

2009

Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power

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Recommended Citation

18 J. L. Pol'y 157 (2009)

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COMMUNITY BENEFITS AGREEMENTS AND COMPREHENSIVE PLANNING: BALANCING COMMUNITY EMPOWERMENT AND THE POLICE POWER

*Patricia E. Salkin and Amy Lavine**

I. INTRODUCTION

Traditionally, the states have empowered local governments to develop plans and implement regulations for neighborhood and community development. When accomplished at the local or regional level, the interests and benefits of the community as a whole are to be weighed against the detriments to individuals. Much has been studied and written about the lack of meaningful public participation in the planning and land use regulatory process, suggesting that often low-income and minority communities are not fully engaged in the process, even when it may result in decisions negatively impacting their neighborhoods.¹ Case studies have also shown that governments

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¹ See, e.g., Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 831–837 (1998); 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, 15–36 (2005) [hereinafter Camacho I]. It should also be noted that planning and

are sometimes so eager to stimulate local economic development that they fail to fully engage communities in the project review process, both to expedite development and to avoid confronting local opposition.² This emphasis on short-term economic growth, however, may obscure a local government's perception of the social and environmental needs of particular communities. When this occurs, formal planning processes have failed to accomplish their goals of engaging community members and guiding future growth in a manner that maximizes long-term benefits for the common good.

zoning boards tend to be composed of community elites, who often have ties to the development sector. AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 7-13 (2002) [hereinafter, GROWING SMART LEGISLATIVE GUIDEBOOK]. See generally, Jerry L. Anderson, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447 (2004) (arguing that bias pervades zoning boards in favor of entrenched interests). The lack of socioeconomic diversity is particularly acute in larger cities, which results in "a pronounced bias toward the professional/technical/managerial class in our cities." *Id.* at 464; see also Jerry L. Anderson, *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues* (Apr. 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119582. But see Wayne Senville, *Survey of Planning Board Members Enlightening* (Oct. 2002), <http://www.planetizen.com/node/66> (suggesting, in a less scientific survey, that greater diversity is being achieved on planning board).

² For example, plans for the Melrose Commons redevelopment project in the South Bronx were initially formed without community involvement, and they were poorly coordinated with the community's needs. Changes were made only after residents organized and presented their concerns to planning officials. Eventually, the community's initiative led to substantial modifications, and the project is today viewed as a success. See SUSTAINABLE COMMUNITIES NETWORK CASE STUDIES, URBAN RENEWAL in MELROSE COMMONS, (Sept. 18, 1996), http://www.sustainable.org/casestudies/newyork/NY_af_melrose.html; see also Amy Wideman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL'Y 135, 197 (2002) (describing New York City's response to a community-based plan as "focus[ing] inordinately on economic repercussions for the city and what the city's role and expenses would be in implementing aspects of the plan that could inhibit future industrial sitings in the neighborhood").

COMMUNITY BENEFITS AGREEMENTS

159

New approaches to planning provide one response to systemic public participation problems. The environmental justice movement, for example, has sought to ensure a fair distribution of both environmental burdens and environmental goods by requiring local governments to make *meaningful* public participation available to all community members. Community-based planning efforts have attempted to improve the planning process by focusing on small and distinct geographic areas and by developing collaborative and inclusive planning programs. Since the late 1990s, community benefits agreements (CBAs) have offered another method to increase community input in the development planning and review process.

CBAs, in their purest form, are private contracts between a developer and a coalition of community interest groups.³ For communities that have historically been excluded from the planning process, CBAs can be a powerful tool to ensure that neighborhood interests are addressed as an integral component of development.⁴ By using CBAs, community coalitions can make project sponsors respond to their needs and interests, and they can bind developers to their promises through legally enforceable contract terms. Perhaps more significantly, the community is empowered to speak and make decisions for itself on myriad issues, including negotiating for community amenities that have traditionally been within the purview of the local comprehensive planning regime. The result, ideally, is growth

³ See Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 46 (2008).

⁴ See, e.g., Ryan Juskus & Elizabeth Elia, *Long Time Coming*, 150 SHELTERFORCE ONLINE (2007), available at <http://www.nhi.org/online/issues/150/longtimecoming.html> (“A neighborhood famous for its vitality under the constraints of segregation, Shaw was neglected and abused for so many ensuing decades One DC and Shaw resident claimed these blighted lots as community assets and declared that even these properties, if jealously guarded, could be a source of neighborhood power and wealth. This is the revolutionary idea of community-benefits agreements: that the community members—even those without money or power, who are usually ignored in development plans or manipulated like chess pieces—can be an asset and a force with which to contend.”).

and development that is accountable to the people it affects and equitable in its distribution of benefits and burdens. However, the people it affects are often a small subset of the municipal jurisdiction and the equitable distribution sought in the CBAs is limited to the proposed project area.

The legal relationship between CBAs and planning is unclear. Critics may perceive CBAs as circumventing government planning processes in order to put insular neighborhood concerns ahead of broader metropolitan interests.⁵ Supporters, on the other hand, may view traditional planning processes as inadequate and may see CBAs as a tool to advance civic engagement.⁶ CBA coalitions have been accused of abusing the tool when they fail to represent the full spectrum of community stakeholders, but as yet no workable definition of the “community” has been established.⁷

This article explores how the comprehensive planning process and CBAs complement and contradict each other, and how both could be improved by innovative and more inclusive planning techniques. Part II provides a brief historical background on comprehensive planning and community development, including issues relating to community planning and public participation. Part III examines CBAs and their role in community empowerment, community development and the promotion of social justice principles, including equitable development. This part also provides examples of typical land use related elements found in existing CBAs. Using these examples, Part IV segues into a discussion regarding whether private CBAs usurp the public planning process. The section explores whether CBAs are just another type of community-based plan and whether CBAs advance narrow interests at the expense of the larger community. The question of what local governments should do when presented with a CBA that is inconsistent with the local comprehensive land use plan is examined to determine whether amending the plan to incorporate

⁵ See *infra* Part IV.B.

⁶ Gross, *supra* note 3, at 38.

⁷ See *infra* Part III.A.1.

COMMUNITY BENEFITS AGREEMENTS

161

the community vision as articulated through the CBA is appropriate. The article concludes in Part V by pointing out that shortcomings of the current regulatory system allow local governments, intentionally or inadvertently, to exclude robust public participation from the development and implementation of comprehensive land use plans. This provides the impetus for privately negotiated CBAs, but these agreements may not always be ideal because not all parties to a CBA will have the best interests of the neighborhood or the community as a whole at the forefront of their agendas. While many CBAs have been successful, a number of case studies also reveal pitfalls in the process. The article concludes with the belief that local governments must be more inclusive and accountable in the public planning process to better meet the true goals of the community benefits movement.

II. COMPREHENSIVE PLANNING AND COMMUNITY DEVELOPMENT

A. The Origins of Traditional Comprehensive Planning

The federal and state governments have long recognized the role of municipalities in comprehensive planning for community development.⁸ Planning, in this context, may be best described as “an attempt to coordinate the development of all the interrelated aspects of the physical environment, and all the closely related aspects of the social and economic environment.”⁹ At the First National Conference on City Planning and the Problems of Congestion, which was convened in Washington, D.C., in 1909, Frederick Law Olmstead, Jr., described city plans as “a compendium of all regulations on building, physical development, ‘districting’ of land, health ordinances, and ‘police rules’ for the use and development of

⁸ See generally SALKIN, AMERICAN LAW OF ZONING §§ 5:2, 5:11 (5th ed. 2009) [hereinafter SALKIN, AMERICAN LAW OF ZONING].

⁹ NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW, VOL. 1 10 (Thomson West 2003).

land.”¹⁰ Almost 20 years later, Alfred Bettman described the city plan as:

. . . a master design for the physical development of the territory of the city. It constitutes the division of land between public and private uses, specifying the general location and extent of new public improvements, grounds and structures . . . and, in the case of private developments, the general distribution [of land areas] amongst various classes of uses, such as residential, business and industrial uses.¹¹

Beginning with the Model Standard City Planning Enabling Act in 1928 (“Standard Act”), local governments were vested with authority to develop community-wide plans.¹² The Act provided for the establishment of a planning commission, which would be vested with the responsibility “to make and adopt a master plan for the physical development of the municipality . . . including, among other things, the general location, character, and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways”¹³ The Standard Act additionally included provisions for the adoption of a master street plan, provisions for the approval of all public improvements by the planning commission, subdivision controls, and provisions for the establishment of a regional planning commission and a regional plan.¹⁴ Under the model set forth in the Standard Act, non-

¹⁰ JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 21 (West Group, 1998).

¹¹ *Id.* at 22 (citing PLANNING PROBLEMS OF TOWN, CITY AND REGION: PAPERS AND DISCUSSIONS OF THE TWENTIETH NATIONAL CONFERENCE ON CITY PLANNING, *reprinted in* W. GOODMAN & E. FREUND, PRINCIPLES AND PRACTICE OF URBAN PLANNING, 352–53 (4th ed. 1968)).

¹² U.S. Department of Commerce, A Standard City Planning Enabling Act (1928), *available at* <http://myapa.planning.org/growingsmart/pdf/CPEnablingAct1928.pdf>.

¹³ *Id.* at 13–15.

¹⁴ *Id.*; *see also*, Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, Feb. 1996, at 4–6, *available at*

COMMUNITY BENEFITS AGREEMENTS

163

elected officials dominated the local planning function.¹⁵ It was believed that their arguably non-partisan status made them better suited than elected politicians to take a hard look at challenging planning issues.¹⁶

Most of the states adopted the Standard Act, and although many of the states' comprehensive planning statutes have been modernized, the influence of the Standard Act continues to resonate today.¹⁷ A process-oriented statute, one of the Standard Act's most significant influences was its preference for optional rather than mandatory planning.¹⁸ While this led to the belief that planning was not necessarily a prerequisite to the adoption of zoning laws, Alfred Bettman explained that "[t]he zoning ordinance is, of course, execution and the planning precedes it"¹⁹

Today, a comprehensive land use plan²⁰ commonly refers to a written document that is formally adopted by a local legislative body, which contains goals, objectives and strategies for the future development and conservation of the community.²¹ It

<http://myapa.planning.org/growingsmart/pdf/LULZDFeb96.pdf>.

¹⁵ GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7–11.

¹⁶ *Id.*

¹⁷ See Rodney L. Cobb, *Toward Modern Statutes: A Survey of State Laws on Local Land-Use Planning*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 21 (1998).

¹⁸ DANIEL R. MANDELKER, LAND USE LAW §3.05 (5th ed., LexisNexis Matthew Bender 2003).

¹⁹ Charles M. Harr, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 362 (1955) (quoting an unpublished note written by Bettman).

²⁰ Depending upon local definition, the terms "comprehensive land use plan," "master plan" and "general plan" may be used interchangeably.

²¹ However, while either legally or intuitively the comprehensive plan should be a written document, this is not the case in all states. For example, in New York, the enabling statutes suggest that a comprehensive plan be a written document. N.Y. Town Law § 272–a. (2009). However, the statutes also recognize the validity of prior caselaw that allowed the concept of the comprehensive plan to be a reflection of an ongoing planning process rather than "pay slavish servitude to any particular document." *Udell v. Haas*, 235 N.E.2d 897, 902 (1968).

should represent the “big picture” of what the community looks like today and what it aspires to look like in the future,²² and the policies identified in the plan should guide development regulations and decisions made under them.²³ By providing a baseline for consistency regarding local governments’ land use decisions, the comprehensive plan helps to safeguard against arbitrary, irrational, biased and ad hoc actions.²⁴

Most states do not make the adoption of a comprehensive plan a statutory pre-requisite to the adoption of zoning regulations,²⁵ but the notion that the plan precedes the regulation is widely accepted as a best practice.²⁶ Where there is a comprehensive plan, the states also diverge on the question of whether zoning must be consistent with it: some states give no significance to the plan and do not require consistency; the majority of states do not require consistency but do consider the plan to be a factor in the evaluation of zoning regulations; and the rest hold the plan to be controlling and require all land use actions to be consistent with its goals and policies.²⁷ Long a

²² See GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-6.

²³ JOHN R. NOLON, WELL GROUNDED: PRIMER FOR LOCAL OFFICIALS AND CITIZENS 18 (1998); GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-7.

²⁴ See GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-7; Daniel J. Curtin & Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. ENVTL. AFF. L. REV. 325, 335 (2005) (discussing the importance of a comprehensive plan in preventing manipulation of the planning process for private gain).

²⁵ See Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295, 305 (2000) [hereinafter Meck, *A Model Statute*]. A survey published by the American Planning Association in 1998 revealed that ten states made local planning optional, twenty-five states made it conditionally mandatory (*i.e.*, local governments would only be required to develop a plan if they created a planning commission); and fifteen states made local planning mandatory. Cobb, *supra* note 17, at 21-23.

²⁶ See SALKIN, AMERICAN LAW OF ZONING, *supra* note 8 at § 5:1.

²⁷ Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 40 URB. LAW. 549, 549 (2008). The three approaches are referred to as

COMMUNITY BENEFITS AGREEMENTS

165

minority position, the consistency approach has steadily been gaining ground, with the result that “the comprehensive plan has been invested with an increasing role in judging land use regulations or actions so that . . . plans are required and, once in place, are a significant, if not decisive, factor”²⁸

The general goals and policies enunciated in modern comprehensive plans are typically organized into separate elements covering such issues as land use, housing, transportation, public facilities, open space, and economic development.²⁹ The American Planning Association’s Growing Smart Legislative Guidebook, which was intended to provide a modern update of the Standard Act,³⁰ recommends that state planning enabling statutes reflect a three tiered approach to local comprehensive plan elements: the most important elements, such as housing and transportation, should be mandatory; important elements that may not be appropriate for smaller local governments, or for other good reasons, should have an opt-out alternative; and elements that are not essential, but which the state considers appropriate planning topics, should be optional.³¹

The states have taken varying approaches. For example, Florida’s enabling statute is very detailed and includes mandatory, opt-out and optional elements.³² In New York, by

the “unitary view” (plans not required and given no effect), the “planning factor view” (plans are a factor in judging land use regulations), and the “planning mandate view” (plans required and zoning must be consistent with them). *Id.*; *see also* Curtin & Witten, *supra* note 24, at 331–37 (2005) (discussing different state approaches to comprehensive planning).

²⁸ Sullivan, *supra* note 27, at 549.

²⁹ *See* GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-61 to 7-66.

³⁰ Recognizing that “[t]he planning approaches of the 1920s are incapable of meeting the challenges of the twenty-first century[.]” the American Planning Association decided to develop a new set of model guidelines. The product culminated in the Growing Smart Legislative Guidebook, which contains model planning statutes and commentary to help explain their purposes and applications. GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at xxix–xxx.

³¹ *Id.* at 7-62.

³² FLA. STAT. § 163.3177 (2009).

contrast, the state has chosen to provide statutory guidance as to the appropriate elements to be addressed in the comprehensive plan, but the listing of elements is completely optional.³³ Other states fall somewhere in the middle. Arizona specifies both mandatory and optional elements, which may vary depending on the city's size,³⁴ and while Idaho's statute is limited to mandatory elements, it allows local governments to opt out if they can explain why they should not have to address a particular element.³⁵ The elements specified in Maryland's planning legislation are almost all mandatory, with only one optional topic,³⁶ whereas New Hampshire requires only two sections but provides a list of more than a dozen optional elements.³⁷

An important characteristic of the comprehensive planning framework is that plans remain flexible and open to change, allowing the creation of new planning goals and new strategies to achieve existing ones. The Growing Smart Guidebook, recognizing that plans must be continually reassessed in light of changing physical assets and new social paradigms, recommends that local governments review and revise their plans at least once every five years.³⁸ The statutory content of comprehensive plans has similarly expanded over the years. Contemporary elements have focused on such issues as affordable housing,³⁹ alternative transportation,⁴⁰ mixed-use development,⁴¹

³³ N.Y. TOWN LAW § 272-a (2003).

³⁴ ARIZ. REV. STAT. ANN. § 9-461.05 (2009).

³⁵ IDAHO CODE ANN. § 67-6508 (2007).

³⁶ MD. ANN. CODE art. 66B, § 1.04 (2009).

³⁷ N.H. REV. STAT. ANN. § 674:2 (2008).

³⁸ See GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-230 to 7-233.

³⁹ See, e.g., CAL. GOV'T CODE § 65583(c)(1)(B)(4) (Deering 2009); NEV. REV. STAT. ANN. § 278.160(1)(e)(2) (West 2009).

⁴⁰ See, e.g., ARIZ. REV. STAT. ANN. 9-461.05(E)(9); FLA. STAT. § 163.3177(3)(a)(6) (amended 2008); MD. CODE ANN., Art. 66B, § 3.05(a)(4)(iii)(2) (2009); NEV. REV. STAT. ANN. § 278.160(1)(q) (2009); OR. ADMIN. R. 660-012-0020(2); S.C. CODE ANN. § 6-29-510(D)(8) (amended 2007); WASH. REV. CODE § 36.70A.070(6)(a)(vii) (2005); WIS.

COMMUNITY BENEFITS AGREEMENTS

167

environmental protection,⁴² disaster management,⁴³ and water resources.⁴⁴ Community awareness regarding the impacts of human development on climate change has recently prompted some states to amend their planning statutes to include alternative energy and sustainability goals.⁴⁵ Local governments, even where not required, have frequently adopted similar elements in their general plans.⁴⁶

STAT. § 66.1001(2)(c) (2009).

⁴¹ See, e.g., ARIZ. REV. STAT. § 11-821(C)(1)(b) (amended 2008); CONN. GEN. STAT. ANN. § 8-23(c), (d)(1) (2009); FLA. STAT. § 163.3177(6)(a) (2009); NEV. REV. STAT. ANN. § 278.160(1)(f) (2009).

⁴² See, e.g., ARIZ. REV. STAT. §§ 11-821(D)(2), 9-461.05(E)(1) (amended 2008); CAL. GOV. CODE § 65302(d); N.H. REV. CODE ANN. § 674:2(III)(d) (2009); MD. CODE ANN. art. 66B, § 3.05(a)(4)(ix) (amended 2009); MASS. GEN. LAWS ch. 41, § 81D(5) (amended 1998); N.H. REV. STAT. ANN. § 674:2(III)(d). (2009); NEV. REV. STAT. ANN. § 278.160(1)(b) (2009); 53 PENN. STAT. ANN. § 10301(a)(6) (2000); S.C. CODE ANN. § 6-29-510(D)(4) (amended 2005); WIS. STAT. § 66.1001(2)(e) (2009).

⁴³ See, e.g., CAL. GOV. CODE § 65302(g)(2009); FLA. STAT. § 163.3177(7)(h) (2009); N.H. REV. STAT. ANN. § 674:2(III)(e) (2009); NEV. REV. STAT. ANN. § 278.160(1)(l).

⁴⁴ See, e.g., ARIZ. REV. STAT. §§ 9-461.05(D)(5), 11-821(C)(3) (amended 2008); COLO. REV. STAT. § 30-28-106 sec. (3) (IV) (amended 2009); FLA. STAT. § 163.3177(6)(c)(2009); MD. CODE ANN. Art. 66B, § 3.05(a)(4)(vi) (amended 2009); 53 PENN. STAT. ANN. § 10301(b) (2000).

⁴⁵ In 2008, for example, Florida amended its planning enabling act to require local plans to consider methods to discourage urban sprawl, support energy-efficient development patterns, and reduce greenhouse gases. See Act of July 1, 2008, 2008 Fla. Laws ch. 191 (codified as amended at FLA. STAT. § 163.3177). Arizona also requires planning for energy efficiency and renewable energy development. ARIZ. REV. STAT. §§ 11-821 (C)(4), 9-461.05 (E) (10); see also N.J. STAT. § 40:55D-28 (b)(16) (West 2009); COLO. REV. STAT. §§ 30-28-106 (3)(a)(VI), 31-23-206 (1)(f); 53 PENN. STAT. ANN. § 10301.1 (2009).

⁴⁶ Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 121 (2009).

B. Community-Based Planning

Despite a lack of guidance from most state comprehensive planning statutes,⁴⁷ “[t]here has long been a move away from centralized planning in the urban context toward more community-based planning.”⁴⁸ Strongly influenced by the racial and socioeconomic discrimination endemic in the implementation of urban renewal plans, and the Civil Rights movement of the 1960s, Paul Davidoff articulated a theory of “advocacy planning” in 1965 that remains applicable today:

The recommendation that city planners represent and plead the plans of many interest groups is founded upon the need to establish an effective urban democracy, one in which citizens may be able to play an active role in the process of deciding public policy. Appropriate policy in a democracy is determined through a process of political debate. The right course of action is always a matter of choice, never of fact. In a bureaucratic age great care must be taken that choices remain in the area of public view and participation.⁴⁹

The ideals of inclusiveness, democracy and public participation remain fundamental to community-based planning,

⁴⁷ Very few state planning enabling acts specifically provide for the creation of small-scale comprehensive plans. Exceptions include Montana, New Hampshire, and the District of Columbia. MONT. CODE ANN. § 76-1-601(4) (2009) (requiring neighborhood plans to be consistent with the municipality’s growth policy); N.H. REV. STAT. ANN. § 674:2(III)(j) (requiring a master plan to be adopted before any neighborhood plan, and requiring that plan to be consistent with the master plan); D.C. Code § 1-306.03 (2009).

⁴⁸ Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 578; see also James Jennings, *Race, Politics, and Community Development in U.S. Cities: Urban Planning, Community Participation, and the Roxbury Master Plan in Boston*, 594 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13–14 (2004) (discussing the origins of the community-based planning movement).

⁴⁹ Paul Davidoff, *Advocacy and Pluralism in Planning*, 34(4) J. AM. INST. PLANNERS 331 (1965), reprinted in READINGS IN PLANNING THEORY 211–12 (Scott Campbell & Susan S. Fainstein, eds., 2d ed. 2003).

COMMUNITY BENEFITS AGREEMENTS

169

and they have become core principles of the community benefits movement as well.⁵⁰

Community-based planning recognizes that metropolitan plans may not be adequate to meet the needs of individual neighborhoods, as “[p]eople who are close to neighborhood issues can clearly identify community needs and advocate passionately for local concerns.”⁵¹ This type of planning is also premised on a belief that a city’s general plan will be made stronger by encompassing separately developed neighborhood plans.⁵² In other words, it is community-driven, rather than “top down.”⁵³ This type of paradigm shift also requires a reappraisal of the role that professional planners play in the land use process. Gone are the “ostensibly omniscient” non-partisan

⁵⁰ Gross, *supra* note 3, at 37–39.

⁵¹ Department of City Planning, Community Based Planning, http://www.nyc.gov/html/dcp/html/community_planning/index.shtml (providing an overview of the city’s 197-a community planning process) (last visited Dec. 1, 2009).

⁵² Seattle’s neighborhood planning process has been thoroughly evaluated and it was found to be a success. The program received a 93% approval rating in a citizen survey, and the city found that it had positive impacts on the coordination of public entities, provided valuable education to citizens concerning the land use process, encouraged community-building, facilitated ongoing citizen participation, and minimized public opposition and legal challenges. The full report identified problems with the process and made suggestions for improvements. Seattle Office of City Auditor, Revisit Neighborhood Plan Implementation. <http://seattle.gov/audit/docs/PublishedNPI.pdf> (last visited Oct. 16, 2009).

⁵³ See New York City Community-Based Planning Task Force, Planning for All New Yorkers, http://www.mas.org/planningcenter/atlas/pdf/PlanningForAllNewYorkers_PlatformForAllNewYorkers.pdf. The Community-Based Planning Task Force, which is staffed by the Municipal Art Society, “is a coalition of grassroots organizations, citywide civic groups, community boards, elected officials, professional planners, and academics. They were motivated to act after seeing that, in some cases, plans devised by the city did not address neighborhood needs, while, at the same time, there is no effective mechanism to implement the creative, proactive plans that communities developed for their neighborhoods.” The Campaign for Community-Based Planning: Task Force, <http://communitybasedplanning.wordpress.com/task-force/> (last visited Oct. 16, 2009).

planners that implemented the Standard Acts; modern city planners, in addition to developing regulatory standards and synthesizing comprehensive planning goals, should act “as facilitators, community organizers, and gatherers and distributors of information”⁵⁴

Because of the smaller scale of community-based plans, there are often more opportunities for citizen engagement, whether through formal public hearings, or through more informal planning workshops and charettes.⁵⁵ The New York City 197-a planning process, for example, requires a number of public hearings and approval by the planning commission and city council before a community plan can be adopted.⁵⁶ With the help of proactive community boards and civic organizations such as the Municipal Art Society, many plans have been shaped through community outreach efforts and collaborative planning sessions.⁵⁷ Other cities, such as Minneapolis, offer funding and

⁵⁴ Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 269, 292 (2005) [hereinafter Camacho II].

⁵⁵ Many cities have developed community-based planning frameworks, whether referred to as neighborhood plans, specific plans, small area plans, or community-based plans. *See, e.g.*, San Jose Department of Planning, Building & Code Enforcement, Specific Plans, Overview, http://www.sanjoseca.gov/planning/spec_plan/default.asp (last visited Oct. 16, 2009); City of Columbus, Guide to Area and Neighborhood Planning, <http://assets.columbus.gov/development/planning/PlanningGuide.pdf> (last visited Oct. 16, 2009); Minneapolis Community Planning & Economic Development, Neighborhood Guide for Developing Planning Documents, <http://www.ci.minneapolis.mn.us/cped/docs/NeighborhoodGuideforDevelopingPlanning.pdf> (last visited Oct. 16, 2009); Baltimore Neighborhood Planning Program, <http://www.ci.baltimore.md.us/neighborhoods/npp/index.html> (last visited Oct. 16, 2009).

⁵⁶ New York City Charter § 197-a (2008).

⁵⁷ *See, e.g.*, The Municipal Art Society, A Vision for Midtown’s East River Waterfront is Unveiled, Jun. 11, 2007, <https://s12544.gridserver.com/viewarticle.php?id=1731&category=46> (describing the results of a charrette intended to define goals for the development of the East River waterfront); GREENPOINT 197-A COMMITTEE, GREENPOINT 197-A PLAN 6 (1998), available at <http://www.gwapp.org/GWAPP/01-Introduction.PDF>

COMMUNITY BENEFITS AGREEMENTS

171

technical assistance for qualified community organizations that wish to build public participation and develop small area plans.⁵⁸ Innovative methods to involve people from all sectors of the community are also being developed. The San Francisco Planning Department organizes walking and bus tours to encourage discussions about how residents want their neighborhoods to develop,⁵⁹ and San Jose has used an online planning wiki to reach people who cannot attend (or do not want to attend) planning meetings in person.⁶⁰

Community-based, small scale planning has moved a long way from the rigid and disconnected framework set up by the Standard Act, but it shares with more conventional planning models the basic idea that communities benefit from long range planning based on common goals and visions. The comprehensive plan, in the context of community-based frameworks, is a more dynamic tool, however. As law professor Alejandro Esteban Camacho explains:

The collaborative model recognizes that modern land use planning and development are not static enterprises, but rather a continuing process that must be flexible in order to maximize effectiveness. Adaptable planning and permitting, which are natural extensions of a problem solving orientation, draw on a pragmatic notion of decision-making as an ongoing, iterative process of

(“Through public forums, workshops, discussions, petitions, and local newspapers, collaboration between community-based groups, merchants, residents, manufacturers, new and old immigrants, and the young and the old began to revitalize the community by means of this local planning process.”).

⁵⁸ See CITY OF MINNEAPOLIS, COMMUNITY PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT, CITIZEN PARTICIPATION PROGRAM GUIDELINES (2006), *available at* http://www.ci.minneapolis.mn.us/cped/docs/citizen_participation_guidelines.pdf.

⁵⁹ San Francisco Planning Department, Better Neighborhoods, The Planning Process, http://www.sfgov.org/site/planning_index.asp?id=25172 (last visited Oct. 16, 2009).

⁶⁰ Press Release, City of San Jose, San Jose Harnesses Web 2.0 Technology to Help Determine City’s Future and Growth (July 31, 2009), *available at* <http://www.sanjoseca.gov/pdf/WikiplanningReleaseFINAL.pdf>.

design, implementation, and evaluation. Adaptability applies not just to plans and agreements but also to the regulatory process itself; as the process matures, it is evaluated and adjusted to incorporate information such as the value of different forms of participation in facilitating informed decision-making, community cooperation, and valuable land use.⁶¹

Another significant difference between traditional and community-based comprehensive planning relates to the timing and duration of community engagement. Most state enabling statutes indicate that it is sufficient to hold one public hearing during the development of a comprehensive plan, and one hearing during the legislative process for its adoption.⁶² Some states, however, have specifically provided for increased public participation in the preparation and adoption of local plans.⁶³ The American Planning Association's Growing Smart Legislative Guidebook adopts this approach:

The processes for engaging the public in planning are not made clear in many planning statutes. Requirements for public notice, public hearings, workshops, and distribution and publication of plans and development regulations are often improvised. Consequently, the public may find its role and the use of its input uncertain, and it may be suspicious of plans and decisions that emerge. Planning should be doing the opposite; it should be engaging citizens positively at all steps in the planning process, acknowledging and responding to their comments and concerns. Through collaborative

⁶¹ Camacho II, *supra* note 54, at 295.

⁶² See, e.g., N.Y. TOWN LAW § 272-a (2009).

⁶³ See PATRICIA E SALKIN, COLLABORATIVE PROCESSES FOR PREPARING AND ADOPTING A LOCAL COMPREHENSIVE PLAN, *in* MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS, vol. 2 (American Planning Association 1998) (noting a number of statutory approaches to achieving a more collaborative and inclusive planning process, including a requirement in the State of Washington for cities and counties that plan under the Growth Management Act to establish and disseminate a public participation program, see R.C.W. sec. 36.70A.140).

COMMUNITY BENEFITS AGREEMENTS

173

approaches, planning should build support for outcomes that ensure that what the public wants indeed will happen.⁶⁴

Community-based planning, moreover, recognizes that there is a continuing need for public participation throughout the plan's implementation. This is especially true given the increasing popularity of development agreements, planned unit developments (PUDs), special overlay districts, and similar long-term land use controls. Unlike zoning ordinances, which are intended to be applied uniformly, the express purpose of these controls is to make the planning process more flexible and more easily tailored to specific properties. However, while "these negotiated processes provide[] the applicant-developer with substantial opportunities to participate in the decision process, public input . . . has not advanced beyond a traditional command and control model that only provides access to the process at the local agency's final approval of the agreement."⁶⁵ To the extent that these regulatory techniques affect a community's long-term goals, as embodied in the adaptive comprehensive plan, the community arguably should have a more significant role in the decision making process.⁶⁶

C. Environmental Justice

One of the hallmarks of the environmental justice movement⁶⁷ is "meaningful involvement," which requires that:

- (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or

⁶⁴ GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at xlvii.

⁶⁵ Camacho I, *supra* note 1, at 17.

⁶⁶ See Camacho II, *supra* note 54, at 297–99.

⁶⁷ The U.S. Environmental Protection Agency defines environmental justice as "[t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." United States Environmental Protection Agency, Basic Information, <http://www.epa.gov/compliance/basics/ej.html> (last visited Oct. 16, 2009).

health; (2) the public's contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.⁶⁸

While the comprehensive planning framework allows more opportunities for public participation than does an ad hoc zoning process,⁶⁹ and community-based planning can encourage even more public involvement, communities are still overlooked⁷⁰—especially those “discrete and insular minorities” that may be more in need of protection than other groups.⁷¹

In addition to meaningful involvement, the environmental justice movement seeks to ensure fair treatment, meaning “that no group of people should bear a disproportionate share of negative environmental consequences resulting from industrial, governmental and commercial operations or policies.”⁷² Fair treatment also requires an equitable distribution of environmental goods, such as parks, open spaces, and cultural and historical resources. Too often, the low income and minority communities that are excluded from the planning process are the same communities that are burdened by negative environmental impacts and provided with few environmental benefits. One model approach proposes to address this reality by

⁶⁸ *Id.*

⁶⁹ Wideman, *supra* note 2, at 191–92 (“[Comprehensive] plans, especially when they result from an inclusive process, do more to foster public participation and simultaneously decrease the potential for corruption because of the diversity of opinions shaping the decisions. Some argue that ad hoc zoning, in contrast, is vulnerable to domination by factions.”).

⁷⁰ *See, e.g., id.* at 135, 144 (“Indeed, the [New York City Planning] Commission’s processes seem designed to discourage public participation—public hearings take place at ten o’clock on Wednesday mornings, making the hearings inaccessible to those with daytime obligations such as work or family, and calendar notices and subscriptions are available at a large fee.”).

⁷¹ *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

⁷² United States Environmental Protection Agency, Basic Information, <http://www.epa.gov/compliance/basics/ejbackground.html> (last visited Oct. 16, 2009).

COMMUNITY BENEFITS AGREEMENTS

175

recommending the appointment of a public participation coordinator to work with various communities and stakeholders to invite and encourage broader participation.⁷³

It has been noted that, “the next frontier for both the [environmental justice] movement and the focus of environmental justice scholarship . . . is land use planning.”⁷⁴ California has been a pioneer in incorporating environmental justice concerns into the local land use planning process.⁷⁵ Ensuring meaningful participation by all cross-sections of the community is important to give credibility and respect to the process. “Providing for active involvement by people-of-color and low-income residents in developing the goals of a locality’s comprehensive plan, at least as it relates to their own neighborhoods, will help to ensure that local zoning laws or ordinances are developed and/or amended to reflect the desires of these communities.”⁷⁶ As professor Craig Anthony “Tony” Arnold argues, “land use planning and regulation foster choice, self-determination, and self-definition for local neighborhoods, not paternalism that insists that there is a single correct environmental justice goal.”⁷⁷

In 1991, the First National People of Color Environmental Leadership Summit was held. The conference delegates drafted seventeen principles that better define environmental justice, and these principles have served as a pioneering document for the

⁷³ SALKIN, *supra* note 63, at 151.

⁷⁴ Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1 (1998).

⁷⁵ See Chapter 762 of the California Laws of 2001, which required the Governor’s Office of Planning and Research to publish guidelines for the incorporation of environmental justice issues in the general plans of municipalities.

⁷⁶ NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING & ZONING 44 (2003), available at <http://www.napawash.org/Pubs/EJ.pdf>.

⁷⁷ Craig Anthony Arnold, *Land Use Regulation and Environmental Justice*, 30 ENVTL. L. REP. 10427 (June 2000).

rapidly expanding movement.⁷⁸ A number of these principles are directly applicable to community development. For example, Principle Five states: “[e]nvironmental [j]ustice affirms the fundamental right to political, economic, cultural, and environmental self-determination of all peoples.”⁷⁹ This principle is related to both community planning and CBAs because both processes emphasize community-driven planning and often include the desire and promise to improve local economic and environmental situations. Principle Twelve states: “[e]nvironmental [j]ustice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provide[s] fair access for all to the full range of resources.”⁸⁰ This is both an example of an aspirational goal appropriate for inclusion in local comprehensive plans, and in the CBA process, project applicants often offer environmental benefits such as park and open space and green building designs.

The equitable development movement, which is closely related to the environmental justice movement, is grounded in four principles: integrating people strategies and place strategies; reducing local and regional disparities; promoting “double bottom line” investments that produce fair returns for investors as well as benefits for the community, and ensuring meaningful community participation, leadership and ownership.⁸¹ As discussed more fully below, CBAs are noted as one effective strategy to achieving equitable development.⁸²

⁷⁸ PRINCIPLES OF ENVIRONMENTAL JUSTICE, FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, Apr. 6, 1996, <http://www.ejnet.org/ej/principles.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Angela Glover Blackwell, *Equitable Development*, in BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICYMAKERS (Roger A. Clay, Jr. & Susan R. Jones, eds., 2009).

⁸² *Id.*

COMMUNITY BENEFITS AGREEMENTS

177

III. THE DEVELOPMENT OF THE COMMUNITY BENEFITS AGREEMENTS MOVEMENT

The CBA movement originated in California in the late 1990s as a way to make large-scale development projects more accountable to the neighborhoods that they impact.⁸³ The basic model is simple: community groups form a coalition and use its capacity for building public support to persuade the project developer to provide amenities and mitigations desired by local residents, business owners, and employees. After negotiations, agreements between the coalition and the developer are memorialized in a legally enforceable bilateral contract.⁸⁴ In states where local governments are authorized to enter into development agreements, CBAs are often incorporated into these documents so that municipal authorities, in addition to community representatives, have the power to enforce the developer's promises.⁸⁵

A. The Overlap of CBAs and Comprehensive Plans

From the outset, CBA coalitions have aspired to achieve environmental and social justice goals for the communities they represent, seeking to bind developers to commitments for living wages, local hiring policies, and increased environmental standards, among other things.⁸⁶ Like community-based planning

⁸³ Patricia Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 301–306 (discussing the Hollywood and Highland CBA).

⁸⁴ *Id.* at 293–94.

⁸⁵ *Id.* at 295. Development agreements are authorized in about a dozen states. See David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 671 n.32 (2001).

⁸⁶ See generally Julian Gross et al., *Community Benefits Agreements: Making Development Projects Accountable*, GOOD JOBS FIRST & THE CALIFORNIA PARTNERSHIP FOR WORKING FAMILIES (2005), available at

programs, they have drawn attention to the fact that the planning and development review process often fails to address the needs of historically disempowered low income, minority, and non-English speaking communities.⁸⁷ While supporters of community-based planning have sought to change the planning and development review process to make it more inclusive and accessible, the CBA contract model allows community coalitions to bypass the traditional planning process entirely.

Many of the commitments contained in CBAs relate primarily to labor standards and corporate operations (e.g., wage and hiring provisions), but other CBA promises involve the same concerns that have historically been addressed through the planning and zoning process. Provisions relating to land use, housing, transportation, environmental standards, and small business development have all become common in CBAs. In many cases, and particularly in California and other states that recognize development agreements, this has led to positive results, with community, government and private sector representatives working together in a sort of extra-public-private-partnership. Yet, in other cases, CBA coalitions have failed to gain the support of a broad enough cross section of community interests to be considered legitimate. This has been especially problematic in New York, where local governments are not formally authorized to engage in development negotiations.⁸⁸ CBAs negotiated under such circumstances are

<http://www.goodjobsfirst.org/pdf/cba2005final.pdf>.

⁸⁷ Gross, *supra* note 3, at 37–38 (2008) (“Community-based organizations often assert that low-income neighborhoods, non-English-speaking areas, and communities of color have little voice in the development process. Laws concerning public notice and participation are sometimes poorly enforced, and official public hearings are often held during the workday.”).

⁸⁸ In New York, any zoning changes offered by a city in exchange for development amenities must be undertaken according to a general incentive zoning ordinance applying to all property developments. N.Y. GEN. CITY § 81–d (2003). However, development often occurs not with the assistance of local governments, but under the aegis of either a state or local economic development authority. These quasi-public agencies have broad authority to condition various types of subsidies, including zoning overrides, on certain

COMMUNITY BENEFITS AGREEMENTS

179

often depicted as “developer-driven,” and they may interfere with the planning process rather than improving it.

The following subsections describe how various CBAs have incorporated community development issues usually reserved as part of the comprehensive or neighborhood planning process. For purposes of this section, several agreements that are only arguably “CBAs” will be discussed.⁸⁹ These, problematic “CBAs,” which have not encouraged inclusiveness, transparency and accountability in the development review process, are discussed in the next Part.⁹⁰

*1. Meaningful Public Participation and
Equitable Development*

The community benefits movement, like community-based planning and environmental justice, has made meaningful community involvement in the development process a priority goal. The act of forming a coalition and demanding that developers be accountable to the neighborhoods that they impact is in itself a form of public participation, and the agreements obtained through CBA negotiations often include provisions to ensure that coalition groups will continue to be heard in the future.

Under most CBAs, the developer must maintain continued contact with the coalition and keep it apprised of the project’s status. An advisory committee is often set up, including

development conditions, and to memorialize such agreements in bilateral contracts. *See* N.Y. GEN. MUN. § 858 (powers of industrial development agencies); N.Y. UNCONSOL. Ch. 252 § 5 (powers of the Empire State Development Corporation).

⁸⁹ CBA advocates have attempted to define the CBA concept as “a legally binding contract (or set of related contracts), setting forth a range of community benefits regarding a development project, and resulting from substantial community involvement.” Gross, *supra* note 3, at 37. This definition excludes all of the New York CBAs.

⁹⁰ The Gateway Center at Bronx Terminal Market and Columbia University CBAs have been criticized for their lack of community involvement and it has been forcefully argued that they are not, in fact, community benefits agreements. *See id.* at 41–44.

developer and coalition representatives, and this committee may make recommendations on project plans or implementation measures.⁹¹ This type of framework gives community representatives a formal role in the project's development, but a few CBAs have gone a step farther by giving coalitions a larger role in the general planning process. The coalition that negotiated the Ballpark Village CBA, for example, secured \$100,000 from the developer for a professionally prepared economic impact study. The study was directed to address "the effects of new construction and rising land values in downtown San Diego on the Neighboring Communities and [to] recommend specific policy measures to encourage investment as well as protect long-term, Low-Income Local Residents from displacement."⁹² In Pittsburgh, a CBA concerning the new Penguins Arena included funding for the creation of a neighborhood master plan, which will cover issues relating to land use, community services, parks and open space, housing, social and environmental impacts, urban design, education,

⁹¹ The Staples Center CBA, for example, established an Advisory Committee to provide input to the developer about the construction management plan, the traffic management plan, the waste management plan, the neighborhood traffic protection plan, and other environmental concerns (e.g. pedestrian safety, air quality, green building). Staples Center, COMMUNITY BENEFITS AGREEMENT, at sec. XI, A-13 (2001), *available at* <http://www.communitybenefits.org/downloads/Los%20Angeles%20Sports%20and%20Entertainment%20District%20Project.pdf> [hereinafter Staples CBA]; *see also* Dearborn Street Implementation Committee, EXECUTED SETTLEMENT AGREEMENT, at art. 5, <http://www.communitybenefits.org/article.php?id=1464> [hereinafter Dearborn Street CBA]; Hunters Point Implementation Committee, COMMUNITY BENEFITS AGREEMENT, at 14 (2008), <http://www.communitybenefits.org/downloads/Bayview%20Hunters%20Point%20CBA.pdf> [hereinafter Hunters Point CBA]; Pacoima Community Oversight Committee, PLAZA PACOIMA PROJECT COMMUNITY BENEFITS AGREEMENT, at sec. X [hereinafter Pacoima Plaza CBA]; Park East Community Advisory Committee, PARK EAST REDEVELOPMENT COMPACT, <http://www.communitybenefits.org/downloads/PERC.pdf> [hereinafter Park East Redevelopment Compact].

⁹² Ballpark Village Project, COMMUNITY BENEFITS AGREEMENT, at 12 (2005), *available at* <http://www.communitybenefits.org/downloads/Ballpark%20Village%20CBA.pdf> [hereinafter Ballpark Village CBA].

COMMUNITY BENEFITS AGREEMENTS

181

economic development, traffic, arts and culture, historic preservation and uses for vacant property. The Penguins, moreover, agreed to postpone the submission of further development proposals until after the plan's completion.⁹³

The site-specific nature of CBAs also offers an effective way to impose mitigation requirements on developers in order to ensure a more equitable distribution of negative environmental impacts.⁹⁴ Many CBAs, for example, include provisions to limit construction impacts such as diesel exhaust, particulate emissions and dust.⁹⁵ The CBA covering the LAX airport

⁹³ One Hill Neighborhood Coalition & Sports and Exhibition Authority of Pittsburgh, HILL DISTRICT COMMUNITY BENEFITS AGREEMENT, at 5-6 (2008), <http://www.communitybenefits.org/article.php?id=1463> [hereinafter Penguins CBA]. To be specific, the Penguins only agreed to postpone further development proposals until February 2010.

⁹⁴ See Larissa Larsen, *The Pursuit of Responsible Development: Addressing Anticipated Benefits and Unwanted Burdens through Community Benefits Agreements* 6 (Ctr. For Local State, and Urban Policy Working Paper Series, No. 9, 2009) (stating that "spatial inequity is central to the environmental justice movement" and "relevant to the site-specific nature of CBAs") (citing DAVID HARVEY, *JUSTICE, NATURE AND THE GEOGRAPHY OF DIFFERENCE* (Blackwell Publishing 1996)).

⁹⁵ See, e.g., Atlantic Yards, COMMUNITY BENEFITS AGREEMENT, at 35, <http://www.buildbrooklyn.org/pr/cba.pdf> [hereinafter Atlantic Yards CBA] (requiring a plan for minimizing truck idling); Ballpark Village CBA, *supra* note 92, at 6, 17, 22, 24-25, 28, 30 (requiring contaminated soils will not be shipped to treatment facilities in urban neighborhoods or that have adverse compliance histories, restrictions in pesticide use in landscaping, prohibition on onsite incineration, minimized idling, and designated construction routes); Pacoima Plaza CBA, *supra* note 91 (requiring trucks to minimize idling, and requiring the developer to give preference to contractors that use low emission equipment); LAX Master Plan Program, COMMUNITY BENEFITS AGREEMENT, at 17, 20, 22, 28, 29, available at http://www.laxmasterplan.org/commBenefits/pdf/LAX_CBA_Final.pdf [hereinafter LAX CBA] (requiring electrified cargo gates to reduce emissions, \$500,000 to replace high emission equipment, requirement to phasing out airport vehicles and replacing them with low emission or alternative vehicles, no idling, that for diesel equipment best available emissions control devices be used for diesel equipment as well as ultra low sulfur fuel, that rock crushing will be located away from the communities neighboring LAX in order to reduce dust, designated construction routes); Columbia University, COMMUNITY BENEFITS

expansion also included special protections for communities located next to the airport, which had long suffered from the airport's noise and pollution. The airport authority agreed to fund an air quality study and a health impact study, the latter focusing on upper respiratory diseases and hearing loss. Nighttime departures were also restricted to limit noise, and more than \$4 million was allotted for soundproofing nearby homes and schools.⁹⁶ Since the LAX CBA was completed in 2004, air quality monitoring requirements have been included in several other agreements.⁹⁷

For industrial projects that create extensive negative environmental impacts, Good Neighbor Agreements ("GNAs") can also be used to mandate protections for nearby communities.⁹⁸ GNAs use the same community-corporation contract framework as CBAs, but they typically focus on the complex technical mitigation solutions required by heavy industrial facilities such as oil refineries, mines, chemical plants, foundries, and large-scale agricultural operations. Most GNAs require information about plant operations to be made available

AGREEMENT 34, <http://www.columbia.edu/cu/gca/pdf-files/CBAAgreement.pdf> [hereinafter Columbia CBA] (ultra low sulfur fuels); Purina Site Development, Community Benefits Agreement, <http://amy.m.lavine.googlepages.com/FINALPDFLongfellowCBA-Feb.242008.pdf> [hereinafter Longfellow CBA]; COMMUNITY BENEFITS AGREEMENT: CONCERNING THE CHRISTINA AVENUE COMPOSTING FACILITY BY AND BETWEEN PENINSULA COMPOST CO., LLC AND THE S. WILMINGTON COALITION 9-10 (2007) [hereinafter Peninsula Compost CBA] (prohibiting truck traffic in adjacent residential communities and requiring that trucks must be covered).

⁹⁶ LAX CBA, *supra* note 95, at 6.

⁹⁷ In the Gateway Center CBA, for instance, the developer agreed to work with the New York City Department of Environmental Protection to test for particulate emissions. Gateway Center at Bronx Terminal Market, COMMUNITY BENEFITS AGREEMENT 33 [hereinafter Gateway Center CBA], available at http://www.bronxgateway.com/documents/copy_of_community_benefits_agreement/Signed_CBA_2_1_06.pdf; see also Ballpark Village CBA, *supra* note 92.

⁹⁸ See generally CPN, Good Neighbor Agreements: A Tool For Environmental and Social Justice, <http://www.cpn.org/topics/environment/goodneighbor.html> (last visited Oct. 16, 2009) (explaining the purpose, benefits, and general scope of good neighbor agreements).

COMMUNITY BENEFITS AGREEMENTS

183

to the public, and they often require facilities to be open to inspection by designated community members or third parties. Other provisions directly restrict corporate signatories. They may be required to formulate accident prevention and preparedness plans, covering such contingencies as chemical spills and fires, and they may have to implement various pollution prevention strategies. Although some GNAs have included provisions relating to local hiring, union neutrality, and funding for health centers and parks,⁹⁹ they do not usually address the variety of issues covered by most CBAs.¹⁰⁰ Another difference is that some GNAs are voluntary agreements that seek primarily to build relationships and create dialogues about pollution reduction and community health,¹⁰¹ whereas the CBA movement makes enforceability a paramount concern.¹⁰²

The close connection between CBAs, GNAs, and environmental justice is evident in Connecticut's 2008 law regarding environmental justice communities¹⁰³—the only general

⁹⁹ The Unocal GNA included funding for health studies and for a clinic, a commitment to improve the site's landscaping and construct a bike path, funding for vocational training at the local high school, a hiring preference for local employees, \$4.5 million for transportation infrastructure improvements, and \$300,000 annually for 15 years to go into a community fund. Good Neighbor Agreement: Unocal (on file with author). A promise to donate certain conservation easements was included in the Stillwater Mine GNA, as well as a promise that any land acquired by the company after the GNA was signed would be encumbered with a conservation easement restricting residential subdivisions. The GNA also limited permissible locations for mine-sponsored housing. Good Neighbor Agreement: Stillwater Mining Company, <http://www.northernplains.org/files/2005amendedgna> (last visited Dec. 1, 2009).

¹⁰⁰ See Gross, *supra* note 3, at 40, n.22.

¹⁰¹ See, e.g., The Southeast Como Improvement Association: Ritrama Agreement, <http://secomo.org/drupal/index.php?q=ritrama-agreement> (last visited Dec. 1, 2009); The Southeast Como Improvement Association: Rock Tenn. Agreement, <http://secomo.org/drupal/index.php?q=rock-tenn-agreement> (last visited Dec. 1, 2009).

¹⁰² Gross, *supra* note 3, at 39 (2007–2008) (“[L]egal enforceability should be a prerequisite for something to be termed a CBA.”).

¹⁰³ Conn. P.A. 08-94, S. 1, (codified as CONN. GEN. STAT. § 22a–20a (2008)).

state or local law yet to be enacted that attempts to regulate CBA-like agreements.¹⁰⁴ The statute defines a “community environmental benefit agreement” (“CEBA”) as:

[A] written agreement entered into by a municipality and an owner or developer of real property whereby the owner or developer agrees to develop real property that is to be used for any new or expanded affecting facility and to provide financial resources for the purpose of the mitigation, in whole or in part, of impacts reasonably related to the facility, including, but not limited to, impacts on the environment, traffic, parking and noise.¹⁰⁵

Unlike CBAs, these CEBA's are only implicated in the construction of “affecting facilities,” which are defined as heavy industrial facilities that are major pollution generators.¹⁰⁶ While a local government can enter into a CEBA regarding any affecting facility, the law's requirements apply only when an affecting facility is being located in an “environmental justice community,”¹⁰⁷ defined as a census tract designated as distressed under state law or with at least 30% of residents at or below 200% of the poverty line.¹⁰⁸ When the law does apply, the developer must consult with the local government regarding the need for a CEBA,¹⁰⁹ which may include provisions for on and off site mitigations and “[f]unding for activities such as environmental education, diesel pollution reduction, construction

¹⁰⁴ In Milwaukee and Atlanta, local laws have been passed requiring community benefits to be included in certain developments. While the Connecticut legislation is a general law, applying throughout the state, both the Milwaukee and Atlanta CBA are limited to specific sites within their jurisdictions. See Salkin & Lavine, *supra* note 83, at 319; Amy Lavine, *Atlanta Beltline Community Benefits*, COMMUNITY BENEFITS AGREEMENTS BLOG, May 19, 2008 (updated Aug. 16, 2009), <http://communitybenefits.blogspot.com/2008/05/atlanta-beltline-community-benefits.html>.

¹⁰⁵ CONN. GEN. STAT. § 22a-20a(a)(4) (2008).

¹⁰⁶ CONN. GEN. STAT. § 22a-20a(a)(2) (2008) (defining “affecting facility”).

¹⁰⁷ CONN. GEN. STAT. § 22a-20a(b)(1) (2008).

¹⁰⁸ CONN. GEN. STAT. § 22a-20a(a)(1).

¹⁰⁹ CONN. GEN. STAT. § 22a-20a(b)(1).

COMMUNITY BENEFITS AGREEMENTS

185

of biking and walking trails, staffing for parks, urban forestry, support for community gardens or any other negotiated benefit to the environment in the environmental justice community.”¹¹⁰ The developer is also required to file a “meaningful public participation plan,”¹¹¹ which should cover issues relating to “appropriate opportunities” for public participation, methods for seeking out and facilitating public input, and assurances that public comments will be considered as part of the agency’s decision.¹¹²

*2. Sustainable Development and
Pedestrian/Transit Oriented Design*

As the public’s awareness of sustainability issues has grown in recent years, planners have increasingly begun to incorporate into community plans provisions encouraging green building, energy and water efficiency, alternative transportation and alternative energy.¹¹³ CBAs, too, have attempted to address many of these issues.

The most common sustainability features found in CBAs relate to green building standards. Typically, they require the developer to meet the eligibility requirements for LEED certification.¹¹⁴ Some require actual certification, usually at the Silver level or lower, while others require only that the project be eligible for LEED certification.¹¹⁵ Specific green building

¹¹⁰ CONN. GEN. STAT. § 22a-20a(c).

¹¹¹ CONN. GEN. STAT. § 22a-20a(b)(1) (2008).

¹¹² CONN. GEN. STAT. § 22a-20a(a)(3) (2008) (defining “meaningful public participation”).

¹¹³ Salkin, *supra* note 46.

¹¹⁴ U.S. Green Building Council, LEED, <http://www.usgbc.org/DisplayPage.aspx?CategoryID=19> (last visited Oct. 16, 2009).

¹¹⁵ See, e.g., Pacoima Plaza CBA, *supra* note 91 (requiring LEED silver); Penguins CBA, *supra* note 93, at 17 (requiring LEED certification); LAX CBA, *supra* note 95, at 29 (requiring LEED to the extent practicable); Longfellow CBA, *supra* note 95, at 8 (requiring LEED or Minnesota standards); Gateway CBA, *supra* note 97, at 31 (requiring LEED Silver goal); Columbia CBA, *supra* note 95, at 32 (requiring minimum LEED

features may also be set forth in the CBA, whether part of the LEED system or not. The Ballpark Village CBA, for example, requires that windows must use bird-reflective glass,¹¹⁶ and the Columbia University CBA specifies that the university will “evaluate the use of green roof technology and managed vegetated areas” as a way to control storm water runoff.¹¹⁷

The Minneapolis Longfellow Station CBA stands out as an example of sustainability planning in CBAs because of its emphasis on transit oriented design (TOD) and amenities for pedestrians and bicyclists. Similar to the broad goals and principles that are typically included in comprehensive plans, the CBA recites a list of guiding TOD principles,¹¹⁸ as well as more specific project requirements. In order to promote alternative transportation and advance the project’s TOD goals, the developer agreed in the CBA to provide free one-month transit passes to residential tenants and to ensure that transit fare can be purchased onsite.¹¹⁹ The development must also include bicycle storage and parking facilities, and dedicated parking spaces for Zipcars.¹²⁰ To discourage automobile use, the CBA limits parking to a maximum of one space per residential unit and 4.5 spaces for every 1,000 square feet of commercial space, and it requires parking spaces to be leased separately from residential units.¹²¹ Walkability and “placemaking” principles are also included in the Longfellow Station CBA to promote human scale

silver); Ballpark Village CBA, *supra* note 92, at 5 (requiring LEED certified minimum, developer must try for better); Atlantic Yards CBA, *supra* note 95, at 35 (requiring “prudent environmentally sound building practices”).

¹¹⁶ Ballpark Village CBA, *supra* note 92, at 7. It also requires pest management, including using naturally pest-repellent vegetation and less toxic pesticides. *Id.* at 31.

¹¹⁷ Columbia CBA, *supra* note 95, at 34.

¹¹⁸ Longfellow CBA, *supra* note 95, at 5–6. The guiding principles include: urban intensity; height, density, and public/green space; economic vitality; urban form; urban uses; retail location; reverse the normal parking rules; walkability; transit connectivity; and neighborhood connectivity.

¹¹⁹ Longfellow CBA, *supra* note 95, at 14.

¹²⁰ *Id.* at 14–15

¹²¹ *Id.* at 14–15

COMMUNITY BENEFITS AGREEMENTS

187

design.¹²² Pedestrians are favored by requirements for paths,¹²³ wayfinding signs,¹²⁴ landscaped public gathering spaces,¹²⁵ and safety measures such as traffic calming infrastructure.¹²⁶

Sustainability principles also play a significant role in the Columbia University CBA, which states that:

In decisions regarding the Project Area, [the university] shall be guided by the following goals: protecting the biosphere; the sustainable use of renewable natural resources; the reduction of waste and the safe disposal of waste; energy conservation; greenhouse gas emission reduction; environmental risk reduction to [Columbia] staff, students and the surrounding community; and correcting damage, if any; reducing the use of products that cause environmental damage; and reducing impacts to air quality in the surrounding area, with a particular sensitivity to the impacts to people suffering from asthma.¹²⁷

Among other things, the CBA includes promises to use energy efficient appliances, mitigate the heat island effect, reduce storm water runoff, and plant street trees.¹²⁸

¹²² *Id.* at 18–19. Pedestrian-scale design requirements are also included in the Gateway Center at Terminal Market CBA. Gateway Center CBA, *supra* note 97, at 32–33, 35 (providing specifically for street trees, lighting, wide sidewalks).

¹²³ Longfellow CBA, *supra* note 95, at 15.

¹²⁴ *Id.* at 16; *see also* Dearborn Street CBA, *supra* note 91, at 7 (providing for way-finding signs).

¹²⁵ Longfellow CBA, *supra* note 95, at 16–17.

¹²⁶ *Id.* at 14–15.

¹²⁷ Columbia CBA, *supra* note 95, at 32.

¹²⁸ *Id.* at 32–33; *see also* Ballpark Village CBA, *supra* note 92, at 7 (providing for “commercially feasible” development of passive infiltration for storm water); SunQuest, COMMUNITY BENEFITS AGREEMENT, at 3, <http://www.communitybenefits.org/article.php?id=1474> [hereinafter SunQuest CBA] (requiring roofs and pavement must be light in color to avoid the heat island effect); Dearborn Street CBA, *supra* note 91, at 10–11 (ensuring construction of permeable sidewalks).

3. Community Facilities and Neighborhood Improvements

Comprehensive plans often contain a community facilities element that discusses public buildings, infrastructure, and “those facilities that contribute to the cultural life or physical and mental health and personal growth of a local government’s residents (e.g., hospitals, clinics, libraries, and arts centers).”¹²⁹ Most CBAs include some type of community amenity that would fall within this planning area, such as dedicated space and funding for community centers,¹³⁰ neighborhood improvements,¹³¹ open/public spaces,¹³² child care facilities¹³³ and medical

¹²⁹ GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-111.

¹³⁰ See, e.g., Dearborn Street CBA, *supra* note 91, at 6, 9-10 (5,000 square feet for community nonprofits and community events; \$200,000 for a community center and Vietnamese cultural center); Longfellow CBA, *supra* note 95, at 17 (space for public information display, a community room for meeting, and 500 square feet for nonprofits at reduced rent); Columbia CBA, *supra* note 95, at 38-39 (space for Community Board 9); MARLTON SQUARE REDEVELOPMENT PROJECT DEVELOPER COMMUNITY BENEFITS PROGRAM 3, available at http://www.communitybenefits.org/downloads/cba_marlton_square.pdf (space for community meetings and other community activities); Penguins CBA, *supra* note 93, at 11 (commitment to assist YMCA to develop and sustain a multi-purpose center for youth, family and seniors in the community); Atlantic Yards CBA, *supra* note 95, at 28 (developer will provide child care, youth and senior centers).

¹³¹ Dearborn Street CBA, *supra* note 91, at 9 (\$50,000 for right of way improvements); SunQuest CBA, *supra* note 128, at 4-5 (\$150,000 for a neighborhood improvement fund; youth center).

¹³² Staples CBA, *supra* note 91, at A-2-3 (needs assessment and \$1 million for parks; street level public plaza); Longfellow CBA, *supra* note 95, at 16-17 (landscaped public gathering places); Atlantic Yards CBA, *supra* note 95, at 30 (6 acres of open space).

¹³³ Columbia CBA, *supra* note 95, at 38 (5,000 square feet for a nonprofit day care center for income eligible families); North Hollywood Mixed-Use Redevelopment Project, COMMUNITY BENEFITS PROGRAM 2 (Nov. 2001), available at <http://amy.m.lavine.googlepages.com/NoHo20CBA.pdf> (developer will build onsite childcare center, find a tenant, and require the tenant to provide care for at least 50 low-moderate income families).

COMMUNITY BENEFITS AGREEMENTS

189

centers.¹³⁴ Several CBAs also require the developer to either market project space to businesses needed by the community, such as grocery stores and banks,¹³⁵ or to restrict the availability of project space to businesses like pawnshops that have been deemed detrimental to the community.¹³⁶

4. Housing

Housing is an important component in both comprehensive plans¹³⁷ and CBAs. When CBAs cover projects involving substantial housing components, they typically require the developer to build more affordable units than would otherwise be required.¹³⁸ As an alternative to including affordable housing

¹³⁴ See, e.g., Columbia CBA, *supra* note 95, at 39 (funding to expand existing medical facilities); Atlantic Yards CBA, *supra* note 95, at 26 (developing a health care center providing comprehensive quality primary care).

¹³⁵ Pacoima Plaza CBA, *supra* note 91, at 9 (developer will market space to traditional banks); Penguins CBA, *supra* note 93, at 8 (\$2 million for a grocery store that must include a pharmacy and a selection of healthy foods); Ballpark Village CBA, *supra* note 92, at 12 (developer will use good faith efforts to rent to a grocery store).

¹³⁶ See Dearborn Street CBA, *supra* note 91, at 7 (no payday lenders or pawnshops); Pacoima CBA, *supra* note 95 (no payday lenders); Gateway Center CBA, *supra* note 97, at 34 (no Wal-Mart); Ballpark Village CBA, *supra* note 92, at 18 (no hotel); Longfellow CBA, *supra* note 95, at 12–13 (no big boxes or stores that do not accept food stamps); Front Range Economic Strategy Center, GATES-CHEROKEE REDEVELOPMENT COMMUNITY BENEFITS AGREEMENT (2008), <http://communitybenefits.blogspot.com/2008/01/gates-cherokee-redevelopment-cba.html> [hereinafter Gates Cherokee CBA] (no big boxes).

¹³⁷ See GROWING SMART LEGISLATIVE HANDBOOK, *supra* note 1, at ch. 4 (housing element).

¹³⁸ See Steve Brandt, *Minneapolis Neighborhood Makes a Deal and History*, STARTRIBUNE.COM, Mar. 4, 2008, <http://www.startribune.com/local/16240642.html> (noting that the Longfellow Station CBA requires more affordable housing than the Minneapolis inclusionary zoning ordinance). If a project is not subject to inclusionary housing minimums, CBAs generally call for the developer to maximize the amount of affordable housing included in the project. See, e.g., Dearborn Street CBA, *supra* note 91, at 8 (200 of 400

within the project, some developers have committed to building offsite affordable housing in order to mitigate the displacement and/or gentrification caused by the project.¹³⁹

Most CBA housing provisions specify levels of housing affordability and the length of time for which units must remain affordable.¹⁴⁰ Some provide requirements for the types of

units must be affordable); Staples CBA, *supra* note 91, at A-9 (20% affordable); Longfellow CBA, *supra* note 95, at 7 (30% affordable housing); Gates Cherokee CBA, *supra* note 136 (10% of for sale units and 20% of rental units); Ballpark Village CBA, *supra* note 92, at 10 (developer will maximize affordable housing).

¹³⁹ See, e.g., Columbia CBA, *supra* note 95, at 10 (\$20 million for affordable housing to address the impact of the project); Ballpark Village CBA, *supra* note 92, at 11 (\$1.5 million for affordable housing in neighboring communities); Hunters Point CBA, *supra* note 91, at 8 (\$27.3 million for a "Community First Housing Fund" to buy market rate properties inside and outside the project for income eligible residents); Grand Avenue Committee, GRAND AVENUE COMMUNITY BENEFITS PROJECT (2008), <http://www.grandavenuecommittee.org/community.html> [hereinafter *Grand Avenue*]

(revolving loan fund of at least \$750,000 for affordable housing development); Staples CBA, *supra* note 91, at A-11 (\$650,000 revolving loan fund for affordable housing development).

¹⁴⁰ Dearborn Street CBA, *supra* note 91, at 9 (120 of the 200 units must be affordable at AMI 50% and the other 80 must be affordable at AMI 80%; 50 years affordability); Hunters Point CBA, *supra* note 91, at 7 (providing a schedule of housing affordability requirements); *Grand Avenue*, *supra* note 139 (half of the affordable units will be priced at not more than 80% AMI, and the other half at 50%; affordability is required for 55 years for rental units and 45 years for for sale units); Staples CBA, *supra* note 91, at A-10 (30% of affordable units will be for 50% AMI, 35% will be for 51-60% AMI, and 35% will be for 61-80% AMI; minimum 30 years affordability); Longfellow CBA, *supra* note 95, at 7 (20% of all units to be affordable at 50% AMI and 10% to be affordable at 40-60% AMI; affordability required for 30 years); Gates Cherokee CBA, *supra* note 136 (units must remain affordable for at least 40 years); Ballpark Village CBA, *supra* note 92, at 10 (average AMI of affordable units can be no more than 47%); Atlantic Yards CBA, *supra* note 95, at 24 (units are to be affordable for 30 years); Oak to Ninth Community Benefits Coalition and the Redevelopment Agency, OAK TO NINTH COOPERATION AGREEMENT, at 3 (2006) <http://www.urbanstrategies.org/programs/econopp/documents/FinalOaktoNinthCooperationAgreementwithCoalitionfinalexecution.pdf> [hereinafter Oak to Ninth CBA] ("[A]ll Project

COMMUNITY BENEFITS AGREEMENTS

191

affordable units to be included in the development (e.g., different unit sizes, rental versus for sale units, senior restricted housing, etc.)¹⁴¹ and the location of affordable units, both in relation to the project and in relation to other affordable housing units.¹⁴² Other CBAs give preferences for affordable units to people displaced by the project, low-income residents or local residents.¹⁴³ CBAs may also seek to expedite the construction of

Units shall be provided at no greater than an Affordable Rent to households earning from 25 percent to 60 percent of Area Median Income for at least 55 years.”).

¹⁴¹ See, e.g., Oak to Ninth CBA, *supra* note 140, at 3 (no more than 25% of affordable units can be senior restricted, at least 30% must be three-bedroom units, and at least 20% must be two-bedroom units); Longfellow CBA, *supra* note 95, at 7 (requiring a mix of studios, and one, two and three bedroom units); Gates Cherokee CBA, *supra* note 136 (requiring 10% of for sale units and 20% of rentals to be affordable); Dearborn Street CBA, *supra* note 91 (requiring 50 units of affordable “family housing”); Ballpark Village CBA, *supra* note 92, at 10–11 (some units in the offsite affordable housing project must be reserved for seniors); Atlantic Yards CBA, *supra* note 95, at 25 (10% of affordable units reserved for seniors); Hunters Point CBA, *supra* note 91, at 9–10 (average affordable unit size of 2.5 bedrooms and requiring some units to be for seniors or disabled residents).

¹⁴² See, e.g., Longfellow CBA, *supra* note 95, at 7 (prohibiting any one building from containing more than 65% affordable housing so as “to prevent a concentration of affordable housing in any particular building in the development”); Gates Cherokee CBA, *supra* note 136 (buildings are to be inclusionary); Ballpark Village CBA, *supra* note 92, at 10 (75% of the affordable units at one building will be 2 or 3 bedroom units, other building will be devoted to single rooms and transitional housing); Staples CBA, *supra* note 91, at A-10 (affordable units will be either on or offsite, but offsite units will be within a 3 mile radius); Oak to Ninth CBA, *supra* note 140, at 5 (permitting the redevelopment agency to construct a maximum of 77 offsite affordable units and limiting them to the immediate area).

¹⁴³ See, e.g., Staples CBA, *supra* note 91, at A-16 (giving priority given to displaced residents); Ballpark Village CBA, *supra* note 92, at 11 (requiring that 10% of the restricted units will be targeted to households with at least one person who has worked in downtown San Diego for one year, 60% shall be targeted to people from neighboring communities, 30% may be targeted to anybody); Hunters Point CBA, *supra* note 91, at 9–10 (requiring priority marketing for the affordable units for existing local residents, displaced residents, etc.); *Grand Avenue*, *supra* note 139 (giving priority for rentals for displaced residents).

affordable units by requiring them to be finished before work is started on other parts of the project.¹⁴⁴

5. Aesthetics and Building Design

Community character is often shaped by a neighborhood's "look," and for this reason, aesthetics and architecture often play a role in community planning.¹⁴⁵ While most CBAs do not contain detailed aesthetic or design regulations, a number of CBAs do address specific aesthetic issues. Several include limitations on signs and blank facades, both of which can give a community a dull or garish appearance.¹⁴⁶ For similar reasons, the Pacoima Plaza CBA prohibits barred windows,¹⁴⁷ the Peninsula Compost CBA requires project facilities to be screened from view,¹⁴⁸ and the Longfellow Station agreement prohibits vinyl siding and drive through windows.¹⁴⁹

In contrast to these preemptive measures, other CBAs include provisions intended to affirmatively foster community character, such as space and funding requirements for public

¹⁴⁴ See, e.g., Oak to Ninth CBA, *supra* note 140, at 5 (requiring construction of any offsite units to be commenced prior to commercial parts of the project); Hunters Point CBA, *supra* note 91, at 7; Dearborn Street CBA, *supra* note 91, at 8 (stating the city will not be obligated to grant a certificate of occupancy for the retail space until the developers can show that construction has commenced on at least 200 housing units, including at least 80 affordable units; developer agrees that within 4 years of the issuance of the certificate of occupancy, construction must be commenced on the other 200 units).

¹⁴⁵ See GROWING SMART LEGISLATIVE HANDBOOK, *supra* note 1, at 7-168 to 7-172 (community design element).

¹⁴⁶ Gateway Center CBA, *supra* note 97, at 32 (requiring that there not be any blank walls); Dearborn Street CBA, *supra* note 91, at 6 (requiring facades of stores are unique and distinct and specific sign restrictions); Ballpark Village CBA, *supra* note 92, at 6.

¹⁴⁷ Pacoima Plaza CBA, *supra* note 91, at 7.

¹⁴⁸ See also Longfellow CBA, *supra* note 95, at 19 (requiring screening of machinery, loading docks, and trash areas).

¹⁴⁹ *Id.*

COMMUNITY BENEFITS AGREEMENTS

193

art.¹⁵⁰ Recognizing the unique character of Seattle's Little Saigon neighborhood, the Dearborn CBA (although the project was later cancelled¹⁵¹) included \$200,000 for the construction of a Vietnamese cultural center, and provisions intended to help existing small businesses run by Vietnamese merchants.¹⁵² Similarly, Columbia agreed to preserve several of the neighborhood's historic buildings and to help create a multi-disciplinary historic preservation and development strategy.¹⁵³

"Placemaking" is an important part of the Longfellow Station CBA. While the design guides are in part intended to promote walking and transit use, as noted above, they are also intended to "encourage interaction and connection at a human scale . . . through creation of a welcoming, safe, and accessible environment."¹⁵⁴ The project is to "be urban, not suburban, in feel and function" and buildings must be "designed to have a pedestrian feel at street level. Scale, massing and relationships of buildings shall be designed to relate to the users (not overwhelm the users)."¹⁵⁵ Additionally, the project is to be designed so as to facilitate outdoor dining and shopping, and high quality exterior building materials are required in order to

¹⁵⁰ See, e.g., Pacoima Plaza CBA, *supra* note 91 (developer will comply with CRA's public art policy); Columbia CBA, *supra* note 95, at 36 (5,000 square feet of space for use by local artists); Ballpark Village CBA, *supra* note 92, at 12 (requires a good faith effort to use local artists); Longfellow CBA, *supra* note 95, at 17 (space for public art).

¹⁵¹ Emily Heffter, *\$300M Project at Seattle Goodwill Site Canceled*, SEATTLE TIMES, Apr. 24, 2009, http://seattletimes.nwsources.com/html/localnews/2009116421_webgoodwill24.html.

¹⁵² Dearborn Street CBA, *supra* note 91, at 6, 9–10 (70,000 square feet set aside for small retail stores that each occupy less than 5,000 square feet and at least 5,000 square feet to one or more non-profit organizations who primarily provide services to the Vietnamese Community); see also Stuart Eskenazi, *Coalition Talks Reach Deal on Goodwill Site*, SEATTLE TIMES, http://seattletimes.nwsources.com/html/localnews/2008152450_dearborn02m.html.

¹⁵³ Columbia CBA, *supra* note 95, at 39–40.

¹⁵⁴ Longfellow CBA, *supra* note 95, at 18.

¹⁵⁵ *Id.* at 19.

establish “a sense of permanency.”¹⁵⁶

6. *Parking & Traffic*

CBAs do not generally include detailed transportation plans, but some agreements have included provisions relating to parking, traffic and transit facilities. (Unlike the TOD provisions described above, which are intended to promote transit and discourage driving, these transportation requirements are aimed at mitigating congestion and improving infrastructure.) Examples of transportation-related community benefits include the establishment of a residential parking permit program,¹⁵⁷ the construction of additional parking facilities,¹⁵⁸ and subway, bus stop and other infrastructure improvements.¹⁵⁹ The Columbia CBA also authorizes funding for a transportation needs assessment study, which may cover such issues as public transportation, parking needs, traffic calming devices, and air quality.¹⁶⁰

7. *Small Business Development*

Comprehensive plans frequently address economic development,¹⁶¹ and “[a] growing number of communities are including in their comprehensive plans an intention to preserve and strengthen locally owned businesses, limit commercial development to the downtown or other existing retail districts,

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., Staples CBA, *supra* note 91, at A-3.

¹⁵⁸ See, e.g., Peninsula Compost CBA, *supra* note 95, at 4 (neighborhood parking lot); Columbia CBA, *supra* note 95, at 36 (adding 72 public parking spaces).

¹⁵⁹ See, e.g., Dearborn Street CBA, *supra* note 91, at 9 (\$150,000 for traffic mitigation); Columbia CBA, *supra* note 95, at 35–36 (subway and bus stop improvements).

¹⁶⁰ Columbia CBA, *supra* note 95, at 35.

¹⁶¹ See, e.g., GROWING SMART LEGISLATIVE GUIDEBOOK, *supra* note 1, at 7-127 to 7-135.

COMMUNITY BENEFITS AGREEMENTS

195

and restrict the proliferation of corporate chains.”¹⁶² With or without the guidance of such policies, community coalitions have often sought CBA benefits to encourage the growth of small and local businesses.

Many CBAs set goals for awarding contracts to local businesses, and these provisions usually include a preference for minority and women owned businesses—frequently referred to as minority-owned business enterprises (“MBEs”), women-owned business enterprises (“WBEs”) or minority-women-owned business enterprises (“MWBEs”).¹⁶³ CBAs relating to projects with retail or commercial components have included space set-asides for small and local businesses¹⁶⁴ and in a few CBAs, big boxes and large chain stores have been effectively prohibited by retail size caps.¹⁶⁵

¹⁶² See New Rules, Comprehensive Plans, <http://www.newrules.org/retail/rules/comprehensive-plans> (last visited Dec. 1, 2009).

¹⁶³ See, e.g., Atlantic Yards CBA, *supra* note 95, at 17–18 (goals to award at least 5% of preconstruction contracts (e.g., architectural, engineering, legal) to MBEs and 3% to WBEs (by total value of contracts), goals to award at least 20% of construction contracts to MBEs and 10% to WBEs (by total value of contracts), with a preference for community based businesses, goals to award at least 20% of post construction purchasing and service contracts to MWBEs).

¹⁶⁴ See, e.g., Atlantic Yards CBA, *supra* note 95, at 19 (15% set aside for small businesses, with below market rents); Dearborn Street CBA, *supra* note 91, at 6 (70,000 square feet set aside for small retail stores greater than 5,000 square feet and at least two non-formula businesses); Gateway Center CBA, *supra* note 97, at 29 (18,000 square feet for small businesses); Longfellow CBA, *supra* note 95, at 12–13 (national chains can occupy no more than 70% of the project and 10% must be reserved for “community based small businesses”); San Jose CIM Project Community Benefits Agreement 121–22 (Dec. 12, 2002), <http://www.communitybenefits.org/article.php?id=1476> (goals of 30% San Jose retailers and 30% regional retailers, with a set aside of 10% of the available retail space for existing small business in the downtown); Columbia CBA, *supra* note 95, at 22 (18,000 square foot set aside for small businesses).

¹⁶⁵ See, e.g., Gates Cherokee CBA, *supra* note 136, at 2 (size cap at 75,000 square feet); Gateway Center CBA, *supra* note 97 (manuscript at 34) (no Wal-Mart); Longfellow CBA, *supra* note 95, at 19 (large retail cap at 30,000 square feet); Columbia CBA, *supra* note 95, at 22 (retail rental size

Other benefits to small and local businesses include low interest loan programs,¹⁶⁶ provisions requiring contracts to be unbundled (to level the playing field for smaller businesses),¹⁶⁷ and programs to better inform local businesses about the project's business opportunities.¹⁶⁸ The Penguins Arena CBA, for example, will seek to increase community business involvement in the project by requiring the developer to notify the coalition of pre-bid activities and meetings with contractors. Local business owners will also be invited to business opportunity workshops provided by the Penguins, which will help them to take advantage of opportunities for concessions, retail space, suppliers, vendors and subcontractors.¹⁶⁹

IV. DO PRIVATE CBAs USURP THE PUBLIC PLANNING PROCESS?

The inclusion in CBAs of community amenities that resemble items normally found in comprehensive plans and/or implementing regulations raises a number of critical community planning issues that have not yet been addressed.

A. Are CBAs Another Type of Community-Based Plan?

When considered as a whole, CBAs are not synonymous with comprehensive land use plans or smaller scale community-based plans. CBAs involve issues not contemplated by planning documents, such as increased wage requirements, union neutrality, local hiring goals, and job training programs. These provisions, moreover, are core issues of the community benefits movement.¹⁷⁰ CBA coalitions also have the potential to

cap at 2,500 square feet).

¹⁶⁶ See, e.g., Atlantic Yards CBA, *supra* note 95, at 20; LAX CBA, *supra* note 95, at 31 (revolving loan fund for small businesses).

¹⁶⁷ See, e.g., Atlantic Yards CBA, *supra* note 95, at 20.

¹⁶⁸ See, e.g., Atlantic Yards CBA, *supra* note 95, at 20–21 (targeted outreach to local small businesses and “Meet the General Contractor” meetings, a series of technical assistance workshops for local MWBEs).

¹⁶⁹ See Penguins CBA, *supra* note 93, at 12–13.

¹⁷⁰ See, e.g., CommunityBenefits.org, A New Urban Agenda for

COMMUNITY BENEFITS AGREEMENTS

197

encourage more public participation than traditional planning processes by building a sense of community empowerment. Rather than the development of the community vision being facilitated by a government employed planning staff, CBAs are usually developed and facilitated by members of the impacted community.¹⁷¹ Community-based planning and coalition organizing have much in common, however, as both seek out diverse stakeholders using non-conventional outreach techniques.

As project-specific documents, the impact of CBAs is also spatially limited,¹⁷² unlike comprehensive plans, which apply to

America: Rebuild the Middle Class, <http://communitybenefits.org/downloads/A%20New%20Urban%20Agenda%20for%20America.pdf> (last visited Oct. 15, 2009) (“The standard menu of progressive urban policy initiatives focuses on addressing identified needs of poor families by reestablishing the social safety net and improving job training and education programs. The new urban agenda adds an important and often missing component by addressing one of the main causes of urban poverty: the prevalence of low-paying, low-quality employment and the dearth of middle-class job opportunities.”).

¹⁷¹ However, in states where the government is more directly involved with CBAs, such as in California, the planning staff may be more intimately involved in the process. For example, staff at the Los Angeles Community Redevelopment Agency are routinely involved in the development of CBAs.

¹⁷² The requirement that CBAs be limited to one development is intended to distinguish the tool from:

redevelopment plans, general plans, specific plans, zoning laws, and other land use documents that might encourage or require specified community benefits for particular geographic areas. This requirement also excludes from the definition of CBA single-issue policies that cover a range of projects, such as typical inclusionary housing policies or local hiring policies.

Gross, *supra* note 3, at 39. However, legislative CBA provisions may require multiple developers to provide specific community benefits lobbied for by the community, as in the Milwaukee Park East Redevelopment Compact. This document requires the developers of county-owned land to provide living wages and job training programs, and to use green building techniques. Park East Redevelopment Compact, *supra* note 91. See also Amy Lavine, *Milwaukee Park East Redevelopment CBA*, COMMUNITY BENEFITS AGREEMENTS BLOG, <http://communitybenefits.blogspot.com/2008/01/milwaukee-park-east-redevelopment-cba.html> (Jan. 3, 2008). Alternatively, a legislative CBA provision may require multiple developers to negotiate CBAs in the future. This approach was taken in relation to Atlanta’s Beltline

all of the residents and businesses in a given city or metropolitan area. CBAs that involve commitments of planning-related amenities and accommodations may be placed on the spectrum close to small-scale comprehensive plans, especially when they include the types of broad policy statements that are commonly used to guide community-based plans.

Despite the similarities between CBAs and small-scale community-based plans, the unregulated CBA negotiation process should not be permitted to displace thorough and accountable government planning. In this regard, the CBA for Atlantic Yards, a proposed arena project and mega-development located in Brooklyn, has been particularly maligned. The CBA has demonstrated that specious appearances of community involvement can legitimate departures from the normal planning process when, in fact, the CBA's effect may be to make development projects less accountable, less transparent, and more exclusionary than they otherwise would be.

In the case of Atlantic Yards, the project's government partner, a state economic development authority, overrode all of the local zoning and planning laws in order to expedite the development.¹⁷³ As a result, the project's approval was left primarily to the state authority's unelected board,¹⁷⁴ with no city

project, requiring developers that accept financial incentives to "reflect, through the development agreements or funding agreements that accompany such projects, certain community benefit principles[.]" ATLANTA, GA., ORDINANCE 05-O-1733 § 19 (2005).

¹⁷³ Lance Freeman, *Atlantic Yards and the Perils of Community Benefits Agreements*, PLANETIZEN, May 5, 2007, <http://www.planetizen.com/node/24335>. Authority for the override of local zoning and planning laws is found in the New York State Urban Development Corporation Act, N.Y. UNCONSOL. LAW § 6255 (2006).

¹⁷⁴ The project also required a land deal with the Metropolitan Transportation Authority, another unelected authority, as well as approvals from the Public Authorities Control Board ("PACB"), which does include several representatives from the state legislature. See N.Y. State Gov't website, *About the Public Authorities Control Board*, <http://www.budget.state.ny.us/agencyGuide/pacb/aboutPACB.html>. The PACB's role is limited, however, to approving project financing; it is not authorized to make planning and development decisions.

COMMUNITY BENEFITS AGREEMENTS

199

officials ever having had a chance to review the project and condition or reject it.¹⁷⁵ The CBA, moreover, was finalized before an environmental impact statement had been prepared for the project, meaning that the CBA signatories may have been unaware of the extent of the project's impacts.¹⁷⁶

The Atlantic Yards CBA does include promises of significant community amenities, such as hundreds of affordable housing units, open space, job training, and a health center, but it has been widely criticized as being unrepresentative of the community.¹⁷⁷ Negotiations were conducted secretly, with many

¹⁷⁵ Normally, the city's uniform land use review process would give local community boards, the borough president, the planning commission, and the city council a chance to review the development application. New York City Dept. of City Planning, *The Uniform Land Use Review Procedure (ULURP)*, <http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml> (last visited Dec. 1, 2009).

¹⁷⁶ The Atlantic Yards CBA was signed in 2005. Atlantic Yards CBA, *supra* note 95, at 1. The EIS was adopted in 2006. New York State's Empire State Development, Atlantic Yards Draft Environmental Impact Statement (DEIS)—July 18, 2006, http://www.empire.state.ny.us/Subsidiaries_Projects/Data/AtlanticYards/AdditionalResources/AYDEIS/AYDEIS.html (last visited Mar. 9, 2010). FEIS was adopted on November 27, 2006. New York State's Empire State Development, Atlantic Yards Final Environmental Impact Statement (FEIS)—Corrected and Amended November 27, 2006, http://www.empire.state.ny.us/Subsidiaries_Projects/Data/AtlanticYards/AdditionalResources/AYFEIS/AYFEIS.html (last visited Mar. 9, 2010).

¹⁷⁷ Only eight community groups joined the CBA coalition, as compared to the more than 50 groups that are opposed to the project. Develop—Don't Destroy Brooklyn, *The Opposition*, <http://dddb.net/php/opposition.php> (last visited Oct. 14, 2009) (listing opposition groups). Testimony made on behalf of Good Jobs New York recognized that “[p]erhaps the most striking is that elsewhere CBAs are negotiated by one broad coalition of groups that would otherwise oppose a project, a coalition that includes labor and community organizations representing a variety of interests In the BAY [Brooklyn Atlantic Yards] case, several groups, all of which have publicly supported the project already, have each engaged in what seem to be separate negotiations on particular issues.” *Public Hearing of the New York City Council Comm. on Econ. Dev. on the Proposed Brooklyn Atlantic Yards Project* (May 26, 2005) (comments of Bettina Damiani, Project Dir., Good Jobs New York), available at http://www.goodjobsny.org/testimony_bay_5_05.htm [hereinafter Damiani testimony]; see also Develop—Don't Destroy Brooklyn, *Where is*

stakeholders excluded, and all of the coalition community groups have received funding from the developer.¹⁷⁸ Additionally, some of the most important commitments in the agreement are likely unenforceable.¹⁷⁹

For the community groups that were not given a chance to participate in defining the developer's public responsibilities—and there are many such groups¹⁸⁰—the CBA was a wholly

the Community in "CBA"?, Apr. 20, 2007, http://www.dddb.net/php/latestnews_Linked.php?id=696.

¹⁷⁸ See, e.g., Damiani testimony, *supra* note 177, ("The negotiations surrounding the development of the BAY project have been marked by secrecy Unsurprisingly, this process has contributed to a fragmentation of community responses, as some groups have been able to work with the 'designated developer' to advance their concerns while others have not."); Jess Wisloski, *Ratner Invites Chosen Few to Draft Agreement*, BROOKLYN PAPER, Oct. 2, 2004, http://www.brooklynpaper.com/stories/27/38/27_38nets2.html (discussing the secrecy and exclusivity of CBA negotiations); Norman Oder, *Atlantic Yards Process a "Modern Blueprint"? Only if the Times Ignores the Evidence*, TIMES RATNER REPORT, Oct. 13, 2005, <http://timesratnerreport.blogspot.com/2005/10/atlantic-yards-process-modern.html> (calling the Atlantic Yards and its CBA "a national model in public manipulation and broken promises"); Norman Oder, *With \$1.5M Grant/Loan, FCR Bails Out National ACORN, Parent of Major CBA Partner*, ATLANTIC YARDS REPORT, Dec. 2, 2008, <http://atlanticyardsreport.blogspot.com/2008/12/with-15m-grantloan-fcr-bails-out.html> (reporting that the developer gave one of the CBA signatories a \$1.5 million bailout); Norman Oder, *AY CBA Witness Bloomberg Blasts CBAs as Extortion; Signatory Nimmons Brushes off Questions from The Local*, ATLANTIC YARDS REPORT, Aug. 26, 2009, <http://atlanticyardsreport.blogspot.com/2009/08/ay-cba-witness-bloomberg-blasts-cbas-as.html> ("On July 22, Forest City Ratner executive Mary Anne Gilmartin confirmed at a public meeting that the developer provides funds to all of the signatories of the Community Benefits Agreement.").

¹⁷⁹ See, e.g., Norman Oder, *More Criticism of the Atlantic Yards Community Benefits Agreement: It (Mostly) Doesn't Apply if Ratner Sells the Project*, ATLANTIC YARDS REPORT, Mar. 30, 2009, <http://atlanticyardsreport.blogspot.com/2009/03/more-criticism-of-atlantic-yards.html> (explaining that many provisions in the CBA would not apply if the developer were to sell the project). Additionally, it is not clear that the CBA, and especially its affordable housing promises, would be enforceable if only the arena were to be built.

¹⁸⁰ See, e.g., *The Opposition*, *supra* note 177 (listing opposition groups).

COMMUNITY BENEFITS AGREEMENTS

201

inadequate substitute for the city's land use review process, even if that process is not ideal for large scale developments.¹⁸¹ As urban planning professor Lance Freeman has explained:

While the CBA does at least give some of the most disenfranchised residents an opportunity to reap some benefits from the project . . . there is no mechanism to insure that the "community" in a CBA is representative of the community. If the signatories to the CBA were simply viewed as another interest group, that might be ok. But the CBA is being presented as illustrative of the development's community input. Public officials are posing for pictures with the developer and signatories to the CBA, giving the impression that the community had significant input into the planning [of] Atlantic Yards. This is not necessarily the case.

[T]he CBA . . . cannot be viewed as a substitute for a true planning process that includes community input. If a developer is proposing a project that will unduly burden

¹⁸¹ See, e.g., Norman Oder, *Catching Up with Coney Island: How CBA-like Trade-offs May Have Sacrificed the Amusement Area*, ATLANTIC YARDS REPORT, Aug. 7, 2009, <http://atlanticyardsreport.blogspot.com/2009/08/catching-up-with-coney-island-how-cba.html> (noting that the city's uniform land use review process failed to "resolve opposing views" regarding the Coney Island rezoning); Norman Oder, *Flashback, 2005: Roger Green Says AY Area "Not Blighted;" Academic Says AY a Far Cry from Times Square Blight*, ATLANTIC YARDS REPORT, Feb. 19, 2009, <http://atlanticyardsreport.blogspot.com/2009/02/flashback-2005-roger-green-says-ay-area.html> (quoting state Assemblyman Daniel O'Donnell as calling the city's planning review process a "horse and pony show" because the city council often ignores the recommendations of local community boards); Norman Oder, *HPD Official Says Development Trade-offs Should Be Transparent (and Implicitly Indicts the AY Approval Process)*, ATLANTIC YARDS REPORT, Nov. 7, 2008, <http://atlanticyardsreport.blogspot.com/2008/11/hpd-official-says-development-trade.html> (quoting an official from the city Department of Housing Preservation as explaining that "ULURP is awfully late to start a conversation about a large project. It's one thing if you're talking about a small project, and you're going to tweak a floor . . . or affordability, slightly. If you're talking about a large-scale project, ULURP is simply too late to really have that dialogue").

the community, exacting benefits in exchange for tolerating these burdens is fine idea. Ideally, this would be done as part of a democratic planning process. When negotiated by private organizations, however, this is symptomatic of a flawed planning process. *When CBAs are used in place of an inclusive planning process they run the risk of legitimating the very process they are supposed to counteract, planning and development that disenfranchises.*¹⁸²

Since the Atlantic Yards CBA was signed in 2005, public officials involved in the Atlantic Yards development have admitted that the project should have gone through the local planning process.¹⁸³ Mayor Bloomberg, who enthusiastically endorsed the CBA in 2005 has now come full circle, stating that he is “violently opposed to community benefits agreements” and that a “small group of people, [who] feather their own nests. . . [and] extort money from the developer” is “just not good government.”¹⁸⁴ Even the developer has removed the CBA

¹⁸² Freeman, *supra* note 173 (emphasis added); *see also* Norman Oder, *Push for AY Development Trust Begins; How Much Power Would it Have?*, ATLANTIC YARDS REPORT, June 17, 2008, <http://atlanticyardsreport.blogspot.com/2008/06/push-for-ay-development-trust-begins.html> (quoting a city council member as remarking that “[t]he fundamental mistake that was made here, really the original [mistake] of this project, is that it was approved in a way that went around all the usual process[es] for approving a big project We never had a chance to fix all the problems.”); Norman Oder, *ACORN’s Lewis Gets Fiery as “Affordable Housing” Debate Heats Up*, ATLANTIC YARDS REPORT, Mar. 1, 2006, <http://atlanticyardsreport.blogspot.com/2006/03/acorns-lewis-gets-fiery-as-affordable.html> (commenting on the controversy that the CBA and the lack of local review has engendered, law professor Vicki Been opined that “[o]ne of the take home messages is we need to use this opportunity to figure out how to fix the [planning] system more broadly so we’re not having these kinds of fights later in the year or decades”).

¹⁸³ *See, e.g.*, Norman Oder, *After Doctoroff Admits AY Should’ve Gone Through ULURP, Will Bloomy, Burden Follow?*, ATLANTIC YARDS REPORT, Dec. 12, 2007, <http://atlanticyardsreport.blogspot.com/2007/12/after-doctoroff-admits-ay-shouldve-gone.html>.

¹⁸⁴ Norman Oder, *AY CBA Witness Bloomberg Blasts CBAs as Extortion; Signatory Nimmons Brushes Off Questions from The Local*, ATLANTIC YARDS

COMMUNITY BENEFITS AGREEMENTS

203

from its website,¹⁸⁵ which at one point prominently displayed information about the project's community benefits.¹⁸⁶

This CBA experience is used to demonstrate that not all CBAs are "textbook" illustrations of the true benefits of meaningful CBA processes and results. In some cases, it is possible that the CBA framework could provide a viable alternative to more conventional planning techniques. But, as illustrated by this example, such a process is susceptible to capture and manipulation.

B. Do CBAs Advance Narrow Interests at the Expense of the Larger Community?

While comprehensive land use plans are designed to benefit the community as a whole, and community-based plans are generally intended to be incorporated into more general planning documents, CBAs are negotiated to benefit small neighborhoods within a metropolitan area. Because of their targeted focus, it has occasionally been contended that CBA coalitions divert resources for themselves at the expense of the larger community. When projects covered by CBAs receive significant public subsidies, as they often do, this perception is all the more heightened.¹⁸⁷

REPORT, Aug. 26, 2009, <http://atlanticyardsreport.blogspot.com/2009/08/ay-cba-witness-bloomberg-blasts-cbas-as.html>.

¹⁸⁵ See Barclay's Center Brooklyn, <http://www.barclayscenter.com> (last visited Oct. 14, 2009).

¹⁸⁶ The developer, in fact, touted the CBA in many of the project's promotional materials. See, e.g., Norman Oder, *In Seventh Slick Brochure, Forest City Ratner Touts "Historic" CBA*, ATLANTIC YARDS REPORT, Mar. 3, 2008, <http://atlanticyardsreport.blogspot.com/2008/03/in-seventh-slick-brochure-forest-city.html> (discussing a brochure calling the CBA "historic").

¹⁸⁷ See Matthew Schuerman, *The C.B.A. at Atlantic Yards: But Is It Legal?*, N.Y. OBSERVER, Mar. 14, 2006, <http://www.observer.com/node/34377> ("Carl Weisbrod, the former president of the city Economic Development Corporation, criticized the use of CBA's in projects that receive public funds—one of which is Atlantic Yards—as fundamentally undemocratic. 'If the public is putting money into the project and the developer is allocating that money in private deals with the community, it is

CBA supporters have made persuasive arguments against this premise, explaining that CBAs can produce social and economic goods that ultimately benefit their surrounding regions. As explained by the Partnership for Working Families, a national organization that promotes CBAs, “Community benefits tools maximize returns on local government investments Community benefits programs can transform regions through stronger, more equitable economies The community benefits model works for developers, too Public input results in better projects that benefit the whole community Community benefits are part of a smart growth agenda.”¹⁸⁸ Indeed, the CBA framework is inherently pro-development, and it can help to obtain project approvals where NIMBYism might otherwise prevail.¹⁸⁹ Additionally, CBAs, like development agreements,¹⁹⁰ can add a measure of certainty to development projects by setting up mechanisms to resolve community concerns that might arise during buildout, before they ripen into public opposition or litigation.¹⁹¹

As with the question of whether CBAs distort the planning

not government setting the priorities. Generally speaking, it is city taxpayer dollars that are being spent in not necessarily high priority areas,’ he said. ‘It shouldn’t be some local community groups making these decisions. It should be a cross-section of the community and city government.’”).

¹⁸⁸ THE PARTNERSHIP FOR WORKING FAMILIES, COMMUNITY BENEFITS: PRACTICAL TOOLS FOR PROACTIVE DEVELOPMENT 3, *available at* <http://communitybenefits.org/downloads/CB%20Tools%20for%20Proactive%20Development.pdf>.

¹⁸⁹ *See, e.g., id.* at 3 (“CBA advocates are pro-growth Once an agreement is achieved, the developer can feel confident that they [sic] have real community support [for] the project, easing the approvals process for everyone.”).

¹⁹⁰ *See* Michael B. Kent, Jr., *Forming a Tie That Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS ENVTL. L. & POL’Y J. 1, 8–9 (2006) (explaining how development agreements provide certainty in the land development process).

¹⁹¹ Most CBAs provide for mediation and/or binding arbitration in the case of a dispute between the coalition and the developer. *See, e.g.,* Longfellow CBA, *supra* note 95, at 24 (mediation); LAX CBA, *supra* note 95, at 33 (arbitration).

COMMUNITY BENEFITS AGREEMENTS

205

process and produce counterproductive results, the effect of a CBA on the allocation of metropolitan resources will vary depending on the circumstances surrounding its adoption and the terms that it embraces. A CBA that is negotiated by a historically disempowered community for a development that will have significant negative impacts will advance equity and fairness goals, rather than inhibit them. But other situations can be easily imagined in which CBAs could lead to private windfalls and misallocations of public and private resources. While this has not been a problem in California, the New York CBAs have not demonstrated as much integrity.

One situation in which CBAs may lead to windfall benefits occurs when coalition community groups receive a direct financial benefit in exchange for their support of a project. This occurred in relation to the Atlantic Yards CBA, as noted above. The director of the Partnership for Working Families, responding to this situation, stated: “[a]s a matter of principle, groups in our network don’t take money from developers. We want to avoid any appearance of a conflict of interest”¹⁹² Ideals may be important to the community benefits movement, but without conflict of interest regulations to protect the integrity of CBAs, the movement will continue to be susceptible to developer-coalition collusion.

It is also possible that communities could demand excessive benefits from developers eager to obtain public support and quick project approvals. While there is nothing unlawful about this in the context of a purely private agreement, especially where the community will suffer definite and negative development impacts, the effect that such a CBA may have on government decision-makers raises ethical and constitutional problems. Ethical considerations come into play where coalitions are used as a proxy for politicians seeking particular community amenities for specific constituent groups. Again, the trouble has

¹⁹² Norman Oder, *Conflict of Interest? \$350K to CBA Signatories Shows Departure From L.A. Model*, ATLANTIC YARDS REPORT, June 8, 2006, <http://atlanticyardsreport.blogspot.com/2006/06/conflict-of-interest-350k-to-cba.html>.

been caused by New York CBAs, and similar sorts of agreements even prompted a New York City Bar Association report in 1988. The report unequivocally counseled against permitting CBA-type deals:

The ad hoc payment of money or services in return for favorable governmental action also adversely affects the decision-making process. In egregious cases, the decision maker is corrupted. In less egregious cases, satisfying the wish list for a borough president, community board or a mayor enhances the recipient's political power. The decision-maker may accept the project in order to get the unrelated amenities, when perhaps it should be voted down. Thus integrity is eroded, of the government in general and of the zoning laws and land use regulations in particular.¹⁹³

These ethical concerns also contribute to the reasoning behind the Supreme Court's doctrine prohibiting development exactions,¹⁹⁴ which "has its roots in the allegations of coercion and illicit motive that long have animated judicial and academic debate about exactions and more generally, about the unconstitutional conditions doctrine."¹⁹⁵ Development agreements permit local governments to avoid the exactions ban by negotiating for developer concessions, usually traded for a guarantee that zoning and land use regulations will not be changed in a manner that prevents successive phases of a project. Because these agreements are *voluntary*, development approvals are not considered to be conditioned on the provision of development amenities, even if this is the de facto (and often desired) result.¹⁹⁶ Local governments are currently authorized to

¹⁹³ Matthew Schuerman, *C.B.A.'s: Coming to a Bar Near You*, N.Y. OBSERVER, Jan. 13, 2006, <http://www.observer.com/node/34098>.

¹⁹⁴ See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁹⁵ Vicki Been, "Exit" as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 475 (1991).

¹⁹⁶ See generally Callies & Tappendorf, *supra* note 85.

COMMUNITY BENEFITS AGREEMENTS

207

enter into development agreements in about a dozen states, but such arrangements have also been upheld in states where no statutory authority for development agreements exists, as in Texas and Massachusetts.¹⁹⁷ In some states where development agreements have not been approved, either by statute or judicial fiat, the development process is often dominated by other types of negotiated agreements between developers and planning entities, often resulting from environmental mitigation measures where local environmental review occurs.

The problem with unauthorized and unregulated bilateral government-developer negotiations is that they open up the possibility that “‘needy’ cities and towns [may] see their zoning powers as for sale to the highest bidder.”¹⁹⁸ And where this is the case, short term economic goals may be just as likely to motivate local government decision makers as are the types of social and environmental policies that require foresight and long-term planning.¹⁹⁹ In the states that have enacted development agreement statutes, on the other hand, the comprehensive plan acts as a safeguard to ensure that development agreements further the community’s broad goals and policies for future development.²⁰⁰ States such as California, which require consistency between zoning and the comprehensive plan, also require consistency in the negotiation of development agreements. The development agreement framework has also allowed planning agencies, community organizations and

¹⁹⁷ See Curtin & Witten, *supra* note 24, at 340, 338–39 (discussing recent Massachusetts cases that “conclude that a *promise by a petitioner* is different from a *requirement imposed* as a condition precedent by the municipality”); Kent, Jr., *supra* note 190, at 6, n.25 (2006) (citing cases permitting development agreements in the absence of enabling legislation from Alabama, Nebraska, and New Mexico).

¹⁹⁸ See Curtin & Witten, *supra* note 24, at 338.

¹⁹⁹ See Camacho II, *supra* note 54, at 271 (“While modern bilateral negotiation attempts to address some of the intrinsic inefficiencies of the traditional command and control approach . . . bilateral negotiation approaches promote adversarial and self-interested behavior while ignoring the long-term community engagement that is essential to the legitimacy of local decision-making processes.”).

²⁰⁰ Curtin & Witten, *supra* note 24, at 345.

developers to work together in building CBAs, while in other states local governments have struggled to determine where they fit into the CBA process.

Four New York CBAs have been negotiated to date, relating to Atlantic Yards, the Gateway Center at Bronx Terminal Market, Yankee Stadium, and the expansion of Columbia University.²⁰¹ In each of these cases, the lack of strong and inclusive community coalitions and the amount of influence wielded by public officials suggests that there were, *at the very least*, opportunities for this sort of bargaining away of the city's comprehensive planning goals.²⁰²

²⁰¹ See Salkin & Lavine, *supra* note 83, at 308–17.

²⁰² Atlantic Yards continues to be promoted with much zeal by the Empire State Development Corporation, even though its public benefits have decreased substantially since the project was approved in 2006. Frank Gehry is no longer the architect, for example; the project's affordable housing component has been significantly delayed; and a renegotiated land deal with the Metropolitan Transportation Authority has resulted in an arguably less valuable package for the authority (and for New York City subway riders). In May 2009, the New York City Independent Budget Office ("IBO") concluded that changes in the project's commercial component and increased subsidies rendered the arena a net money loser for the city. See Norman Oder, *Senate Hearing: No Tough Questions for ESDC*, ATLANTIC YARDS REPORT, May 29, 2009, <http://atlanticyardsreport.blogspot.com/2009/05/senate-hearing-no-tough-questions-for.html>. Despite this revelation, and despite increasingly loud calls for more transparency in the project, the Empire State Development Corporation refuses to release its updated cost-benefit analysis until after the project's next board approval. As a result, the public will not get a chance to comment on the situation. What's more, while refusing to provide a meaningful response to serious allegations that the project may no longer be in the public's best interest, ESDC has "not looked closely at that [the IBO's] report." Norman Oder, *ESDC, FCR Face, Answer, Evade Tough Questions*, ATLANTIC YARDS REPORT, July 23, 2009, <http://atlanticyardsreport.blogspot.com/2009/07/esdc-fcr-face-answer-evade-tough.html>.

In the Bronx, it was revealed last year that the mayor's office had pressured the Yankees to provide a free luxury suite for the mayor and other high-ranking officials. State Senator Richard Brodsky, who has been urging reforms, asked "what is the public interest here and who's protecting it?" David W. Chen, *City Pressed for Use of Yankee Luxury Suite*, N.Y. TIMES, Nov. 30, 2008, available at <http://www.nytimes.com/2008/11/30/nyregion/30stadium.html>. The project has been riddled with other controversies, from

COMMUNITY BENEFITS AGREEMENTS

209

In states that do not allow development agreements, the exactions issue also raises the question of the most appropriate way for public officials to react when faced with a developer that refuses to negotiate a CBA with a strong and broadly inclusive CBA coalition: the local official can become involved in CBA negotiations and try to persuade the developer into negotiating, which might raise exactions problems if that persuasion amounts to coercion; or she can remain on the sidelines and hope that the parties reach a deal. In Pittsburgh, the mayor and county executive became very involved in negotiations for the Penguins CBA, to the point where they committed \$1 million in matching funds to help secure a grocery store and YMCA for the community. Both of these facilities are sorely needed in the underserved community located near the arena site, and the CBA coalition was one of the largest and most inclusive coalitions formed to date. In short, this was an ideal situation for the negotiation of a CBA. But the city has changed its tune toward CBAs since its legal department concluded that “[w]hile [CBAs] could provide benefits to the community, they are simply not a part of what the Planning Commission may consider when reviewing master-development plans and project-development plans.”²⁰³

a U.S. Congressional inquiry to its tax-exempt bonding scheme (which resulted in an IRS move to close certain loopholes), to an 18-month delay in implementing the CBA. With the old Yankee Stadium still standing after 311 days, preventing the construction of parks to replace the ones covered over by the new stadium, some people have begun referring to the “Yankee Stadium Death Watch.” Neil deMause, *Yankee Stadium Death Watch: Day 331*, N.Y. NEWS BLOG, http://blogs.villagevoice.com/runninscared/archives/2009/08/yankee_stadium_3.php. With problems such as these it seems fair to inquire into the propriety of the CBA, which was completed with no community participation and which is very likely unenforceable.

The Gateway Center at Bronx Terminal Market and the Columbia University expansion have both raised controversies of their own, but their CBAs have received less criticism.

²⁰³ Chris Togneri, *Updated North Shore Plan Approved*, PITTSBURGH TRIBUNE REV., June 10, 2009, http://pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_628882.html. See also Oro Valley Town Council Minutes, Regular Session, Aug. 27, 2008 (“Town Attorney Tobin Rosen explained that

*C. How Should a Local Government Respond if a CBA is
Inconsistent with the Comprehensive Plan?*

To the extent that CBAs cover land use and community development issues, they may produce a different vision for the neighborhood than the vision articulated in a legally adopted comprehensive plan covering the entire community. A recent example from the Bronx highlights how CBA provisions can conflict with government planning efforts in this manner. The Kingsbridge Armory Redevelopment Alliance (“KARA”), the first truly inclusive grassroots CBA coalition in New York City, raised this problem in the summer of 2009 when, during negotiations, it demanded a ban on new grocery stores in the development. To some community members, the provision was intended to protect existing businesses and the jobs they provided; but to others, the ban was viewed as interfering with the community’s need for grocery stores with more healthy and organic food.²⁰⁴ For the redevelopment project to proceed, the site will need to be rezoned to C4-4²⁰⁵—a general commercial designation consistent with the comprehensive plan²⁰⁶ that typically permits grocery and other retail food stores.²⁰⁷ Accordingly, the CBA poses the question of whether local groups should be able to modify generally applicable zoning

these agreements are great if neighbors and developers are willing to agree to it. He pointed out that the Town cannot require the agreement if the developer meets the requirements of the Zoning Code.”).

²⁰⁴ Terry Pristin, *Proposed Supermarket Divides Bronx Community*, N.Y. TIMES, Sept. 29, 2009, available at http://www.nytimes.com/2009/09/30/realestate/commercial/30armory.html?_r=1.

²⁰⁵ EXECUTIVE SUMMARY OF THE SHOPS AT THE ARMORY PROJECT Fig. S-4, http://www.nyc.gov/html/oec/downloads/pdf/08DME004X/08DME004X_FEIS/08DME004X_FEIS_00_Executive_Summary.pdf (last visited Dec. 1, 2009).

²⁰⁶ The Kingsbridge Armory Redevelopment Alliance Proposal Fig. S-4, S-6, http://www.nyc.gov/html/oec/downloads/pdf/08DME004X/08DME004X_FEIS/08DME004X_FEIS_00_Executive_Summary.pdf (last visited Dec. 1, 2009).

²⁰⁷ NEW YORK CITY PLANNING COMMISSION, ZONING RESOLUTION 534 (2009), available at <http://www.nyc.gov/html/dcp/pdf/zone/allarticles.pdf>.

COMMUNITY BENEFITS AGREEMENTS

211

regulations via private agreement, even if the city has specifically decided to apply those general regulations to the site. Although in many cases this type of use restriction would resemble a simple restrictive covenant, the city in the Kingsbridge case must implicitly approve any CBA related to the development because of the extensive subsidies being given to the developer.²⁰⁸ Can the city with one hand apply a uniform, general regulation, and with the other approve a private pact limiting the reach of the general law?

Another hypothetical could be imagined where a comprehensive plan and implementing land use regulation articulates a preference for recreational facilities in designated areas, but such facilities are not planned for a neighborhood where a coalition has just negotiated a private CBA to include a neighborhood park. Such a CBA could be viewed as inconsistent with the comprehensive plan, raising the question of who speaks for the neighborhood. A core principle of the social justice movement is that the community speaks for itself. What then, is the appropriate role of the government? If in fact the community coalition is representative of the views of the neighborhood it purports to represent, and where the neighborhood, speaking through its coalition representatives expresses the desire for a certain amenity that is inconsistent with the comprehensive plan, whether the coalition and the project sponsor should legally agree to the amenity may be an open question. Going back to the notion that the local government is responsible for the development, adoption and implementation of the comprehensive plan, where a CBA contains items that are inconsistent with that plan, should the locality view the CBA as public input and begin a process to amend the plan and regulations to make them consistent with such views? Or should the government refuse to amend the comprehensive plan, thereby preventing the project

²⁰⁸ See, e.g., Ivonne Salazar, *Live Blogging From Armory IDA Hearing: Tax Breaks Approved, Land Use Review to Begin*, BRONX NEWS NETWORK, Mar. 11, 2009, http://www.bronxnewsnetwork.org/2009/03/live-blogging-from-armory-ida-hearing_11.html (discussing the last phase of the project going through the city's land use review process).

sponsor from fulfilling its promises? This is a critical question for all private parties involved in the negotiation of a CBA. Legally binding CBAs arguably should not be entered into where one party lacks the legal ability to deliver on a promise, given that such situations are susceptible to manipulation and bad faith.

Across the country there is a wide disparity as to the level of government involvement in the development and “acceptance” of CBAs as a condition of development approval. As noted above, local governments in California are likely to be at least tangentially involved in CBA negotiations. In these cases, the government’s involvement may lead to information for the parties indicating that land use related terms of the CBA may not be enforceable absent an adjustment to current planning documents and regulations.

In states such as New York, where the government is not involved in purely private CBA negotiations, or at least is better advised not to be, the municipality must decide how, if at all, it should embrace the community coalition’s articulated desires for certain community amenities that are not currently part of the land use regulatory regime. At a minimum, the planning department within the municipality will be on notice that the needs of certain sections of the community are not being met by the overall plan and vision for the community as a whole. This information should be the basis for a re-evaluation of the comprehensive plan—either specific aspects of the plan or the plan as a whole—to make sure that the plan and its implementing regulations are serving the best interests of the jurisdiction as a whole. Nevertheless, as explained above, conditioning project approvals on criteria not included in the zoning ordinances or comprehensive plan may, if coercive enough, make the action unlawful.

Further support for the notion that CBAs should inform and influence the comprehensive planning process, which should be ongoing and continuously evolving, is that the methodology used for the development of a CBA tends to be more inclusive than that used for the development of a comprehensive plan, at least where no community-based planning programs exist. The protocols used in coalition building for the purposes of

COMMUNITY BENEFITS AGREEMENTS

213

negotiating a CBA, including the consensus building process for articulating community desires, are more empowering than the typical opportunities for public participation in the development and implementation of a comprehensive plan.

While it can be argued that local governments give up planning authority by yielding to the community desires expressed in CBAs that are inconsistent with the existing plan, it may be better viewed as the government doing exactly what it is supposed to be doing—viewing the planning process as ongoing and engaging public involvement.

CONCLUSIONS

When CBAs are negotiated by broad based, inclusive coalitions that are truly representative of community interests, and such agreements result in a community planning vision that dramatically differs from the existing traditional comprehensive plan and implementing regulations for the area, it indicates that existing governmental planning processes may be inadequate, and the most appropriate action for a local government to take may be to reform the way that it plans.²⁰⁹ As described above, a new paradigm of community-based planning and environmental justice has emerged that places an increased focus on

²⁰⁹ See Oro Valley Town Council Minutes, Regular Session, Aug. 27, 2008, available at <http://lexicon.orovalleyaz.gov/ACK/ArchiveSearch/ArchiveSearch.htm> (select Option 2; search minutes; enter date 08/27/08; select study session) (“Bill Adler, Town resident and member of the Planning & Zoning Commission presented information about Community Benefit Agreements. He explained that the current process of meeting with neighborhoods and developers could be formalized, bridging communication between neighbors, the Town and developers. He explained the importance of citizens first meeting without the applicant so they can be educated on the development review process, Zoning Code and entitlements and where effect of change can take place on the development so that they have an understanding of the process before meeting with the developer. Terry Parish, Town resident, encouraged the Council to formalize the process so that developers know upfront that the goal is to come to an agreement with neighbors and require neighbors to be educated on the development process.”).

transparency, accountability, and *meaningful* public participation, *within* the existing planning process. As explained by law professor Alejandro Esteban Camacho, there are four underlying reasons for developing more participatory planning models:

- (1) that an open negotiation process can thwart the corruption and unfair dealing so closely associated with conventional negotiated land use regulation; (2) that participatory processes are necessary to obtain important information about the interests and preferences of affected parties; (3) that fostering meaningful participation has a positive impact on both participants' and the general public's satisfaction with the regulatory process and outcomes; and (4) that direct participation serves the important goal of enhancing accountability for governmental services and decisions.²¹⁰

In California, local governments have responded to CBA campaigns by working closely with community groups and consistently incorporating CBAs into development agreements. The result, more often than not, has been an improved planning process for all parties. In New York and the many other states where development agreements have not been formally authorized, either by statute or judicial order, the CBA model is less ideal for fostering this type of collaboration. Other ways must be found to educate the public about the development process and make it more transparent, democratic and accountable.

Fortunately, local governments and planning commissions already have the tools to improve the way that planning decisions are made. To list just a few methods to encourage community-based planning, local governments can:

- (1) make planning information easily accessible online and at designated public facilities in all communities and neighborhoods;
- (2) provide hearing notices that are actually designed to

²¹⁰ Camacho II, *supra* note 54, at 279.

COMMUNITY BENEFITS AGREEMENTS

215

reach impacted community members, rather than the “rudimentary public notice”²¹¹ mandated by state or local law;

(3) hold hearings in locations close to impacted neighborhoods and at times of day when community members are likely to be available;

(4) hold additional public meetings, workshops, and other events in order to reach a diverse cross section of community members;

(5) partner with existing neighborhood associations, civic organizations, and faith based entities which typically have established community networks;

(6) make clear that planners will be responsive to neighborhood residents’ concerns and desires regarding future growth; and

(7) express a commitment to ensure that community-based planning is an integral part of the planning process and will, to the greatest extent practical, be incorporated into the comprehensive plan.

Development controversies can also be headed off by including the community in discussions about proposed projects early enough in the process so that impacted stakeholders can help to shape project plans. Too often, communities do not get a chance to participate in the planning process until the developer has already worked out its financials and the local government has invested substantial resources in preliminary planning reviews, making it likely that the project’s fate has already been decided. The CBA movement has clearly demonstrated the importance of having a system in place whereby community members can feel that they play an important role not just in the planning process, but also in the development review process. Especially in those states that do not permit development agreements, leaving community involvement unregulated in the hands of private developers carries substantial risks that the CBA concept will be co-opted, abused, or ignored. Recognizing

²¹¹ *Id.* at 279–80.

this, local governments, as part of their continuous comprehensive planning function, should be proactive in developing alternative planning processes that advance the community benefits movement's goals of inclusiveness, democracy, and accountability.