods surrounding the development first.⁷²

2. Equitable Development and Economic Justice

As the number and frequency of CBA campaigns increases nationwide, CBAs are increasingly seen as the cost of doing business for major development projects.⁷³ The primary arguments supporting CBAs include a range of perspectives that advance concepts of equity and justice.⁷⁴ The overwhelming goal of community groups in negotiating CBAs is fighting poverty.⁷⁵ One study indicated that “economic justice” was the number one community goal in negotiating a CBA.⁷⁶

It is a primary goal of this Article to assess the extent to which CBAs actually achieve equitable development, and if so, equitable to who? This Article will return to the notion of equitable development in the case studies in Part II, as well as in the analysis in Part III.

E. Arguments Against CBAs

There are several arguments against CBAs, or at least arguments suggesting strong caution in widely adopting CBA negotiation procedures. CBA criticisms range from the rhetorical, which are typically made by politicians who would prefer that CBAs not exist, to

who took office in January 2014, dropped the lawsuit in March 2014; de Blasio, who had backed off previous campaign promises to expand the Act to apply to more workers, recently signed an executive order expanding the Act. Andrew J. Hawkins, *Mayor to Tenants at City-Backed Projects: Pay Up*, CRAIN'S: INSIDER (Sept. 30, 2014), <http://www.crainsnewyork.com/article/20140930/BLOGS04/140939987/mayor-to-tenants-at-city-backed-projects-pay-up>; Rachel L. Swarns, *Silence from de Blasio on Expansion of Living Wage Law*, N.Y. TIMES (July 6, 2014), http://www.nytimes.com/2014/07/07/nyregion/silence-from-bill-de-blasio-on-living-wage-law.html?_r=0.

⁷² Been, *supra* note 8, at 18.

⁷³ Fazio & Wallace, *supra* note 1, at 543. In 2008, one article provided a comprehensive national survey of CBAs in Los Angeles, San Diego, San Jose, Oakland, New York, New Haven (Connecticut), Milwaukee, Minneapolis, Denver, Pittsburgh, Washington, D.C., Camden (New Jersey), New Orleans, and elsewhere. See Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113 (2008).

⁷⁴ Musil, *supra* note 20, at 837.

⁷⁵ *Id.* at 846.

⁷⁶ *Id.*

the scholarly, which often focus on instances involving state action. This Section highlights major concerns with CBAs in the literature.

1. Claims of Extortion by Community Groups

One of the harshest rhetorical criticisms of CBAs came from former New York City Mayor Michael Bloomberg. Despite signing a 2005 CBA related to the development of the Barclays Arena at Atlantic Yards⁷⁷ as a witness, Mayor Bloomberg's opinion changed as of 2009 when he referred to CBAs simply as a "small group of people . . . feather[ing] their own nests, extort[ing] money from the developer."⁷⁸ Bloomberg's position was further clarified by then president of the New York City Economic Development Corporation, Seth Pinsky, who indicated that the objection was to the private nature of CBAs as functioning outside the political process, preventing elected officials from ensuring "communities get the benefits that they need."⁷⁹

The critique of CBAs as outside the political process, and therefore beyond control of duly elected representatives of the people, is perhaps the most harming. Since community groups themselves are unelected their motives can be called into question.⁸⁰ This Article will assess this argument in greater detail in Part III.

2. Lack of Representativeness

Perhaps related to the extortion argument is the fact that occasionally, CBA coalitions do not represent community interests. Since CBA coalition negotiators are not elected,⁸¹ community members have limited established mechanisms—save going to the press or

⁷⁷ Now termed "Pacific Park Brooklyn." *Pacific Park Brooklyn*, FORESTCITY, http://www.forestcity.net/properties/mixed_use/property_listing/Pages/Pacific_park_brooklyn.aspx (last visited July 24, 2015).

⁷⁸ Mike McLaughlin, *Bloomy Still Wants Gehry—Plus Other Tidbits from the Mayor in Our Endorsement Sit-Down*, BROOKLYN PAPER (Aug. 25, 2009), http://www.brooklynpaper.com/stories/32/34/32_34_mm_bloomberg_in_our_office.html (quoting Michael Bloomberg).

⁷⁹ Norman Oder, *On Brian Lehrer Show, NYC EDC'S Pinsky Avoids AY CBA Discussion, Misrepresents Railyard, and Claims He Lives "a Few Blocks" from the Site*, ATLANTIC YARDS/PACIFIC PARK REP. (Jan. 12, 2010, 2:53 AM), <http://atlanticyardsreport.blogspot.com/2010/01/on-brian-lehrer-show-nyc-edcs-pinsky.html> (quoting Seth Pinsky).

⁸⁰ In the Atlantic Yards CBA, for instance, the signatory groups had a direct financial interest in the CBA moving forward. Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 316 (2010).

⁸¹ GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 11; Been, *supra* note 8, at 21.

leveraging their own political power—for holding negotiators accountable for the outcomes of CBA negotiations, or for negotiators' conduct during the negotiation.⁸²

3. Corruption by Elected Officials and Impermissible State Action

When private CBA negotiations impact public approvals, there are many opportunities for impermissible state action—and worse.⁸³ Political decisions are rife with opportunities for self-dealing. Government decisions, including those related to land use, are often corrupted by insider deals.⁸⁴

CBAs are susceptible to government involvement when elected officials or government agents attempt to enter into CBAs as parties. Even if not acting as parties, government officials can use their power and office to steer lucrative benefits to nonprofits that they direct or control, often via family members or supporters.⁸⁵ Directing benefits to particular groups favored by government officials is contrary to the transparent and inclusive nature of CBAs.

With government involvement comes the legal doctrinal trappings of state action. Although the “essential nexus”⁸⁶ and “rough proportionality”⁸⁷ tests may not directly apply to CBAs as private agreements, CBAs are seen against the backdrop of Supreme Court

⁸² Been, *supra* note 8, at 21–22.

⁸³ Further examples include when governments pass legislation supporting or opposing certain community benefits, or adopting their own CBA without community input. *See, e.g.*, Ted Phillips, *Hempstead Residents Rally Against Downtown Redevelopment*, *NEWSDAY* (Apr. 18, 2015, 9:49 PM), <http://www.newsday.com/long-island/nassau/hempstead-residents-rally-against-downtown-renaissance-1.10294356?pts=915712>.

⁸⁴ This becomes evident when entrenched factions are brought down with indictments and the political landscape shifts. Nick Reisman, *Corruption Probes Hamper Deal Making*, *DeFran Says*, *ST. POL.* (June 8, 2015, 2:56 PM), <http://www.nystateofpolitics.com/2015/06/corruption-probes-hamper-deal-making-defran-says>. In one instance, a “secret benefits agreement” was reportedly negotiated around the development of the Gateway II shopping complex in the East New York neighborhood. Erin Durkin & Jake Pearson, *Charles Barron Backs Brooklyn Complex After Developer Vows Cash for Ex-Aide’s ‘Confidential’ Plan*, *N.Y. DAILY NEWS* (July 7, 2011, 4:00 AM), <http://www.nydailynews.com/news/politics/charles-barron-backs-brooklyn-complex-developer-vows-cash-ex-aide-confidential-plan-article-1.160819>. Allegedly, a former aide of a city councilmember was the sole signer of an agreement that was not made public, which provided a cash payout to a coalition represented by a single negotiator. *Id.*

⁸⁵ *See, e.g.*, Durkin & Pearson, *supra* note 84.

⁸⁶ *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (holding that there must be an essential nexus between conditions the government imposes during a land use approval and the proposed development).

⁸⁷ *See Dolan v. City of Tigard*, 512 U.S. 374 (1994) (holding the impact of a proposed development must be roughly proportional to the government’s conditions set for a specific land use approval).

jurisprudence regulating negotiations over land use approvals.⁸⁸ This Article will revisit state action in Part III by assessing the success of CBA negotiations in avoiding government interference.

F. CBA Campaigns Shape Major Economic Development Projects

1. Detroit City Council Considers CBA Ordinance

In Detroit, the City Council considered an ordinance that would have required CBAs between community groups and developers for development projects estimated to cost over fifteen million dollars in public or private funds, receiving public land, or receiving cumulative tax abatements over three hundred thousand dollars.⁸⁹ Such CBAs would have been a requirement for a project receiving public approval.⁹⁰ First-source hiring programs, a mechanism to recruit and train local workers for construction and operations job, would have been required for projects under three million dollars.⁹¹

The proposed Detroit bill borrowed largely from recommendations made in the literature, and from two reports released in New York City in 2010.⁹² First, the bill required developers to negotiate with the “Host Community,” defined as residents within the census tract where the development is located, or in adjacent census tracts.⁹³ As some have correctly observed, when developers approach communities as equals, there is the potential for a win-win scenario.⁹⁴

The bill also follows in part the recommendations of a 2010 report by the New York City Bar’s Land Use Committee, in which the authors recommended that city officials consider CBAs only in economic development projects, and not in land use approvals.⁹⁵ The Land Use Committee argued that, were government to consider CBAs in the land use process, it might run afoul of constitutional protections afforded

⁸⁸ Been, *supra* note 8, at 14–15.

⁸⁹ See *READ! The Current Draft CBA Ordinance*, EQUITABLE DETROIT COALITION, <http://www.equitabledetroit.org/read-the-current-draft-cba-ordinance> (last visited Apr. 22, 2016).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *infra* notes 94–98 and accompanying text.

⁹³ *READ! The Current Draft CBA Ordinance*, *supra* note 89.

⁹⁴ See, e.g., DLA Piper Press Release, *supra* note 18.

⁹⁵ See LAND USE COMM., ASS’N OF THE BAR OF THE CITY OF N.Y., *THE ROLE OF COMMUNITY BENEFIT AGREEMENTS IN NEW YORK CITY’S LAND USE PROCESS* 47–48 (2010), <http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>.

developers.⁹⁶ The Detroit ordinance, as was proposed, suggested that CBAs be considered in economic development projects, or in projects involving land disposition.⁹⁷

Following the NYC Bar report, NYC Comptroller John C. Liu commissioned his own report, which advocated “public benefit agreements” in both land use approvals and in economic development projects (1) with footprints greater than five hundred thousand square feet, and (2) receiving in excess of seventy-five million dollars.⁹⁸ The comptroller’s report recommended that public benefits commitments be included in public approvals and enforceable by the city and its economic development agency.⁹⁹ This is in contrast to the proposed Detroit ordinance that would have kept CBAs enforceable by the community groups that are parties to the agreement.¹⁰⁰ Importantly, the proposed ordinance was limited in that developers would not have been required to sign a CBA, but only to engage with the community for a CBA negotiation.¹⁰¹ Nevertheless, the proposed ordinance was not supported by all Detroiters.

Rodrick Miller, president and CEO of the Detroit Economic Growth Corporation has argued that requiring CBAs only raises barriers to attracting new businesses to the city.¹⁰² This is consistent with the two primary arguments against the ordinance: First, that requiring developers to enter into a CBA will discourage them from building in Detroit. And second, that the city’s challenges are best solved by economic growth.¹⁰³ But critics of these arguments claim that CBAs are critical in sharing benefits that were missed during the development

⁹⁶ *Id.* at 46–48; see also *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

⁹⁷ *READ! The Current Draft CBA Ordinance*, *supra* note 89.

⁹⁸ TASK FORCE ON PUBLIC BENEFIT AGREEMENTS, *supra* note 65.

⁹⁹ *Id.*

¹⁰⁰ *READ! The Current Draft CBA Ordinance*, *supra* note 89.

¹⁰¹ DAVID WHITAKER, LEGISLATIVE POLICY DIV., CITY COUNCIL, CITY OF DETROIT, COMMUNITY BENEFITS AGREEMENTS POLICY DEBATE (2014), http://www.detroitmi.gov/Portals/0/docs/Legislative%20Policy%20Reports/2014/Community%20Benefits%20Agreement%2010-14-14_1.pdf?ver=2014-10-15-145656-547.

¹⁰² Ryan Felton, *Report: Community Benefits Ordinance Not ‘Absolute Requirement’ for Development to Sign Agreement*, DETROIT METRO TIMES: NEWS HITS (Oct. 17, 2014, 1:23 PM), <http://www.metrotimes.com/Blogs/archives/2014/10/17/report-community-benefits-ordinance-not-absolute-requirement-for-development-to-sign-agreement>.

¹⁰³ See, e.g., Eli Day, *Opinion, Community Benefits Agreements Make Economic Sense*, DETROIT NEWS (Apr. 30, 2015, 12:08 AM), <http://www.detroitnews.com/story/opinion/2015/04/30/day-community-benefits-agreements/26595573>.

of the Detroit Red Wings arena¹⁰⁴ and the international bridge crossing into Canada.¹⁰⁵

While city council members in Detroit considered the merits of the proposed legislation, lawmakers in the Michigan state legislature preemptively prohibited aspects of the ordinance that raised wages for workers. In particular, the Michigan legislature recently passed, and the governor approved, the controversial House Bill No. 4052, known as the Local Government Labor Regulatory Limitation Act.¹⁰⁶ The Act prohibits local governments from enacting a wage ordinance (such as a living wage law) that exceeds the minimum wage in Michigan.¹⁰⁷ Of course, the legislature cannot prevent a CBA coalition and a private developer from agreeing to a living wage at a particular site. Nevertheless, requiring state approval for a living wage ordinance is clearly designed to stop the movement to a fifteen dollars per hour minimum wage, which has recently been passed in Los Angeles, Seattle, and other cities.¹⁰⁸

2. New Atlanta Falcons Stadium Rises Despite CBA Campaign

When construction of the Georgia Dome was completed in 1992, it was the largest domed stadium in the world.¹⁰⁹ It cost \$214 million to build,¹¹⁰ is owned by the State of Georgia, and has hosted home games for the National Football League's (NFL) Atlanta Falcons, the National Basketball Association's (NBA) Atlanta Hawks for a time, the Georgia State Panthers, the National Collegiate Athletic Association's (NCAA) Football Chick-fil-A Peach Bowl, and the Southeastern Conference Football Championship.¹¹¹ In 2010, the Georgia World Congress Center, the stadium's operator, released a study that it commissioned in

¹⁰⁴ See, e.g., Ryan Felton, *The Unexpected Politician: Raquel Castañeda-López*, DETROIT METRO TIMES (June 10, 2015), <http://www.metrotimes.com/detroit/the-unexpected-politician-raquel-castaandntildeeda-landoacutepez/Content?oid=2349311>.

¹⁰⁵ See, e.g., Alexis Stephens, *Detroit Is Taking the Lead in the Community Benefits Movement*, NEXT CITY (Mar. 10, 2015), <https://nextcity.org/daily/entry/detroit-community-benefits-agreement>.

¹⁰⁶ H.R. 4052, 98th Leg., Reg. Sess. (Mich. 2015).

¹⁰⁷ *Id.*

¹⁰⁸ For news about the fifteen dollar per hour minimum wage campaign, see *Latest News*, 15NOW.ORG, <https://15now.org/latest-news> (last visited Aug. 11, 2015).

¹⁰⁹ *About the Georgia Dome*, GA. DOME, <http://gadome.com/about/Default.aspx> (last visited Mar. 3, 2016).

¹¹⁰ *Georgia Dome*, PBS, <http://www.pbs.org/wgbh/buildingbig/wonder/structure/georgia.html> (last visited Mar. 3, 2016).

¹¹¹ *About the Georgia Dome*, *supra* note 109.

order to build a new stadium to replace the Georgia Dome.¹¹² The Falcons management expressed a preference for a new stadium versus renovating the Georgia Dome.¹¹³

In March 2013, the Atlanta City Council approved \$200 million in tax exempt stadium construction bonds for the project, paid for by hotel and motel taxes, plus an undefined hundreds of millions more to defray maintenance and operations through 2050.¹¹⁴ In May 2013, the NFL agreed to loan \$200 million for stadium construction.¹¹⁵ Architectural plans for the new stadium include room for around 70,000 seats, 180 luxury suites, and 7500 club seats, at an estimated cost of \$1 billion.¹¹⁶

In June 2013, Common Cause Georgia attempted to gain the 35,000 signatures necessary under the Atlanta City Charter to bring a ballot question of whether or not to back the \$1 billion dollar project. They were unsuccessful in the petition drive.¹¹⁷

In March 2014, a local church was demolished to make way for the new stadium construction.¹¹⁸ In May 2014, there was groundbreaking on the new site.¹¹⁹ By January 2015, it was announced that the new stadium would have a digital screen three times larger than any existing single board display in the NFL.¹²⁰ It would have a 100-yard bar and a circular roof opening inspired by the Roman Pantheon.¹²¹ Public

¹¹² POPULOUS, GWCC: MASTER PLAN PHASE II—STADIUM SOLUTIONS: FINAL REPORT (2010), <http://www.gwcc.com/about/stadium/Reports/Master%20Plans/mpreport2.pdf>.

¹¹³ Tim Tucker, *Fans Pay the Price for New Stadiums*, ATLANTA J.-CONST. (May 27, 2012, 4:49 PM), <http://www.ajc.com/news/news/local/fans-pay-the-price-for-new-stadiums/nQT7T>.

¹¹⁴ CITY OF ATLANTA, NSP FINANCING PROPOSAL: PROPOSED NEW STADIUM PROJECT AND HOTEL/MOTEL TAX (2013), <http://www.atlantaga.gov/modules/showdocument.aspx?documentid=7191>.

¹¹⁵ *NFL Grants \$200 Million Loan for New Atlanta Falcons Stadium*, NAT'L FOOTBALL LEAGUE (May 21, 2013, 1:07 PM), <http://www.nfl.com/news/story/0ap1000000204938/article/nfl-grants-200-million-loan-for-new-atlanta-falcons-stadium>.

¹¹⁶ *Mercedes-Benz Stadium*, STADIUMS PRO FOOTBALL, <http://stadiumsofprofootball.com/future/MercedesBenzStadium.htm> (last visited Mar. 3, 2016).

¹¹⁷ Jim Galloway, *Common Cause Concedes Defeat in Petition Drive to Stop Falcons Stadium*, ATLANTA J.-CONST.: POL. INSIDER (Aug. 8, 2013, 4:20 PM), <http://www.ajc.com/weblogs/political-insider/2013/aug/08/common-cause-concedes-defeat-petition-drive-stop-f>.

¹¹⁸ Michelle E. Shaw, *First of Two Churches Demolished for New Falcons Stadium*, ATLANTA J.-CONST. (Apr. 24, 2014, 6:42 PM), <http://www.ajc.com/news/news/first-of-two-churches-demolished-for-new-falcons-s/nfhJf>.

¹¹⁹ Tim Tucker, *At Stadium Groundbreaking, Blank Lobbies for a Super Bowl*, ATLANTA J.-CONST. (May 19, 2014, 11:07 PM), <http://www.ajc.com/news/sports/football/at-stadium-groundbreaking-blank-lobbies-for-a-supe/nfzg3>.

¹²⁰ Tim Tucker, *Falcons Hire Firm to Build NFL's Largest Video Board*, ATLANTA J.-CONST. (Jan. 30, 2015, 5:15 PM), <http://www.ajc.com/news/sports/football/falcons-hire-firm-to-build-nfls-largest-video-boar/nj2DH>.

¹²¹ Marissa Payne, *Check Out the Atlanta Falcons' New, Ridiculously Cool Stadium*, WASH. POST (Jan. 13, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/01/13/check-out-the-atlanta-falcons-new-ridiculously-cool-stadium>.

financing commitments were increased to \$554 million.¹²² Personal seat licenses were offered for sale at up to \$45,000.¹²³ The Chick-fil-A Peach Bowl has already said it will bid to host the College Football Playoff once the stadium is built, and the 2020 NCAA Men's Basketball Final Four is already scheduled to take place at the stadium.¹²⁴

In summary, the city and state made an almost \$600 million public financing commitment for construction, and undetermined sums for maintenance and operations for the next thirty years. Yet nowhere is there an enforceable agreement stating how the money will be spent, and whether any of the procurement, jobs, or revenue will benefit local residents. Indeed the one effort to put the question of whether to publically finance the stadium to a public vote was abandoned.¹²⁵ Had there been a CBA negotiation, one might conjecture, it may have looked like one of the CBA negotiations that resulted in binding agreements.

II. THE 2013 KINGSBRIDGE NATIONAL ICE CENTER CBA: ANALYSIS AND LESSONS LEARNED

Following in large part the strategies discussed above and implemented by organizers in Atlanta, Chicago, and elsewhere, the Kingsbridge Armory Redevelopment Alliance, staffed at the time by the Northwest Bronx Community and Clergy Coalition (NWBCCC),¹²⁶ waged a CBA campaign that led to a binding agreement around the \$345 million renovation of a building that takes up three city blocks and could house nearly two football fields side-by-side.¹²⁷ The 2013

¹²² Neil deMause, *Falcons Stadium Cost to Taxpayers, Counting Hidden Subsidies: \$554 Million*, FIELD SCHEMES (Mar. 18, 2013), <http://www.fieldofschemes.com/2013/03/18/4735/falcons-stadium-cost-to-taxpayers-counting-hidden-subsidies-554-million>.

¹²³ Doug Richards, *Falcons: Seat Licenses Start at \$500, Up to \$45,000*, 11 ALIVE (June 2, 2015, 5:55 PM), <http://www.11alive.com/story/news/local/downtown/2015/06/02/falcons-seat-licenses/28372491>.

¹²⁴ *Atlanta Selected to Host 2018 College Football Playoff National Championship*, CHICK-FIL-A PEACH BOWL (Nov. 4, 2015), <http://www.chick-fil-apeachbowl.com/2015/11/04/2018ncg>; *New Atlanta Stadium to Host 2020 NCAA Final Four*, MERCEDES-BENZ STADIUM (Nov. 14, 2014), <http://mercedesbenzstadium.com/2014/11/14/new-atlanta-stadium-to-host-2020-ncaa-final-four>.

¹²⁵ Galloway, *supra* note 118.

¹²⁶ NWBCCC was incorporated as a New York not-for-profit corporation in August 1974. *Northwest Bronx Community and Clergy Coalition, Inc.*, N.Y. ST. DEP'T ST., https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=407037&p_corpid=349067&p_entity_name=Northwest%20Bronx%20Community%20and%20Clergy%20Coalition&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0 (last visited Apr. 22, 2016).

¹²⁷ Laura Flanders, *After 20-Year Fight, Bronx Community Wins Big on Development Project Committed to Living Wages and Local Economy*, YES! MAG. (Jan. 3, 2014), <http://>

Kingsbridge National Ice Center (KNIC) CBA can be viewed from the perspective of a variety of interest groups, including community organizers, developers, government officials, and private citizens. This Part poses and discusses several key questions, including: Who gets to negotiate CBAs? What is the appropriate value of the benefits agreed to? And are community groups the best parties to be negotiating CBAs with developers?

This Part presents examples of how successful CBA negotiations and campaigns happen, focusing on the Kingsbridge Armory example, while alluding to others. The KNIC CBA involved many of the issues discussed above regarding co-option by government, and the CBA is still being implemented. Nevertheless, it can serve as an important guide to future CBA negotiations. Thus far, a study of the KNIC CBA is missing from the legal academic literature. This Article fills that gap.

A. *The KNIC CBA*

Located in the Kingsbridge neighborhood of the Bronx,¹²⁸ the Kingsbridge Armory¹²⁹ is part of a revival movement of armory construction in New York City.¹³⁰ The armory became city owned in the

www.yesmagazine.org/commonomics/kingsbridge-armory-community-benefits-agreement (stating that the Northwest Bronx Community and Clergy Coalition founded Kingsbridge Armory Redevelopment Alliance); Zoe Rosenberg, *See Inside the Colossal Abandoned Kingsbridge Armory*, CURBED N.Y. (June 9, 2015, 3:10 PM), <http://ny.curbed.com/2015/6/9/9951688/see-inside-the-colossal-abandoned-kingsbridge-armory> (stating that the project was estimated at \$345 million, covers nearly three city blocks, and the drill floor is the size of two football fields).

¹²⁸ The Bronx derives its name from Jonas Bronck, of Danish ancestry, who arrived in the area in 1639. See Jared Tobin Finkelstein, Commentary, In re Brett: *The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430, 430 n.3 (1983) (citing 4 ENCYCLOPEDIA AMERICANA 599 (1968 ed.)).

¹²⁹ Officially the home of the 258th Field Artillery (Eighth Regiment), the Kingsbridge Armory was designated a landmark site on September 24, 1974, by the New York City Landmarks Preservation Commission. The Commission describes the armory as having been built over a five-year period, from 1912 to 1917, and designed by the firm Pilcher & Tachau, which also designed the Troop C Armory at 1579 Bedford Avenue in the Crown Heights neighborhood of Brooklyn in 1901. “[O]ne of the few remaining armories in New York City, . . . it gives the appearance of a medieval Romanesque-style fortress with its massive towers and crenellated parapets” LANDMARKS PRES. COMM’N, N.Y.C., KINGSBRIDGE ARMORY (EIGHT REGIMENT ARMORY) (1974), http://www.neighborhoodpreservationcenter.org/db/bb_files/74-KINGSBRIDGE-ARMORY.pdf. In 1974, the Landmarks Preservation Commission regarded it as the largest armory in the world. *Id.*

¹³⁰ Robert Koch, *The Medieval Castle Revival: New York Armories*, J. SOC’Y ARCHITECTURAL HISTORIANS, Oct. 1955, at 23.

1990s and sat vacant for years.¹³¹ This Section discusses two attempts to redevelop the armory. It highlights the KNIC CBA reached between the Kingsbridge National Ice Center Partners and a broad-based community coalition led by the Kingsbridge Armory Redevelopment Alliance (KARA), a community organizing group. The case study analyzes the KNIC CBA negotiation process, the substance of the agreement, and draws lessons from both that can help build a legal framework for assessing the usefulness of CBAs in land use approvals.

1. Kingsbridge Armory Redevelopment Alliance

NWBCCC is a grassroots organizing group known for its Saul Alinsky-modeled community organizing methodology.¹³² “Organizing” for Alinsky means three general principles: winning immediate improvements in people’s lives, giving people a sense of their own power and altering the relations of power.¹³³ NWBCCC brought this organizing approach to the redevelopment of the Kingsbridge Armory when it launched KARA.¹³⁴

KARA is the first truly inclusive grassroots CBA coalition in New York City.¹³⁵ The KARA campaign to shape the development of the Armory had initially started around 1997 after the city of New York took ownership of the building.¹³⁶ KARA’s activities included outreach

¹³¹ Following the announcement of the redevelopment of the armory in 2013, Mayor Michael Bloomberg said: “What is now an abandoned structure will soon become the world’s largest indoor ice rink facility . . . and it will serve as yet another example of our administration’s commitment to turning what were once symbols of New York City’s decline . . . into community treasures and international attractions.” Winnie Hu, *City Council Approves an Ice Center for the Bronx*, N.Y. TIMES (Dec. 10, 2013), http://www.nytimes.com/2013/12/11/nyregion/city-council-approves-an-ice-center-for-the-bronx.html?_r=0 (quoting Mayor Bloomberg).

¹³² Julissa Reynoso, *The Impact of Identity Politics and Public Sector Reform on Organizing and the Practice of Democracy*, 37 COLUM. HUM. RTS. L. REV. 149, 150 (2005). Since the 1940s, community organizing has been linked with Saul Alinsky. *Id.* at 153 (citing Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 461 (2001)).

¹³³ *Id.* at 153 (citing KIMBERLEY A. BOBO ET AL., ORGANIZING FOR SOCIAL CHANGE: MIDWEST ACADEMY MANUAL FOR ACTIVISTS 11–12 (3d ed. 2001)).

¹³⁴ Telephone Interview with Alice McIntosh, Lead Negotiator, Kingsbridge Armory Redevelopment All. (Dec. 18, 2014). “NWBCCC . . . collaborated with the United Federation of Teachers (UFT); the Retail, Wholesale, and Department Store Employees Union (RWDSU); and the Carpenters and the Laborers Union to start an Armory Committee to” present the community’s ideas for renovation of the Armory. Reynoso, *supra* note 132, at 182 n.191 (citing NW. BRONX CMTY. & CLERGY COAL., FINAL REPORT TO THE ROCKEFELLER BROTHERS FUND 13 (2002) (on file with author)).

¹³⁵ Salkin & Lavine, *Balancing Community Empowerment*, *supra* note 19, at 210.

¹³⁶ Telephone Interview with Alice McIntosh, *supra* note 134.

to congregations in the neighborhoods surrounding the armory, as well as direct actions, such as candlelight vigils, protests, and direct meetings with city officials.¹³⁷

2. The Related Companies' Failed CBA Attempt

In 2008, the city selected The Related Companies to redevelop the Armory into a \$310 million retail mall, including shops, restaurants, and a movie theater.¹³⁸ Following selection, KARA demanded The Related Companies agree to a CBA prior to final approval of the project by the City Council.¹³⁹ Then Mayor Michael Bloomberg and then president of the city's Economic Development Corporation publically opposed KARA's demand.¹⁴⁰

One of the more divisive terms among the community coalition was the proposal to exclude a grocery store from the proposed development.¹⁴¹ KARA sought to block a supermarket or grocery store in the project plan, while the chairman of the local Community Board¹⁴² asked that the project include a grocery store.¹⁴³

¹³⁷ *Id.*

¹³⁸ LAND USE COMM., *supra* note 95, at 22; Terry Pristin, *Bronx Groups Demand a Voice in a Landmark's Revival*, N.Y. TIMES, June 25, 2008, at C6.

¹³⁹ Bill Egbert, *Coalition Battles Kingsbridge Armory Developer over Community Benefits*, N.Y. DAILY NEWS (Apr. 24, 2008, 11:24 PM), <http://www.nydailynews.com/new-york/bronx/coalition-battles-kingsbridge-armory-developer-community-benefits-article-1.279649> ("The Kingsbridge Armory was built to serve and protect our community . . . Let's make it a beacon of hope once again."(quoting Desiree Pilgrim-Hunter, one of the leaders of KARA)); Pristin, *supra* note 138.

¹⁴⁰ Terry Pristin, *Proposed Supermarket Divides Bronx Community*, N.Y. TIMES, Sept. 30, 2009, at B6; Daniel Beekman, *Bloomberg Sits Down with CNG*, BRONX TIMES (Aug. 27, 2009), <http://www.bxtimes.com/stories/2009/35/doc4a96911003b49524387239.html>.

¹⁴¹ Salkin & Lavine, *Balancing Community Empowerment*, *supra* note 19, at 210 (pointing out that some members of the KARA coalition did not want a grocery store included in the development, while others felt that a grocery store was a necessary service that the neighborhood was lacking). Subsequently, a family-owned, Bronx-based company opened an approximately 10,000 square foot grocery store with an entrance across the street from the armory site. See *Our Locations*, MORTON WILLIAMS, <http://www.mortonwilliams.com/#!/our-locationa/c1sa7> (last visited Aug. 5, 2015) (listing a 15 E. Kingsbridge Road location in the Bronx).

¹⁴² Community boards in New York City have an advisory role in land use decisions under the City's Uniform Land Use Review Procedure (ULURP). See N.Y.C., N.Y., CHARTER ch. 8, § 197-a (2015). Borough presidents also have an advisory role; the City Planning Commission has a vote; and ultimately, the City Council decides whether or not a project will proceed. *Uniform Land Use Review Procedure* (ULURP), N.Y.C. DEP'T CITY PLAN., <http://www1.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page> (last visited July 25, 2015) (illustrating the ULURP process).

¹⁴³ Terry Pristin, *Proposed Supermarket Divides Bronx Community*, N.Y. TIMES, Sept. 30, 2009, at B6.

The wages that tenants at the project would be required to pay their employees was a divisive issue, not amongst the coalition members, but between the coalition and the developer. KARA, Bronx Borough President Ruben Diaz Jr., and others called for a “living wage” to be paid to all employees at the redeveloped armory.¹⁴⁴ Jesse Masyr, attorney for The Related Companies, called the living wage proposal a deal killer.¹⁴⁵

On December 14, 2009 the City Council voted down the project proposal of The Related Companies.¹⁴⁶ This was the first time in the twelve years of the Bloomberg Administration that the Council rejected a Uniform Land Use Review Procedure (ULURP) proposal.¹⁴⁷ The Council went on to pass the Fair Wages for New Yorkers Act, over Bloomberg’s veto, requiring a higher living wage be paid for projects receiving subsidies from the City.¹⁴⁸ New York City Mayor de Blasio has increased the living wage in the legislation to the symbolic \$13.13 per hour¹⁴⁹ by executive order.¹⁵⁰

¹⁴⁴ Bill Egbert, *Bronx Leaders Demand Living Wage at Kingsbridge Armory Development Even if it Scuttles Deal*, N.Y. DAILY NEWS (Aug. 27, 2009, 1:53 AM), <http://www.nydailynews.com/new-york/bronx/bronx-leaders-demand-living-wage-kingsbridge-armory-development-scuttles-deal-article-1.399130>.

¹⁴⁵ Sam Dolnick, *Planners Accept Proposal for Mall at Bronx Armory*, N.Y. TIMES, Oct. 20, 2009, at A28 (“We’re opposed to imposing an economic penalty to tenants that come to our site that doesn’t exist literally across the street or anywhere else in New York City.” (quoting Jesse Masyr)).

¹⁴⁶ Sewell Chan, *Council Spurns Plan to Turn Kingsbridge Armory into Mall*, N.Y. TIMES: CITY ROOM (Dec. 15, 2009, 8:54 AM), <http://cityroom.blogs.nytimes.com/2009/12/15/council-spurns-plan-to-turn-kingsbridge-armory-into-mall>. For a discussion on KARA persuading the Council to vote no on the project as a success of the checks and balances of the City Charter, see Michael A. Cardozo, *Reflections on the 1989 Charter Revisions*, 58 N.Y.L. SCH. L. REV. 85, 89 (2014).

¹⁴⁷ Sally Goldenberg, *A Bronx Bummer*, N.Y. POST (Dec. 15, 2009, 5:00 AM), <http://nypost.com/2009/12/15/a-bronx-bummer> (discussing the blow to Bloomberg in halting one of his hoped for projects, as well as Bronx Borough President Ruben Diaz Jr.’s push for a ten dollar per hour minimum wage plus benefits). Diaz Jr.’s position at the time was the idea “that any job is better than no job no longer applies.” *Id.* (quoting Diaz Jr.). Masyr stated that “the council ‘voted no to over 2,000 jobs,’” and questioned the Council’s rationale since the Council’s Land Use Committee based its no vote on traffic and parking concerns. *Id.*

¹⁴⁸ See N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 6, § 6-134 (2015); see also *supra* note 71.

¹⁴⁹ Perhaps this mirrors President Obama’s minimum wage raise for federal contractors to \$10.10 per hour. See Ben Wolfgang, *Because He Says So: Acting Alone, Obama Boosts Minimum Wage for Contractors*, WASH. TIMES (Feb. 12, 2014), <http://www.washingtontimes.com/news/2014/feb/12/obama-raise-minimum-wage-1010-hour-federal-contrac>.

¹⁵⁰ Matt Flegenheimer, *De Blasio’s Executive Order Will Expand Living Wage Law to Thousands More*, N.Y. TIMES (Sept. 29, 2014), <http://www.nytimes.com/2014/09/30/nyregion/de-blasio-to-sign-executive-order-significantly-expanding-living-wage-law.html>.

3. A Successful CBA for the Kingsbridge National Ice Center

Following the defeat of the 2009 proposal, Diaz Jr. and Council Member Fernando Cabrera cochaired a task force to study redevelopment models for the armory.¹⁵¹ Desirée Pilgrim-Hunter, President of NWBCCC, was a member of the committee working on this report, along with Majora Carter, newly elected State Senator Gustavo Rivera, Community Board Chair Paul Foster, and Partnership for New York City President Kathy Wylde. The task force report, issued in June 2011, studied three uses for the armory: sports, wellness, and entertainment center; sustainable food industry; and film studio.¹⁵²

On January 12, 2012, the New York City Economic Development Corporation released a new request for proposals (RFP) to redevelop the armory.¹⁵³ The RFP took many of the task force report recommendations into account. It encouraged developers to submit proposals for recreation, community facility, and entertainment uses, as well as commercial and retail uses, while discouraging residential and big-box store uses.¹⁵⁴ The RFP also stated it would view favorably proposals that maximized jobs falling under Local Law 38 of 2002, which requires contractors and subcontractors doing business with the city to pay employees at least ten dollars per hour with health benefits, or \$11.50 per hour without health benefits.¹⁵⁵

¹⁵¹ KINGSBRIDGE ARMORY TASK FORCE, KINGSBRIDGE ARMORY TASK FORCE REPORT (2011), <http://bronxboropres.nyc.gov/pdf/Kingsbridge-Armory-Task-Force-Report.pdf>.

¹⁵² *Id.* (specifying a hockey rink and other uses, such as a field house, in the section on sports, wellness, and entertainment).

¹⁵³ *City Renews Efforts to Redevelop Kingsbridge Armory*, *supra* note 71; *see also* N.Y.C. ECON. DEV. CORP., REQUEST FOR PROPOSALS: KINGSBRIDGE ARMORY (2012), <https://www.scribd.com/doc/85645468/Kingsbridge-Armory-Request-For-Proposals-2011-FF-1-11-12>. In contrast to the 2006 RFP, which The Related Companies had responded to and had been selected from, this RFP entertained options to lease, as well as to purchase, the site. *City Renews Efforts to Redevelop Kingsbridge Armory*, *supra* note 71.

¹⁵⁴ *City Renews Efforts to Redevelop Kingsbridge Armory*, *supra* note 71.

¹⁵⁵ Local Law 38 of 2002 is an early living wage law passed by Mayor Bloomberg that extended a living wage primarily to home healthcare and childcare workers employed by agencies with city contracts. Press Release, Brennan Ctr. for Justice, *Mayor Bloomberg Signs New York City Living Wage Law* (Nov. 27, 2002), <https://www.brennancenter.org/press-release/mayor-bloomberg-signs-new-york-city-living-wage-law>; *see also* *File No. Int 0066-2002*, N.Y.C. COUNCIL, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=437415&GUID=621101D0-2EBF-468B-9E13-DF9AFBDA66BB&Options=ID|Text|&Search=2002%2f038> (last visited May 11, 2016). The New York City Council has expanded the living wage law over the past decade into what is now called the Fair Wages for New Yorkers Act, which was enacted June 28, 2012. N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 6, § 6-134 (2015); *see also supra* note 71. As this article goes to publication, the future of the Kingsbridge National Ice Center project is uncertain, as the KNIC team and the New York City Economic Development Corporation are engaged in an open dispute about whether KNIC satisfied the conditions to receive its lease to the armory. Charles V. Bagli, *Bronx Ice Center Plan Hangs in the Balance*, N.Y. TIMES (Apr.

A group led by National Hockey League all-star Mark Messier proposed to build nine ice rinks inside the Kingsbridge Armory to be called the Kingsbridge National Ice Center.¹⁵⁶ The proposal reflected many of the terms in the RFP, including living wage jobs, a general local hiring provision, and green building practices.¹⁵⁷ The KNIC team also began an aggressive, targeted, media and outreach effort, which included obtaining the endorsement of Diaz Jr.,¹⁵⁸ as well as courting KARA leadership.¹⁵⁹

KARA formed a partnership with Bronx Community Board 7 in advocating for a CBA.¹⁶⁰ KARA and the developer, led by Kevin Parker¹⁶¹ met on January 29, 2013, to discuss terms in a possible CBA.¹⁶²

10, 2016), http://www.nytimes.com/2016/04/11/nyregion/bronx-ice-center-plan-hangs-in-the-balance.html?_r=0.

¹⁵⁶ Matt Chaban, *How Exactly Do You Cram Nine Ice Rinks into a 95-Year-Old Armory, Even One as Big as Kingsbridge*, OBSERVER (Aug. 8, 2012, 2:40 PM), <http://observer.com/2012/08/how-exactly-do-you-cram-nine-ice-rinks-into-a-95-year-old-armory-even-one-as-big-as-kingsbridge>; see also *Redevelopment of Kingsbridge Armory*, NW. BRONX COMMUNITY & CLERGY COALITION, <http://northwestbronx.org/wp-content/uploads/2013/09/Cooperation-Agreement-Kingsbridge-Armory-CBA.pdf> (last visited Mar. 4, 2016) [hereinafter KNIC CBA].

¹⁵⁷ KNIC CBA, *supra* note 156.

¹⁵⁸ Chaban, *supra* note 156; Winnie Hu, *Ice Center with 9 Rinks Is Proposed for Bronx Armory*, N.Y. TIMES (Aug. 23, 2012), http://www.nytimes.com/2012/08/24/nyregion/ice-center-proposed-for-kingsbridge-armory.html?_r=0.

¹⁵⁹ Telephone Interview with Alice McIntosh, *supra* note 134. KNIC and KARA leaders even toured the Ed Snider Foundation ice sports program in Philadelphia. *Id.* Ed Snider is chairman of Comcast Spectacor, which owns the Philadelphia Flyers National Hockey League Team, and other companies, including Global Spectrum, which manages events facilities. *Founder, SNIDER HOCKEY*, <http://sniderhockey.com/who-we-are/founder> (last visited Apr. 11, 2016).

¹⁶⁰ *Community Board 7 and Kingsbridge Armory Redevelopment Alliance Partner to Negotiate Community Benefits Agreement*, NORWOOD NEWS (Dec. 20, 2012) [hereinafter NORWOOD NEWS], <http://www.norwoodnews.org/id=10014&story=community-board-7-and-kingsbridge-armory-redevelopment-alliance-partner-to-negotiate-community-benefits-agreement> (reporting that the community board and KARA released a joint statement sharing their goals that an enforceable CBA is signed and that the community's priorities are contained in the lease signed with the city).

¹⁶¹ In October 2014, a judge in the Bronx ruled that Kevin E. Parker is the sole member of the Kingsbridge National Ice Center LLC—the entity that was selected to redevelop the armory—and could continue to negotiate a lease with the City of New York. David Cruz, *Judge: KNIC Project Can Proceed*, NORWOOD NEWS (Oct. 7, 2014), <http://www.norwoodnews.org/id=15916&story=judge-knic-project-can-proceed>. Mark Messier, National Hockey League all-star and former New York Ranger, also participated in the discussion. Mike Sielski, *'The Captain' Quits the Rangers*, WALL ST. J. (June 27, 2013, 8:42 PM), <http://www.wsj.com/articles/SB10001424127887323873904578571902630546868>. Messier, who had sought the Rangers' coaching position, left the organization in June 2013 to assist in the development of KNIC and to expand the game of hockey in the New York area. *Id.* Sarah Hughes, Olympic figure skater, also participated in the discussion. Neil Best, *Sarah Hughes Developing World's Largest Indoor Ice Rink in the Bronx*, NEWSDAY (Feb. 13, 2014, 12:55 PM), <http://www.newsday.com/sports/olympics/sarah-hughes-developing-world-s-largest-indoor-ice-rink-in-the-bronx-1.7059462>.

¹⁶² David Cruz, *CBA Talks for Kingsbridge Armory Bid Underway*, BRONX TIMES (Jan. 31, 2013), http://www.bxtimes.com/stories/2013/5/05_armory_2013_01_31_bx.html (discussing

By April 2013, it was speculated that the city would designate a developer to redevelop the armory.¹⁶³

After months negotiating terms, on April 17, 2013, twenty-five member organizations of KARA and the developer signed an enforceable CBA.¹⁶⁴ The CBA was called the first of its kind in New York City, one that will provide generations of Bronx residents with shared economic development benefits.¹⁶⁵ Soon thereafter, then Mayor Bloomberg designated KNIC to redevelop the armory into the largest ice sports complex in the world.¹⁶⁶

The numbers in the selected project are impressive. The 750,000 square foot ice center would house nine regulation-size rinks for skating and hockey, including a 5000 seat arena.¹⁶⁷ It is expected to cost at least \$350 million,¹⁶⁸ create 267 permanent jobs,¹⁶⁹ and 890 temporary construction jobs.¹⁷⁰

The voluntary agreement signed between KNIC and almost thirty community groups¹⁷¹ is equally impressive. KNIC promised to pay every worker a living wage of at least ten dollars per hour with health

efforts between KARA and KNIC to reach a settlement on the terms of a community benefits agreement).

¹⁶³ Tanyanika Samuels, *Decision Imminent in Fate of Kingsbridge Armory*, N.Y. DAILY NEWS (Apr. 22, 2013, 6:00 AM), <http://www.nydailynews.com/new-york/bronx/decision-imminent-fate-kingsbridge-armory-article-1.1322131>.

¹⁶⁴ KNIC CBA, *supra* note 156. The author, who was counsel to the KARA coalition during the CBA negotiation process with KNIC, prepared execution drafts of the CBA, and the signing process is based on personal recollection and review of the final draft of the KNIC CBA.

¹⁶⁵ DLA Piper Press Release, *supra* note 18 (“I have closely followed attempts to negotiate community benefits agreements in New York City over the past ten years, and this is the first credible CBA in the City. Congratulations to KARA and everyone involved. I have every expectation that this agreement will deliver real economic benefits for the surrounding communities. KARA and the developer have shown again that when developers and communities come together as equals, everyone wins.” (quoting Julian Gross)).

¹⁶⁶ Jennifer H. Cunningham, *Bronx Community Board 7 Sets Aside Opposition to Approve a Massive Ice Palace at the Former Kingsbridge Armory*, N.Y. DAILY NEWS (Sept. 18, 2013, 8:31 PM), <http://www.nydailynews.com/new-york/bronx/bronx-community-board-okays-ice-skating-palace-article-1.1459218>; Winnie Hu, *Plan for Ice Center in Bronx Armory Moves Forward*, N.Y. TIMES (Apr. 23, 2013), <http://www.nytimes.com/2013/04/24/nyregion/bloomberg-announces-ice-sport-center-proposal-for-bronx-armory.html>.

¹⁶⁷ Hu, *supra* note 166.

¹⁶⁸ Sally Goldenberg, *Mark Messier Tussles with Mayor over Cuomo Funding for Kingsbridge*, POLITICO N.Y. (Mar. 28, 2016, 5:28 AM), <http://www.capitalnewyork.com/article/city-hall/2016/03/8594957/mark-messier-tussles-mayor-over-cuomo-funding-kingsbridge>.

¹⁶⁹ Hu, *supra* note 166. Permanent jobs might include full-time equivalent positions, which actually involve multiple employees working part-time schedules. KNIC CBA, *supra* note 156, at A-3.

¹⁷⁰ Hu, *supra* note 166. The cost of securing the support of elected officials, including Diaz and others, was substantial, as city lobbying records indicate that KNIC paid lobbying firm James F. Capalino & Associates \$197,500. *Id.*

¹⁷¹ Hu, *supra* note 166.

benefits, or \$11.50 without benefits.¹⁷² These wages are pegged to the Consumer Price Index and will increase annually.¹⁷³ KNIC will give hiring preference to Bronx residents.¹⁷⁴

Further, KNIC will lease to the coalition, rent-free, almost 50,000 square feet of community space in the armory for ninety-nine years, contract with minority and women-owned businesses, and give ice skating time to public school children in surrounding neighborhoods.¹⁷⁵ There are also detailed provisions in the agreement addressing green building standards, such as installing water bottle filling fountains, and providing water bottles to youth who participate in programs.¹⁷⁶

After the designation, the armory project was supported by Bronx Community Board 7,¹⁷⁷ Diaz Jr.,¹⁷⁸ the City's Planning Commission,¹⁷⁹ and ultimately, the City Council.¹⁸⁰ Almost a year later, in October 2014,

¹⁷² KNIC CBA, *supra* note 156, at A-8.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at A-9.

¹⁷⁵ *Id.* at 6, A-11, A-18, A-20; Hu, *supra* note 131; Hu, *supra* note 158.

¹⁷⁶ See KNIC CBA, *supra* note 156, at A-12 to -17.

¹⁷⁷ Cunningham, *supra* note 166. Following a public hearing at Lehman College, the full Board voted twenty to five in favor of the project. Testifying at the hearing about the CBA that KARA and KNIC entered into, Pilgrim-Hunter stated that “[w]e have set a new standard, across the country, for how development will be done in low-income communities.” *Id.*

¹⁷⁸ Sarina Trangle, *Armory Ice Center Barrels Through ULURP*, RIVERDALE PRESS (Sept. 25, 2013), <http://riverdalepress.com/stories/Armory-ice-center-barrels-through-ULURP,53022>. Diaz's office recommended the KNIC project be approved on September 20 at a hearing that highlighted the \$1.7 billion in shared economic development coming from the community benefits agreement, and the Landmarks Preservation Commission approved the plan later that day. *Id.*

¹⁷⁹ Chris Pomorski, *Ice, Ice Baby: City Planning Commission Approves Plan to Convert Bronx Armory to Ice Skating Mecca*, OBSERVER (Nov. 6, 2013, 5:52 PM), <http://observer.com/2013/11/ice-ice-baby-city-planning-commission-approves-plan-to-convert-bronx-armory-to-ice-skating-mecca> (summarizing the Commission's unanimous vote to approve the project, and Messier's, Bloomberg's, and others' excitement at the project progressing).

¹⁸⁰ The Council has a practice of deferring to the local council member in whose district a given project is being voted on. See, e.g., Press Release, Helen Rosenthal, Council of the City of N.Y., Land Use Committee Approves TF Cornerstone Proposal for 606 West 57th Street (Apr. 24, 2014), <http://helenrosenthal.com/wp-content/uploads/2015/05/220128366-Press-Release-Land-Use-Committee-Approves-TF-Cornerstone-Proposal-for-606-West-57th-Street-April-24-2014.pdf>. In this case, Cabrera was won over by additional funds to address traffic and parking issues. See Hu, *supra* note 131. Cabrera's motives were under scrutiny as it came to light that, during negotiations, he had unsuccessfully demanded KNIC pay \$100,000 per year for ninety-nine years to a nonprofit called Community Action Unlimited, which was associated with Mr. Cabrera's New Life Outreach International. *Id.*; see also Jennifer H. Cunningham, *Councilman Dodges Allegations He Tried to Secure Money from Kingsbridge Armory Developer*, N.Y. DAILY NEWS (Nov. 25, 2013, 9:29 PM), <http://www.nydailynews.com/new-york/bronx/councilman-icy-answer-article-1.1528967>; *Gustavo Rivera Beats Fernando Cabrera in Democratic State Senate Primary*, NEWS 12 BRONX (Sept. 10, 2014, 10:30 AM), <http://bronx.news12.com/news/gustavo-rivera-beats-fernando-cabrera-in-democratic-state-senate-primary-1.9274846>.

KNIC entered into a ninety-nine-year lease with the city of New York for the armory.¹⁸¹

4. KNIC CBA Challenges and Next Steps

As of this writing, there is an approved project to redevelop the armory. The project has achieved a unique trifecta of (1) private commitment from KNIC, (2) government approval from the legislative and executive branches of the city government,¹⁸² and (3) consensus among the organized community groups and institutions that the project should proceed as proposed and according to the CBA.¹⁸³ There is also a private CBA between KNIC and the KARA coalition, sharing economic gains over nearly the next 100 years.¹⁸⁴ The following are the challenges that all parties faced achieving a CBA, difficulties they will face in moving forward on the project, and how that particular CBA contributes to the legal academic scholarship about CBAs generally.

a. A Redevelopment Eighteen Years in the Making

When the City took over the armory in 1996, the City, the Bronx, and the Kingsbridge neighborhood were much different than they are now.¹⁸⁵ Crime rates have a correlation to urban depopulation, which, since 1996, has reversed as rates have fallen and the City's population has risen.¹⁸⁶ In 1996, the city was only starting to convey residential city-

¹⁸¹ Joe Anuta, *Kingsbridge Armory Project Skates Past Obstacle*, CRAIN'S (Oct. 16, 2014), http://www.crainsnewyork.com/article/20141016/REAL_ESTATE/141019922/kingsbridge-armory-project-skates-past-obstacle. Signing the lease had been held up by litigation brought by Jonathan Richter, Marcus Wignell, and Jeff Spiritos, which was cleared when a Bronx judge ruled against the three men. *Id.* Also announced in 2014 was a thirty million dollar equity investment by Michigan-based Kresge Foundation. *Id.*

¹⁸² The statute of limitations to challenge the project approval in court through an Article 78 action in New York Supreme Court, the State's trial court, lapsed 120 days after the Council's approval in December 2013. N.Y. C.P.L.R. 7801 (MCKINNEY 2008); *see also* LAW OFFICES OF KEVIN P. SHEERIN, UNDERSTANDING ARTICLE 78 (2014), http://civilservice.sheerinlaw.com/files/2014/06/sheerinlaw.com-Article_78_eBook.pdf. No lawsuits were filed.

¹⁸³ There has been no organized opposition to the project, and any opposition to the project has been unserious and unreasoned. *See, e.g.*, Cunningham, *supra* note 166.

¹⁸⁴ KNIC CBA, *supra* note 156, at 6.

¹⁸⁵ Crime rates in 1996 were dropping from their peaks, though there were still 515 murders reported during the first six months of 1996. *See* Clifford Krauss, *1996 Data Show Crime Rates Are Still Falling in New York*, N.Y. TIMES (July 3, 1996), <http://www.nytimes.com/1996/07/03/nyregion/1996-data-show-crime-rates-are-still-falling-in-new-york.html>. In contrast, only 333 murders were reported in all of 2014. POLICE DEP'T OF N.Y.C., SEVEN MAJOR FELONY OFFENSES (2015), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/seven_major_felony_offenses_2000_2014.pdf.

¹⁸⁶ Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences of Cities*, 81 REV. ECON. & STAT. 159 (1999); Michael Howard Saul, *New York City Population Hits*

owned property for redevelopment as affordable housing.¹⁸⁷ The economic development projects of Mayor Rudy Giuliani's administration were focused on redeveloping 42nd Street, and sports team stadiums.¹⁸⁸ Commercial development of city-owned property, especially in low-income neighborhoods, was not high on the city's economic development agenda at the time.

Nevertheless, the KARA coalition formed in 1996 to shape the redevelopment of the armory as a community space.¹⁸⁹ It took seventeen years of advocacy, organizing, negotiating, testifying, and volunteering to build a credible community coalition that a developer could take seriously.¹⁹⁰ It also required the KARA coalition to organize against the 2009 proposal of The Related Companies to build up the power and support it needed to negotiate and win the 2013 KNIC CBA. Going forward, there are many new obstacles to clear, including obtaining private financing, and keeping KNIC accountable for promises made.

b. KNIC Finances the Project and Resolves Internal Disputes

From the developer's perspective, they still face a plethora of market-based challenges. KNIC must convince investors to contribute equity in the project. Several high profile investors have already made equity investments.¹⁹¹ But KNIC still needs to raise additional equity, and to secure construction loans from lenders willing to take a risk on this atypical development project. KNIC's business model relies on

Record High, WALL ST. J.: METROPOLIS (Mar. 27, 2014, 3:09 PM), <http://blogs.wsj.com/metropolis/2014/03/27/new-york-city-population-hits-record-high>.

¹⁸⁷ *Directory of New York City Affordable Housing Programs*, N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y, <http://furmancenter.org/institute/directory/entry/third-party-transfer-program> (last visited Mar. 4, 2016) (detailing the Third Party Transfer Program that the NYC Department of Housing Preservation and Development created in 1996).

¹⁸⁸ *A Timeline of the Block*, NEW 42ND STREET, <http://www.new42.org/about/redevelopment-timeline.aspx> (last updated Apr. 2016); see also Charles V. Bagli, *Despite Criticism, Giuliani Pursues Ballparks as Economic Catalysts*, N.Y. TIMES (Mar. 2, 2000), <http://www.nytimes.com/2000/03/02/nyregion/despite-criticism-giuliani-pursues-ballparks-as-economic-catalysts.html>.

¹⁸⁹ Telephone Interview with Alice McIntosh, *supra* note 134; Breaden Thompson, *Northwest Bronx Community and Clergy Coalition*, PREZI (July 8, 2013), <http://prezi.com/s6bfatpjut72/untitled-prezi>.

¹⁹⁰ *Redevelopment of Kingsbridge Armory*, NW. BRONX CMTY. & CLERGY COALITION, <http://northwestbronx.org/what-we-do/k-a-r-a> (last visited Mar. 4, 2016).

¹⁹¹ Joe Anuta, *Kingsbridge Armory Ice Center Nets \$30M Infusion*, CRAIN'S (Aug. 12, 2014), http://www.craigslist.com/article/20140812/REAL_ESTATE/140819966/kingsbridge-armory-ice-center-nets-30m-infusion. The investment, less than ten percent of the \$350 million needed to redevelop the armory, includes a market-rate investment from the Kresge Foundation. *Id.*; see also Michael Buteau, *Messier-Led Bronx Ice Center Gets \$4 Million Bauer Investment*, BLOOMBERG (Aug. 19, 2014, 12:00 AM), <http://www.bloomberg.com/news/articles/2014-08-18/messier-led-bronx-ice-center-gets-4-million-bauer-investment>.

“contract ice,”¹⁹² which will generate their business plan claims, as well as revenue sufficient to cover debt service and to pay investors.¹⁹³ It also must resolve outstanding financial claims from Richter, Spiritos, and Wignell.¹⁹⁴

c. KARA Coalition Decides How to Build Out and Program Community Space

The KARA coalition also faces challenges moving forward. It has to continue to use its power to influence the benefits won in the CBA. For instance, it must develop a consensus on building out and programming the almost 50,000 square feet of community space.¹⁹⁵ The coalition must also develop a proposal of its own to equitably divide space, charge rents, and use funds from rents for community uses that the coalition approves.¹⁹⁶ All these administrative tasks take resources and buy in from the groups within the coalition.

With much work done, and much more to come, what can be learned from the 2013 KNIC CBA to both improve outcomes of the development at the Armory, and in other economic development projects nationally? The next Section begins to address this question. It analyzes the KNIC CBA from the perspectives of the community coalition and of the developer.

B. *Analysis of the KNIC CBA*

The KNIC project has been approved, and the time to challenge the City Council’s approval of the Mayor’s designation of the KNIC to lead the project has passed.¹⁹⁷ This Section analyzes the agreement viewed from both sides of the transaction. It also addresses the agreement from the perspective of the public, which is not a party to the agreement.

¹⁹² “Contract ice” refers to ice rink time that is contracted for certain periods of time for various athletic endeavors (e.g., figure skating and amateur or professional hockey teams).

¹⁹³ KNIC CBA, *supra* note 156, at Exhibit D.

¹⁹⁴ Cruz, *supra* note 161.

¹⁹⁵ Cabrera, and even de Blasio, have mentioned a hip hop museum being included in the space, but the coalition itself, which controls the use of the space, has not yet taken a public position on how the space will be used. Shant Shahrigan, *Birth of Hip Hop to Be Honored with New Museum at Armory*, RIVERDALE PRESS (Mar. 19, 2014), <http://riverdalepress.com/stories/Birth-of-hip-hop-to-be-honored-with-new-museum-at-armory,53951>; *see also* Michael Howard Saul, *Mayor de Blasio Takes Questions in Google Hangout*, WALL ST. J.: METROPOLIS (Apr. 11, 2014, 1:44 PM), <http://blogs.wsj.com/metropolis/2014/04/11/mayor-de-blasio-takes-questions-in-google-hangout>.

¹⁹⁶ KNIC CBA, *supra* note 156, at A-19, § 11.

¹⁹⁷ *See* N.Y. C.P.L.R. 7801 (MCKINNEY 2008); *supra* note 182.

1. Is the 2013 KNIC CBA a Good Deal for the Community?

The first goal of the KARA coalition was to secure an enforceable agreement. With respect to this goal, KARA was successful.¹⁹⁸ But the question remains: Did the community negotiate a good deal?

a. Valuing the 2013 KNIC CBA

One estimate of the overall benefits to the community contained in the agreement is \$1.7 billion.¹⁹⁹ This estimate presumably factors in both cash and in-kind contributions from the developer to the community through the KARA coalition over the ninety-nine year term of the CBA. For example, the developer will provide specific dollar amounts of benefits through the agreement.

These defined dollar amount benefits include an initial contribution of eight million dollars in capital toward developing and building out the community space.²⁰⁰ Section 3(a)(ii) of the Community Benefits Program has a \$10,000 per year scholarship for ninety-nine years for residents of the northwest Bronx to become accredited in operating a geothermal and/or solar power system at the Armory. Section 3(a)(v) includes a \$250,000 fund for establishing and administering a grant program for local businesses to make capital improvements.²⁰¹

There is a so-called “run rate contribution” of \$1,000,000 per year, adjusted by the consumer price index, that the coalition can use to purchase in-kind services, such as ice rink or classroom rentals, from the developer.²⁰² Section 3(c) outlines a revenue contribution where the developer pays \$250,000 in the first year of the project, and going forward pays 1% of gross ice rink rental revenue up to \$25,000,000, and 2% of gross ice rink rental revenue above \$25,000,000.²⁰³ For example, if gross ice rink rentals are \$26,000,000 in a given year, KNIC contributes \$250,000, or 1% of \$25,000,000, plus an additional \$20,000, or 2% of \$1,000,000.

There are also certain benefits the developer agreed to that do not have a definite dollar value assigned. For these benefits, some are easier to assign a dollar value than others. For example, section 11 contains a Community Space Lease term where the developer agrees to lease two

¹⁹⁸ DLA Piper Press Release, *supra* note 18 (quoting Julian Gross).

¹⁹⁹ Trangle, *supra* note 178.

²⁰⁰ KNIC CBA, *supra* note 156, at A-5, § 3(a).

²⁰¹ *Id.* at A-5, §§ 3(a)(ii), 3(a)(v).

²⁰² *Id.* at A-6, § 3(b).

²⁰³ *Id.* at A-6 to -7, § 3(c).

areas on subterranean floors to the coalition for one dollar for ninety-nine years.²⁰⁴ One can assign a rental value to this space based on an escalating dollar per square foot amount.

Other terms, like paying workers a living wage above the minimum wage, can also be assigned a dollar amount based on the current minimum wage.²⁰⁵ Yet, other terms are more difficult to assign a definite dollar value, though they have clear value for the community. Section 6 requires that 51% of permanent workers are hired from the local population so that local residents get priority access to jobs.²⁰⁶ Section 7 requires that 25% of all contractors hired during project construction are Bronx-based minority and women-owned businesses, with 25% of the project's construction workers coming from local neighborhoods.²⁰⁷ Section 8 requires the developer to meet certain green building targets,²⁰⁸ and section 10 requires a Local Procurement Plan ensuring that between 25% and 51% of project goods and services are purchased from local businesses.²⁰⁹ It is more difficult to assign a definite dollar value to these requirements.

b. Risk Factors for the Community

It is possible that KNIC never intends to perform under the contract and entered into it only to obtain the project's approval. The protection to the community coalition, however, is that the remedy agreed to in the CBA is not money damages—it is specific performance.²¹⁰ Presumably, should KNIC not perform, one of the members of the coalition can compel performance with a breach of contract claim under New York law. KNIC could plead government coercion as a contract defense; however, given the private nature of the

²⁰⁴ *Id.* at Exhibit B (showing the community space on floor SL1 and SL2).

²⁰⁵ *Id.* at A-8, § 4.

²⁰⁶ *Id.* at A-9 to -11, § 6(c).

²⁰⁷ *Id.* at A-11 to -12, § 7(a).

²⁰⁸ *Id.* at A-12 to -17, § 8.

²⁰⁹ *Id.* at A-17 to -19, § 10.

²¹⁰ *Id.* at 6, § 5(d). The remedy in CBAs is often specific performance instead of money damages in order to avoid both the developer, and the community coalition, not honoring their end of the bargain. See, e.g., *Index of Docs*, LAW OFF. JULIAN GROSS, http://juliangross.net/docs/CBA/Staples_Cooperation_Agreement.pdf (last visited Aug. 20, 2015) (follow “CBA/” hyperlink; then follow “Staples_Cooperation_Agreement.pdf” hyperlink); *Index of Docs*, LAW OFF. JULIAN GROSS, http://juliangross.net/docs/CBA/Hunters_Point_Agreement.pdf (last visited Aug. 20, 2015) (follow “CBA/” hyperlink; then follow “Hunters_Point_Agreement.pdf” hyperlink). With money damages there is also the risk that the community coalition will be seen to have been bought out.

agreement and the valuable consideration it received, such a defense is unlikely to withstand scrutiny.²¹¹

At this moment, the greatest risk to the community coalition is if KNIC fails to raise the money it needs to move forward with the project. If KNIC fails to finance the project, the promised benefits would not be delivered. The coalition would need to renegotiate with any subsequent developer.

Another risk is that KNIC might decide that it wants to withdraw from the project entirely. To limit the risk to the coalition in the event of a withdrawal, section 6(c) of the Cooperation Agreement has a cooling off period of five years before KNIC can resubmit a proposal to develop the Armory in the event of a withdrawal. This term is designed to guard against a strategic withdrawal and reapplication by KNIC in order to avoid its obligations in the CBA.

Other risks come both from inside and outside of the coalition. From the inside, there is risk that one or more coalition members will not be able to survive to enforce the agreement. This risk is minimized by the fact that any or all of the twenty-five members can enforce all terms of the agreement.²¹² With twenty-seven decision makers, it is likely that there will be disputes among dissenting parties. However, this risk is minimized by having a strategic leadership committee, and an open consensus decision-making model.

From outside the coalition, individuals and groups are already trying to influence how the community space is used. Council member Cabrera held a press conference with supporters of a hip hop museum to call for space within the armory for the museum.²¹³ While it is up to the coalition to decide how the space is used, Cabrera, or others, might continue to push the coalition members in one direction or another.

Outsiders or internal decision makers might also argue vagueness of particular terms for their own ends. While CBAs have not faced court scrutiny thus far, it may be the case that a party seeks to enforce a particular term through the court process. While this is a risk, it is a small one given the care with which the agreement was drafted.

²¹¹ DLA Piper Press Release, *supra* note 18 (stating the opinion of the two lead attorneys working for KARA and an outside CBA expert that the KNIC CBA is credible and will deliver benefits to generations of Bronx residents).

²¹² KNIC CBA, *supra* note 156, at 1–2 (defining “Coalition”); *c.f.* *Atlantic Yards Community Benefits Agreement*, DOWNTOWN BROOKLYN NEIGHBORHOOD ALLIANCE, <http://thedbna.org/atlantic-yards-community-benefits-agreement-2> (last visited Apr. 22, 2016). The coalition could not enforce the housing terms once ACORN imploded. Norman Oder, *Forest City Seems to Be Backing Off Its Pledge to Have 50% of Affordable Apartments Be Larger Units. What Will Bertha Lewis Say?*, ATLANTIC YARDS/PACIFIC PARK REPORT (Nov. 18, 2011, 8:31 AM), <http://atlanticyardsreport.blogspot.com/2011/11/forest-city-seems-to-be-backing-off-its.html>.

²¹³ See Shahrigan, *supra* note 195.

2. Is the 2013 KNIC CBA a Good Deal for KNIC?

There are two important questions to ask when approaching the CBA from KNIC's perspective: First, what is the actual value of the promised benefits? And second, was the bargained for exchange adequate to KNIC? So far, this Article has attempted to answer the first question. Now, the Article turns to the questions of the adequacy of the consideration KNIC received in the transaction, and what it had to promise in exchange for that consideration.

Practically, KNIC succeeded where The Related Companies failed. KNIC was able to secure nonopposition from the KARA coalition, which almost ensured approval of the ice center project. In obtaining an approved project, the 2013 KNIC CBA was 100% successful for the KNIC Partners.

KNIC agreed to a magnitude and duration of community benefits never before offered by a developer in New York City.²¹⁴ As mentioned above, the project has continued to attract financier attention despite the CBA's promised benefits. One will know for certain once the project moves forward; however, in the short term, it does not appear that the CBA has hindered KNIC's ability to attract investors in the project.

C. *Concluding Thoughts and Lessons Learned*

The prospect of an ice rink development in the Bronx—let alone the largest ice sports complex in North America—tends to be met with skepticism. The African American, Dominican, Puerto Rican, and other Caribbean backgrounds of the people that make up the Bronx communities, particularly in the northwest Bronx, lack a history of ice sports involvement. But involving traditionally underrepresented communities is only part of the allure of the Kingsbridge National Ice Center. The KNIC developers estimate an average of one year round indoor ice rink per every 100,000 people—in a city of an estimated 8.3 million people (1.4 million in the Bronx alone) there should be eighty-three rinks instead of the current seven year round rinks, and none in the Bronx.²¹⁵

One result of the approved development has been uncertainty among landlords across the street about what to do with their properties

²¹⁴ Complaint, *KNIC LLC v. N.Y.C. Econ. Dev. Corp.*, No. 22507/2016E (N.Y. Sup. Ct. Apr. 12, 2016) (No. 22507/2016E), <http://www.norwoodnews.org/wp-content/uploads/2016/04/KNIC-Lawsuit-.pdf>.

²¹⁵ KNIC CBA, *supra* note 156, at Exhibit D.

given the specter of the KNIC development. Landlords have started giving tenants of mom and pop retail shops along West Kingsbridge Road month-to-month lease renewals, and in some cases sought a fifty percent increase in rent.²¹⁶ Buildings surrounding the site continue to command high sales prices. One in particular, boasting ten occupied retail storefronts and fifty-seven apartment units, sold recently for fifteen million dollars,²¹⁷ having been sold the year before for only \$4.5 million.²¹⁸

It is perhaps logical that the KNIC development might drive real estate speculation and increase property values in the neighborhood. This result is largely not addressed in the KNIC CBA. While residential tenants may benefit from rent regulated apartment units,²¹⁹ commercial tenants have no such protection.

Mitigating the effects of increased commercial rent and increased residential rent for market rate tenants is a challenge. While tax increment financing districts capture some of the value of increased property prices from landlords,²²⁰ no such similar mechanism is easily implemented to limit the rents that tenants, both commercial and residential, pay.²²¹ CBA coalitions should consider involving commercial and residential tenants in CBA negotiations to brainstorm and consider alternative strategies for limiting the negative impacts of increased rents on existing businesses. The KNIC CBA included a \$250,000 small business grant program,²²² and a “good faith efforts”

²¹⁶ Wendy Davis, *Rents Shoot Up Across from Kingsbridge Armory*, CRAIN'S (Nov. 3, 2014), http://www.crainsnewyork.com/article/20141103/REAL_ESTATE/311029990/rents-shoot-up-across-from-kingsbridge-armory.

²¹⁷ David Cruz, *Another Property Sold Blocks from Kingsbridge Armory*, NORWOOD NEWS (June 25, 2015), <http://www.norwoodnews.org/id=18408&story=another-property-sold-blocks-from-kingsbridge-armory>.

²¹⁸ Search by Document ID/CRFN, AUTOMATED CITY REGISTER INFO. SYS. (ACRIS), <http://a836-acris.nyc.gov/DS/DocumentSearch/CityRegisterFileNumber> (last visited Apr. 22, 2016) [hereinafter ACRIS] (search “2014021800080002” in the “Enter the Document ID Number” field).

²¹⁹ For a description of the two types of residential rent regulations in New York State, see Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, “Master Communities,” and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 719–21 (2010). Residential rents in rent-stabilized apartments may only be increased by landlords by an amount set by the Rent Guidelines Board. *Mission Statement*, N.Y.C. RENT GUIDELINES BOARD, <http://www.nycrgb.org/html/about/about.html> (last visited Aug. 24, 2015).

²²⁰ For an explanation about tax increment financing, see JOEL MICHAEL, RESEARCH DEP'T, MINN. HOUSE OF REPRESENTATIVES, TAX INCREMENT FINANCING (2014), <http://www.house.leg.state.mn.us/hrd/pubs/ss/sstif.pdf>.

²²¹ MICHAEL, *supra* note 220. Tax increment financing districts only tax property owners—any increase in tax revenue from renters must come through increased rents charged by landlords. *Id.*

²²² KNIC CBA, *supra* note 156, at A-5.

provision to provide technical assistance to businesses with three to five employees who might sell goods to the KNIC.²²³ It is possible that grant program funds and technical assistance might address the commercial lease negotiation issues. However, thinking through the impact of project development on rising commercial rents prior to CBA formation is a key lesson learned.

It remains to be seen how the various parties will work together in the Community Advisory Council (CAC). The CAC governance is to be determined collectively and cooperatively by CAC members.²²⁴ Whether and how the CAC can make decisions will largely impact the implementation of the KNIC CBA terms. As of this writing, the City's Economic Development Corporation has not released the KNIC lease from escrow; however, the Economic Development Corporation extended the escrow agreement.²²⁵

III. THE IMPACT OF CBAs ON ECONOMIC DEVELOPMENT

Part I discussed the existing literature about CBAs, definitional issues, and current trends in the CBA movement. Part II presented a case study of the 2013 Kingsbridge Armory CBA and assessed its significance within the CBA movement. This Part assesses the impact of CBAs on economic development through the lens of community organizing campaigns and other constituencies, such as taxpayers, policymakers, and practitioners.

This Article proposes a framework for assessing the effectiveness of CBAs through four key issues: First, it looks at the extent to which CBAs effectively resolve disputes around a project's approval. To evaluate these criteria we shall investigate the extent to which CBAs resolve disputes outside of litigation, preapproval, as well as an interpretation of the CBA through implementation.

Second, this Article evaluates the extent to which CBAs enhance civic participation in land use approvals. Third, it looks at the ability of CBAs to protect taxpayers by valuing a project's approval and negotiating an enforceable set of benefits provided in exchange for that value. Fourth, and last, is the success that CBAs have in avoiding state action and the trappings of constitutional protections for developers

²²³ *Id.* at A-7.

²²⁴ *Id.* at A-2.

²²⁵ Goldenberg, *supra* note 168 (stating that the Economic Development Corporation spokesperson Anthony Hoglebe expressed willingness to work with the KNIC team).

who, this Article argues, tend to need them less than marginalized communities in isolated rural or urban areas.

A. *Avoiding Costly Litigation and the Ability to Solve Problems Prior to Project Approval*

Power imbalances between developers and community groups frequently result in development moving forward whether or not it is opposed. Typically, deals are struck either prior to a project's approval, as is most frequently the case with CBAs, or after a project is approved, as in a settlement following litigation. Litigation and the court process adds time and expense to an outcome that more likely than not is similar to what would be reached through a CBA at the outset. This Article argues, therefore, that CBAs, despite their costs and challenges, are preferable because they frequently resolve disagreements about public project approvals in advance, thus avoiding the costly and time consuming court process.

The ability of a CBA to stand alone without subsequent lawsuits speaks to the quality of the CBA at resolving differing positions, while CBAs that result in contentious litigation were probably not that good to begin with. In other words, one strength of CBAs is that they can be judged on their ability to resolve disputes around a project. For example, if a CBA is reached, yet there is still significant litigation among dissenting parties, it is unlikely that the CBA is effective. On the other hand, if a CBA is reached, and only minimal lawsuit activity occurs by groups with fringe points of view, it is more likely than not that the CBA is truly effective. This Article suggests further study in this area around quantitative analysis of dispute resolution activity, including number of lawsuits filed, and whether there was a CBA.

Of course, not all constituent groups will be happy all of the time. Nevertheless, CBA processes are useful because they lead to better decisions, or at least to the types of decisions that get resolved through litigation if there is no CBA, or an unsuccessful CBA negotiation process.

1. Litigation Activity Surrounding Atlantic Yards

An example of this analysis is the 2005 Atlantic Yards CBA, which has been criticized for its lack of inclusivity within the community

coalition.²²⁶ Following the CBA's execution, there were as many as thirty-seven lawsuits filed related to the project.²²⁷ In addition, in June 2014, a group called BrooklynSpeaks negotiated an agreement to speed up the creation of affordable housing at Atlantic Yards.²²⁸ While the agreement was not styled as a CBA (i.e., BrooklynSpeaks was not a party), the agreement between the developer and the State of New York achieved much of the goals advanced by the coalition.

2. Lack of Litigation Activity Related to Successful CBA Campaigns

Federal or state case law on the enforceability of CBAs does not exist thus far,²²⁹ which perhaps supports the proposition that successful CBAs have not needed court intervention. To prove this proposition for certain, one should also look at economic development projects without CBAs and how they tend to have, or not have, significant litigation. In the case of the Willets Point economic development project, where no CBA was included in the project approval process, there has been chronic litigation related to almost every stage of the project and its approvals.²³⁰

The author is unaware of any controversial development that had no CBA, but which also had little to no significant litigation. It is possible to imagine such a project. However, to appease dissenting groups, it is likely that the parties involved spent significant time coming to an agreement on terms, such that litigation was unnecessary.

²²⁶ Lavine & Oder, *supra* note 80, at 316 (asserting that most of the eight groups that participated in negotiations were created specifically to sign the CBA, while other established groups were excluded).

²²⁷ See, e.g., Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008); Apple v. Atl. Yards Dev. Co., No. 11-CV-5550 (JG), 2014 WL 5450030 (E.D.N.Y. Oct. 27, 2014); Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721 (N.Y. 2010); Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164 (N.Y. 2009); Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., 942 N.Y.S.2d 477 (App. Div. 2012); 730 Equity Corp. v. N.Y. State Urban Dev. Corp., No. 1689/2012, 2014 WL 2134562 (N.Y. Sup. Ct. May 7, 2014); Heron Realty Corp. v. N.Y. State Urban Dev. Corp., No. 1690/2012, 2013 WL 3213086 (N.Y. Sup. Ct. June 21, 2013); *In re* N.Y. State Urban Dev. Corp., No. 32741/09, 2010 WL 702319 (N.Y. Sup. Ct. Mar. 1, 2010); Brooklyn Bridge Park Legal Def. Fund, Inc. v. N.Y. State Urban Dev. Corp., 825 N.Y.S.2d 347 (Sup. Ct. 2006).

²²⁸ The author was counsel to BrooklynSpeaks during this negotiation.

²²⁹ Been, *supra* note 8, at 30.

²³⁰ A recent decision appears to have fatally wounded the redevelopment of Willets Point. Avella v. City of New York, 13 N.Y.S.3d 358 (App. Div. 2015); see also Charles V. Bagli, *City Declines to Fight in Court for Land Deal in Stadium's Shadow*, N.Y. TIMES, Aug. 20, 2015, at A19.

B. CBAs Increase Civic Engagement

CBAs can be an effective way for bringing diverse voices into land use approvals. Alejandro Camacho has written a multipart article, titled *Mustering the Missing Voices*, about how current government approval processes neglect large swaths of stakeholders in the land use approval process.²³¹ This Article draws on Camacho's research to support the argument that CBAs increase civic engagement, which is positive both in bringing diverse voices into land use, and in encouraging participants in other aspects of civic life. Camacho points out elsewhere that CBAs reflect the lack of public engagement in land use approvals due to the bilateral nature of land use negotiations.²³²

The CBA movement is rooted in the movement for Smart Growth.²³³ Smart Growth proponents advance the idea that development should be governed by the three E's: the economy, the environment, and equity.²³⁴ A jobs-housing balance, and transit-oriented development, are key principals for Smart Growth advocates.²³⁵

The inclusion of Smart Growth advocates, labor, and other urban constituencies within the CBA movement has meant a more diverse group involved in land use decisions as communities organize.²³⁶ In the field of behavioral psychology, there is support for the conclusion that people tend to be more likely to consent to decisions, even if they disagree with them, once they have had an opportunity to participate in the decision-making process.²³⁷ The notion of legitimacy derives from a source of shared values or shared consent, and varies from one society to the next.²³⁸ It is logical that if individuals have an opportunity to shape a process, then they are more likely to support the result.

²³¹ Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 STAN. ENVTL. L.J. 3 (2005); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment Two*, 24 STAN. ENVTL. L.J. 269 (2005).

²³² Alejandro E. Camacho, *Community Benefits Agreements: A Symptom, Not the Antidote, of Bilateral Land Use Regulation*, 78 BROOK. L. REV. 355 (2013) (arguing that CBAs do not solve issues related to land use, however, CBAs are a temporary fix to the current bilateral land use regulation scheme).

²³³ GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 5.

²³⁴ *Id.* at 4.

²³⁵ *Id.* at 5.

²³⁶ *Id.* at 6.

²³⁷ Camacho, *supra* note 232, at 365 & n.63 (citing TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990)).

²³⁸ See, e.g., Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 132–33 (2012).

One study of CBA participants found that increases in public participation on development outcomes ranked highest in ways that CBAs improve development.²³⁹ In other instances where citizens are given the opportunity to participate in public decision making, such as deciding how capital budget dollars are allocated, residents from diverse communities are shown to participate at higher rates than in local elections.²⁴⁰ This includes women, youth, and individuals from immigrant communities.²⁴¹

While more study is needed in this area as it applies to CBAs, evidence strongly suggests that civic participation is a key aspect to CBAs' impact on economic development. As communities organize and gain sophistication, more diverse voices are added to the land use decision process, which was heretofore the exclusive domain of businesses and developers.²⁴² The inclusion of diverse voices yields better decisions and more positive impacts on citizens' lives.

C. *Protecting Taxpayers*

This Article has argued that CBAs provide a critical function in allowing community groups to enforce key terms in development projects outside the political process. Elected officials, the argument goes, may or may not enforce specific terms of a deal depending on a variety of forces. A political check for voters to elect a new representative is less effective than simply having community groups directly contract as parties to agreements and give them the ability to enforce those agreements.

In existing CBAs, including L.A. Live and Kingsbridge Armory so far, community groups are able to enforce CBA terms outside of government intervention. Although, CBA terms are often *also* included in relevant development agreements or leases.²⁴³

(discussing the work of David Beetham and Jean-Marc Coicaud, specifically that legality, shared values, and consent are key to studying legitimacy).

²³⁹ Musil, *supra* note 20, at 847.

²⁴⁰ ALEXA KASDAN ET AL., URBAN JUSTICE CTR., A PEOPLE'S BUDGET: A RESEARCH AND EVALUATION REPORT ON PARTICIPATORY BUDGETING IN NEW YORK CITY 16 (2014), http://cdp.urbanjustice.org/sites/default/files/CDP.WEB.doc_Report_PBNYC-cycle3-FullReport_20141030.pdf.

²⁴¹ *Id.* at 16–17.

²⁴² GROSS WITH LEROY & JANIS-APARICIO, *supra* note 4, at 6.

²⁴³ In the instance of the Kingsbridge Armory CBA, the lease contains the same access terms for community groups, thus enshrining the “right to skate” in the commercial lease. Ben Kochman, *Developer, City Finalize Lease to Turn Vacant Kingsbridge Armory into Ice Center*, N.Y. DAILY NEWS (Oct. 16, 2014, 5:33 PM), <http://www.nydailynews.com/new-york/bronx/developer-signs-lease-kingsbridge-armory-article-1.1977160>.

By contrast, the development surrounding the new Atlanta Falcons Stadium has no such similar community group CBA accountability check.²⁴⁴ Taxpayers have no protection to ensure they derived a fair bargain given the tremendous public equity invested in the stadium's construction.²⁴⁵ True, one can monitor to see how the thirty million dollar Westside Neighborhood Prosperity Fund and Westside Tax Allocation District are spent.²⁴⁶ But there is no agreement governing the benefits provided in exchange for the public subsidy spent.²⁴⁷

Invest Atlanta announced the initial recipients of the Westside Tax Allocation District Community Improvement Fund in November 2014.²⁴⁸ Almost two-thirds of the fifteen million dollar Fund were allocated toward construction of 407 apartment units near the stadium site, and a mixed-use shopping, hotel, and apartment development.²⁴⁹ It appears that the Blank Foundation has hired an experienced professional to implement the Westside Neighborhood Prosperity Fund in the area surrounding the stadium.²⁵⁰

In the case of both funds, taxpayers or community groups are not represented at all in decisions made about allocating resources. Taxpayers need protection from developers making commitments that they fail to adhere to after a project is approved. In the Atlanta example, commitments have been made without a binding mechanism to enforce those terms. Often, commitments are included in project development agreements; however, these agreements may only be enforced by governments and are subject to the changing winds of elected office. The benefits of a CBA are that the benefits *themselves* can be enforced

²⁴⁴ See Rabouin, *supra* note 11 (stating that the community benefits “plan” was adopted without the agreement of any community coalition).

²⁴⁵ See deMause, *supra* note 122 (stating that \$554 million in public financing was provided without any community benefits beyond the anticipation of jobs and tax revenue that would be associated with a new stadium).

²⁴⁶ See *Westside Neighborhood Prosperity Fund Background*, *supra* note 12.

²⁴⁷ See discussion *supra* Section I.F.2.

²⁴⁸ Collin, *Invest Atlanta Announces Funding for Westside Projects*, ATLANTA INTOWN (Nov. 20, 2014), <http://www.atlantaintownpaper.com/2014/11/invest-atlanta-announces-funding-westside-projects>.

²⁴⁹ *Id.* Other recipients include a soul food restaurant and an office building's energy efficiency program. *Id.*

²⁵⁰ *Our Staff & Board of Directors*, ARTHUR M. BLANK FAM. FOUND., <http://www.blankfoundation.org/staff-and-board> (last visited July 26, 2015) (“Frank [Fernandez] joined the Foundation in January 2014 to lead and implement the Westside Neighborhood Prosperity Fund, a program designed to contribute to the transformational revitalization and redevelopment of Vine City, English Avenue, Castleberry Hill and other adjacent neighborhoods.”). For more information about the Westside Neighborhood Prosperity Fund application process, see *Westside Neighborhood Prosperity Fund—Application Process*, ARTHUR M. BLANK FAM. FOUND., <http://blankfoundation.org/westside-application-process> (last visited Aug. 25, 2015).

directly by the groups that are the intended beneficiaries—*outside* the political process. This is a protection to taxpayers who are supposed to benefit from the commitments. It is also a protection to taxpayers who saw the project approved with certain commitments. CBAs provide enforcement in the event that those commitments are not upheld.

D. *Avoiding State Action*

As discussed in Parts I and II, CBAs function outside of government involvement to (1) permit community groups to directly enforce CBA terms, and (2) to avoid constitutional protections afforded developers by the Supreme Court. Viewing the success of CBAs in avoiding state action is significant in assessing their influence on economic development projects. First, if community groups cannot enforce CBA terms, it undermines the benefits of CBAs that this Article has highlighted. Second, if CBAs involve state action, then the terms that can be included in a CBA are arguably significantly limited to what has both a “nexus” and “rough proportionality” to the project’s approval.²⁵¹

This Section begins by analyzing what amounts to state action in the case of CBAs. It then considers the practical reality that as soon as a developer receives project approval, it is significantly less likely for a developer to claim that there was impermissible state action. After looking at both factors, we can draw conclusions about the importance of avoiding state action in the effectiveness of CBAs in influencing economic development projects.

1. What Amounts to State Action?

There is some disagreement in the literature about what might constitute state action in a CBA negotiation. Vicki Been on the one hand suggests that local governments should not consider CBAs and CBA terms in land use approvals in order to avoid unconstitutional conditions doctrine issues, or, if CBAs are to be considered, that they meet certain standards.²⁵² Been also writes that it may be appropriate for government to review CBAs in economic development approvals. Developers who do not like the conditions set can simply decline to

²⁵¹ See discussion *infra* Section III.D.2.

²⁵² Been, *supra* note 8, at 31–34.

develop the project.²⁵³ The New York City Comptroller Report recommended that CBAs only be used in major projects with more than 500,000 square feet of development, on more than twenty-seven acres, and receiving an excess of seventy-five million dollars.²⁵⁴ This definition and recommendation is consistent with Been's notion that local governments can consider CBAs when economic development subsidies are provided.²⁵⁵

Local government review of CBA terms as part of economic development subsidy approval is similar to planned unit development (PUD) review. PUD regimes exist in cities including Washington, D.C., Baltimore, Boston, and Arlington and Alexandria, Virginia.²⁵⁶ Often in PUD review, developers receive a density bonus for approval of a master development plan. Developers and elected officials negotiate land use approvals all of the time. The difference in the CBA context is that community groups can enforce them. Ultimately, this perhaps exposes the challenges related to negotiating CBAs more than it does in determining state action, or not.

In the Kingsbridge Amory CBA, was it state action for the council member to say that a CBA was necessary in order for him to approve the project?²⁵⁷ Was it state action for the community board to form an "alliance" with the community coalition, which, arguably led to the community coalition obtaining the necessary leverage to negotiate terms?²⁵⁸ What about the fact that the principals were negotiating with the council member who requested, unsuccessfully, a sum of money for an organization connected to him?²⁵⁹ What about the fact that the council member's chief of staff was present in the room during negotiations?²⁶⁰

²⁵³ *Id.* at 34.

²⁵⁴ TASK FORCE ON PUBLIC BENEFIT AGREEMENTS, *supra* note 65, at 24.

²⁵⁵ Been, *supra* note 8, at 35.

²⁵⁶ DC ZONING UPDATE: PLANNED UNIT DEVELOPMENT STUDY 34–39 (2007), https://www.communicationsmgr.com/projects/1355/docs/PUD_Study_FINAL.pdf; Alexandra Croft Moravec, An Analysis of Planned Unit Development (PUD) Regulations and Processes in Washington, DC: A Development Risk Management Case Study 67–68 (2009) (unpublished Masters Project, University of North Carolina).

²⁵⁷ See Hu, *supra* note 131.

²⁵⁸ See NORWOOD NEWS, *supra* note 160.

²⁵⁹ See Hu, *supra* note 131.

²⁶⁰ See Cruz, *supra* note 161.

2. Consequences of State Action

Depending on how local government land use regulators are involved in CBA negotiations, CBAs may encounter Supreme Court precedent preventing unconstitutional conditions or exactions.²⁶¹ According to the Court, any terms that the government seeks in order to permit a development to go forward must have an “essential nexus” to a legitimate state interest claimed when rejecting the developer proposal.²⁶² The condition must also have “rough proportionality” to the extent and impact of the proposed development.²⁶³ Monetary exactions must also satisfy the nexus and rough proportionality conditions set by government.²⁶⁴

Were CBAs to involve a government setting conditions, which they as a rule do not, this line of Supreme Court protections would apply. Since local governments should not be conditioning project approval on CBA terms, then this analysis is not necessary. It is therefore desirable for developers and community groups to negotiate directly through CBAs.

3. What Is the Likelihood that a Developer Will Raise State Action as an Issue After a Project’s Approval?

CBAs settle disputes. From a practical perspective, it is unlikely that a developer will enter into a CBA, obtain project approval, and then turn around and claim they were wronged by impermissible government action. In the case of a successful approval, a developer would be foolish to challenge the administrative decision that granted it the right to build. In the case of an unsuccessful approval, the terms negotiated in the CBA would be unenforceable since CBA terms are conditioned upon the project moving forward. Development projects are very costly, even at the preapproval, and recently postapproval, stages. Therefore, if a CBA is reached, developers are more likely to move ahead with the project instead of attempting to tie themselves up in litigation.

²⁶¹ Been, *supra* note 8, at 13–14.

²⁶² *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

²⁶³ *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

²⁶⁴ *Koontz v. St. John’s River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013).

E. Recommendations

CBA campaigns are currently underway in towns and cities across the country, and elsewhere in North America. In addition to the examples discussed around the Obama Presidential Library, the Atlanta Falcons Stadium, the Somerset County wind farm, and the Kingsbridge National Ice Center, there are community benefits debates commencing around other projects, including: the Atlanta Braves mixed-use development in Cobb County Georgia,²⁶⁵ redevelopment of Union Square in Somerville, Massachusetts,²⁶⁶ Buffalo,²⁶⁷ throughout projects in Canada, especially Ontario,²⁶⁸ Manitoba,²⁶⁹ the Gateway Real Estate Development in Chicago,²⁷⁰ the high-speed rail in Illinois,²⁷¹ rail station redevelopment²⁷² and urban revitalization projects²⁷³ in Long Island, New York, and projects funded in northwest Indiana,²⁷⁴ Maryland,²⁷⁵

²⁶⁵ ATLANTA BRAVES, ATLANTA BRAVES MIXED-USE DEVELOPMENT SUMMARY, <http://atlanta.braves.mlb.com/atl/downloads/suntrust-park/mixed-use-fact-sheet.pdf> (proposing 100% privately financed stadium, hotel, and retail complex).

²⁶⁶ *Union Square Redevelopment*, SOMERVILLE, MA, <http://www.somervillema.gov/departments/ospcd/economic-development/union-square-redevelopment> (last visited Apr. 23, 2016).

²⁶⁷ Buck Quigley, *Fruit Belt Residents Still Want a Community Benefit Agreement*, ARTVOICE (May 14, 2015), http://artvoice.com/issues/v14n19/news_feature.html.

²⁶⁸ John Lorinc, *The Plan: Train and Hire Toronto's Neediest for Six-Figure Jobs. The Catch: How to Find Them*, GLOBE & MAIL (Apr. 17, 2015, 3:37 PM), <http://www.theglobeandmail.com/news/toronto/the-plan-train-and-hire-torontos-neediest-for-six-figure-jobs-the-catch-how-to-find-them/article24008225>; Sara Mojtehdzadeh, *Why the Woodbine Gaming Deal Could Be a Pathway to Good Jobs*, THESTAR.COM (July 12, 2015), <http://www.thestar.com/news/gta/2015/07/12/why-the-woodbine-gaming-deal-could-be-a-pathway-to-good-jobs.html>; Laurie Monsebraaten, *Groundbreaking Infrastructure Law a Boon for At-Risk Youth*, THESTAR.COM (June 7, 2015), <http://www.thestar.com/news/gta/2015/06/07/groundbreaking-infrastructure-law-a-boon-for-at-risk-youth.html>.

²⁶⁹ Avery Zingel, *Remote Manitoba First Nation Gets Funding for New Bridges*, CBC NEWS (Feb. 20, 2015, 8:02 PM), <http://www.cbc.ca/news/canada/manitoba/remote-manitoba-first-nation-gets-funding-for-new-bridges-1.2965652>.

²⁷⁰ La Risa Lynch, *West Siders Demand Community Benefits Agreement for New Medical District Development*, PROGRESS ILL. (July 21, 2015, 2:12 PM), <http://progressillinois.com/quick-hits/content/2015/07/21/west-siders-demand-community-benefits-agreement-new-medical-district>.

²⁷¹ Doug Finke, *House Passes Bill to Create High-Speed Rail Oversight Panel*, ST. J.-REG. (Apr. 24, 2015, 7:09 PM), <http://www.sj-r.com/article/20150424/NEWS/150429642>.

²⁷² Deborah S. Morris, *Huntington Station Redevelopment Benefits Agreement Approved; Provides Fees for Community Programs*, NEWSDAY (Jan. 14, 2015, 9:28 PM), <http://www.newsday.com/long-island/towns/huntington-station-redevelopment-benefits-agreement-approved-provides-fees-for-community-programs-1.9808783>.

²⁷³ Ted Phillips, *supra* note 83.

²⁷⁴ Lu Ann Franklin, *Gary Pastor, Award Nominee, Lives by Motto 'Never Quit'*, TIMES (Northwest Indiana) (Jan. 13, 2015), http://www.nwitimes.com/news/local/lake/gary-pastor-award-nominee-lives-by-motto-never-quit/article_c9660419-9cc8-565e-8841-c634ac1e09a5.html.

Miami,²⁷⁶ Milwaukee,²⁷⁷ Minnesota,²⁷⁸ New Haven,²⁷⁹ and University of California's Richmond Campus.²⁸⁰ CBAs have the potential to positively impact many different communities. This Article makes a couple of recommendations for how these communities might approach the CBA negotiation process given the KNIC CBA and other examples discussed above.

1. Protecting Residential and Commercial Tenants from Rising Rents

As development projects in low-income urban and rural areas move forward, land values tend to increase. Existing landowners are well positioned to reap the returns of higher land values.²⁸¹ Tenants, on the other hand, subject to the residential and commercial rental markets, face the prospect of displacement when land values increase.

There are several mechanisms that CBAs might implement to address this issue. In the KNIC CBA, for instance, there is a "revenue contribution" that amounts to profit sharing between the developer and the CBA signatories.²⁸² The funds from the revenue contribution amount to one percent of gross ice rink rental revenue up to twenty-five million dollars, or \$250,000, and two percent of gross ice rink rental revenue over twenty-five million dollars.²⁸³ These funds *could* be used

²⁷⁵ Ellison Barber, *Minority Business Owners: Casino Bids Bias*, WUSA9 (Mar. 20, 2015, 12:37 PM), <http://www.wusa9.com/story/news/local/maryland/2015/03/20/minority-business-owners-casino-bids-bias/25081185>.

²⁷⁶ David Smiley, *FIU Study: Worldcenter Subsidy Deal Falls Short*, MIAMI HERALD (May 4, 2015, 2:00 AM), <http://www.miamiherald.com/news/local/community/miami-dade/article20038665.html>.

²⁷⁷ Don Walker, *Milwaukee Urban League Backs Public Financing for Bucks Arena*, J. SENTINEL (Milwaukee) (Apr. 6, 2015), <http://www.jsonline.com/news/milwaukee/milwaukee-urban-league-backs-public-financing-for-bucks-arena-b99475770z1-298777101.html>.

²⁷⁸ ALL. FOR METRO. STABILITY, COMMUNITY BENEFITS AGREEMENTS: GROWING A MOVEMENT IN MINNESOTA (2007), <http://www.metrostability.org/efiles/CBAREPORT.pdf>; Eliot Brown, *Use of Taxpayer Money for Pro-Sports Arenas Draws Fresh Scrutiny*, WALL ST. J. (Mar. 8, 2015, 7:17 PM), http://www.wsj.com/articles/use-of-taxpayer-money-for-pro-sports-arenas-draws-fresh-scrutiny-1425856677?mod=djem_jiewr_PS_domainid.

²⁷⁹ Steven M. Seigel, *Community Benefits Agreements in a Union City: How the Structure of CBAs May Result in Inefficient, Unfair Land Use Decisions*, 46 URB. LAW. 419 (2014); Allan Appel, *Looney Calls for UI to Clean Up English Station*, NEW HAVEN INDEP. (Aug. 5, 2015, 3:29 PM), http://www.newhavenindependent.org/index.php/archives/entry/looney_calls_for_an_english_station.

²⁸⁰ Alexandra Yoon-Hendricks, *Community Concerned About Gentrification with Proposed Richmond Global Campus*, DAILY CALIFORNIAN (July 16, 2015), <http://www.dailycal.org/2015/07/16/community-concerned-gentrification-proposed-richmond-campus-major-development>.

²⁸¹ ACRIS, *supra* note 218; *see also supra* text accompanying notes 217–18.

²⁸² KNIC CBA, *supra* note 156, at A-6 to A-7.

²⁸³ *Id.*

for tenant organizing work, funding property acquisition for community or cooperative use, or in some other manner.

Of course, the challenges involved in deciding how to allocate these funds are manifold. Who benefits, and to what extent? It is possible to create cooperative housing or commercial space that can be rented out on a lottery system to qualifying individuals. There are examples of real estate investment cooperatives in areas such as Minnesota²⁸⁴ and New York City.²⁸⁵ CBA funds could be allocated to such programs.

2. Consider Jurisdiction-Wide Implications and Fixes

Municipal government is reluctant to plan on a jurisdiction-wide scale.²⁸⁶ Because land use decisions are likely to remain the purview of local elected officials,²⁸⁷ CBAs—alongside the law of public land use approval—will continue to be the norm for how decisions are made. Even if a CBA is not reached for a particular project, CBA campaigns alone are changing how developers act in the marketplace.

The fact that a CBA affects only a single development site is inherently limiting. It is difficult to influence jurisdiction-wide policy through one off negotiated agreements. Occasionally, CBA campaigns may lead to changes in municipal law, as in the adoption of a living wage law for city-sponsored developments in New York City.²⁸⁸ Studying and permitting negotiated CBA terms to bubble up to the level of jurisdiction-wide law is one possible outcome of the CBA movement.

One local government scholar has suggested a way that CBAs can work with municipal-wide payment systems to compensate local residents who have developments in their neighborhoods.²⁸⁹ David Schleicher has proposed a Tax Increment Local Transfer (TILT) payment system that combines Tax Increment Financing with Trade Adjustment Assistance theory, which is used to negotiate free trade deals. Schleicher proposes TILTs as a mechanism to “trade” among

²⁸⁴ NE. INV. COOPERATIVE, <http://www.neic.coop> (last visited Jan. 18, 2016).

²⁸⁵ NYC REAL EST. INV. COOPERATIVE, <http://nycreic.com> (last visited Jan. 18, 2016). The author is an adviser to this organization.

²⁸⁶ The bilateral negotiation model, either through negotiated zoning or through the use of development agreements, is the baseline land use approval model in most U.S. states. Camacho, *supra* note 232, at 360.

²⁸⁷ The New York City Council, for example, has a practice of deferring to the local council member in whose district a given project is being voted on. *See supra* note 180.

²⁸⁸ *See supra* note 71 (discussing the NYC Living Wage).

²⁸⁹ Schleicher, *supra* note 30, at 1725–32.

municipal-wide interests and local opposition groups. TILTs and CBAs may work together, he writes, to achieve municipality-wide goals.²⁹⁰

CONCLUSION

The question this Article has set out to answer is: Do community benefits agreements benefit communities? The answer this Article proposes is that community benefits agreements *do* benefit communities—if they are negotiated and implemented in a transparent and accountable manner. The Article has come to this answer through a case study of the negotiations and execution of the KNIC CBA, and through analysis of other projects that lacked a CBA.

This Article presented a framework for assessing the role of CBAs in economic development projects. The framework focused on four aspects, including the ability of CBAs to resolve disputes surrounding significant development projects, to increase civic participation and encourage diverse stakeholder voices in land use approvals, to protect taxpayers with a binding enforcement mechanism, and to avoid state action and a host of constitutional challenges. Through the lens of this framework, it assessed how CBAs actually can and do benefit communities.

Despite this conclusion, it is of course possible to imagine situations where CBAs do not benefit communities. Some of these situations were mentioned above, while some may be new. It is important to understand when CBAs fail to benefit communities.

CBAs that are not transparently negotiated can lead individuals or groups to reap benefits that are limited to benefiting only a small group of people and not the community as a whole. One can imagine a scenario where a politically connected individual or group negotiates a CBA with a developer. It would not be surprising if only those individuals or groups benefitted to the exclusion of the broader community. In other words, outright theft or graft resulting from a corrupt transaction is possible. Such a transfer is bound to have a harmful effect on the relevant community.

Likewise, CBAs that do not solicit community input also run the risk of not benefitting the community. Civic participation and public engagement are keys to successful CBAs. Failure to solicit feedback or ideas from large segments of the community can lead to CBAs that are contrary to the interest of the community.

²⁹⁰ *Id.*

Overly paternalistic CBAs may not benefit communities. That is, CBAs with terms that assume a community wants a certain benefit but does not specifically investigate whether there is demand for such a benefit may be wasteful or ineffective. Avoiding assumptions about what benefits a community can avoid this aspect of harmful benefits.

Similarly, CBA terms may lead to waste or other harmful effects because the local infrastructure cannot support the long-term intended benefits.²⁹¹ Considering whether a CBA is the best mechanism to distribute benefits is an important step in the economic development process. Perhaps more advantageous alternatives exist.²⁹²

CBAs tend to lead to development that increases land value and that may then force out long-time residents. CBAs as tools of economic development may in fact impede development by furthering gentrification and increasing displacement. Balancing the needs of long-time residents with new arrivals is key to ensuring that CBAs do benefit communities.

The goal of this Article was not to argue that community benefits agreements are appropriate in all communities everywhere. Rather, it set out to show the situations in which CBAs benefit communities. Communities, government, and developers may benefit from considering the situations in which CBAs do benefit communities when crafting compromises to challenging land use approvals. Land use disputes are not likely to magically disappear—and CBAs are not the mechanism to achieve total land use harmony. Although, in certain cases, CBAs do and will have powerful positive impacts on generations of low-income families.

²⁹¹ International development projects sometimes rely on assumptions, for example, that capital investment in a rural well in an impoverished community will benefit the community, while in fact the community lacks the infrastructure to maintain the well. Annie Kelly, *Money 'Wasted' on Water Projects in Africa*, GUARDIAN: KATINE CHRONICLES BLOG (Mar. 26, 2009, 9:15 AM), <http://www.theguardian.com/society/katineblog/2009/mar/26/water-projects-wasted-money>.

²⁹² Some economists and scholars tout, for instance, the Earned Income Tax Credit (EITC) as an appropriate alternative to direct welfare support. For an explanation of the EITC program, see Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 534 (1995).